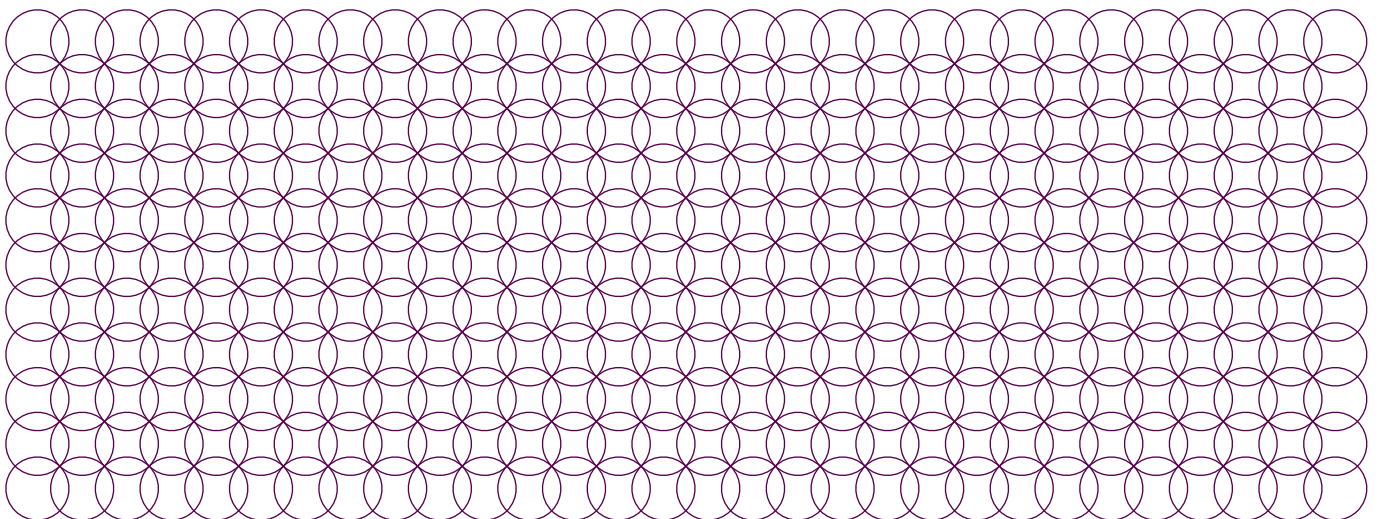




Ministry of  
**JUSTICE**

**The Optional Protocol  
to the United Nations Convention  
for the Elimination of all forms  
of Discrimination Against Women (CEDAW):  
The Experience of the United Kingdom**

**An evaluation by Professor Jim Murdoch  
School of Law, University of Glasgow**



# **Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**

## **The experience of the United Kingdom**

### **An Evaluation by Professor Jim Murdoch, School of Law, University of Glasgow**

#### **Executive Summary**

- The important symbolic value of a State's recognition of the right of complaint under the Optional Protocol indicates a clear commitment to human rights.
- Acceptance by the United Kingdom of the right of complaint to the United Nations Committee on the Elimination of All Forms of Discrimination against Women has in principle added to remedies available to women in the UK. However, it is difficult to identify any real practical benefits arising from the UK's acceptance of the right of individual complaint.
- Use of the Optional Protocol to date has been minimal. At an international level, NGOs have rarely used the right of complaint to advance the cause of women. NGOs in the UK have not yet used this right.
- The Optional Protocol has not obviously complemented the UN Committee's monitoring of States Parties. Nor has it had any impact upon policy-making. It has not been used to highlight systemic problems of discrimination against women, and has not led to a breakthrough in advancing women's rights.
- At best, the Optional Protocol has had success in allowing the Committee (in upholding complaints brought by women outside the UK) to emphasise the importance of an effective response to instances of domestic violence and of protecting women against medical treatment without informed consent.
- The quality of the UN Committee's adjudication on admissibility of complaints can appear inconsistent. There is also some (albeit limited) possibility that its disposal of the merits of a complaint could be incompatible with a State's obligations under the European Convention on Human Rights.
- Government expenditure on cases involving the UK has been calculated at just over £4K per case.

## **1. Purpose, scope and methodology of evaluation**

This evaluation of the experience of the United Kingdom under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is to fulfil an undertaking given by the Government in 2004 at the conclusion of its Interdepartmental Review of International Human Rights Instruments.

At that time, the Government decided to accede to the CEDAW Optional Protocol to enable it to consider on a more empirical basis the merits of the right of individual petition under three other UN treaties (the International Covenant on Civil and Political Rights, the International Convention for the Elimination of Racial Discrimination, and the United Nations Convention Against Torture). The Government undertook to review the experiment two years after the Optional Protocol came into force in the UK – i.e. by 17 March 2007.

On 22 March 2007, in a debate in the House of Lords, the Parliamentary Under-Secretary for Constitutional Affairs, Baroness Ashton of Upholland, explained that the Government had decided to postpone the review in order to take into account the decisions of the CEDAW committee which were then awaited on the first two applications naming the UK.

On 21 May 2007, in reply to a parliamentary question from Lord Morris of Manchester, Baroness Ashton explained that the review would:

- seek to identify any practical benefits which have resulted from ratification of the protocol;
- assess the costs to the taxpayer of handling any applications to the UN committee that oversees the convention;
- take a view on whether the process of application to the UN adds to remedies already available in the UK;
- consider the wider implications for government policy of future use of the protocol; and
- inform any future consideration on recognising the competence of other United Nations committees (including the Committee on the Rights of Persons with Disabilities) to receive petitions (known as “communications”) from individuals in the United Kingdom.

