

**Submission to the Committee on the Elimination of Racial Discrimination
By Minority Rights Group International**

International Non-Governmental Organisation with ECOSOC Consultative Status

**United Kingdom of Great Britain
and Northern Ireland**

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Introduction:

Minority Rights Group International (MRG) is an international NGO working to secure the rights of ethnic, religious and linguistic minorities worldwide. MRG has consultative status with the United Nations Economic and Social Council (ECOSOC), observer status with the African Commission on Human and Peoples' Rights (ACHPR) and is a civil society organisation registered with the Organization of American States (OAS). MRG and its partners have researched and advocated for the rights of the Chagos Islanders for many years.

In line with the mandate of MRG, 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 Convention on the Elimination of Racial Discrimination ('the Convention'). It provides an overview of the situation of the Chagos Islanders and updates 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 Convention 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 Convention.

1. Overview of the Situation

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).

Between 1967 and 1973, the United Kingdom removed 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 for their employment. 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 Ilois, 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. The Chagossians have never been appropriately consulted about their removal from the island. Subsequent to their removal, a treaty was concluded between the US and the UK by which the island of Diego Garcia was leased to the American military, which has constructed and operates a military base there.

The Chagossians now live in poverty and marginalisation in Mauritius, Seychelles and the UK. Adequate provision was never made by the UK Government for their housing, feeding, employment, healthcare, social needs and community facilities. They have suffered for over 40 years as a result of their resettlement.

b. Legal action

The Chagossians have brought a number of legal actions in the UK courts challenging their expulsion. In 2000, the High Court struck down the relevant part of the Immigration Ordinance on

the grounds that the relevant power contained within BIOT, the power to legislate for the ‘peace, order and good government’ of the territory, while broad, did not include a power to exile a people from their homelands.¹ The UK Government did not appeal the decision and passed a new Ordinance allowing inhabitants to return to the outer islands of the archipelago but not to Diego Garcia. However, the Government later overturned its decision to support the resettlement and revoked the original BIOT order, passing new orders - the BIOT (Constitution) Order and the BIOT (Immigration) Order - in 2004. These provisions reinstated full immigration control; they “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.”²

A second case was brought challenging the legality of the new arrangement including the provision where (a) no provision had the right to abode in the BIOT and (b) that no person was entitled to enter BIOT without authorisation.³ The challenge was successful both in the High Court and the Court of Appeal, the latter holding that the orders amounted to an abuse of power because they negated the islanders’ rights to return to their homeland⁴. The Government appealed to the House of Lords, where the majority ruled that the exercise of power under the 2004 orders was essentially a concern for the government and Parliament and not properly a matter for the courts⁵. In dissent, one of the Lords stated that the Government’s submission “treats BIOT and the... power to make... laws relating to BIOT as if they related to nothing more than the bare land, and as if the people inhabiting BIOT were an insignificant inconvenience”.⁶

In 2014, the Chagossians challenged this ruling, lodging an appeal before the Supreme Court on the basis that key evidence had been withheld by the Government during the earlier litigation⁷. Specifically, papers suggested that a feasibility study conducted in the early 2000s – which found that a Chagossian resettlement would be difficult - was highly flawed. Documents released under the Freedom of Information Act suggested that the Foreign Office paid an academic to heavily critique the original draft of a study, which was generally more favourable to the return of the Chagossians than the final published version.⁸ The matter was heard by the Supreme Court on 22 June 2015 and judgment was delivered on 29 June 2016, with the judges ruling 3-2 in favour of the UK Government. However, the Supreme Court did note that “circumstances have changed in the light of the 2014-15 [feasibility] study and/or governmental confirmation that the MPA [Marine Protection Area]⁹ does not preclude resettlement. It is now open to any Chagossian to mount a fresh challenge to the failure to abrogate the 2004 orders in the light of the 2014-15 study’s findings, as an alternative to further lengthy litigation and quite possibly a fresh first instance hearing about the factually superseded... report”.

