



# MAPPING THE UK'S RESPONSIBILITIES FOR HUMAN RIGHTS IN CROWN DEPENDENCIES AND OVERSEAS TERRITORIES (CDOTS)

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## A - INTRODUCTION

This paper is the product of a project funded by the Legal Education Foundation (LEF) to support the Island Rights Initiative in mapping the UK's responsibilities for human rights in the British Crown Dependencies and Overseas Territories (CDOTS). The British Crown Dependencies (CDs) are all located in the British Isles and include the Isle of Man and the Channel Islands. The 14 British Overseas Territories (OTs), of which 11 are populated, are scattered around the world in Europe, the Caribbean, South Atlantic, Pacific and Indian Oceans. Their populations are British citizens and the UK is responsible for their international relations, including international human rights obligations.

## BACKGROUND

Each CDOT is unique. Some, like St Helena or Pitcairn are heavily dependent on the UK for their survival because of their size, remoteness and limited resources. Others, like Bermuda, are economically self-sufficient. Some are remnants of the UK's colonial past while others share a history of belonging to the Crown. This project aims to map the constitutional arrangements between the UK and its CDOTs in terms of international human rights obligations and responsibilities. It is part of the Island Rights Initiative's ongoing policy engagement on these issues including Parliamentary evidence and policy advice.

The relationships between the UK and its CDOTs have developed on an *ad hoc* basis over centuries which means that there is a lack of consistency in terms of human rights protections for their populations most of whom are British citizens. Although the UK Government has supported the development of human rights laws and policies in its CDOTs in recent years, including the drafting of constitutions that protect human rights, it has not sought to codify its own responsibility for human rights in these territories. Recent developments such as the exclusion of CDOT residents (with the exception of Gibraltar) from the Brexit referendum, domestic litigation around same-sex marriage in OTs and the assertion by the UK Parliament of direct legislative powers in OTs (though not in CDs) through the Sanctions and Anti-Money Laundering Act 2018, have brought this issue into sharp relief.

This project aims to map the key legal and constitutional responsibilities the UK has with its CDOTs in terms of international human rights obligations. It identifies lines of responsibility, gaps and issues in the protection of international human rights through the legal framework applied to CDOTs that need to be addressed by policy makers. Given the scale and complexity of constitutional relationships between the UK and its CDOTs, this paper will not seek to give comprehensive detail of the situation but will rather highlight three main areas that raise general questions about the UK's relationship with CDOTs and effective human rights protection:



- The application of international human rights instruments in CDOTs
- The powers of UK Parliament and the Crown in relation to human rights in CDOTs
- The applicable standards of human rights in CDOTs

#### HISTORICAL FRAMEWORK AND DEPARTMENTAL RESPONSIBILITIES

The arrangements between the UK and each CDOT is very much dependent on the historical background to that relationship. Annexes 1 at the end of this report provides a series of fact sheets outlining the characteristics of each of the CDOTs but one fundamental difference between Crown Dependencies (CDs) and Overseas Territories (OTs) is the basis of their historical links with the UK. CDs relationship with the UK is through their historical links to the Crown while OTs are generally former colonial acquisitions although the way in which they were acquired varies. This distinction is reflected in the UK departmental responsibilities for CDOTs which are primarily divided between the Ministry of Justice responsible for Crown Dependencies and the Foreign and Commonwealth Office responsible for Overseas Territories. In addition, the Ministry of Defence<sup>1</sup> is responsible for the Sovereign Base Areas (SBAs) of Akrotiri and Dhekelia while the Department for International Development<sup>2</sup> manages the development funding for OTs that are entitled to Official Development Assistance (ODA) – currently Montserrat, Pitcairn and St Helena.

At the international level, the 11 populated OTs are listed as Non-Self-Governing Territories<sup>3</sup> for which the UK has ongoing international obligations under the UN Charter.<sup>4</sup> The Charter binds administering Powers to recognize that the interests of dependent Territories are paramount, to agree to promote social, economic, political and educational progress in the Territories, to assist in developing appropriate forms of self-government and to take into account the political aspirations and stages of development and advancement of each Territory. Administering Powers are also obliged under the Charter to convey to the United Nations information on conditions in the Territories. Their situation is subject to regular review by the UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the Special Committee on decolonization or C-24)<sup>5</sup> although the UK has regularly questioned the ongoing relevance of the C-24 to the OTs.

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<sup>1</sup> <https://www.sbaadministration.org/>

<sup>2</sup> <https://www.gov.uk/world/organisations/dfid-overseas-territories>

<sup>3</sup> <http://www.un.org/en/decolonization/nonselvgovterritories.shtml>

<sup>4</sup> Article 73. <http://www.un.org/en/sections/un-charter/chapter-xi/index.html>

<sup>5</sup> <http://www.un.org/en/decolonization/specialcommittee.shtml>



The responsibilities the UK has for its OTs are therefore clearly codified in the UN Charter. Although the text of Article 73 does not explicitly include human rights, the promotion of “well-being”, “just treatment” and “protection from abuses” are all clearly dependent on the protection of human rights for those populations. More generally, international human rights law requires States to respect, promote and protect the rights of all people within their jurisdiction. The constitutional and legal complexity of the UK’s relationship with its CDOTs should not be used as a means of diluting those commitments.

## B - APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN CDOTs

International human rights treaties cannot be signed directly by the Governments of CDOTs as they are not sovereign states capable of signing international treaties on their own behalf. According to the Vienna Convention on the Law of Treaties 1969, “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”<sup>6</sup> In practice, when the UK signs, accedes to and ratifies such treaties, it decides on a case by case basis whether or not to extend the treaty to each CDOT and this is reflected in the instrument of accession or ratification.<sup>7</sup> It will also consider whether or not any reservations are needed in relation to a particular territory following consultation with the Government in the CDOT concerned.

As a matter of law, the UK can apply treaties to or withdraw the application of treaties from CDOTs without any consultation whether or not the subject matter of the treaty is devolved to a territory’s government.<sup>8</sup> However, by convention, the UK consults with the governments of territories before taking such action. The Cayman Islands Constitution has included a requirement that the Governor, unless instructed otherwise by a Secretary of State, must obtain the agreement of the Cabinet before entering into, agreeing or giving final approval to any international agreement that would affect internal policy or require internal legislation for implementation.<sup>9</sup> However the UK Government could still impose the extension of a treaty against the will of the territory government if it needed to in order to comply with an international obligation.<sup>10</sup> This could be the case in relation to international human rights obligations.

## EUROPEAN CONVENTION ON HUMAN RIGHTS AND PROTOCOLS

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<sup>6</sup> Vienna Convention on the Law of Treaties 1969, Article 29

<sup>7</sup> See “British Overseas Territories Law”, Ian Hendry and Susan Dickson, 2<sup>nd</sup> edition 2018, p. 282

<sup>8</sup> See *ibid*

<sup>9</sup> Cayman Islands Constitution (SI 2009/1379, as amended by SI 2016/780) s 55(3)

<sup>10</sup> See Hendry and Dickson p. 282



The [European Convention for the Protection of Human Rights and Fundamental Freedoms \(ECHR\) 1950](#) is arguably the most important of the human rights treaties that the UK has ratified because of the possibility of interpretation and enforcement of the Convention through the [European Court of Human Rights and the Committee of Ministers of the Council of Europe](#). But, unlike most other international human rights instruments, the ECHR explicitly allows States to choose how the Convention applies to their overseas territories by making a declaration on the territorial application of the ECHR under Article 56.<sup>11</sup> Some commentators have suggested that Article 56 is a throwback to the colonial era with little relevance for international human rights law in the 21<sup>st</sup> Century.<sup>12</sup> But, while recognising those arguments, the ECtHR has continued to take State's decisions under Article 56 into account as fundamental to its interpretation of the territorial application of the ECHR and Protocols.

