

Minority Rights Group International  
Shadow report submitted to the Human Rights Committee  
with respect to the Sixth Periodic Report of the United Kingdom of Great Britain  
and Northern Ireland

Minority Rights Group International (MRG) is an international NGO in Special Consultative Status with ECOSOC. MRG works to secure the rights of minorities and indigenous peoples worldwide. This report focuses on the behaviour of the government of the United Kingdom towards the Chagos Islanders in light of its obligations under the International Covenant on Civil and Political Rights.

1) Introduction:

This report will provide an overview of the situation of the Chagos Islanders and update the Committee on the legal developments since the consideration of the previous periodic report of the UK. The report will then contest the inapplicability of the ICCPR in the BIOT as well as evaluate the UK's behaviour towards the displaced residents of the BIOT in light of its obligations under the ICCPR.

In its 2001 Concluding Observations on the United Kingdom of Great Britain and Northern Ireland ("UK"), the Human Rights Committee ("Committee") suggested that the UK "should, to the extent still possible, seek to make exercise of the Ilois' right to return to their territory practicable. It should consider compensation for the denial of this right over an extended period. It should include the territory in its next periodic report."<sup>1</sup>

In 2002 the government of the UK submitted Official Comments on the Committee's Concluding Observations. With respect to the Committee's comments on the Chagos Islands, referred to in these UN documents as the British Indian Overseas Territory ("BIOT"), it held that the International Covenant on Civil and Political Rights ("ICCPR") does not apply in the BIOT because while the UK "ratified the Covenant in respect of itself and certain of its Overseas Territories, it did not ratify it in respect of BIOT."<sup>2</sup>

In its Sixth periodic report to the Committee,<sup>3</sup> the UK government does not address the Committee's request in the 2001 Concluding Observations to report to the Committee on BIOT. It refers to BIOT once in the table 2, general information on the Overseas Territories whereby it states the language of BIOT is English (page 13) and again on page 17, the report restates the opinion that the Covenant does not apply to BIOT.

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<sup>1</sup> International Covenant on Civil and Political Rights [hereinafter "ICCPR"], Human Rights Committee [hereinafter "HRC"], *Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland and Overseas Territory of Great Britain and Northern Ireland* [hereinafter "Concluding Observations"], ¶ 38, U.N. Doc. CCPR/CO/73/UK (2001).

<sup>2</sup> ICCPR, HRC, *Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, Addendum, Comments by the Government of the United Kingdom of Great Britain and Northern Ireland on the reports of the United Kingdom (CCPR/CO/73/UK) and the Overseas Territories, (CCPR/CO/73/UKOT)* [hereinafter "Addendum"], ¶ 88, U.N. Doc. CCPR/CO/73/UK/Add.2 (2002).

<sup>3</sup> CCPR/C/GBR/6

## 2) Overview of the situation<sup>4</sup>

### a. Removal of the population

Up until the 1960s, the Chagos Islands in the Indian Ocean were inhabited by an indigenous people, the Ilois (also known as Chagossians), who were born there, as were their parents and many of their ancestors. In the early 1960s the governments of the United Kingdom and the United States of America resolved to establish a major military base on the largest of the Chagos Islands, Diego Garcia. To facilitate the creation of the base, in 1965 the Chagos archipelago (including Diego Garcia) was divided from Mauritius (then a British colony) and constituted as a separate colony called the British Indian Ocean Territory (BIOT) by way of Order in Council (SI 1965 No 1920).

From 1965 onwards Britain began removing the inhabitants of the Chagos Islands by *inter alia*, refusing to let them return from visits to Mauritius and closing down the plantations which provided employment for the Islanders. In 1971, an 'Immigration Ordinance' was issued by the Commissioner of BIOT (pursuant to powers contained in the 1965 Order) requiring the compulsory removal of the whole of the population of the territory, including all the Ilios, to Mauritius. The Ordinance also provided that no person could enter the territory without a permit. The last inhabitants were removed from the Chagos Archipelago in 1973. Most now live in poverty in Mauritius and the Seychelles with a small number in the UK.

### b. Ongoing legal actions

In 2001 when the Committee examined the previous periodic report of the UK, the Government told the Committee that the law which they had enacted following the departure of the population had been ruled "*invalid in that it denied access to people belonging to the territory. The United Kingdom had not appealed against that ruling, but had amended the law to ensure that any island-dweller had the right to return to any part of the territory except Diego Garcia.*"<sup>5</sup>

Indeed the first High Court judgment in November 2000 not only struck down the Immigration Ordinance of 1971, but gave as its underlying reason the conclusion that the power of Peace, Order and Good Government can only mean "the People are to be governed not removed". This legal ruling followed by the Government's decision not to appeal the ruling led to the Committee taking note "of the State party's acceptance that its prohibition of the return of Ilois who had left or been removed from the territory was unlawful". The Government did not appeal the ruling; instead, on 10 June 2004 two Orders in Council were made by the Queen which "declared that no person has the right of abode in BIOT nor the right without authorisation to enter and remain there. The Chagossians were thus effectively exiled."<sup>6</sup> Orders in Council are a relic from the colonial period made under the royal prerogative. It was not until the following week that the UK Parliament was informed of the Orders in Council by way of a written ministerial statement.