In 2012, the European Court of Human Rights (‘ECtHR’) issued its decision in *Chagos Islanders v. United Kingdom*, where the Chagossians alleged breaches of Articles 3, 6, 8 and 13 and Article 1 of

¹ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

² *R (Bancoult) v. Secretary of State for the Foreign and Commonwealth Affairs (No 2)*, [2007] EWCA Civ 498, para 11.

³ British Indian Ocean Territory (Constitution) Order 2004, available at:

<http://www.worldstatesmen.org/BIOT2004.PDF>, accessed on 27 June, 2011

⁴ *R (Bancoult)* (n 2)

⁵ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61

⁶ *ibid* para 157

⁷ *R (on the application of Bancoult No 2) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 2015/0021

⁸ FOI release: Chagos resettlement? (*Gov.uk*) <<https://www.gov.uk/government/publications/foi-release-chagos-resettlement>> accessed 11 May 2016

⁹ See page 3 below for further explanation

Protocol 1¹⁰. In 2009, Minority Rights Group International, in conjunction with Human Rights Watch, submitted a third party intervention in this case. The ECtHR found that the application was inadmissible, since, in its view, the Chagossians' claims about their removal were the result of inappropriate treatment but they had been definitively settled by domestic courts.¹¹ The ECtHR found that the Chagossians had accepted and received compensation, and therefore had lost their right to bring any further claims to determine the unlawfulness of their removal and to receive any other remedies as victims of a violation under the Convention.¹² It is worth noting here that, in fact, only 1,344 Chagossians (those living in Mauritius) received any compensation, and this compensation totaled £2,976 per person, with no compensation paid to any Chagossians living in the Seychelles.¹³ Further, on receipt of the monies, the Chagossians were required to sign an English-language document, yet many of the signees were illiterate, Creole-speaking and generally did not understand the true intent of what they signed.¹⁴

In April, 2010, the Chagos Archipelago was declared a marine preserve.¹⁵ This reserve is the largest in the world, more than twice the size of the United Kingdom, a move that made any fishing or deep sea mining within its boundaries illegal.¹⁶ The only exception to this ban was for traditional fishing around the island of Pitcairn by its local population.¹⁷ In 2013, the High Court upheld the Chagossians' challenge of the 2010 creation of the Chagos Marine Park. The Chagossians had argued that the Park was created for an improper purpose, and would effectively prohibit them returning because fishing was their livelihood. More disturbingly, in cables sent from then British diplomat Colin Roberts to US diplomats, in assuring them that the creation of the reserve would not adversely affect the US Air Force base present on Diego Garcia, Mr. Roberts wrote that the park would prohibit the resettlement of the island, meaning there would be "no human footprints" or "Man Fridays."¹⁸ Unfortunately, the judges in the case ruled that the Diplomatic Privileges Act 1964 forbade the cables or copies of them from being admissible as evidence.¹⁹

2. The Convention is applicable to BIOT and to UK acts affecting the Chagossians

a. The Convention is applicable to UK acts affecting its citizens outside its territory

In 2003, this Committee expressed regret that the UK had not provided any information on the implementation of the Convention in the BIOT in its report, and requested the UK to include information on its measures towards the adequate development and protection of the Ilois for the

¹⁰ *The Chagos Islanders v UK*, Application no 35622/04

¹¹ ECHR Press Release, 'Chagos islanders' case inadmissible because they accepted compensation and waived the right to bring any further claims before the UK National courts' (20 December 2012) ECHR 420 2012

¹² *ibid*

¹³ *Chagos Islanders v the United Kingdom* [2012] ECHR 35622/04

¹⁴ *ibid* paras 12 and 53

¹⁵ 'About the Chagos Marine Reserve' <<http://chagos-trust.org/about/chagos-marine-reserve>> accessed 16 May 2016

¹⁶ *ibid*

¹⁷ Brian Clark Howard, 'World's Largest Marine Reserve Created in Pacific' (*National Geographic*, 18 Mar 2015) <<http://news.nationalgeographic.com/2015/03/150318-pitcairn-marine-reserve-protected-area-ocean-conservation/>> accessed 16 May 2016