In carrying out this review, I was asked to consider in particular the communications made to date in respect of the United Kingdom, but as the number of such communications is only two, and as the total number of all communications considered to date by the Committee under the Optional Protocol is only ten, I felt it appropriate to examine all of these communications, particularly in order to ascertain whether the experience of the United Kingdom was (insofar as it is possible to do so) typical or not. The review is thus based upon relatively little in the way of decision-making by the Committee.

I was also given sight of other background material (in particular, an internal Government evaluation of the time and resources involved in the Government’s responses to the two applications involving the United Kingdom).

There is a rather surprising lack of secondary literature on the workings of the Optional Protocol, and all of this in any event appears to concentrate primarily upon

the circumstances giving rise to the treaty.<sup>1</sup> There appears to have been no published evaluation of the Optional Protocol since its entry into force. However, it is still possible to make some observations on the extent to which it can be said that the intentions behind the establishment of the Optional Protocol have been realised in practice.

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<sup>1</sup> See bibliography available at [www.un.org/womenwatch/daw/cedaw/protocol/biblio.htm](http://www.un.org/womenwatch/daw/cedaw/protocol/biblio.htm). Even more recent discussion of CEDAW or of the CEDAW Committee makes little reference to the Optional Protocol.

## 2. The Optional Protocol – an overview

Four international human rights treaties currently make additional provision for complaints systems: the International Covenant on Civil and Political Rights, the Convention against Torture, the International Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In respect to CEDAW, there are two principal aspects to the Optional Protocol, each of which is designed to enhance the effectiveness of the monitoring of State responsibilities:<sup>2</sup>

- First, a *communications procedure* (arts 2-4) which allows either individuals or groups of individuals to submit individual complaints to the Committee (communications may also be submitted on behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received). Art 5 allows the Committee to make an urgent request that the State Party take steps to protect the alleged victim or victims from irreparable harm prior to the Committee's consideration of the complaint. Arts 6 and 7 make provision for the communications procedure: admissible communications are brought to the attention of the state party in confidence, provided the complainant has consented to disclosure of their identity to the State Party. The State Party is given six months to provide a written explanation or statement to the complainant. Consideration takes place in closed meetings, with the Committee's views and recommendations

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<sup>2</sup> The State obligations assumed upon ratification of CEDAW include a general requirement to eliminate discrimination against women (art 2), an obligation considered to include the provision of 'opportunities for recourse and protection against discrimination' including 'a system for filing complaints within national tribunals and courts',<sup>2</sup> and another general requirement to take 'all appropriate measures; in the 'political, social economic and cultural fields' to ensure the full advancement of women (art 3). However, 'temporary special measures' promoting equality with men are not to be regarded as discriminatory' (art 4). Other articles concern the modification of social and cultural patterns (art 5), the suppression of human trafficking in women and the 'exploitation of prostitution of women' (art 6), the taking of measures to eliminate discrimination in public and political life at national and international level (arts 7 and 8), equality in nationality laws (art 9), in education (art 10) in employment and labour rights (art 11) and in access to health facilities (art 12). Further provisions require the elimination of discrimination in economic and social life (art 13), the addressing of the situation of 'rural women' (art 14), equality in legal and civil matters (art 15) and in family law (art 16). Reservations may be made at the time of ratification. The Convention should be read alongside general recommendation no. 19 concerning gender-based violence and which treats such violence as a specific form of discrimination. Arts 17 et seq establish a Committee and make provision for a system of reporting to the Committee by State Parties at regular intervals of around four years. However, commentators have noted that significant use has been made by States of reservations in respect of substantive provisions, even when such reservations may be incompatible with the treaty: see e.g. McColgan 'Principles of Equality and Protection from Discrimination in International Human Rights Law' [2003] EHRLR 157 at 165-66. It is also too easy to be pessimistic: see Schopp-Schilling 'Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination Against Women' [2007] HRLR 201 at 204:

'from my long experience on the CEDAW Committee I have evidence indicating that many States Parties have often not addressed issues of legal reform or programmes to improve the material situation of women to enable and empower them to claim, exercise and enjoy their human rights, even if they ratified the CEDAW 15 or 20 years ago. Even fewer efforts have been aimed at the modification or elimination of the cultural, including religious, factors which may be the ultimate and persistent cause of the human rights violations that women experience.'

transmitted to the parties concerned and the State thereafter has to consider the views of the Committee and provide a written response (including remedial steps taken) within six months. The Committee may thereafter request further information from the State Party.

- Second, an *inquiry procedure* (arts 8 and 9) that allows the Committee to initiate a confidential investigation where it receives reliable information of grave or systematic violations by a State Party of rights contained in CEDAW: if warranted (but also with the consent of the State Party), the Committee may visit the territory of the State Party. The Committee's findings, comments and recommendations are thereafter transmitted to the State concerned, to which it may respond within six months. After the six-month period referred to in article 8, the State Party may be invited to provide the Committee with details of any remedial efforts taken following an inquiry. Details may also be provided in the State Party report to the Committee under article 18 of the Convention.

Art 10 provides that a State may opt out of the inquiry procedure (but not out of the communication procedure). There is also a general requirement (art 13) that States Parties publicise the Convention and its Protocol and provide access to the views and recommendations of the Committee.

The Optional Protocol thus seeks to enhance the effectiveness of compliance with State party observation of international obligations. This right of communication or complaint in particular is now increasingly considered a necessary mechanism to supplement the shortcomings in monitoring compliance through the traditional device of State party reporting, and thus it is increasingly found as a feature of UN human rights treaty-monitoring bodies.