Two cases before the Court have explored the practical implications of the need for a declaration under Article 56 ECHR (and similar clauses in Protocols to the ECHR) in UK OTs in cases where the UK decided not to extend provisions to the territory in question – *Quark Fishing Ltd v the UK*<sup>13</sup> which dealt with the applicability of Protocol 1 to South Georgia and the South Sandwich Islands (SGSSI) and, more recently, *Chagos Islanders v the UK*<sup>14</sup> which looked at the jurisdiction of the Court and the relevance of Article 56 ECHR in light of recent case-law on extra-territorial jurisdiction in *Al-Skeini and Others v UK*.<sup>15</sup>

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<sup>11</sup> ARTICLE 56 (formerly Article 63)

*Territorial application*

- 1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.*
- 2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.*
- 3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.*
- 4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.*

<sup>12</sup> See e.g. Louise Moor and A. W. Brian Simpson, 'Ghosts of colonialism in the European Convention on Human Rights', *British Year Book of International Law*, 76(1) (2006), 121–94.

<sup>13</sup> Admissibility Decision in *Quark Fishing Ltd v UK*, ECHR 2006-XIV, 44 EHRR SE 4

<sup>14</sup> Admissibility Decision in *Chagos Islanders v UK*, Application no. 35622/04, 20 December 2012

<sup>15</sup> *Al-Skeini and Others v UK*, Application no. 55721/07, Judgment of 7 July 2011



In *Quark Fishing Ltd*, a case concerning the granting of fishing licences in the territorial waters of SGSSI, the Court considered but ultimately rejected the applicants' arguments about the relevance of Article 56 in a modern interpretation of the ECHR saying:

*"...the applicants contend that the declarations system set out in Article 56 is outdated, geared to the colonial systems in the aftermath of the Second World War, and the Convention should not be interpreted so as to allow the United Kingdom to escape responsibility for its unlawful actions where there is no objective justification for failing to extend the Convention and its Protocols fully. The Court can only agree that the situation has changed considerably since the time that the Contracting Parties drafted the Convention, including former Article 63. Interpretation, albeit a necessary tool to render the protection of Convention rights practical and effective, can only go so far. It cannot unwrite provisions contained in the Convention. If the Contracting States wish to bring the declarations system to an end, this can only be possible through an amendment to the Convention to which those States agree and give evidence of their agreement through signature and ratification. Since there is no dispute as to the status of the SGSSI as a territory for whose international relations the United Kingdom is responsible within the meaning of Article 56, the Court finds that the Convention and its Protocols cannot apply unless expressly extended by declaration. The fact that the United Kingdom has extended the Convention itself to the territory gives no ground for finding that Protocol No. 1 must also apply or for the Court to require the United Kingdom somehow to justify its failure to extend that Protocol. There is no obligation under the Convention for any Contracting State to ratify any particular Protocol or to give reasons for their decisions in that regard concerning their national jurisdictions. Still less can there be any such obligation as regards the territories falling under the scope of Article 56 of the Convention."*<sup>16</sup>

In the *Chagos Islanders* case,<sup>17</sup> the applicants complained that their removal from and the refusal to allow their resettlement in the BIOT amounted to violations of the Convention under Articles 3, 8 and Article 4 of Protocol 1 while the extra-judicial annulment of the UK court's decision regarding resettlement was a breach of their rights to a fair trial and to an effective remedy (Articles 6 and 13 ECHR). The UK Government argued that the ECHR and its Protocols had never been extended to the BIOT and therefore the Court had no jurisdiction.<sup>18</sup> The applicants argued that, as the ECHR had been extended to Mauritius, a territory which included the BIOT before its independence in 1965, that extension survived in the BIOT. They

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<sup>16</sup> *Quark Fishing Ltd v UK*, see fn 13

<sup>17</sup> *Chagos Islanders v UK*, see fn 14

<sup>18</sup> *Ibid* Para 38

also argued that, even if there was no extension of the ECHR under Article 56, jurisdiction could be established under Article 1 ECHR on the basis that the UK has effective control over the BIOT. Human Rights Watch and Minority Rights Group International intervening in the case said that Article 56 was designed to cater for overseas territories with some degree of domestic autonomy but that the drafters had not intended to absolve States from responsibility for their extra-territorial actions.

The Court rejected all the arguments of the applicants on the territorial application of the Convention. But its discussion of the question of alternative bases for jurisdiction in the absence of an extension under Article 56 taking account of more recent case law in the *Al-Skeini* judgment<sup>19</sup> is illuminating:

*“72. ... as regards the applicants’ arguments that Article 1 jurisdiction may apply even in respect of overseas territories for which a Contracting State has not accepted the Convention, the Court observes that the Grand Chamber stated:*

*“140. The “effective control” principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, “with due regard ... to local requirements,” to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term “jurisdiction” in Article 1. The situations covered by the “effective control” principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89 and *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-...).”*

*73. It is true that the Court was in that passage answering the Government’s argument, based on Article 56, that finding jurisdiction covered the actions of their armed forces in Iraq would have the strange result that a State was free to choose whether or not to extend the Convention and its Protocols to a territory outside the Convention “espace juridique” over which it might in fact have exercised control for*

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<sup>19</sup> *Al-Skeini and Others v UK*, see fn 15

*decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised temporary control as a result of military action: this is in effect the obverse of the argument being advanced by the applicants in the present case. However, the Court's judgment on the point was cast in general terms: the Grand Chamber not only cited the Quark decision as an authority but in fact adopted the reasoning in that decision that the situations covered by the "effective control" principle were clearly separate and distinct from circumstances falling within the ambit of Article 56. The Court is not therefore persuaded that Quark can be regarded as wrongly decided or as having wrongly held that the South Sandwich and South Georgia islands were outside the jurisdiction of the Convention due to the absence of an Article 56 declaration.*

*74. Nor can the Court agree with the applicants' contention that any possible basis of jurisdiction under Article 1 such as set in the Al-Skeini judgment (cited above) must take precedence over Article 56 on the ground that it should be set aside as an objectionable colonial relic and to prevent a vacuum in protection offered by the Convention. Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result.*

*75. The question remains as to whether the passage from Al-Skeini cited above indicates that there must now be considered to be alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue, namely, that the United Kingdom can be held responsible for its acts and omissions in relation to the Chagos Islands, despite its exercise of its choice not to make a declaration under Article 56, if it nonetheless exercised "State agent authority and control" or "effective control" in the sense covered by the Grand Chamber judgment. This interpretation is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories."<sup>20</sup>*

The ECtHR unfortunately decided that, even accepting the above interpretation, it was unnecessary to rule on the point<sup>21</sup> as the applicants lacked victim status under the ECHR in

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<sup>20</sup> Chagos Islanders v UK, see fn 14

<sup>21</sup> Ibid at para 76





any event. Therefore, the possibility for States such as the UK to avoid responsibility for the protection of human rights in CDOTs simply by failing to extend or withdrawing declarations on the extension of the Convention and Protocols to territories as it sees fit remains open.