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<sup>4</sup> For a detailed overview of the removal of the population, see Madeley, J. *Diego Garcia: A Contract to the Falklands*, MRG 1985, available at: <http://www.minorityrights.org/?lid=645>

<sup>5</sup> Government reply in summary record CCPR/C/SR.1963, Oct 2001, para 14

<sup>6</sup> *The Queen (on the application of Bancoult) v. Secretary of State for the Foreign and Commonwealth Affairs* (2007), [2007] EWCA Civ 498, para 11.

The Chagossians successfully challenged the legality of the Orders in Council through the courts<sup>7</sup> in a ruling of 11 May 2006. The Government appealed that decision and on 23 May 2007 the court again ruled in favour of the Chagossians. The Court did not grant the Government leave to appeal; however, it ruled that the Government seek permission from the House of Lords for permission to appeal the decision. The Government applied to the House of Lords for permission to appeal in June 2007. The House of Lords has to date not made a decision.

3) The ICCPR is applicable to the BIOT and to UK acts affecting the Chagossian people

a. The ICCPR is applicable to UK overseas territory

While the issue of selective application of the ICCPR to overseas territory is an unsettled point of law, the text of the ICCPR as well as its accompanying General Comments, suggest that the ICCPR is in fact applicable to the BIOT.

This Committee and the government of the UK disagree over the applicability of the ICCPR to the BIOT. In its written response to the concluding observations of this Committee, the UK government explained that “when, in 1976, the United Kingdom ratified the Covenant in respect of itself and certain of its Overseas Territories, it did not ratify it in respect of BIOT. It is for this reason...that the Covenant does not apply, and never has applied, to BIOT.”<sup>8</sup> This Committee, however, has indicated that it considers the ICCPR to apply to the BIOT, and has urged the UK to “include the territory in its next periodic report.”<sup>9</sup> This disagreement has never been adjudicated, and the legal status of the declaration exempting the ICCPR from application to the BIOT is unclear

Although it was not formally registered as a reservation, the UK’s declaration should nonetheless be considered one and evaluated according international law and to the Committee’s practice on reservations. According to General Comment 24,

[i]t is not always easy to distinguish a reservation from a declaration as to a State’s understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation.<sup>10</sup>

Limiting the territorial application of the ICCPR does “exclude...the legal effect” of article 2(1) “in its application to the State” by explicitly holding that, contrary to the article, the UK government will *not* “ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR].”<sup>11</sup> Although not titled as such, it is clearly a reservation according to this Committee’s definition.

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<sup>7</sup> The Queen (on the application of Louis Olivier Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs Rev1 (2006) EWHC 1038 (Admin) (11 May 2006).

<sup>8</sup> *Id.*

<sup>9</sup> *Concluding Observations*, ¶ 38.

<sup>10</sup> ICCPR, HRC, *General Comment 24 (52), General comment on issues relating to reservations made upon ratification or in relation to declarations under article 41 of the Covenant* [hereinafter “*General Comment 24*”], ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

<sup>11</sup> International Covenant on Civil and Political Rights [hereinafter “ICCPR”], art. 2(1), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966).

Analysed as a reservation, this declaration of selective application should be declared invalid. According to article 19(c) of the Vienna Convention on the Law of Treaties, which General Comment 24 (on issues relating to reservations) cites with approval,<sup>12</sup> a reservation may not be “incompatible with the object and purpose of the treaty.”<sup>13</sup> Limiting the territories to which the ICCPR applies not only modifies the “object and purpose” of article 2(1), but completely negates it, denying to whole classes of UK citizens, those of the excluded territories, the ability to enjoy any of the rights enshrined in the ICCPR at all.

Moreover, this reservation is not only incompatible with article 2(1), but is incompatible with the “object and purpose” of the entire treaty as well. By virtue of article 2 and General Comment 24, universal applicability to all within a state party’s jurisdiction is a central feature of this Covenant. To negate such a feature by reserving the right of selective application cannot but be “incompatible with the object and purpose of the treaty.”

Even if the Committee does hold, however, that territorially selective application of the ICCPR is not *presumptively* invalid, it must nonetheless hold that certain rights, some of which we will argue below have been violated by the UK government, cannot be withheld from individuals living in the excluded territories. This is because the Committee has stated that reservations “that offend peremptory norms would not be compatible with the object and purpose of the Covenant.”<sup>14</sup> The Committee specifically mentions freedom from cruel, inhuman, and degrading treatment, the right to culture, and the right to self-determination as guarantees that may not be eliminated by way of reservation. Thus, even if the UK government is correct in asserting that selective application is acceptable under the ICCPR,<sup>15</sup> it is not correct in stating that it therefore need not “report to the Committee in respect of that Territory.”<sup>16</sup> There are certain features of the ICCPR that cannot be selectively negated, no matter what the state party claims to the contrary.

This Committee, however, seems to already be treating the declaration as an invalid reservation by dismissing the UK’s inapplicability argument and insisting that the government include the BIOT in its next report to the Committee.<sup>17</sup> Although the status of the declaration has not, as mentioned above, been adjudicated, the Committee’s interpretation of the declaration should be privileged. As General Comment 24 states, “[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.”<sup>18</sup>

Because the UK government’s declaration on the selective applicability of the ICCPR to overseas territory takes the form of a reservation, and because that reservation is

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<sup>12</sup> *General Comment 24*, ¶ 6.