### 3. Survey of Communications considered by the Committee to date

#### 3.1 UK Experience

Since March 2005, the UK has been named in two applications to the UN Committee under the CEDAW OP:

- The first was by a woman who complained that UK law had prevented her from passing on her British nationality to her Colombian-born son (by then 52 years old). On 7 March 2007, the Committee declared her application inadmissible on the grounds that the facts of the case occurred before the CEDAW OP entered into force in the UK, and because the applicant had not exhausted all domestic means of pursuing her complaint.
- The second was by a woman who complained that her proposed deportation to Pakistan put her back at risk from her violent husband. On 6 June 2007, the Committee declared her application inadmissible on the grounds that the applicant had not exhausted all domestic means of pursuing her complaint.

#### 3.2 Other countries

Initially, it was suggested to me that I should concentrate primarily upon Committee decisions in relation to the United Kingdom, since a detailed consideration of the Committee's conclusions concerning complaints involving other countries would only be useful in providing a wider context to the review. However, in light of the limited number of communications received and considered by the Committee to date, a broader (but by no means a comprehensive) analysis of Committee decisions in relation to other countries may be of help in assessing the possible advantages or disadvantages to the United Kingdom in having ratified the Protocol. This, in turn, may allow conclusions to be drawn as to the wider implications for government policy of future use of the protocol.

Five observations are immediately striking.

First, the number of communications determined by the Committee to date<sup>3</sup> has been minimal: only ten communications have been considered to date<sup>4</sup> (and indeed two communications essentially concern the same issue). The *inquiry procedure* has itself been used only once, in respect of Mexico.<sup>5</sup>

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<sup>3</sup> That is, from 22 December 2000 when the Optional Protocol entered into force on receipt of the tenth instrument of ratification. The Committee adopted its first decision on a communication on 14 July 2004. This report considers Communications made public by the Committee as at 30 April 2008. Minimal use of the right of individual complaint has been a feature of those other UN treaty bodies competent to determine communications: Bayefsky *The UN Human Rights Treaty System: Universality at the Crossroads* (2001), pp 25-27.

<sup>4</sup> Communications are referred to by the number of the communication and the year of submission (e.g., Communication no 10/2005). Opinions are published on the CEDAW website (see <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>). Details of Communication no 9/2005 (or 9/2006) are unavailable and presumably this communication is still being considered by the Committee.

<sup>5</sup> See CEDAW/C/2005/OP.8/MEXICO (NGOs based in Mexico and in the USA requested the Committee to conduct an inquiry into the abduction, rape and murder of women in a particular region following the Committee's examination of Mexico's fifth periodic report in which the

Second, these communications have been submitted in respect of only seven States (out of now 90 States which have ratified or acceded to the Optional Protocol).<sup>6</sup>

Third, violations have been established in a relatively high number of cases (that is, in four of the ten cases) although in respect of only two State Parties.

	<b>Communications made under OP</b>	<b>Admissible</b>	<b>Violation(s) of CEDAW established</b>
Austria	2	2	2
Germany	1	0	
Hungary	2	2	2
Netherlands	1	1 (partly admissible)	0
Spain	1	0	
Turkey	1	0	
United Kingdom	2	0	

Fourth, each of the States against whom communications have been submitted is also a Member State of the Council of Europe, a regional organisation which can claim to have the most advanced regional system of protection for human rights, and one of whose particular initiatives involves the active promotion of equality between men and women. Only one communication has been submitted by a complainant living outside the jurisdiction of a member State of the Council of Europe (and even in this case, the challenge was to the domestic law of a member state of the European Union and of the Council of Europe).<sup>7</sup> All of these States with the exception of Turkey are also, of course, members of the European Union, another regional institution seeking to eliminate discrimination between the sexes within its areas of competence.<sup>8</sup>

Fifth, the use made of the Optional Protocol by NGOs is also surprisingly limited. While it can be assumed that NGOs with a particular focus upon ensuring the protection or advancement of women are likely to be aware of the Optional Protocol and the possibilities it offers, only three communications have been submitted by NGOs, and of these, only the two 'clone' communications involving protection against domestic violence directly involved organisations with such a remit. (The third case was brought by a NGO involved in race (rather than sex) equality).

That the use of the Optional Protocol should have been confined to complaints submitted in respect of States that are already bound to respect European regional

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Committee had expressed particular concern at the apparent lack of results of the investigations into murders of women and the failure to identify and bring to justice the perpetrators).

<sup>6</sup> As at 27<sup>th</sup> November 2007. (During the course of 2007, there were 6 accessions.)

<sup>7</sup> Communication no 11/2006 was submitted by a British citizen living in Columbia and married to a Columbian national, and concerned British nationality law which (then) provided that a child's nationality was determined by that of its father.

<sup>8</sup> Each of these States has also now ratified or acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, although Turkey only did so in 2006



legal obligations to enhance equality of the sexes across a wide range of political, economic, social and legal activities poses a problem in carrying out an evaluation of the Optional Protocol. In respect of the very low number of communications, it must be observed that any evaluation at this time could seem particularly premature.

The limited number of cases and the European context in which they arise (assuming some degree of congruence in domestic law and practice between European States) can justify a more detailed analysis of communications involving State Parties outside Europe. Confining consideration to the limited experience of the United Kingdom was even less likely to provide any meaningful conclusion to whether any practical benefits have resulted from acceptance of the right of complaint under the Optional Protocol. Yet the fact that so little use has been made of the Optional Protocol is of considerable significance in itself.