While other States<sup>22</sup> such as France, Spain<sup>23</sup> and the Netherlands<sup>24</sup> extended the ECHR to all of their territories automatically on ratification, the UK has taken a piecemeal approach. This has meant that the application of the ECHR and its Protocols along with the right of individual petition in CDOTs has varied over time since the UK ratified the ECHR. In some cases, this situation may have arisen by accident rather than by design, but the circumstances which allow the UK to decide whether or not to extend the ECHR and its Protocols along with the right to individual petition to CDOTs on a case by case basis are unclear.

The UK has now extended the ECHR to most but not all CDOTs.<sup>25</sup> The Convention has not been extended to British Antarctic Territory (BAT) and the BIOT is still not within the territorial application of the ECHR.<sup>26</sup> Pitcairn is also outside the territorial application of the ECHR despite support being demonstrated in an unofficial referendum on the extension of the ECHR to the territory in 2007<sup>27</sup> and the inclusion of ECHR rights and additional rights such as environmental rights in the 2010 Constitution for the Islands.<sup>28</sup> While BIOT and BAT do not currently have permanent populations and the population of Pitcairn is extremely small, it is difficult to square the rationale for keeping those territories outside the scope of ECHR protection with the stated commitment to human rights. This situation means that individuals have less protection for their human rights in British territories than they would have, for example, in foreign territory where the UK has effective control such as the situation in Iraq that was the subject of the *Al-Skeini* judgment.<sup>29</sup> It is apparent, given the lack of a permanent population in BAT and BIOT and the support in Pitcairn for the ECHR, that the decision not to extend the application of the ECHR in these cases is not driven by concerns of

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<sup>22</sup> See: [https://en.wikipedia.org/wiki/Territorial\\_scope\\_of\\_European\\_Convention\\_on\\_Human\\_Rights](https://en.wikipedia.org/wiki/Territorial_scope_of_European_Convention_on_Human_Rights)

<sup>23</sup> See Reservations and Declarations: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations>

<sup>24</sup> See Reservations and Declarations: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations>

<sup>25</sup> See Reservations and Declarations: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations>

<sup>26</sup> See *Chagos Islanders v United Kingdom*, fn 14

<sup>27</sup> [https://en.wikipedia.org/wiki/2007\\_Pitcairn\\_Islands\\_European\\_Convention\\_on\\_Human\\_Rights\\_referendum](https://en.wikipedia.org/wiki/2007_Pitcairn_Islands_European_Convention_on_Human_Rights_referendum)

<sup>28</sup> <http://www.government.pn/Pitcairn%20Islands%20Constitution%20Order%202010.pdf>

<sup>29</sup> *Al Skeini and others v United Kingdom*, fn 15



the local population but is, rather, a decision taken by Central Government in the UK which results in human rights black holes in British territories.

Protocol 1 of the ECHR<sup>30</sup> which includes rights to property, education and elections has been signed and ratified by the UK but has not been extended to the SBAs, BAT, Bermuda, the Falklands, Guernsey Pitcairn or SGSSI.<sup>31</sup> It has been extended to the other CDOTs with reservations and reservations apply in relation to its application in the UK as well. Protocol 13 of the ECHR which deals with the prohibition of the death penalty has been signed and ratified by the UK but has not been extended to BAT, BIOT, BVI, Cayman and Pitcairn.<sup>32</sup> Again, these choices in relation to the extension of international human rights protections are difficult to justify in accordance with the principle of the universality of human rights and the UK's international commitments to human rights and stated policy in support of human rights in the CDOTs.

Extension of the ECHR, Protocols and the right of individual petition by the UK was done originally by way of a renewal every five years which set out the territorial application of the Convention. This meant that the status of the ECHR in British CDOTs could effectively be changed by way of omission whenever the UK renewed its declaration. This was the approach taken around the *Tyrer v UK*<sup>33</sup> case concerning the use of judicial corporal punishment (known as "birching") on the Isle of Man. When the renewal of the right of individual petition was due in 1976, the Manx authorities requested that the UK should make the necessary declaration but with the caveat that rights of appeal against a sentence of corporal punishment by a Manx Court should be excluded.<sup>34</sup> Faced with resistance from the Manx government and the risk of responsibility for further breaches in the Crown Dependency, the right of individual petition was allowed to lapse on the Island when the UK renewed its declaration in 1976.<sup>35</sup> Due to concerns about the compatibility with the ECHR of Manx laws regarding criminalisation of homosexual acts and corporal punishment and the potential for challenge before the Court, there was no right of individual petition from the Isle of Man between 1976 and 1992 when a new declaration was made on a five year basis, later made

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<sup>30</sup> <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009>

<sup>31</sup> [https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009/declarations?p\\_auth=BWSpUpCP](https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009/declarations?p_auth=BWSpUpCP)

<sup>32</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/declarations?p\\_auth=fsNzwT4Z](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/declarations?p_auth=fsNzwT4Z)

<sup>33</sup> *Tyrer v United Kingdom*, Application no 5856/72, Judgment of 25 April 1978

<sup>34</sup> See Address given by HM Attorney General, WJH Corlett QC at the Isle of Man Human Rights Bill Seminar, Friday 23<sup>rd</sup> June 2000.

<sup>35</sup> *Ibid*



permanent in 2003.<sup>36</sup> The Manx example shows that the UK approach gives room for the expression of local sentiment on human rights issues allowing the UK to tailor its international human rights obligations to reflect the wishes of local populations in CDOTs. But it also reveals an ambivalent approach to the universal applicability of international human rights which does not sit well with the UK's international commitment to human rights.

The ability to withdraw a declaration is not very tightly prescribed. This means that withdrawing the application of the ECHR or the right of individual petition could be done with relative ease if the UK or a CDOT had concerns that their legislation or practices would not be ECHR compliant. This is of concern for vulnerable minorities including LGBTI people and migrants whose rights are under threat in some CDOTs. For example, in Bermuda, the recent attempt to repeal same-sex marriage through legislation which would have meant that rights already granted to same-sex couples were removed<sup>37</sup> shows the precariousness of hard-won rights in some communities.

While the ECtHR has said that the Declarations system could only be ended by an amendment to the ECHR agreed to by the States concerned<sup>38</sup> there is nothing to prevent the UK from making a general declaration under Article 56 (and relevant articles in the Protocols) to the effect that the ECHR and its Protocols apply to all territories under the territorial sovereignty of the UK.<sup>39</sup> This would have the effect of ensuring that there are no human rights black holes in British territory.