<sup>13</sup> VIENNA CONVENTION ON THE LAW OF TREATIES [hereinafter “VIENNA CONVENTION”], art. 19(c), 23 May 1969, 1155 U.N.T.S. 331.

<sup>14</sup> *General Comment 24*, ¶ 8

<sup>15</sup> *Addendum*, ¶ 88.

<sup>16</sup> *Id.*

<sup>17</sup> *Concluding Observations*, ¶ 38.

<sup>18</sup> *General Comment 24*, ¶ 18.

“incompatible with the object and purpose of the Covenant,”<sup>19</sup> the government’s argument that the ICCPR therefore does not apply to the BIOT should be rejected.<sup>20</sup>

- b. The ICCPR is applicable to UK acts affecting its citizens outside of UK territory

Although the UK government justifies its exclusion of the BIOT from its reports to the Committee on the grounds of territorial inapplicability, discussed above, the UK government also argues that the ICCPR is *practically* inapplicable to the BIOT, and therefore inapplicable to the situation of the Chagossians, because the Chagossians no longer live there.<sup>21</sup> The authors of this submission maintain that the ICCPR does in fact apply to the BIOT, but in the event that the Committee accepts the UK’s argument of selective applicability, this submission will also discuss why that would still not relinquish the UK from its obligations to the Chagos Islanders under the ICCPR.

In explaining why it did not need to address the situation of the Chagos Islanders in its periodic reports to this Committee, the UK government noted “the fact that there was no resident population in BIOT meant, in the opinion of the United Kingdom, that the Covenant could have no practical relevance to the Territory.”<sup>22</sup> This argument presupposes that the ICCPR applies to territory alone, and fails to consider the UK’s obligations to the Chagossian people, most of whom are British citizens, as individuals. In doing so, it ignores a fundamental strand of ICCPR jurisprudence. This Committee has repeatedly held that “the beneficiaries of the rights recognized by the Covenant are individuals.”<sup>23</sup> Although article 2(1) mentions state obligations to “individuals within its territory and subject to its jurisdiction,”<sup>24</sup> the Committee has made clear that this phrase does not absolve states from responsibility for violations committed outside of its territory, especially as regards its citizens. In General Comment 31, the government explains that

State Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory *and* to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.<sup>25</sup>

In other words, the ICCPR does not apply only to individuals who are within the territory of a state party *and* subject to its jurisdiction, but rather to anyone within the territory of a state party *or* subject to its jurisdiction, including those outside of the state’s borders.

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<sup>19</sup> VIENNA CONVENTION, art. 19(c).

<sup>20</sup> Declaring the reservation invalid would not affect the UK government’s obligations under the ICCPR. Because invalid reservations are presumptively severable (*General Comment 24*, ¶ 18), these obligations remain and will be addressed below.

<sup>21</sup> *Addendum*, ¶ 87.

<sup>22</sup> *Id.*

<sup>23</sup> ICCPR, HRC, *General Comment 31, Nature of the general legal obligation on states parties to the Covenant* [hereinafter “*General Comment 31*”], ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

<sup>24</sup> ICCPR, art. 2(1).

<sup>25</sup> *General Comment 31*, ¶ 10. Emphasis added.

This Committee's jurisprudence expands further on the individual extraterritorial application of the ICCPR in a series of cases regarding the extraterritorial kidnappings of Uruguayan citizens by agents of the Uruguayan government. In the case of *Casariago v. Uruguay*, the Committee explained that

the reference...to "individuals subject to its jurisdiction" does not affect the above conclusion [that the ICCPR is applicable to extraterritorial violations of the rights guaranteed therein] because the reference in that article is not the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.<sup>26</sup>

Similarly, "[a]rticle 2(1)...does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State."<sup>27</sup> In a case decided a few days earlier, the HRC noted that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."<sup>28</sup> The HRC has thus clearly established that state acts perpetrated outside of the territory of a state party to the ICCPR against someone within the jurisdiction of that state are subject to scrutiny under the ICCPR.

"The relationship between the individual and the state" is the same in the case of the Chagos Islanders and the United Kingdom as it was in the Uruguayan kidnapping cases: both involve citizens subject to extraterritorial acts taken against them by their respective states. As citizens of the United Kingdom, the Chagossians are therefore within its jurisdiction, regardless of where they reside and regardless of whether the ICCPR applies to the BIOT itself. The ICCPR is therefore not irrelevant to the situation of the Chagos Islanders simply because most of them live outside of British territory.

Although the act of barring the Chagossians from returning to their homeland is distinct from the extraterritorial abductions at issue in the cases cited above, the Committee's holdings in those cases were not limited to kidnappings alone, but referred more broadly to extraterritorial state violations of the Covenant. The executive orders barring the Chagossians from returning home are, moreover, compatible with this Committee's definition of an act engaging the responsibility of a state. In General Comment 31, the Committee noted that "all branches of government...and other public or governmental authorities, at whatever level...are in a position to engage the responsibility of the State Party."<sup>29</sup> Although the orders "engage the responsibility of the State Party" in a form different from that of a kidnapping, their effect is the same: to subject an extra-territorial citizen to the coercive power of the state in a manner that would constitute a violation of the ICCPR if exercised within the territory of the state.