### 3.2 Issues raised in Communications

This section seeks to provide an overview of the types of issue raised in the communications considered to date under the Optional Protocol:

<b>Issue</b>	<b>Number of communications</b>
Financial settlement upon divorce	1
Financial provision during maternity leave	1
Succession to title of nobility	1
Threatened deportation following denial of asylum	1
Sterilisation without informed consent	1
Dismissal from public service for wearing of headscarf	1
Child's nationality determined by that of its father, rather than its mother	1
Ineffective protection against domestic violence	3

The above categorisation of the subject-matter of communications is not watertight: for example, the case involving threatened deportation also concerned allegations that the complainant would face a real risk of violence at the hands of her former husband. Further, a particular factual issue can prompt the complainant (or the Committee in the absence of specification by the complainant<sup>9</sup>) to seek to rely upon multiple CEDAW provisions:

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<sup>9</sup> Communication no 10/2005.

<b>CEDAW Article</b>	<b>Summary of provision in relevant Article</b>	<b>No. of communications</b>
Art 1	Interpretation of 'discrimination'	3
Art 2 – general	General obligation to condemn discrimination against women in all its forms	2
Art 2(a)	Equality principle to be embodied in constitution, etc and practical realisation	3
Art 2(b)	Adoption of legislative & other measures prohibiting all discrimination against women	1
Art 2(c)	Establishment of legal protection for equal rights of women through tribunals and institutions	4
Art 2(d)	Refraining from discrimination against women, and ensuring public authorities & institutions so act	2
Art 2(e)	Taking of all measures to eliminate discrimination by any person, organisation or enterprise	3
Art 2(f)	Modification, etc laws, regulations, customs & practices constituting discrimination against women	5
Art 3	Taking of all appropriate measures to ensure full development and advancement of women for purpose of guaranteeing enjoyment of human rights on a basis of equality	6
Art 5-general		2
Art 5(a)	Modification of social & cultural patterns to eliminate prejudices, stereotyped roles, etc	1
Art 9(2)	Equality of rights in respect to nationality of children	1
Art 10(h)	Access to health and family planning advice	1
Art 11 - gen	Measures to eliminate discrimination in employment	1
Art 11(2)(b)	Paid, etc maternity leave	2
Art 12	Elimination of discrimination in health care	1
Art 16 - gen	Elimination of discrimination in matters relating to marriage & family relations	1
Art 16(1)(e)	Equality to decide on number and spacing of children and access to relevant information	1

### 3.3 Communications declared admissible

The Optional Protocol makes provision for certain admissibility criteria.<sup>10</sup> These largely replicate those found elsewhere in international treaties that provide the right

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<sup>10</sup> Art 3 provides that a communication will only be considered by the Committee if it concerns a State that has become party to the protocol; and that a communication must be submitted in writing and may not be anonymous. Art 4 provides:

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.
2. The Committee shall declare a communication inadmissible where:
  - (a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

of complaint.<sup>11</sup> Four of the ten communications considered to date have been declared admissible, and a fifth partly admissible:

<b>Issue raised</b>	<b>Inadmissibility criterion</b>
Financial settlement upon divorce	Non-exhaustion of domestic remedies & <i>ratione temporis</i>
Financial provision during maternity leave	Admissible (partly); partly inadmissible <i>ratione temporis</i>
Succession to title of nobility	Inadmissible <i>ratione temporis</i>
Threatened deportation following denial of asylum	Non-exhaustion of domestic remedies
Sterilisation without informed consent	Admissible
Dismissal from public service for wearing of headscarf	Non-exhaustion of domestic remedies
Child's nationality determined by that of its father, rather than its mother	Non-exhaustion of domestic remedies & <i>ratione temporis</i>
Ineffective protection against domestic violence	Admissible

### 3.4 Communications in which violations have been established

Violations have been established in four of the five communications declared admissible. These four cases (two of which were essentially 'clone') concern two situations: sterilisation without informed consent (one case);<sup>12</sup> and ineffective protection against domestic violence (three cases).<sup>13</sup>

(In the fifth admissible case, the Committee considered that a complaint of differential treatment in the payment of maternity benefits as between different categories of mother did not disclose a violation of CEDAW. There was no requirement to ensure full recompense or income during leave, and whether domestic rules could take into account different categories of employed women fell within a State's margin of discretion in decision-making).<sup>14</sup>

The cases in which violations were established are worthy of some consideration to allow more detailed assessment in section 4 of this report:

#### *Health care: (Communication no 4/2004)*

- In Communication no 4/2004, a woman complained of coerced sterilisation during unsuccessful labour. She had been asked to sign a form consenting to a caesarean section and an appended handwritten note authorising her

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(b) It is incompatible with the provisions of the Convention;  
(c) It is manifestly ill-founded or not sufficiently substantiated;  
(d) It is an abuse of the right to submit a communication;  
(e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

<sup>11</sup> There is, however, no time limit for the bringing of a communication.

<sup>12</sup> Communication no 4/2004.

<sup>13</sup> Communications nos 2/2003; 5/2005 and 6/2005.