#### UN HUMAN RIGHTS CONVENTIONS

The 2012 White Paper on the Overseas Territories describes the UK Government's position as follows:

*"The UK Government's long-standing practice in this area is to encourage the Territories to agree to the extension of UN human rights conventions that the UK has ratified, but to extend these to the territories only when they are ready to apply them. We will support those Territories that face resource and capacity constraints."*<sup>40</sup>

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<sup>36</sup> by a letter from the Permanent Representative of the United Kingdom, dated 28 August 2003, registered at the Secretariat General on 29 August 2003

<sup>37</sup> See Island Rights Initiative analysis of the Bermuda Domestic Partnership Act 2018: <https://www.islandrights.org/fundamental-principles-of-international-human-rights-law-and-same-sex-marriage-in-bermuda/>

<sup>38</sup> See Quark Fishing Ltd, fn 13

<sup>39</sup> See Hendry and Dickson p. 282 for a discussion of the possibility for the UK to do this in relation to international instruments in general.

<sup>40</sup> 2012 White Paper, n 10, 52



As with the ECHR and its protocols, the UK has extended many of the UN Conventions that it has signed and ratified to most of its CDOTs, usually following consultation with their Governments. These include the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) which have been extended to all populated CDOTs with the exception of Anguilla which has agreed in principle to the extension.<sup>41</sup> The Convention on the Rights of the Child<sup>42</sup> (CRC) has been extended to all the substantially populated territories except Gibraltar. The Convention on the Elimination of Discrimination against Women (CEDAW), the Convention Against Torture (CAT), the Convention on the Elimination of Racial Discrimination (CERD) have been extended to most substantially populated territories and the UK Government has asked territories if they wish the Convention on the Rights of People with Disabilities (CRPD) to be extended to them. Again, however, the extension of human rights treaties to CDOTs is haphazard and difficult to justify in the wider context of the universality of human rights.

The recent litigation in the Supreme Court<sup>43</sup> regarding the application of the Refugee Convention 1951 as extended by its 1967 Protocol to the SBAs has highlighted the problems with the UK's piecemeal approach. The UK Government sought to argue that the Convention and Protocol had not been explicitly extended to the SBAs when they were ceded from the former British colony of Cyprus when it became independent in 1960. The Supreme Court found that:

*"...As a matter of international law the Convention continues to apply to the SBAs by virtue of the declaration in 1956, in the same way it applied to the colony of Cyprus before 1960. Article VII(4) of the Protocol provides that where a state made a declaration under Article 40(1) or (2) of the Convention extending its application to a territory for whose international relations it was responsible, and then acceded to the Protocol, the declaration should apply to the Protocol also, unless that state notified the Secretary-General to the contrary. No further declaration was required to extend the Protocol to dependent territories where the original Convention applied. The UK acceded to the Protocol without any reservation relating to the SBAs. Since the Convention continued to apply to the SBAs after 1960, the Protocol applies there also."<sup>44</sup>*

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<sup>41</sup> See Hendry and Dickson p. 185

<sup>42</sup> UKTS No 44 (1992); Cm 1976.

<sup>43</sup> R (on the application of Tag Eldin Ramadan Bashir and others) (Respondents) v Secretary of State for the Home Department (Appellant) [2018] UKSC 45 On appeal from [2017] EWCA Civ 397

<sup>44</sup> Ibid para 71



The fact that this issue was not settled before it reached the Supreme Court this year with the result that six refugee families have spent over two decades living in extremely difficult conditions on the SBAs while fighting a complex and costly legal battle highlights the human risks associated with the ad hoc application of international human rights and related instruments to CDOTs. The families were eventually allowed to resettle in the UK this month shortly before another Supreme Court Hearing scheduled to finalise the case.<sup>45</sup>

Unlike the ECHR, most UN Human Rights Treaties have limited mechanisms for individuals to enforce their provisions and the UK has not ratified provisions relating to individual petition in relation to many of them. But despite that, UN mechanisms such as the Human Rights Committee (HRC), have taken a broader approach to their interpretation of jurisdiction. So, for example, Article 2 of the ICCPR has been interpreted to mean that State parties had to ensure rights to all persons in their territory and to anyone “within the power or effective control of that State Party even if not situated within the territory of the State Party.”<sup>46</sup> The HRC has found that the ICCPR did apply to the BIOT despite UK Government assertions to the contrary and has indicated that the UK should include the BIOT in its periodic reporting on the Covenant.<sup>47</sup>

The UK reports to the relevant Committees on behalf of CDOTs as part of its regular reporting cycle and various Committees have raised human rights concerns about the situation in CDOTs in their concluding observations. For example, the HRC has expressed concerns about powers of the Governor of the Cayman Islands to deport any person who is “destitute” or “undesirable” in violation of Articles 17 and 23 of the Covenant.<sup>48</sup> It also criticised the fact that corporal punishment of children is not prohibited in schools in Bermuda, the British Virgin Islands, Gibraltar, Montserrat and the Crown Dependencies in contravention of Articles 7 and

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<sup>45</sup> <https://www.independent.co.uk/news/uk/home-news/refugees-enter-uk-stranded-army-base-cyprus-20-years-dhekelia-akrotiri-a8665931.html>

<sup>46</sup> See *Chagos Islanders v UK* (ECtHR interveners submissions at Para 55 of admissibility decision) and HRC, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, § 11. Annex 6. See also General Comment 2 on Article 2 of the Convention Against Torture which states at § 16: "Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also "in any territory under its jurisdiction." The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law." (emphasis added).

<sup>47</sup> Concluding observations: United Kingdom of Great Britain and Northern Ireland, 30 July 2008 UN Doc. CCPR/C/GBR/CO/6, at para. 22, Annex 8; see also Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland. 10 December 2003, UN Doc. CERD/C/63/CO/11 at para. 26.

<sup>48</sup> Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 30 July 2008 UN Doc. CCPR/C/GBR/CO/6, at para 23.



24 of the Covenant and urged the UK to expressly prohibit corporal punishment of children in all CDOTs.<sup>49</sup>

The efficacy of UN Human Rights Monitoring mechanisms, however, depends very much on the information they are given. The UK coordinates inputs from CDOTs insofar as it considers that the relevant Treaties apply to them. But the capacity for CDOT Governments to provide detailed information is variable according to the availability of resources. And while some OTs have their own Human Rights Commissions or similar NHRIs, the CDs and some OTs do not. This means that there is no independent human rights institution that can contribute to the process in many cases, and in the territories where there are independent oversight mechanisms, their capacity is extremely variable. Similarly, in small communities, the ability of civil society organisations to contribute to UN oversight processes through shadow reporting is extremely limited. There is, therefore, a need for UK support to CDOTs to ensure that periodic reporting on the situation in CDOTs is effective.

#### C - UK POWERS AND RESPONSIBILITIES IN CDOTS

The issue of self-determination, that is the right of peoples to decide on their place in the international order and the question of the scope of self-government regarding home affairs are primarily relevant in those CDOTs which have a permanent population. They are also clearly of relevance in the context of BIOT but in light of the pending Advisory Opinion on the legal status of the BIOT at the ICJ<sup>50</sup> it would not be useful to look at the BIOT situation in great depth here.