As UK citizens, the Chagossians fall within the jurisdiction of the UK; therefore, the ICCPR applies to the UK government's behaviour towards them, even if they are living outside of UK territory.

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<sup>26</sup> ICCPR, HRC, *Casariago v. Uruguay*, U.N. Doc. Supp. No 40 (A/36/40) at 185, ¶ 10.2 (29 July 1981).

<sup>27</sup> *Id.*, ¶ 10.3.

<sup>28</sup> ICCPR, HRC, *Burgos v. Uruguay*, U.N. Doc. Supp. No. 40 (A/36/40) at 176, ¶ 12.3 (29 July 1981).

<sup>29</sup> *General Comment 31*, ¶ 4.

Having established that the ICCPR applies both to the BIOT and to the UK's behaviour towards its Chagossian subjects, this submission will now analyse the UK's substantive violations of the ICCPR with respect to the situation of the Chagos Islanders.

- 4) The continuing exile of the Chagossian people constitutes a violation of article 1

The individuals exiled from the Chagos Islands constitute a people entitled to exercise the right to self-determination under article 1, and the UK government's exclusion of them from the BIOT prevents them from exercising that right. The arguments that the UK government advances to justify their exclusion do not satisfactorily address the issue of an article 1 violation.

Article 1 guarantees to "all peoples...the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". "All peoples" are also guaranteed the right to, "for their own ends, freely dispose of their natural wealth," and "in no case may a people be deprived of its own means of subsistence."<sup>30</sup> The precise meaning of the terms in this article has never been defined, and article 1 jurisprudence is especially scarce since the right to self-determination has been deemed a collective right and therefore not justiciable under Optional Protocol 1.<sup>31</sup> Nonetheless, pronouncements from this Committee and other UN bodies offer significant guidance for interpreting these terms.

- a. The former inhabitants of the Chagos Islands and their descendants constitute "a people" entitled to self-determination under article 1.

Although a people's right to self-determination is central to the enjoyment of rights guaranteed by the ICCPR, the term "people" is not defined in the ICCPR, nor in the UN Charter. Yet while the definition of "people" is not clear, the United Nations Educational, Social and Cultural Organization ("UNESCO") has described some characteristics common to groups of individuals constituting a people. According to these standards, the Chagos Islanders do possess the characteristics typically associated with a people entitled to self-determination.

In 1989 UNESCO convened a meeting of jurists and scholars to clarify the concept of peoples' rights. In its final report and recommendations the group noted that it adopted the following description of a people:

- (1) A group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life. (2) The group must be of a certain number which need not be large...but which must be more than a mere association of individuals within a State; (3) the group as a whole must have the will to be identified as a people or the consciousness of being a people...(4) The

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<sup>30</sup> ICCPR, art. 1.

<sup>31</sup> ICCPR, HRC, *Ominayak v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984, ¶ 13.3 (1990).

group must have institutions or other means of expressing its common characteristics and will for identity.<sup>32</sup>

The Chagos Islanders satisfy all four of the above conditions. As to the first condition, several scholars have noted that the Chagos Islanders possess common cultural and linguistic characteristics distinct from that of other peoples in Mauritius and the Seychelles.<sup>33</sup> Numbering in the thousands, and all originating from the same territory, they satisfy the requirements of characteristic two. The Chagossians, even in exile, generally self-identify as members of a distinct group, in compliance with the third characteristic. Finally, through the medium of oral history, songs, and advocacy organizations like the Chagos Refugee Group, the Chagossian people have established “institutions [and] other means for expressing its common characteristics and will for identity.”

The Committee on the Elimination of Racial Discrimination (CERD) has also issued a recommendation on individual self-identification as a member of a racial or ethnic group. “Having considered reports from States parties concerning information about the way in which individuals are identified as being members of a particular racial or ethnic group or groups,” the recommendation holds, CERD “is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.”<sup>34</sup> Although this recommendation does not directly address the definition of a people, it does suggest that in relation to defining group membership, significant weight should be given to individual preference. This is relevant to the Chagos Islanders, who continue to identify as a distinct ethnic group, even in exile.

The Chagossians have also been recognized as a people by this Committee and in UK national legislation. In its 2001 Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, this Committee urged “the State Party...to the extent still possible” to “seek to make exercise of the Ilois’ right to return to their territory practicable.”<sup>35</sup> In section 6 of the British Overseas Territories Act 2002, there is a statutory definition of those who can claim British Citizenship by virtue of a connection through their Mother with the Chagos Islands.

The Chagos Islanders have the characteristics typically associated with a people, and have been recognized as a people by the UK government and this Committee itself; therefore the Committee should continue to recognize the Chagossians as a people possessing the right to self-determination.

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<sup>32</sup> United Nations Economic, Social and Cultural Organization (hereinafter “UNESCO”), *Meeting of Experts on Further Study of the Concept of the Rights of a People*, ¶ 22, UNESCO Doc. SHS-89/Conf602/7 (1990).

<sup>33</sup> See, for example, the work of Mauritian scholars H. Ly-Ti-Fane and S. Rajabalee, “An Account of Diego Garcia and its People,” 1 J. MAURITIAN STUD. 90, 105 (1986), and the account of National Heritage Museum anthropologist Jean-Claude Mahone, quoted in Angela Kerr, “Chagos Islanders—Home at Last,” SEYCHELLES TODAY, 2 December 2000.