<sup>14</sup> Communication no 3/2004, para 10.2.

sterilisation. The reference to her sterilisation had used Latin terminology, and the woman had been in a poor condition of health when she had signed the form. Admissibility<sup>15</sup> and merits were examined simultaneously. The Committee found violations of the three provisions relied upon by the complainant's representatives: access to health and family planning advice (art 10(h)), on the ground that there was a right to 'specific information on sterilization and alternative procedures for family planning'; elimination of discrimination in health care (art 12), since hospital personnel did not ensure she gave her informed consent; and equality to decide on number and spacing of children and access to relevant information (art 16(1)(e)), since the sterilisation procedure must be considered irreversible, and to have deprived her permanently of her reproductive capacity).<sup>16</sup>

*Ineffective protection against domestic violence (Communications 2/2003, 5/2005 and 6/2005)*

- The other three cases<sup>17</sup> (the latter two are essentially 'clone' cases, although with certain differences in the material facts) concerned complaints by women (or representatives of their descendants) that domestic authorities had failed to ensure adequate protection against the real risk of violence from their long-term partner<sup>18</sup> or husbands.

In each instance, the women feared for their safety (and that of their children); in each instance, either little or no official action took place, and the women were either severely assaulted (as in the first case) or killed by their partners (in the second and third cases). In the earlier case involving Hungary, the findings of violations were of articles 2(a), (b) and (e) and 5(a). In the two 'clone' cases (involving Austria, in each of which the victims had been killed), the violations established were of articles 2(a) and (c) – (f), and 3.

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<sup>15</sup> The State party's observations on admissibility were perhaps unfortunate: the State sought to argue that the sterilisation was theoretically reversible; a domestic court had determined that she had understood the contents of the form she had signed; and the fact that she had other children established that she was aware of the nature of childbirth. The Committee considered that domestic remedies had not been exhausted as the remedy of judicial review at the time had subsequently been declared unconstitutional; sterilisation was considered reversible; and even although the operation took place before the date of entry into force of the Optional Protocol, its effects were continuing).

<sup>16</sup> Communication no 4/2004, paras 11.2-11.4.

<sup>17</sup> Communications nos 2/2003, 5/2005 and 6/2005.

<sup>18</sup> Communication no 2/2003 (reference by complainant to her 'common law husband').

#### 4. Assessment of the disposal of communications by the Committee

In attempting to analyse the disposal of communications considered to date, it must again be stressed that such an exercise may not be meaningful in light of the low numbers of cases. Only four of the ten communications considered have been declared admissible, with a fifth partly admissible; and four of the five cases declared admissible in whole or in part resulted in findings of violations of CEDAW.

Further, while the number of communications declared admissible, and the number of admissible cases resulting in a finding of a violation are both higher than would have perhaps have been expected (particularly given the extensive range of European initiatives to seek to promote equality of the sexes), the circumstances of the cases in which complainants of communications succeeded in achieving a favourable outcome on the merits were particularly compelling (that is sterilisation, a failure to address serious and repeated domestic violence, and two cases where the lack of effective response to domestic violence resulted in deaths).

Nevertheless, it is possible to draw some conclusions in respect of the quality of adjudication, the outcomes of communications, and whether the complainants involved could have made use of alternative channels of complaint.

##### 4.1. Determination of admissibility

As would perhaps be expected (but again bearing in mind the low number of communications), there seems to be some correlation between admissibility and availability of representation.<sup>19</sup> (In the one admissible case in which a complainant represented herself, the State did not seek to contest the admissibility of the communication).<sup>20</sup>

The following table indicates the disposal of submissions by State Parties concerning inadmissibility in the five communications ultimately declared inadmissible and in the sixth declared inadmissible in part:

Optional Protocol – admissibility provision	State party submissions	Ground of inadmissibility established
Non-exhaustion of domestic remedies (art 4(1))	5	4
Matter already examined by Comm / international institution (art 4 (2)(a))	3	Nil
Incompatibility with CEDAW (art 4(2)(b))	3	Nil
Manifestly ill-founded or not substantiated (art 4(2)(c))	4	Nil
Abuse of the right to submit a communication (art 4(2)(d))	Nil	Nil
Factual basis occurred prior to the OP's entry into force re. the State Party <i>unless</i> facts continued after that date (art 4(2)(e))	4	4

<sup>19</sup>

	Represented	Not represented
Admissible	3	1
Inadmissible	2	3
Partly admissible	1	

<sup>20</sup> Communication no 2/2003, paras 5.6 and 8.4.

The Appendix to this report examines the Committee's disposal of admissibility issues. It is perhaps difficult to discern any attempt on the part of the Committee to develop settled case-law in this area. This may be of some frustration to State Parties.

It is instructive to compare the (inevitably multiple) grounds advanced by States concerning the inadmissibility of these particular communications with the grounds eventually established by the Committee. All that can be said with confidence is that it seems that the Committee has in essence relied upon two grounds in determining communications inadmissible: failure to exhaust domestic remedies, and inadmissibility *ratione temporis* (this latter ground is likely to be less relevant with the passing of time as fewer complaints arise in which the State can argue that the facts in question occurred before the entry into force of the Optional Protocol).

In other words, the Committee arguably appears reluctant to address with any degree of adequacy or confidence certain of the inadmissibility headings advanced by State Parties. While there are occasional instances where a State can be criticised for not preparing its initial submissions adequately,<sup>21</sup> the ability to supplement these observations and to respond to the complainant's submissions will at least invariably allow the State the full opportunity to challenge the admissibility of a communication.

A State Party will often – and understandably - seek to argue that a communication is inadmissible on a number of grounds. However, the Committee has in many cases dismissed arguments raised by the State Party (other than those mentioned above) only by use of the formula: 'The Committee sees no reason to find the communication inadmissible on any other grounds'.