The UK is responsible for the security and governance of most of its OTs and their people as non-self-governing territories under international law flowing from the UN Charter. This includes a recognition of the principle that *“the interests of the inhabitants of these territories are paramount, and [Member States] accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security .... the well-being of the inhabitants of these territories, and, to this end:*

*a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;*

*b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according*

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<sup>49</sup> Ibid, at para 27

<sup>50</sup> <https://www.icj-cij.org/en/case/169>



*to the particular circumstances of each territory and its peoples and their varying stages of advancement;*<sup>51</sup>

Recent developments including the decision by the UK Parliament to legislate in a way that assumes powers to legislate directly for the OTs,<sup>52</sup> the exclusion of most CDOT residents from the Brexit referendum and concerns around legislation affecting LGBTI communities in OTs<sup>53</sup> have highlighted the fault-lines in the constitutional relationship between the UK and its CDOTs in terms of the powers and responsibilities of the UK Government and Parliament to intervene and make decisions on behalf of their populations against their will.

#### ROLE OF GOVERNOR

The Queen is the Head of State for all CDOTs and she is represented by a Governor or other administrative officer in each territory.<sup>54</sup> The powers and practical arrangements for the office vary from territory to territory but the role of Governor is key to the relationship between the UK and CDOTs. Appointment of the Governor is made by Her Majesty, in practice on the advice of Her UK Ministers.<sup>55</sup> In constitutional terms, the Governor is an officer of the UK Government as the representative of the Queen. It is clear that, if a Secretary of State of the UK Government gives instructions to the Governor of a CDOT, they do so on behalf of Her Majesty in right of the government of the CDOT itself.<sup>56</sup> However, the House of Lords has rejected the argument that such an instruction in relation to the SGSSI could be considered as an act of a UK public authority for the purposes of the Human Rights Act 1998 where it was given in the interests of the UK. The Lords felt that the motivation for such a decision was not, or should not be, justiciable because to look into such motivation would cause great uncertainty.<sup>57</sup>

The degree to which the Governor has powers to intervene in internal affairs varies according to the constitutions of each CDOT. There remains, however, a tension between the Governor's role in acting in the interests of the UK and the interests of the territory in CDOTs

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<sup>51</sup> Article 73. <http://www.un.org/en/sections/un-charter/chapter-xi/index.html>

<sup>52</sup> Sanctions and Anti-Money Laundering Act 2018

<sup>53</sup> E.g. Bermuda Civil Partnership Act 2018 and Cayman same-sex marriage case: <https://www.caymancompass.com/2018/10/07/trial-set-for-same-sex-marriage-case/>

<sup>54</sup> In the SBAs the title is "Administrator" and in SSGL, BAT and BIOT the title is "Commissioner". Schedule 1 to the Interpretation Act 1978 defines as follows: "'Governor' in relation to any British possession, includes the officer for the time being administering the government of that possession."

<sup>55</sup> See Hendry and Dickson p. 37 fn. 8

<sup>56</sup> See e.g. *R(Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 (HL) Lord Bingham at para 12

<sup>57</sup> See *Quark* (above) Lord Bingham para 18, Lord Hoffmann, para 64 and Lord Hope, paras 78-79.





where the legislative body of a territory is elected as the Governor is also the senior officer of the government of the territory.<sup>58</sup> The Governor is not a member of the legislative body where the legislative body of a territory is elected but exercises the power of assent in relation to Bills and in some cases makes laws with the advice and consent of the legislative body.<sup>59</sup>

For example, it was the Governor who exercised the power of assent for the controversial Bermuda Domestic Partnership Act 2018. It is arguable that, in a situation where domestic legislation would breach UK international human rights obligations,<sup>60</sup> the Governor should not be able to assent to that legislation. However, in the Bermuda Domestic Partnership Act case, the Bermudian Courts have found at first instance<sup>61</sup> and on appeal<sup>62</sup> that the Act is not constitutional in any event. Therefore, the domestic courts have upheld the domestic application of human rights standards without the need to challenge the Governor or, by extension, the Secretary of State about the legality of the assent in terms of the UK's international human rights law obligations.

The acts of a Governor are potentially subject to judicial review in the courts of the relevant CDOT according to the law of the CDOT.<sup>63</sup> However some constitutions provide an exception for that in relation to the question of whether a Governor has complied with instructions from her Majesty.<sup>64</sup> The justiciability of acts of Governors in CDOTs where they impact on human rights is, therefore, still unclear.

#### CAPACITY TO LEGISLATE FOR CDOTS

The ability for the UK Parliament to legislate for CDOTs has been put under the spotlight in relation to the passing of the Sanctions and Anti-Money-Laundering Act (SAMA) 2018<sup>65</sup> earlier this year. SAMA gave the British Government powers to require OTs to introduce publicly accessible registers of the beneficial ownership of companies if they have failed to do so by

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<sup>58</sup> See Hendry and Dickson p. 38

<sup>59</sup> *ibid*

<sup>60</sup> See arguments put forward by Island Rights Initiative Director, Susie Alegre and Associate, Dr Leo Raznovich regarding the legality of the Act under international human rights law:  
<https://www.islandrights.org/fundamental-principles-of-international-human-rights-law-and-same-sex-marriage-in-bermuda/>

<sup>61</sup> *R Ferguson v AG & OUTBermuda et al v AG*[2018] SC (Bda) 46 Civ (6 June 2018)

<sup>62</sup> Judgment of 23<sup>rd</sup> November available at: <http://cloudfront.bernews.com/wp-content/uploads/2018/11/The-Attorney-General-v-Roderick-Ferguson.pdf>

<sup>63</sup> See e.g. *McLaughlin v Governor of the Cayman Islands* [2007] UKPC 50, and *Swann v Attorney General of the Turks and Caicos Islands* [2009] UKPC 50

<sup>64</sup> See Hendry and Dickson p. 53 fn 86, e.g. Bermuda Constitution s 17(2); BVI Constitution s. 35(3) etc.

<sup>65</sup> <http://www.legislation.gov.uk/ukpga/2018/13/contents>





the end of 2020.<sup>66</sup> Interestingly, these powers applied only to OTs, not CDs. It has been argued that this was due to the different constitutional relationships the UK has with its CDs which would make it impossible to legislate in this way for them without sparking a constitutional crisis.<sup>67</sup> However, in those OTs in the Caribbean most acutely affected, there have been allegations that this distinction has more to do with the fact that the CDs are European than any real constitutional difference.<sup>68</sup>

Douglas Parnell, the Chairman of the ruling party in the Turks and Caicos Islands said

*“...this action highlights for us as a people the attitude towards us. If it suits their interests, an Order in Council is easily passed. Our constitution is an Order in Council and could just as easily be changed if there was the political will in the UK. It is time that we seriously consider a different, more empowering relationship with the UK. This should be seen for what it is – a constitutional smack down by our overseers...”<sup>69</sup>*

And the Deputy Prime Minister of the British Virgin Islands (BVI), Dr Kedrick Pickering, addressing a crowd protesting about the legislation said BVI was “declaring war” on the UK, spoke of the need to discuss divorce from the UK and called for experts from across the world to consider new constitutional options for the BVI separate from the UK.<sup>70</sup> Their concerns were reflected in the pre-Joint Ministerial Council meeting in London where the OTs put the question of their constitutional relationship with the UK firmly on the agenda with assertions that the recent action of the “UK Parliament to impose legislation on the OTs was undemocratic, a step backwards and a clear contradiction to UK policy statements and commitments to the OTs and the UN.”<sup>71</sup>