<sup>34</sup> CERD, *General Recommendation 8, Membership of racial or ethnic groups based on self-identification*, U.N. Doc. A/45/18 at 79 (1991).

<sup>35</sup> *Concluding Observations*, ¶ 38. Although the Committee does not specifically use the word “people,” it does refer to a collective right of return. The only collective right under the ICCPR is the right to self-determination, and only a people possess this right. The above sentence is therefore tacit recognition of the Chagossians’ status as “a people.”

- b. The UK government's treatment of the Chagossian people violates their right to self-determination

The continued exile of the Chagos Islanders by the UK government constitutes a violation of their right to self-determination.

The precise definition of "self-determination," like that of "people," is similarly complicated. It does not necessarily mean secession from an independent state. Article 47 of the ICCPR implies that, because self-determination cannot be exercised in a way that conflicts with other peoples' right to "to enjoy fully and freely their natural wealth and resources," one people cannot simply secede from a state, taking with it all the wealth and resources contained in its territory.<sup>36</sup> Instead, as the Committee on the Elimination of Racial Discrimination has noted,

The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference...The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community.<sup>37</sup>

Without prejudice to any future claims of external self-determination, at this point the Chagossians only seek the less comprehensive right of internal self-determination. This submission will therefore focus exclusively on the contours of that right.

Participation is central to the effective exercise of the right to internal self-determination. Both the text of article 1 and its accompanying General Comment emphasize that the components of self-determination, designation of political status and the pursuit of economic, social, and cultural development, must be exercised *freely* by a people itself.<sup>38</sup> General Comment 12 also notes that state reports to the Committee that "confine themselves to a reference to election laws" alone have not sufficiently addressed their peoples' rights under article 1.<sup>39</sup> This suggests active participation of a people in deciding how to freely pursue such development within the bounds of state power, as opposed to choosing between a limited set of options its government has proposed to it, or some other more passive form of resistance.

In the case of minority and/ or indigenous peoples, active participation is especially crucial to the enjoyment of self-determination. In its 2002 Concluding Observations on Sweden, this Committee noted its concern

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<sup>36</sup> ICCPR, art. 47. See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, ¶ 2, G.A. Res. 2625, Annex, U.N. Doc. A/5217 (1970): "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair...the territorial integrity or political unity of a sovereign State."

<sup>37</sup> Committee on the Elimination of Racial Discrimination [hereinafter "CERD"], *General Recommendation 21, the right to self-determination* [hereinafter "*General Recommendation 21*"], ¶ 4, U.N. Doc. A/51/18, annex VII at 125 (1996). CERD language is relevant here because ICCPR General Comment 12 states that "[i]n connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination." *General Comment 12*, ¶ 7.

<sup>38</sup> ICCPR, art. 2; *General Comment 12*, ¶ 2.

<sup>39</sup> *General Comment 12*, ¶ 3.

at the limited extent to which the Sami [a minority people] Parliament can have a significant role in the decision-making process on issues affecting the traditional land and economic activities of the indigenous Sami people...(arts. 1, 25 and 27 of the Covenant).<sup>40</sup>

The Committee similarly recommended the active participation of the Sami minority in managing its internal affairs in its 2004 Concluding Observations on Finland, in a paragraph that addressed both article 1 and 27: "The State party should, *in conjunction with the Sami people*, swiftly take decisive action to arrive at an appropriate solution of the land dispute."<sup>41</sup> These comments on the right to internal self-determination thus include a special emphasis on state consultation as form of participation, at least in the case of minority and/ or indigenous peoples.

This emphasis on minority participation also appears in the CERD General Recommendation on self-determination, which emphasizes that

governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens.<sup>42</sup>

CERD's general recommendation on indigenous peoples as calls upon States to "ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."<sup>43</sup>

As an indigenous, or at the very least a minority, people, the Chagossians are thus legally entitled to not only choose how to order their economic, social, and cultural affairs, but to do so freely and actively, and in consultation with the government in the case of state action affecting their internal self-determination. In practice, they are denied the ability to meaningfully, much less freely and actively, order their affairs.

Decisions regarding their fate have frequently been made without public debate, and have always been made without consulting the Chagossians themselves. The Chagos Islanders are currently barred from returning home by the British Indian Ocean Territory (Constitution) Order 2004 ("the Order"). The Order declares that

Whereas [the BIOT] was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in [the BIOT]...Accordingly, no person is entitled to enter or be present in the Territory.<sup>44</sup>

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<sup>40</sup> ICCPR, HRC, *Concluding Observations of the Human Rights Committee, Sweden*, ¶ 15, U.N. Doc. CCPR/CO/74/SWE (2002).

<sup>41</sup> ICCPR, HRC, *Concluding Observations of the Human Rights Committee, Finland*, ¶ 17, U.N. Doc. CCPR/CO/82/FIN (2004). Emphasis added.

<sup>42</sup> *General Recommendation 21*, ¶ 5.

<sup>43</sup> CERD, *General Recommendation 23, Rights of indigenous peoples*, ¶ 4(d), U.N. Doc. A/52/18, annex V at 122 (1997).

<sup>44</sup> *R. v. Secretary of State for Foreign and Commonwealth Affairs*, ¶ 91.