¹⁸ 'HMG Floats Proposal for Marine Reserve Covering the Chagos Archipelago' (British Indian Ocean Territory) (*Wikileaks*) <https://wikileaks.org/plusd/cables/09LONDON1156_a.html> accessed 11 May 2016

¹⁹ 'Chagos Marine Park is lawful, High Court rules' (BBC 11 June 2013) <<http://www.bbc.co.uk/news/uk-22852375>> accessed 11 May 2016

purpose of guaranteeing their full enjoyment of human rights under Article 2, paragraph 2 of the Convention.²⁰

In 2006, the UK replied to the Committee that the Convention does not apply to the BIOT. The UK Government maintained that it did not consider “Article 2 paragraph 2 of the Convention relevant to the territory of the BIOT, or that any separate report was required”²¹. The UK Government then stated that “so far as concerns the Ilois, the Territory has no permanent inhabitants” and members of the armed forces or other officials only spend brief periods on the island.²² The Government continues “Those individuals who are sometimes referred to as “Ilois” (or more frequently now as “Chagossians”) are in many cases now British citizens.... by virtue of the British Overseas Territories Act 2002....”²³

In its 2011 Concluding Observations, responding to the 2006 periodic report, CERD expressed concern about the United Kingdom’s position regarding the application of the Convention in the BIOT.²⁴ The Committee reminded the UK that the Convention is applicable to all territories under its control.²⁵ The Committee ultimately recommended that all discriminatory restrictions against the Chagossians reentering of Diego Garcia or other Islands be removed.²⁶

Although the reasoning for the UK Government’s statement that the Convention does not apply to BIOT is not completely clear, it would seem that the Government’s argument rests on the fact that the Chagossians do not reside on the BIOT, and therefore the UK is not under any duty to respect or protect the rights of the Chagossians, pursuant to its obligations under the Convention. Such a statement is incorrect, in that it presupposes that the Convention applies to the territory alone, and fails to consider the UK’s obligations to the Chagossian people, most of whom are British citizens as individuals, as the UK itself recognises²⁷. In doing so, the UK ignores the fundamental obligations clearly set out within the Convention. The Committee has repeatedly held that the Convention applies to its “citizens or non citizens”²⁸.

As UK citizens, the Chagossians fall within the jurisdiction of the UK, therefore, the Convention applies to the UK government’s behavior towards them, even if they are living outside of UK territory.

²⁰ *Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland. 10/12/2003 CERD/C/63/CO/11*, para 26

²¹ Reports submitted by the State Parties under Article 9 of the Convention, eighteenth to twentieth reports of State Parties due in April, 2006. ‘*Response to CERD, 2003 Concluding Observations* (paragraph 26) relating to British Indian Ocean Territory,’ Annex XI, p. 96. March, 2010.

²² *ibid*

²³ *ibid*

²⁴ UN Committee on the Elimination of Racial Discrimination, ‘Consideration of reports submitted by States parties under article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination’ (2011) UN Doc CERD/C/GBR/CO/18-20 para 12

²⁵ *ibid*

²⁶ *ibid*

²⁷ *ibid*

²⁸ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 1(2)

b. The Convention is applicable to UK overseas territory

In submissions to other international mechanisms, including the ECtHR²⁹ and the UN Human Rights Committee³⁰, the UK Government has taken the position that certain human rights conventions which it has ratified (notably, the European Convention on Human Rights ('ECHR') and the International Covenant on Civil and Political Rights ('ICCPR')) do not extend to the BIOT because the UK did not ratify the Convention specifically in relation to BIOT. The UK Government does not appear to be taking the same position in relation to the Convention and indeed, this Committee has indicated that it considers the Convention to apply to the BIOT, in requesting the UK to provide information about the measures it has taken towards the adequate development and protection of the Ilois for the purpose of guaranteeing their full enjoyment of human rights under Article 2, paragraph 2 of the Convention.³¹ However, for the avoidance of doubt, this submission will briefly address such an argument.