The reality of the distinction between the constitutional status of CDs and OTs in terms of the powers of the UK to legislate for them is less clear than the assertions made to justify the provisions in the SAMA. While there is a constitutional convention that the UK Parliament does not legislate for the CDs without their consent, there is no legal obligation to follow that convention. The Kilbrandon Commission noted that “it can be said that a constitutional

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<sup>66</sup> Section 51: <http://www.legislation.gov.uk/ukpga/2018/13/section/51>

<sup>67</sup> See : <https://www.gov.im/news/2018/may/10/chief-minister-statement-on-uk-sanctions-and-anti-money-laundering-bill-and-beneficial-ownership-registers/>

<sup>68</sup> See : <http://www.caribbean360.com/news/oecs-urges-uk-parliament-to-reject-discriminatory-amendment-proposal-to-anti-money-laundering-bill> and <https://wp.caribbeannewsnow.com/2018/05/03/overseas-territories-react-to-uk-legislation-requiring-public-disclosure-of-beneficial-ownership/>

<sup>69</sup> Reported in <https://wp.caribbeannewsnow.com/2018/05/03/overseas-territories-react-to-uk-legislation-requiring-public-disclosure-of-beneficial-ownership/>

<sup>70</sup> Reported in <http://bvinews.com/new/uk-put-on-notice-bvi-has-declared-war-pickering/>

<sup>71</sup> Source – Montserrat Government Information Unit: <https://discovermni.com/2018/06/21/premier-romeo-meets-with-ot-and-uk-ministers-at-pre-jmc-in-london/>



*convention has been established whereby Parliament does not legislate for the islands without their consent on domestic matters.”<sup>72</sup> But the Supreme Court pointed out in *Barclay 2* that the Commission concluded that “in the eyes of the courts the UK Parliament did have a paramount power to legislate for the Islands on any matter, domestic or international, without their consent, although it should be no more ready than in the past to interfere in their domestic affairs. The Crown also retains the right to legislate for the Islands by Order in Council”<sup>73</sup>*

The CDs generally legislate for their own domestic affairs and such legislation is then submitted for Royal Assent. The Channel Islands divided between the Bailiwicks of Jersey and Guernsey have a further division of legislative powers between the islands. Jersey, Guernsey, Alderney and Sark each have their own legislature. But the States of Guernsey have power to legislate for the whole Bailiwick of Guernsey, including Alderney and Sark. Consent is required for legislation on all matters except for criminal matters where the consent of the Alderney and Sark legislatures is not required.<sup>74</sup>

While the UK Parliament has generally respected convention and does not legislate for CDs on domestic matters, it has equally not generally legislated for OTs on domestic matters either. The field of international human rights, however, bridges the international and the domestic spheres. The Justice Committee in its 2010 report on Crown Dependencies said that, while the grounds for withholding Assent to a measure are not entirely clear<sup>75</sup> “it would certainly be legitimate to withhold Assent if the legislation would put the relevant Island in breach of an international obligation which applies to the Island and for which the UK is responsible.”<sup>76</sup> Jersey and Guernsey intervening in the *Barclay 2* case in the Supreme Court argued that Assent may be withheld if the draft legislation would breach an international obligation which had been extended, by agreement to the Islands, but that this does not apply where the relevant agreement had already been incorporated by legislation in to the domestic law of the Islands.<sup>77</sup> But this question, along with the wider question of the grounds on which Assent could be refused in the public interest were not resolved by the Supreme Court in *Barclay 2* and therefore remain unsettled.

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<sup>72</sup> Cmnd 5460, para 1469 as cited in *R (on the application of Sir David Barclay and another) v Secretary of State for Justice and the Lord Chancellor and Others* [2014] UKSC 54 (*Barclay 2*) at para 12

<sup>73</sup> See *R (on the application of Sir David Barclay and another) v Secretary of State for Justice and the Lord Chancellor and Others* [2014] UKSC 54 (*Barclay 2*) para 12

<sup>74</sup> See *Barclay 2*, para 13

<sup>75</sup> (2010, HC 56, para 51)

<sup>76</sup> (2010, HC 56, para 51; see also Cm 7965, p 16 note 36)

<sup>77</sup> *Barclay 2* para 17



The UK's approach to human rights issues in CDOTs has generally been to encourage the development of domestic legislation improving the situation of human rights in CDOTs either on a case by case basis or through the development of increasingly strong fundamental rights protections in OT constitutions. But there are areas of contention, in particular in relation to minority rights. SAMA related to financial regulation and transparency rather than international human rights obligations. But it did touch on issues that CDOTs regard as crucial to their survival and to their ability to govern themselves. It remains to be seen whether or not the UK will seek to rely on the provisions to force OTs to legislate in this area against their will or how those OTs affected would respond.

#### ROUTES FOR LEGAL CHALLENGE

The *Barclay 2* judgment in the Supreme Court dealt extensively with the relationship between the Channel Islands, the Crown and the United Kingdom to identify the potential route for challenge to Royal Assent to legislation in the CD of Sark. Lady Hale concluded that,

*“as a general proposition, to which there may well be exceptions, I would hold that the courts of the United Kingdom do have jurisdiction judicially to review an Order in Council which is made on the advice of the Government of the United Kingdom acting in whole or in part in the interests of the United Kingdom.”<sup>78</sup>*

But the bulk of the arguments related to whether or not jurisdiction should, in this case be exercised by the courts of England and Wales to decide on compatibility of Island legislation with ECHR rights. While those arguments focused on the specific situation of Sark, they can be read across to the situation of other CDOTs.

Lady Hale's analysis of the position under the Human Rights Act 1998, is very useful:

*“35. .... Does it make a difference to the scope of the 1998 Act that the United Kingdom has extended the rights in question to the Channel Islands? On the one hand, under our dualist approach to the incorporation of international treaties, there is an important distinction between assuming responsibility in international law and extending rights and responsibilities in domestic law. On the other hand, the House of Lords has decided since *Quark Fishing* that the 1998 Act applies to the acts of United Kingdom public authorities in relation to persons “within its jurisdiction” for the purposes of article 1 of the Convention wherever they may be in the world: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153. Liability under sections 6 and 7 of the 1998 Act is therefore likely to depend upon whether the alleged victim was within the jurisdiction of the United Kingdom and whether the*

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<sup>78</sup> *Barclay 2* para 58

*perpetrator was a United Kingdom public authority. It certainly cannot be ruled out that violations of Convention rights committed in one of the Channel Islands by a United Kingdom public authority are actionable in the United Kingdom courts under the 1998 Act.*

*36. But in my view it can be ruled out that sections 3 and 4 of the 1998 Act were intended by Parliament to apply to Channel Islands legislation as it applies in the Channel Islands. It is not for the courts of England and Wales to interpret the law of the Channel Islands or decide what is law there. Insofar as that task rests with the courts, it rests with the Island courts, culminating ultimately in the Judicial Committee of the Privy Council. It is not for the courts of England and Wales to “read down” Island legislation so as to make it conform to the Convention rights. It is not for the courts of England and Wales to declare that Island legislation is incompatible with the Convention rights. I would not, therefore, read an “Order in Council made in exercise of [the royal prerogative]” in the definition of primary legislation in section 21(1) of the 1998 Act as including an Order in Council giving Royal Assent to Island legislation or legislating directly for an Island.*