This has unfortunate consequences for State Parties (and for those who would wish to take advantage of the Optional Protocol) in that the normative value of the 'views' of the committee is considerably weakened. The Committee appears unwilling to be seen to be building up a coherent jurisprudence. There must be a concern for State parties that the Committee may not even be attempting to establish consistency in this area, let alone seeking to establish collegiate decision-making.<sup>22</sup>

These criticisms can be illustrated by consideration of the two communications involving the United Kingdom. The paucity of reasoning in admissibility decisions is of some concern in light of the obvious time (and cost) involved in the preparation of responses.<sup>23</sup>

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<sup>21</sup> In particular, Communication no 7/2005 in which the State party initially merely submitted that the same question had been considered by the Human Rights Committee in Communications nos 1008/2001 and 1019/2001: at para 4.

<sup>22</sup> Communication no 7/2005 concerned a challenge to restrictions on the right of females to inherit titles of nobility: 9 of the 18 members decided that the complaint was inadmissible on the grounds of Art 4(2)(e), while 8 deemed that the matter was incompatible with CEDAW and were of the opinion that it was inadmissible in terms of Art 4(2)(b) (with one member dissenting, and holding the complaint admissible on both counts).

<sup>23</sup> It is estimated, for example, that each Communication required the combined input of 8.5 days of the time of officials and legal advisers. The average cost for the preparation of each application (including fees paid to counsel) was just over £4k.

- In Communication 10/2005, an asylum-seeker claiming to fear for her life at the hands of her former husband if returned to Pakistan (and for the future of her two sons and their education in such circumstances) submitted a communication. She did so without legal representation, after having had an application under the European Convention on Human Rights rejected as inadmissible, and without making specific reference to any particular provision of CEDAW.

Initially, the United Kingdom challenged the admissibility of the communication on three headings: that she had failed to exhaust domestic remedies (art 4(1)); that the same matter had been examined by the European Court of Human Rights (art 4(2) (a)); and that the communication was not sufficiently substantiated and/or manifestly ill-founded (art 4(2) (c)). The detailed submissions of the United Kingdom – and with references to relevant case-law of the Human Rights Committee – produced no additional meaningful submission from the complainant.

In deciding that the communication was inadmissible on the ground of failure to exhaust domestic remedies, the Committee nevertheless failed to address the issue of whether the matter had been considered by ‘another procedure of international investigation or settlement’ within the meaning of the Optional Protocol, remarking merely that ‘The Committee sees no reason to find the communication inadmissible on any other grounds’.<sup>24</sup> That this was so in the sole case in which a complainant of a communication had herself brought a complaint before the European Court of Human Rights on the same factual basis (albeit by reference to provisions not involving allegations of discrimination on the basis of sex) is less than satisfactory.

- In the second communication concerning the United Kingdom, the British mother of a child born in 1954 complained that her inability to transmit her British nationality to him constituted sex-based discrimination within the meaning of articles 1, 2(f) and 9(2) of CEDAW.

The United Kingdom’s submissions on admissibility were again very full and made reference to relevant sources, including jurisprudence of the Human Rights Committee. These submissions included incompatibility *ratione temporis* (in respect that the facts arose before recognition of the right of communication under the Optional Protocol), lack of standing as victim, failure to exhaust domestic remedies (including the possibility of reliance on the European Convention on Human Rights either to seek to construe domestic legislation in a manner compatible with this treaty, or to seek a declaration of incompatibility) and manifestly ill-founded (in light of the reservation lodged by the United Kingdom in respect of CEDAW, art 9).

Again, the complainant was not represented, but on this occasion there was a fuller response to the Government’s submissions than in the previous communication. Again, though, the Committee’s disposal addressed only certain (although in this instance, the most crucial) of the arguments submitted: the communication was inadmissible first *ratione temporis* under art 4(2)(e) as the disputed facts occurred prior to the entry into force of the Optional Protocol for the United Kingdom (it being accepted that the situation complained of ended at the time her son attained majority), and second, on

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<sup>24</sup> Communication no 10/2005, para 7.4.

account of a failure to exhaust domestic remedies as required by art 4(1) (as the complainant had never sought an application for registration of her child as a British citizen, as would have been possible in terms of the legislation).

The United Kingdom's other submissions were again dismissed with the formula: 'the Committee sees no reason to find the communication inadmissible on any other grounds' – without detailed reasoning.

#### 4.2. Communications in which findings of violations of CEDAW provisions have been made

A finding that a State has violated substantive guarantees is likely to involve a determination that there have been breaches of multiple provisions of CEDAW. However, the actual determination of which particular treaty obligations have been violated is perhaps unpredictable. This is clear from the disposals of the three cases involving lack of effective protection against domestic violence:

<b>CEDAW Article</b>	<b>Summary of provision</b>	<b>Cases in which violation found</b>
Art 2(a)	Equality principle to be embodied in constitution, etc and practical realisation	3
Art 2(b)	Adoption of legislative & other measures prohibiting all discrimination against women	1
Art 2(c)	Establishment of legal protection for equal rights of women through tribunals and institutions	2
Art 2(d)	Refraining from discrimination against women, and ensuring public authorities & institutions so act	3
Art 2(e)	Taking of all measures to eliminate discrimination by any person, organisation or enterprise	3
Art 2(f)	Modification, etc laws, regulations, customs & practices constituting discrimination against women	2
Art 3	Taking of all appropriate measures to ensure full development and advancement of women for purpose of guaranteeing enjoyment of human rights on a basis of equality	2
Art 5(a)	Modification of social & cultural patterns to eliminate prejudices, stereotyped roles, etc	1

It is difficult to discern any rationale for the varying approaches. In one of the cases,<sup>25</sup> the State appears to have conceded the violations (including article 2(b) requiring the adoption of 'appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women'). However, in that case the absence of findings of violations in respect of articles 2(d), 2(f) and 3 (as occurred in two other cases) is unexplained.