Firstly, any limitation of the scope of applicability of the Convention, if made within a specific reservation, would fall contrary to the international law on state reservations. According to Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation may not be "incompatible with the object and purpose of the treaty."³² Limiting the territories to which the Convention applies not only modifies the "object and purpose" of Article 2(2), but completely negates it, denying whole classes of UK citizens, including those of the excluded territories, the ability to enjoy any of the rights enshrined in the Convention at all.

In addition, the courts have accepted jurisdiction over the events that took place on the Chagos Islands. As a matter of international law, the BIOT is a UK territory and not a sovereign state. As a matter of domestic law, the BIOT is directly administered by the UK Government. The declared purpose of the BIOT is to further the defence of the UK and its allies. Moreover, the UK courts accepted jurisdiction over the merits of the entire Claimant's complaints concerning events in the BIOT.

Further, the ECtHR has held, in multiple cases, that jurisdiction can be found outside of a nation's physical territory. The Court has found that military intervention in an occupied territory requires a State to apply the ECHR within said territory.³³ The Court upheld this decision in stating that, while traditionally jurisdiction is confined to a State's physical territory, it can extend its jurisdiction outside its borders if it takes effective control of an area abroad, and that the obligation to uphold the ECHR's human rights protections extends to these extraterritorial areas.³⁴ More recently, the ECtHR confirmed these decisions when it held that the UK Government's human rights obligations are not limited to within the UK itself, but do extend to overseas territories where British officials exercise "control and authority" over foreign nationals.³⁵

²⁹ *The Chagos Islanders* (n 9)

³⁰ 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), 7 November 2002 at para 88

³¹ Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland. 10/12/2003 CERD/C/63/CO/11, para 26

³² Vienna Convention on the Law of Treaties, art. 19(c), 23 May 1969, 1155 U.N.T.S. 331

³³ *Loizidou v Turkey* [1995] ECHR 10

³⁴ *Issa and ors v Turkey* [2004] ECHR 629

³⁵ *Al-Skeini and others v. United Kingdom* [2011] ECHR 55721/07

With regards to the ICCPR, the Human Rights Committee has also found that it may be applied extraterritorially. The Committee stated 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.”³⁶ This sentiment was further reiterated in General Comment No. 31: “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all person 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 their power or effective control of that State Party, even if not situated within the territory of the State Party.”³⁷

c. The United Kingdom retains responsibility for unlawful acts committed on Diego Garcia

In 1966, the United Kingdom and the United States exchanged notes leasing Diego Garcia from the UK to the US. In this agreement, the States agreed that, “The Territory shall remain under United Kingdom sovereignty.”³⁸ In Annex II of this same agreement, differentiation is made between “the military authorities of the United States” and “the authorities of the Territory,” where a plain language reading can only lead to the understanding that “the authorities of the Territory” is the United Kingdom herself. The agreement thus stipulates that “the authorities of the Territory shall have jurisdiction over the members of the United States Forces with respect to offenses committed within the Territory and punishable by the law in force there, and that, “the authorities of the Territory shall have the right to exercise exclusive jurisdiction over members of the United States Forces with respect to offenses [...] punishable by law in the Territory but not by the law of the United States.”³⁹

The United Kingdom thus remains responsible for actions committed in the Chagos Islands that are contrary to her obligations under human rights treaties.

The authors of this submission therefore maintain that the Convention applies to the BIOT and the UK cannot be relinquished from its obligations to the Chagos Islanders.