*37. For the courts of England and Wales to entertain challenges to the compatibility of Island legislation with the Convention rights would clearly be to subvert the scheme of the Islands’ own human rights legislation. It would also be to subvert the method by which the United Kingdom extended the European Convention to the Channel Islands. This was not by extending the 1998 Act to them: amendments to that effect were resisted in the UK Parliament. It was by extending the scope of the Convention in international law by a declaration under article 56, and leaving it to the Islands to legislate to incorporate the rights contained in the Convention into Island law. They happened to adopt the same model as the 1998 Act but they did not have to do so. It would be inconsistent with that scheme for the definition of “primary legislation” in the 1998 Act to cover any form of primary Island legislation as defined in the Human Rights (Bailiwick of Guernsey) Law 2000.”<sup>79</sup>*

So it seems clear that the route for challenge on human rights grounds in CDOTs is generally through their domestic courts insofar as compatibility with domestic legislation is concerned. However, there may be circumstances where the impact on human rights in a CDOT is the result of a UK public authority’s actions with effect in the CDOT concerned. In such cases, the question of whether or not the victim was within the jurisdiction of the UK for the purposes of the 1998 Act would be a deciding factor in the ability to challenge that action in the courts

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<sup>79</sup> Barclay 2



of England and Wales under the 1998 Act. Arguably, in circumstances where such a challenge was not available either in the UK courts or in the courts of the CDOT concerned, as long as the ECHR or relevant Protocol had been extended to the territory, direct recourse to the European Court of Human Rights would be possible in the absence of domestic remedies to exhaust<sup>80</sup> but the absence of domestic remedies would probably require clarification by the UK courts.

#### D - EFFECTIVE ENJOYMENT OF RIGHTS

In the 2012 White Paper on OTs, the UK Government stated that:

*“We expect Territory Governments to meet the same high standards as the UK Government in maintaining the rule of law, respect for human rights and integrity in public life, delivering efficient public services, and building strong and successful communities. Territories in receipt of budgetary support are expected to do everything they can to reduce over time their reliance on subsidies from the UK taxpayer”<sup>81</sup>*

As noted above, however, the UK Government also indicated that it would support territories that face resource and capacity constraints in the implementation of international human rights standards.<sup>82</sup>

#### WHAT STANDARDS APPLY

Under the ICESCR the UK is obliged to take steps “to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant...”<sup>83</sup> The duty of progressive realisation in relation to economic, social and cultural rights recognises the fact that States may be at different stages of economic development that will affect their ability to deliver things like education and health services. But the ICESCR does not permit a State to discriminate in terms of guaranteeing rights within its jurisdiction.<sup>84</sup> This would seem to indicate that the UK’s commitment to the same high standards of human rights, including economic, social and cultural rights in its CDOTs is not only a policy goal but an international legal obligation.

Human rights standards depend not only on appropriate legislation, but also on effective implementation including oversight institutions and resources to ensure that the

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<sup>80</sup> Article 35(1) ECHR

<sup>81</sup> 2012 White Paper p.14

<sup>82</sup> See fn 40

<sup>83</sup> ICESCR Article 2.1

<sup>84</sup> ICESCR Article 2.2



infrastructure is in place to deliver on human rights commitments. While the UK Government has made political and policy statements about the basic standards of human rights in the OTs being the same as they are in the UK, there is little information to show that this is the case or to clarify what resources would be needed to ensure that. In some other European countries with OTs, the legal basis and evidence base for improving human rights standards in the OTs has been a focus in recent years that could provide useful examples for the UK.

In France, the recognition that people in the OTs should enjoy the same standards of human rights, including economic, social and cultural rights, as those in the metropolitan state is established in law.<sup>85</sup> Importantly, the legal provisions have been accompanied by in-depth research to identify areas where improvements need to be made. The French *Commission Nationale Consultative des Droits de L'Homme* (CNCDH) has conducted an extensive study<sup>86</sup> on the effective enjoyment of rights in OTs. This has included research on the right to education, access to justice, the right to adequate healthcare, the right to a healthy environment, poverty and social exclusion and the situation with regard to gender-based violence in French OTs. While the study reveals significant problems in the enjoyment of human rights in French OTs, it also provides a serious platform for addressing those problems.

In the Caribbean Netherlands, a constitutional shift in status in 2010 was accompanied by a review of the situation in the territories to underpin the principle that populations in the Caribbean Netherlands should have equal rights as those in the metropolitan Netherlands. This has resulted in a substantial increase<sup>87</sup> in funding to the territories to improve standards. The Netherlands Institute for Human Rights issued a report in 2016 on poverty, social exclusion and human rights in the Caribbean Netherlands.<sup>88</sup> This highlighted the need for structural steps to address spirals of poverty and problems with access to health as well as the need for research to ensure that social security levels adequately reflected the cost of living in the islands.

The situation in British OTs is variable and complex. But there is a lack of coherent research to identify problems relating to human rights in the OTs so it is unclear what kind of support may be needed to ensure the same standards of human rights apply in the OTs as do in the UK. For many OTs, their size and remoteness pose particular challenges in terms of access to health and education, but within that context they should be able to expect the same

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<sup>85</sup> (Loi n° 2017-256 du 28 février 2017 de programmation relative à l'égalité réelle Outre-mer et portant autres dispositions en matière sociale et économique, nommée ci-après « loi pour l'égalité réelle Outre-mer »)

<sup>86</sup> <http://www.cncdh.fr/fr/travaux-en-cours/etude-outre-mer>

<sup>87</sup> <https://kennisopenbaarbestuur.nl/media/211723/Joined-together-for-five-years-Bonaire-St-Eustatius-Saba-and-the-European-Netherlands-conclusions-.pdf>

<sup>88</sup> <https://publicaties.mensenrechten.nl/file/32db1f1d-1ba4-4929-b24c-20b2c0a62d79.pdf>



standards as those enjoyed in UK small island communities such as the Scottish Islands or the Scilly Isles. Funding from the UK and access to UK services has serious implications for the rights of people in CDOTS. A recent case, in St Helena shows how even the level of damages for human rights violations can have a significant impact on the ability of the territory to fund basic healthcare provision.<sup>89</sup> And the problems around funding support to BVI and Anguilla post-hurricane show the complexity of the relationships which can leave populations vulnerable in times of need.<sup>90</sup> And even OTs that have a relatively high GDP, like Bermuda, may have significant problems with income inequality and poverty due to the extremely high cost of living and the limited benefits system.<sup>91</sup> Further work is needed to identify areas where the standards of human rights protection in CDOTs differ from those in the UK so that these differences can be addressed.

Although some OTs have their own human rights commissions such as Bermuda,<sup>92</sup> the Cayman Islands,<sup>93</sup> Turks and Caicos<sup>94</sup> and St Helena,<sup>95</sup> the limited resources along with the challenges of highlighting problems within a small jurisdiction, mean that they are unlikely to be able to carry out this kind of extensive work alone and would not be in a position to deliver comparative analysis. The UK Government could consider funding a study of the effective implementation of human rights standards in CDOTs involving UK Institutions like the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission to provide a comparative picture against the benchmark of basic standards applicable in the UK.