The Order takes the form of an Order in Council, a rarely used vestige of royal prerogative that gives the Queen the power to unilaterally pass laws relating to the peace, order and good governance of an overseas territory. The 2004 Order was therefore passed without any sort of public debate, and, although probably drafted by the Secretary of State for Foreign and Commonwealth Affairs,<sup>45</sup> derived its asserted legal authority exclusively from approval by an un-elected head of state, the Queen.

The Order has twice been rejected as unlawful by UK courts; although the Government has requested permission to appeal the latest decision. The UK government has offered two arguments in support of the Order, but neither satisfies the active participation requirement for the enjoyment of self-determination.

The first argument is that “anything other than short-term resettlement on a purely subsistence basis would be highly precarious and would involve expensive underwriting by the UK government...it would be impossible for the Government to promote or even permit resettlement to take place.”<sup>46</sup> This argument is insufficient to release the government from its obligations under the ICCPR. The determination that islands should not be resettled was made after the government conducted a deeply flawed feasibility study. The feasibility study was carried out without consultation with any former residents of the Chagos Islands; therefore, it ignores the ICCPR’s emphasis on participatory self-determination. The government also put limitations on its terms of reference which gave editorial control to the government. This lack of transparency on the issue stems as far back as public pronouncements to the Decolonisations Committee of the United Nations on 16 November 1965, when the Government falsely claimed that the detachment of the Archipelago amounted merely to “new administrative arrangements”, and falsely claimed that there was no permanent population. It also claimed that consultation had taken place with “representatives of the people concerned”.

The second argument is that national security interests prevent the return of the Chagossians, fails on similar grounds. Like the feasibility argument, the security determination was made without any consultation with the Chagossian people, and without considering their interests. This unilateral action runs contrary to the emphasis on participation found in ICCPR and CERD jurisprudence. The UK court found this unilateral action problematic as well, noting that the security decision was made exclusively from the point of view of the United Kingdom and the United States, with regard for the interests of the Chagossians.<sup>47</sup> For this reason, the decision was found to be “irrational.”<sup>48</sup>

The lack of consideration of Chagossian interests is further demonstrated by the fact that the Order in Council banned them not just from Diego Garcia, home of the U.S. military base, but from the outlying islands located over one hundred miles away as well. Moreover, argued counsel for the Chagos Islanders in *R. v. Secretary of State*, the Chagossians are prohibited from returning home on grounds of national security, yet

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<sup>45</sup> *Id.*, ¶ 5.

<sup>46</sup> Written statement of the Parliamentary Undersecretary for Foreign and Commonwealth Affairs, 15 June 2004, quoted in *id.*, ¶ 93.

<sup>47</sup> *Id.*, ¶ 122.

<sup>48</sup> *Id.*

private yachters are permitted to sail into the territorial waters (i.e. within three miles) of Diego Garcia.<sup>49</sup>

In addition to being restricted from participating, actively or otherwise, in the decisions regarding their ability to return home, the Chagos Islanders are also prevented from freely pursuing their economic, social and cultural development. The Chagossians live today in forced exile, mostly in Mauritius, with small communities in the Seychelles and the UK as well. Because they are completely barred from living on, or even visiting, any of their ancestral homeland, they are unable to organize their economic, social, and cultural affairs the way they were before their exile. Their poverty and marginalisation in Mauritius, a result of insufficient relocation assistance and compensation from the UK government,<sup>50</sup> also limits the autonomy of their life in exile. The UK courts themselves have recognized that that this situation constitutes a violation of their right to self-determination.<sup>51</sup>

The Chagos Islanders are, on the orders of the UK government, currently exiled from their homeland and unable to freely determine their political status and freely pursue their economic, social and cultural development. This is a violation of their article 1 right to self-determination.

Finally, even if this Committee determined that the ICCPR is not applicable to the BIOT territories this would not exonerate the United Kingdom from respecting and promoting the Chagossians' right to self-determination. As General Comment 12 asserts, the right to self-determination is "of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights."<sup>52</sup> For this reason, article 1 "imposes specific obligations on States parties...vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination...all States parties should take positive action to facilitate realization of and respect for the right of peoples to self-determination."<sup>53</sup> Given the United Kingdom's unique position as the state that displaced the Chagossians as well as the only state that can help them to fully realize their right to self-determination, the positive obligations created by article 1 compel at the very least that it allows the Chagossians to return home.

#### 5) Violation of article 7

- a. The continued exile of the Chagossian people constitutes a harm rising to the level of an article 7 violation

The continued exile of the Chagossian people from their homeland constitutes cruel, inhuman and degrading treatment. Although the initial expulsion took place before the UK government ratified the ICCPR, the Chagossians' current exile is a direct result of actions taken by the government of the United Kingdom, meaning that the violation of

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<sup>49</sup> *Id.*, ¶ 103.

<sup>50</sup> That the UK government failed to adequately assist the Chagossians' in the resettlement process has been recognized by the UK courts (*Chagos Islanders v. The Attorney General*, EWHC 2222 (QB), ¶ 154 (9 October 2003)), and the need for additional compensation has been recognized by this Committee (*Concluding Observations*, ¶ 38).

<sup>51</sup> *R. v. Secretary of State for Foreign and Commonwealth Affairs*, ¶ 101.