Having established that the Convention 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 Convention with respect to the situation of the Chagos Islanders

3. The continuing exile of the Chagossian people constitutes a violation of Article 1

Article 1.1 of the Convention defines "racial discrimination" as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Discrimination includes purposive or intentional discrimination and

³⁶ *Lopez Burgos v. Uruguay* (Communication No. 52/1979)

³⁷ Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, adopted on 29 March 2004 (2,187th meeting), para 10

³⁸ Exchange of Notes concerning the Availability for Defence Purposes of the British Indian Ocean Territory (United Kingdom-United States) (entered into force 30 December 1966) Treaty Series No. 15 1967

³⁹ *ibid* Annex II 1(a)(ii) and 1(b)(ii)

discrimination in effect.⁴⁰ Differential treatment constitutes discrimination if ‘the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.’⁴¹ Further, “in seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”⁴²

An assessment of proportionality – or whether an action has an unjustifiable disparate impact on a group – will involve a consideration of whether the measure being taken was necessary (for example, a ‘pressing social need’), whether there is an alternative means of achieving the same with less or no interference, and the fairness of the decision-making process behind the measure. It is submitted that the UK Government’s actions in removing the Chagossians from their homes and continued failure to return them to their ancestral land and/or provide adequate compensation cannot be justified. There was no ‘pressing social need’, such as a state of emergency or the presence of hostile insurgents, which would justify such actions. Further, there has never been any suggestion that the Chagossians presented a threat to anyone. Indeed, the UK courts have already ruled that the removal of the Chagossians from their homes was unlawful.⁴³

In the past, the UK Government has argued 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.”⁴⁴ This argument is insufficient to release the Government from its obligations under the Convention. 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. 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”. A further feasibility study, conducted by KPMG in 2014-2015, has found that there would be scope for resettlement.

In addition, the UK Government has raised arguments that national security interests prevent the return of the Chagossians. Yet, like the feasibility argument, those security determinations were 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 ICERD jurisprudence. The UK courts have 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

⁴⁰ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 32’ (24 September 2009) UN Doc CERD/C/GC/32 para 7

⁴¹ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 30’ (18 October 2013) UN Doc CEDAW/C/GC/30 para 4

⁴² UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 14’ (22 March 1993) UN Doc A/48/18 para 2

⁴³ *R (Bancoult)* (n 1)

⁴⁴ Written statement of the Parliamentary Undersecretary for Foreign and Commonwealth Affairs, 15 June 2004, cited in *ibid.*, para 93.

United States, with regard for the interests of the Chagossians.⁴⁵ For this reason, the decision was found to be “irrational.”⁴⁶

It is submitted that the Government actions in evicting the Chagossians were discriminatory in effect and cannot be seen to be proportionate, not least because the decision-making process behind the evictions was wholly opaque.

4. The continued exile of the Chagossian people constitutes a violation of Article 2

Article 2(1)(a) provides

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.

The continued exile of the Chagossians falls foul of the UK Government’s obligation to eliminate “acts of racial discrimination against persons or group of persons” under Article 2(1) (a). From 1967 to 1973, the British Government forcibly removed the Chagossians from their homes through strategies which included deception and concealment. In particular, the Government concealed from the United Nations and from the British public the fact that there were permanent inhabitants of the BIOT who were to be removed from or excluded from the island without consultation or consent. Statements made by Government in the run-up to, and during, the Chagossians’ eviction evidence the racial discrimination behind their removal from the island.⁴⁷ Further, in 2004, the UK Government passed the BIOT (Constitution) Order 2004, which 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”.⁴⁸

⁴⁵ Written statement of the Parliamentary Undersecretary for Foreign and Commonwealth Affairs, 15 June 2004, cited in *R. v. Secretary of State for Foreign and Commonwealth Affairs, (No 2)* 1038 (Admin) (11 May 2006) at para 122