Nor is it clear why the Committee determined there had been a violation of article 5(a) in only one case. There is again some suggestion that the quality of adjudication under the Optional Protocol is likely to be somewhat inconsistent.

<sup>25</sup> Communication no 2/2005, at para 5.6.



While some of this may reflect (as far at least as the Committee is concerned) a more sophisticated attempt to link the communications procedure with the system of reporting (that is, the Committee may perceive the Optional Protocol not so much as establishing a quasi-judicial machinery as a mechanism supplementary to the existing and established reporting-system), it also at the same time may weaken confidence in the quality of adjudication, particularly on the part of State Parties who may wish to be assured that the Committee is determining like cases in a like manner.

#### 4.3 Consequences upon a determination of a violation

A determination that there has been a violation of the provisions of CEDAW will result in the making of recommendations of consequence for the individual victim and (in respect of specific action to be taken) the State Party. In the four communications to date, these have involved a range of recommendations:

##### *4.3.1 Specific measures of direct assistance to the complainant*

- *Payment of compensation:* payment of reparation 'proportionate to the physical and mental harm undergone' (Communication no 2/2003); or to 'provide appropriate compensation ... commensurate with the gravity of the violations of her rights' (Communication no 4/2004) (*but* no compensation was ordered to be paid in cases where the victim had been killed (Communications 5/2005 and 6/2005)).
- *Taking of specific action:* 'immediate and effective measures' to guarantee physical and mental integrity' of the complainant and her family; provision of a 'safe home', child support, and legal assistance (Communication 4/2004).

The choice of forum is considered further below. At this stage, there is one relevant observation. As far as the victim is concerned, it is not immediately clear why an individual would seek to make use of the Optional Protocol rather than (if relevant) the European Convention on Human Rights in light of the restricted right to monetary compensation and the lack of specification of the amount to be paid.

##### *4.3.2 Measures of general applicability*

- Improved implementation and monitoring of implementation of domestic law (Communications 2/2003; 4/2004; 5/2005 and 6/2005)
- Enhanced co-ordination amongst criminal justice officials (Communications 5/2005 and 6/2005)
- Introduction of new legislative provisions (Communication no 2/2003); or review of legislation to ensure compatibility with international law (Communication no 4/2004)
- Provision of access to justice, including free legal aid (Communication no 2/2003)
- Strengthened training programmes for state officials (Communications 2/2003; 5/2005 and 6/2005)

- Publication of relevant CEDAW standards (Communication no 4/2004).

As far as the State is concerned, the recommended action seems to mirror the type of systemic recommendation made by the Committee in the periodic reporting system. CEDAW is primarily concerned with 'specific goals and measures that are to be taken to facilitate the creation of a global society in which women enjoy full equality with men and thus full realization of their guaranteed human rights',<sup>26</sup> and thus it is not inappropriate for the Committee to make such observations in its conclusions.<sup>27</sup>

However, there are important differences between implementing a CEDAW recommendation and implementing a judgment of the European Court of Human Rights in which a violation is established. First, in the event of an adverse judgment by the Court, the State takes the initiative in identifying what action it considers necessary in light of the factual and circumstances in the case, and implementation is overseen by the Committee of Ministers. Second, and more crucially, under the Optional Protocol there is no formal procedure whereby the Committee may call for the relevant State to provide evidence or information on the action taken in light of any recommendation made, and the only method of review at present is *ad hoc* by an appointed rapporteur. In other words, any follow-up to a case is thus most likely through the periodic review procedure. From a European perspective, this suggests a certain weakness in the ability to ensure that States begin to address deep-rooted or systemic causes of discrimination.

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<sup>26</sup> United Nations *Factsheet no 22: Discrimination against Women* (1995), 4. Cf. Council of Europe *Gender Mainstreaming* [Recommendation No R (98) 14 on gender mainstreaming] (1998) at pp 11-15: 'Gender equality is the opposite of gender inequality, not of gender difference.... [and is] not synonymous with sameness, with establishing men, their life style and conditions as the norm'.

<sup>27</sup> But cf. König 'Die Durchsetzung internationaler Menschenrechte: neuere Entwicklungen' in Dicke, ed *Weltinnenrecht: Liber Amicorum Jost Delbrück* (2005), pp 418-419 (suggestion that a 'margin of appreciation' should be accorded States in determining the most appropriate means of addressing discrimination).

## 5. The Optional Protocol – concluding remarks

The discussion above has been critical of the quality (and thus the predictability) of Committee decision-making. If this criticism is valid, it may nevertheless be readily addressed by the Committee, if and when the Committee has the opportunity to develop a settled body of case-law. This will, of course, be dependent upon greater use being made of the right of complaint.

The more crucial question whether the Optional Protocol has added (or has the potential to add) any real value to the advancement of human rights involves not so much an assessment of its actual use by individuals and NGOs as an evaluation of the extent to which the Protocol supplements existing channels of complaint (for example, it has already been questioned whether use of the Optional Protocol is likely to result in outcomes as beneficial as those which may occur by making use of the Strasbourg machinery). Nevertheless, the lack of recourse<sup>28</sup> to the Optional Protocol is still of some concern.