<sup>52</sup> *General Comment 12*, ¶ 1.

<sup>53</sup> *Id.*, ¶ 6.

article 7 continues today. This submission will therefore focus on the harm to the Chagossian people that post dates the ICCPR, namely that arising out of their continued exile. This harm is largely of a psychological and/ or mental nature, and falls squarely in line with other types of harm recognized by this Committee as a violation of article 7.

Article 7 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>54</sup> Although “[t]he Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts,”<sup>55</sup> the Committee has clearly established that article 7 violations are not limited to acts causing physical harm. General Comment 20 states that “[t]he aim of the provisions of article 7 of the [ICCPR] is to protect both the dignity and physical and mental integrity of the individual. . . The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.”<sup>56</sup>

The inclusion of non-physical suffering in the Committee’s definition of treatment prohibited under article 7 appears in several individual cases brought before the Committee as well. In *Quinteros v. Uruguay*, the Committee held that “the anguish and stress caused to [a] mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts” rose to the level of an article 7 violation.<sup>57</sup> Similarly, in *Schedko v. Belarus*, the Committee noted that it “understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner” by the state’s failure to notify her of the date of her son’s execution and the place of his burial, and found a violation of article 7.<sup>58</sup> The significance to this Committee of mental suffering as a form of inhuman treatment is emphasized by the fact that the author of the *Schedko* complaint did not actually raise the issue of an article 7 violation in her original complaint; rather, the Committee raised the issue at its own discretion.<sup>59</sup>

In neither case was the victim of the article 7 violation required to prove that her suffering rose to the level of an article 7 violation; rather, the Committee seemed to accept as objective fact that mental anguish arising out of uncertainty as to the fate of one’s child was sufficient to constitute a violation. As noted above, the author of the *Schedko* complaint did not raise the article 7 claim herself, nor is it noted in the decision that she even mentioned her own suffering in her application. The Committee simply inferred from the fact that as the mother of the executed prisoner that she must have suffered immensely from not knowing the precise date of his execution or place of his burial.<sup>60</sup>

In light of the above Committee jurisprudence on article 7, the Chagossians’ current state of exile should be considered cruel, inhuman and degrading treatment. The personal accounts of Chagossians reveal a life in exile marked by poverty, marginalisation, and profound personal anguish. In a case before a U.S. District Court, one Mauritius-born

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<sup>54</sup> ICCPR, art. 7.

<sup>55</sup> ICCPR, HRC, *General Comment 20, Article 7* [hereinafter “*General Comment 20*”], ¶ 4, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

<sup>56</sup> *Id.*, ¶¶ 2, 5.

<sup>57</sup> *Quinteros v. Uruguay*, U.N. Doc. CCPR/C/OP/2 at 138, ¶ 14 (21 July 1983).

<sup>58</sup> *Schedko v. Belarus*, U.N. Doc. CCPR/C/77/D/886/1999, ¶ 10.2 (11 January 1999).

<sup>59</sup> *Id.*, ¶ 3.2.

<sup>60</sup> *Id.*, ¶ 10.2.

Chagossian explained that “as a result of the poverty her family endured in Mauritius, she suffered social, cultural, and economic oppression.”<sup>61</sup> Olivier Bancoult, a leader of the Chagossians in exile in Mauritius and a plaintiff in the same case, similarly described how, after being displaced, “he and his family did not receive any relocation assistance and therefore suffered abject poverty in Mauritius.”<sup>62</sup> A prominent motif in Chagossian oral culture is the idea that many of the exiled islanders have died of grief since their displacement.

External sources confirm the anguish that characterizes Chagossian life in exile.<sup>63</sup> A UK High Court decision, for example, noted that the Chagossians,

were uprooted from the only way of life which they knew and were taken to Mauritius and the Seychelles where little or no provision for their reception, accommodation, future employment and well-being had been made. Ill-suited to their surroundings, poverty and misery became their common lot for years... Their poverty, sadness and sense of loss and displacement impel their continuing desire to return to the islands which were their home.<sup>64</sup>

Journalistic accounts of life in exile also consistently mention the “slum conditions,”<sup>65</sup> “poverty,”<sup>66</sup> and “racism”<sup>67</sup> that the Chagossians face in Mauritius and the Seychelles.

Because of the continued anguish and mental suffering that accompanies the Chagossians’ forced exile upon the orders of the UK government, this Committee should find the UK in violation of article 7.

- b. Possible UK counter-arguments to the Chagossians’ claim of an article 7 violation should fail.

The UK government could raise several possible counter-arguments to this submission’s allegations of an article 7. These arguments should fail.

The UK government could argue that since the initial displacement of the Chagos Islanders occurred before the entry into force of the ICCPR that the current situation of the Chagossian people is not relevant. The degradation of the Chagossians’ “dignity...and mental integrity,”<sup>68</sup> however, continues due to their perpetual exile, as does their “anguish and mental stress.”<sup>69</sup> It is, moreover, acts of the UK government that are directly responsible for the Chagossians’ current exile. The factors characteristic of an

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<sup>61</sup> Bancoult v. McNamara, 370 F. Supp. 2d (2004) 1, 4-5.

<sup>62</sup> Id. at 4.