⁴⁶ *ibid*

⁴⁷ Contempt for the Chagossians is evidenced in a number of internal Government communications and memoranda, describing them as “a few tarzans and man Fridays” (Decision of Ouseley J in *Chagos Islanders v The Attorney General and HM BIOT Commissioner*, [2003] EWHC 2222 (QB) para 74). These memoranda proposed to conceal from the outside world the true nature of the population: “we would not wish it to become general knowledge that some of the inhabitants have lived on Diego Garcia for at least two generations and could, therefore, be regarded as “belongers”. We shall therefore advise ministersto say there is only a small number of contract labourers from the Seychelles and Mauritius engaged in on the copra plantations on the islands. That is being economical with the truth” (*ibid* para 284) . Other memoranda advised “a policy of quiet disregard” and that it was “not at present HMG’s policy to advise “contract workers” of their dual citizenship”. The lawyer employed by the Foreign & Commonwealth Office who was charged with drawing up legislation to evict or prohibit the return of Chagossians referred to “maintaining the fiction” that there was “only a floating population”. (*ibid* para 259).

⁴⁸ British Indian Ocean Territory (Constitution) Order 2004, section 9

In conjunction with passing the BIOT (Immigration) Order 2004, the Government has reinstated the prohibition to return to BIOT and thus prolonged the exiling of the Chagos Islanders. Both Orders are discriminatory in nature in that they directly target the Chagossians, and as explained above, cannot be justified. In particular, the BIOT (Immigration) Order 2004 prohibits anyone from entering the BIOT without a permit from the immigration officer. This Order bans Chagossians not just from Diego Garcia, home of the US military base, but also from the outlying islands located over one hundred miles away. Members of the armed forces and public officers are exempt from this requirement, and listed contractors working on the American base are deemed to possess a permit. It is also understood that British policemen are based on Diego Garcia, and civil servants involved in the administration of the islands are permitted to enter. Moreover, as argued by counsel for the Chagos Islanders in the UK courts, the Chagossians are prohibited from returning home on grounds of national security, yet private yachters are permitted to sail into the territorial waters (i.e. within three miles) of Diego Garcia.⁴⁹ And still, the Chagossians are completely barred from living on, or even visiting, any of their ancestral homeland.

Under Article 2(1)(c), the UK Government is required to “*amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.*” To date, and despite a series of ongoing legal challenges and requests from the Chagossians, the Government has failed to amend or rescind the BIOT (Constitution) Order 2004 and BIOT (Immigration) Order 2004, and the Chagossians remain in forced exile.

Article 2(2) provides:

*States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, **special and concrete measures** to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved* (emphasis added).

The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing by the adoption of special temporary measures designed to secure disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.⁵⁰ ‘Measures’ includes the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes.⁵¹ Further, the use of the verb ‘shall’ in relation to taking special measures clearly indicates the mandatory nature of the obligations to take such measures. This mandatory nature of the obligation is not weakened by the addition of the phrase ‘when the circumstances so warrant’.⁵²

In spite of these clear and unequivocal obligations, the UK Government has failed to take any measure to address the discrimination suffered by the Chagossians. The Chagossians now live in poverty and marginalisation in Mauritius, Seychelles and the UK and have been deprived of their land and livelihood for over 40 years. Despite repeated requests and numerous legal challenges,

⁴⁹ *R (Bancoult)* (n 5) para 138

⁵⁰ CERD General Recommendation No 32 (n 39) para 11.

⁵¹ *ibid* para 13

⁵² *ibid* para 30

adequate provision has never been made by the UK Government for their housing, feeding, employment, healthcare and social needs nor community facilities, nor has adequate compensation been offered for their forcible removal from their homes. The UK Government is therefore in violation of Article 2.

5. The continuing exile of the Chagossian people constitutes a violation of Article 5

The right to self-determination is a fundamental principle of international law. It is enshrined in article 1 of the Charter of the United Nations, in article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, as well as in other international human rights instruments.⁵³

In respect of the self-determination of peoples, two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect, there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the Convention.⁵⁴

Article 5(c) provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
(c) Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

This emphasis on minority participation is further emphasised by the Committee as follows, “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.”⁵⁵

The second aspect of self-determination, the external aspect, is not examined here since the Chagossians only seek the less comprehensive right of internal self-determination.