The International Development Act 2002 at s.2<sup>96</sup> provides that development assistance may be given to OTs for reasons beyond the reduction of poverty. This appears to be a recognition of the fact that the UK's responsibilities for the OTs are quite different in nature to international development funding to other countries. However, as the House of Commons Foreign Affairs Committee pointed out in its report on the UK's response to hurricanes in its Overseas Territories<sup>97</sup> last year, there is a lack of clarity about OTs eligibility for Official Development Assistance (ODA) and their potential to access international funding in light of

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<sup>89</sup> See, for example the situation of Adult M with regard to access to healthcare for complex needs in the Wass Inquiry Report pp. 125-128

<sup>90</sup> <https://www.bbc.co.uk/news/uk-41785235>

<sup>91</sup> <https://www.taxjustice.net/2018/06/21/bermuda-inequality-and-poverty-in-uk-overseas-territory/>

<sup>92</sup> <https://www.gov.bm/departments/human-rights-commission>

<sup>93</sup> <http://www.humanrightscommission.ky/>

<sup>94</sup> <https://www.gov.tc/hrc/>

<sup>95</sup> <http://humanrightssthelena.org/>

<sup>96</sup> <https://www.legislation.gov.uk/ukpga/2002/1/section/2>

<sup>97</sup> [https://publications.parliament.uk/pa/cm201719/cmselect/cmfa/722/72207.htm#\\_idTextAnchor037](https://publications.parliament.uk/pa/cm201719/cmselect/cmfa/722/72207.htm#_idTextAnchor037)

Brexit. As they are not sovereign states, their ability to access international funding mechanisms or to make their own international agreements on issues like access to healthcare is extremely limited. Given the uncertainty around access to funds and the acute impact that this can have on OTs, particularly very small territories that are extremely vulnerable to financial shocks, the UK Government should develop clear guidance on the scope and meaning of s. 2 of the International Development Act.

#### WHAT ARE LOCAL REQUIREMENTS?

Article 56(3) of the ECHR states that *“the provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.”*<sup>98</sup> But the idea that the enjoyment of human rights should be somehow limited according to local conditions does not sit well with the universality of human rights or the UK’s avowed commitment to high standards of human rights in its CDOTs.

In any event, the ECtHR has been reluctant to dilute human rights protections on this basis. For example, in the case of *Tyrer v UK*,<sup>99</sup> the representative of the Isle of Man sought to rely on Article 56(3) (formerly Article 63(3)) by arguing that judicial corporal punishment was a “local requirement” on the Island.

The Court noted that:

*“there would have to be positive and conclusive proof of a requirement and the Court could not regard beliefs and local public opinion on their own as constituting such proof.... The Isle of Man not only enjoys long-established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble to the Convention refers. The Court notes, in this connection, that the system established by Article 63 (art. 63) was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention....”*<sup>100</sup>

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<sup>98</sup> Article 56(3) ECHR

<sup>99</sup> *Tyrer v UK*, fn 33

<sup>100</sup> *Tyrer v UK*, fn 33 para 38





In addition, given the absolute nature of Article 3, the prohibition on torture, the Court found that there could not be local requirements which could justify action that would normally be considered a violation of that right.<sup>101</sup>

The conclusions in the Tyrer judgment would make it very difficult to argue that Article 56(3) could be relied upon to justify limitations on the application of the Convention in British CDOTs in the 21<sup>st</sup> Century. While the Court did accept that the particular history and transitional status of New Caledonia could amount to a “local requirement” for restricting the right to vote in an independence referendum in the territory,<sup>102</sup> any such limitations would be very fact specific and unlikely to justify broader limitations on human rights or discriminatory practices in a CDOT.

#### SPECIFIC ISSUES

While this report has focused on the overarching issues around UK responsibilities for human rights in CDOTs, there are several concrete areas where the constitutional responsibilities of the UK and the relationships between the UK and CDOTs pose potential problems in terms of the protection and promotion of human rights. These are areas where it would be useful to develop further focused research including:

- Immigration and asylum
- British citizenship
- Access to and standards of healthcare
- Criminal justice where cross border assistance is required
- Discrimination, in particular in relation to LGBTI people
- Conflicts of interest between the UK and CDOTs

#### E - CONCLUSION

The UK is responsible for the international human rights obligations of its CDOTs but the way in which it fulfils that responsibility is unclear and variable. This can result in different standards of human rights applying in the CDOTs with unclear pathways to remedy the situation. The limitations on their ability to engage with the wider world and make foreign policy decisions on their own terms either to access additional funding and resources or to make their own international agreements exacerbates this problem. The UK’s arrangements with its CDOTs and its responsibility for international relations affect their access to justice,

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<sup>101</sup> See Tyrer v UK, fn 33 para 38

<sup>102</sup> See Py v France (2005) 42 EHRR 548



healthcare, and education. But their size and status mean they are often overlooked in policy decisions and their populations suffer as a result.

Without clear avenues for legal challenge, the populations and governments of the CDOTs may be unable to defend their own interests and protect their rights where UK interests conflict with theirs. This could arise in circumstances where Westminster decides to legislate for the CDOTs or in circumstances, such as Brexit, where UK decisions on the international stage have direct impacts on the CDOTs while they do not have a voice in those decisions.

The UK Government has made political commitments to ensure the same standards of human rights apply in CDOTs as do in the UK, but it is not clear how those commitments would be put into practice. There is a need for support to ensure adequate protection for human rights and equal standards of enjoyment of economic, social and cultural rights as well as civil and political rights in CDOTs. This should include both technical support and financial support as the effective enjoyment of rights, particularly in sensitive areas such as healthcare, is dependent not only on adequate legal frameworks but on available resources.

This report is a first step to identifying key areas where the UK's overall approach to international human rights in CDOTs needs attention. The recommendations below The Island Rights Initiative would welcome the opportunity to work with the CDOTs and the UK Government to further explore ways of ensuring that UK CDOTs really do enjoy the same standards of human rights protection in practice as those in the UK.

## RECOMMENDATIONS

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### EXTENSION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

In order to minimise the complexity and risk of creating human rights black holes in British territories, the UK Government could extend all its international human rights commitments to all "territories under the territorial sovereignty of the United Kingdom."<sup>103</sup> This would demonstrate a clear commitment to equal standards of human rights in CDOTs while the manner of implementation or the need for any kind of reservation could be decided upon in discussion with the local legislature.

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### SUPPORT FOR INTERNATIONAL REPORTING

The UK Government should provide support to CDOTs, in particular independent human rights institutions, for engagement with periodic reporting and UN Special Procedures to

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<sup>103</sup> See discussion in Hendry and Dickson p. 282



ensure that voices from all British Territories are properly considered in terms of compliance with international human rights standards.

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#### CREATING LEGAL CERTAINTY

There is a need for legal certainty and clarity in terms of the routes to challenge acts and decisions made by the UK authorities that will have impacts on the rights of people in the CDOTs.

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#### ENSURING THE SAME STANDARDS APPLY

There should be a wide-ranging assessment of the current standards of the enjoyment of human rights in CDOTs as they compare with those in the UK in order to understand what areas may need further development and support. And the avenues to access funding to support improvement of human rights in CDOTs from the UK under the International Development Act need clarification.

**Susie Alegre**

**Director**

**Island Rights Initiative**

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