<sup>63</sup> Although in Quinteros and Schedko the Committee did not require objective verification of the suffering and anguish of those recognized as victims of an article 7 violation, external confirmation of the injury to the Chagossians’ “dignity and...mental integrity” only bolsters the argument that the UK government is in violation of article 7.

<sup>64</sup> Chagos Islanders v. the Attorney General, EWHC 2222, ¶ 154 (9 October 2003).

<sup>65</sup> BBC NEWS ONLINE, “Diego Garcia Islanders Battle to Return,” <http://news.bbc.co.uk/1/hi/world/africa/2380013.stm> (31 October 2002) (last visited 2 August 2006).

<sup>66</sup> David White, “Exiled Chagos Islanders Make Painful Return Visit,” THE GUARDIAN, 20 March 2006.

<sup>67</sup> Paul Harris and Martin Bright, “Exiled from Paradise to Crawley New Town,” THE GUARDIAN, 27 July 2003.

<sup>68</sup> *General Comment 20*, ¶ 4.

<sup>69</sup> Quinteros v. Uruguay, ¶ 14.

article 7 violation are thus present in the Chagossians' current situation, despite the fact that it was brought about an act predating the ICCPR.

It could also be argued that, as not every form of psychological suffering satisfies the requirements for consideration as an article 7 violation, the lingering psychological suffering from an act occurring over thirty years ago is insufficiently similar to the anguish of a mother uncertain about the fate of her child to qualify as an article 7 violation. Three points challenge the validity of such an argument. First, as General Comment 20 indicates, the Committee has intentionally avoided a rigid or narrow definition of "the concepts covered by article 7."<sup>70</sup> That the fact pattern surrounding the Chagossians' displacement may not be sufficiently analogous to that of other fact patterns previously recognized as article 7 violations should not be considered dispositive.

Second, regardless of whether the Chagossian fact pattern must *necessarily* be analogous to that of previously recognized article 7 fact patterns, it arguably *is* analogous. The "anguish and stress" suffered by the Chagossians, like that suffered by the mothers in Quinteros and Schedko, is rooted in uncertainty about the future—when will they be permitted to return home? When will their legal right of self-determination, recognized by domestic<sup>71</sup> and international<sup>72</sup> tribunals, finally be respected? In fact, the psychological harm suffered by the Chagossians is linked to perpetual uncertainty about their own futures, as opposed to those of others. It is not only the lingering psychological anguish from the evictions, the UK government's more recent legal manoeuvres – first accepting the islander's right to return in 2001 and undertaking the feasibility study, then abruptly changing their policy and issuing the Orders in Council to remove that right – have added to the mental harm through perpetual uncertainty suffered by the Chagossians.

Third, should there still be any doubt as to whether the level of psychological harm suffered by the Chagossians as a direct result of their forcible displacement from the archipelago is sufficiently high to constitute an article 7 violation, it should be noted that "[d]eportation or forcible transfer of population" constitutes a crime against humanity under the Rome Statute of the International Criminal Court.<sup>73</sup> Although the Rome Statute is not directly applicable to the decisions of this Committee, the fact forcible transfer of a population is considered under customary international law to be a crime against humanity emphasises the severity of suffering rising out of it.<sup>74</sup>

For these reasons, the possible UK counter-arguments discussed above should be dismissed if raised.

## 6) Conclusion

In its last communication with this Committee, the UK argued that it was not required to address the situation of the exiled Chagos Islanders in light of its obligations under the

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<sup>70</sup> *General Comment 20*, ¶ 4.

<sup>71</sup> *R. v. Secretary of State for Foreign and Commonwealth Affairs*, ¶ 101.

<sup>72</sup> *Concluding Observations*, ¶ 38.

<sup>73</sup> Rome Statute of the International Criminal Court, ¶ 7(1)(d), U.N. Doc. A/Conf.183/9 (17 July 1998).

<sup>74</sup> It is not within the scope of this submission to analyse the displacement of the Chagos Islanders under the Rome Statute. For discussion of the possibility that their displacement could constitute a crime against humanity, see [http://www.minorityrights.org/features/features\\_diegogarcia.htm](http://www.minorityrights.org/features/features_diegogarcia.htm) (last visited 8 August 2006).

ICCPR. This, the government argued, was because the ICCPR did not legally apply to the BIOT, and even if it did, that it did not apply practically. Both of these arguments fail in light of this Committee's jurisprudence on convention reservations and the individualized nature of ICCPR rights, respectively.

Since the Committee considered the 5<sup>th</sup> Periodic Report of the Government, the UK government has revoked its recognition of the right of return of the Chagos Islanders which it had previously acknowledged to the Committee. It has used archaic little-known legal manoeuvres to remove that right of return and although its actions have been found unlawful by the UK courts three times<sup>75</sup> now, the government continues to appeal the decisions and prevent the islanders from exercising their right of return.

Substantive analysis of the UK's behaviour towards the Chagos Islanders reveals that the UK is in violation of articles 1 and 7 due its prolonged exiling of the Chagossians. The authors of this submission respectfully request the Committee to inform the UK government of its obligations to the Chagossian people under ICCPR, to recognize the violations that are currently taking place and to recommend to the Government that they facilitate and support the Chagossians right to return to the islands immediately.

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<sup>75</sup> Once for the 1971 order and twice for the Orders in Council