In addition, CERD’s general recommendation on indigenous peoples 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.”⁵⁶

⁵³ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 21’ (23 August 1996) UN Doc A/51/18 para 2

⁵⁴ *ibid* para 4

⁵⁵ *ibid* para 5

⁵⁶ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 23’ (18 August 1997) UN Doc A/52/18 annex V para 4(d)

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.

As stated above, decisions regarding the Chagossians' fate have frequently been made without public debate, and have always been made without consulting them. Through its intervention, the UK has breached on the rights of Chagos Islanders to participate in public affairs and enjoy equal access to public service according to Article 5 (c).

Further, by expelling the Chagossians from their home, the UK has violated their right to enjoy freedom of movement under Article 5 (d) (i). In addition, the Government's assertion that the Chagossians "enjoy the right of abode in the United Kingdom and associated rights of residence in Member States of the European Union"⁵⁷ completely ignores the fact that they are wholly deprived of the opportunity to return to their country as guaranteed by Article 5 (d) (ii) of the Convention.

6. The failure to provide the Chagossians with an effective remedy and adequate compensation for their continued exile constitutes a violation of Article 6

Article 6 provides:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

In 2000, the UK High Court quashed the 1971 Immigration Ordinance requiring the compulsory removal of the whole of the population of the territory, including all the Ilois, to Mauritius on the grounds that the relevant power contained within BIOT, the power to legislate for the 'peace, order and good government' of the territory, while broad, did not include a power to exile a people from their homelands.⁵⁸ It is evident from the reasoning within that judgment that the purpose of quashing the order was to ensure the Chagossians could return to and remain in the BIOT.

The UK Government did not appeal the decision and passed a new Ordinance allowing inhabitants to return to the outer islands of the archipelago but not to Diego Garcia. The then Foreign Secretary, whose ministry maintains authority over the BIOT Commissioner, announced that he would be accepting the Court's ruling and investigating possibilities for the Chagossians' resettlement. However, the Government delayed and obstructed this action, and in June 2004, passed two Orders which completely denied the Chagossians' right as recognised by the UK court in 2000. They were not consulted or warned about these Orders. This unilateral decision meant that a binding judicial decision respecting the Chagossians' rights cannot now be implemented.

⁵⁷ Response to CERD, '2003 Concluding Observations relating to British Indian Ocean Territory,' Annex XI, para 26

⁵⁸ *R (Bancoult)* (n 1)

The Chagossians challenged the 2004 Orders through legal action, which was successful at first instance and in the Court of Appeal, but in 2008 the House of Lords ruled against them, finding that the issue was essentially a concern for the government and Parliament and not properly a matter for the courts⁵⁹.

The Chagossians are now completely barred from living on, or even visiting, any of their ancestral homelands and they are unable to organise 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, also limits the autonomy of their life in exile.⁶⁰ The UK has offered very limited compensation that does not allow the Chagossians to lead dignified lives in exile. Indeed, the need for additional compensation has been recognised by the Human Rights Council in its concluding observations⁶¹.

The Chagossians have therefore been wholly deprived of an effective remedy and/or adequate compensation for their treatment by the UK Government within the national courts, in violation of Article 6.

7. Conclusions and Recommendations

Substantive analysis of the UK's behaviour towards the Chagos Islanders reveals that the UK is in violation of articles 1, 2, 5 and 6 of the Convention 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 the Convention, to recognise 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.

To this end, MRG specifically recommends that the UK Government:

- recognise the violations that the Chagossians have endured after being removed from the islands;
- repeal the two 2004 Orders in Council;
- facilitate and support the Chagossians right to return to the islands immediately;
- pay the Chagossians adequate compensation for the violation of their rights over the past 40 years; and
- appropriately consult with and seek the free, prior and informed consent of the Chagossians in relation to the return and compensation process.

⁵⁹ *R (Bancoult) (n 5)*

⁶⁰ 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).

⁶¹ Human Rights Committee, 'Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland and Overseas Territory of Great Britain and Northern Ireland', U.N. Doc. CCPR/CO/73/UK (2001) para 38