### 5.1 Use and value of the Optional Protocol

The following observations are appropriate:

First, as discussed, the actual use made of the Optional Protocol and the geographical concentration of the countries in respect of which communications have been submitted hardly support the conclusion that the Optional Protocol has been of any real success in advancing general protection for women globally – with the sole exception of highlighting a State's positive obligations to take effective action to protect women against domestic violence.

Second, it is striking that NGOs have made virtually no use of the Protocol. An important consideration in the adoption of the Optional Protocol was the impetus it would give not only to the advancement of women's rights but also to the standing of the CEDAW Committee.

It had been expected that the provision of an effective supervisory mechanism would give greater impetus to the standing of the Committee which seems to have been weakened from the outset of its work by a lack of adequate resources (resulting in a significant backlog of work),<sup>29</sup> geographical isolation (it was serviced in New York by the Division for the Advancement of Women rather than by the Centre for Human

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<sup>28</sup> It is understood that there have been some efforts made to publicise the communications procedure under the Optional Protocol, but these have had little real impact (the number of applications now received by the Committee is 17, although the number of decisions made remains at 10). However, as noted (fn 3 above), the lack of recourse to the system of individual complaints is not confined to CEDAW.

<sup>29</sup> The weakness applies across the UN treaty-body system: see e.g. O'Flaherty and O'Brien 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 HRLR 141 at 142. See further Bayefsky *The UN Human Rights Treaty System : Universality at the Crossroads* (2001), pp 3-29.

Rights in Geneva and this also tended to minimise the opportunity for effective co-operation with other UN treaty-bodies),<sup>30</sup> and a lack of engagement with NGOs (since NGOs inevitably focused on the work of treaty-bodies based in Geneva). In short, the opportunity accorded NGOs in bringing complaints or providing information in the context of a communication<sup>31</sup> or inquiry would raise the profile of CEDAW amongst such organisations and in turn prompt greater recourse by them to communication procedure.<sup>32</sup> This simply has not happened.

It does not appear that the CEDAW Committee has yet explored the reason for the minimal use of the complaints machinery by NGOs,<sup>33</sup> although it is understood that it privately acknowledges that this is of concern.

Third, the Optional Protocol has not obviously complemented the Committee's monitoring functions to any real extent in relation to State Parties. Only in one communication was there any reference to a Committee's monitoring report (and in this one instance, it was the State which chose to raise the issue in an attempt to

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<sup>30</sup> However, at the beginning of 2008, responsibility was transferred to the Office of High Commissioner for Human Rights in Geneva. In any event, the impact of geographical isolation may have been overstated: Bayefsky *The UN Human Rights Treaty System: Universality at the Crossroads* (2001), pp 45-47 (positive working relationships have been developed by CEDAW and NGOs; but still at pp127-128 recommending relocation).

<sup>31</sup> Art 7(1): 'The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.'

<sup>32</sup> See e.g. Freeman 'The Human Rights Of Women Under The CEDAW Convention: Complexities And Opportunities Of Compliance' in (1997) 91 Am. Soc'y Int'l L. Proc. 377 at 382:

'The absolute necessity of having complete information in order to produce effective reviews and concluding comments, in any of the human rights treaty bodies, places a premium on provision of information by NGOs. ... The CEDAW Committee also relies on international NGOs to distribute the concluding observations to national groups and to promote follow-up at the national level. ...An Optional Protocol to the CEDAW Convention will provide an entirely new avenue for NGO action to promote compliance. It also will provide a new challenge for NGOs, to use the process effectively. If the NGO experience in using the reporting process is any indication, the NGO community will need only a few years to make the Optional Protocol its own.'

Cf Council of Europe *Gender Mainstreaming* [Recommendation No R (98) 14 on gender mainstreaming] (1998), at p 27 (mere ratification of CEDAW is insufficient, and NGOs have a crucial role in helping challenge 'current gender relations and the structures, processes and policies perpetuating inequality'.

<sup>33</sup> See O'Hare 'Ending the 'Ghettoisation': the Right of Individual Petition to the Women's Convention' [1997] 5 Web Journal of Current Legal Issues:

'The ability to give authoritative interpretations to the Women's Convention through the medium of the individual complaints procedure can be expected to enhance publicity and awareness of the work of the CEDAW and of women's human rights generally. If the proposed procedures are to be effective, however, it is imperative that a serious commitment is made to improve the level of funding of the CEDAW in order to enable it to increase the time available for its work. ...'

See also Bayefsky *The UN Human Rights Treaty System: Universality at the Crossroads* (2001), pp102-104 (noting membership concerns, including independence from governmental influence).

explain measures taken in order to address the Committee's earlier observations in respect of the subject-matter of the communication).<sup>34</sup>

Fourth, a significant number of the communications arguably have sought to advance specific and atypical grievances after all other channels of complaint have been exhausted. It is not unreasonable to suggest that some complainants and their representatives may have viewed the Optional Protocol as in essence providing the final opportunity to challenge domestic law and policy, often on what appears a speculative basis.

This charge can be made in several communications: in Communication 10/2005 the material facts had already been deemed inadmissible by the European Court of Human Rights; in Communication 7/2005 the matter had been brought before both the European Court of Human Rights and the Human Rights Committee but rejected in both instances *ratione materiae*; in Communication 8/2005 the question whether a civil servant could be dismissed for wearing an item of religious significance had already been considered under the European Convention on Human Rights; in Communication 1/2003 the issues had not even been determined by a domestic court leading to the suggestion that the complaint was part of a stratagem designed to overcome the refusal of the German Constitutional Court to consider the matter; and in Communication 11/2005 the law forming the object of the complaint had itself been rectified many years before. In short, the issues highlighted in these communications have hardly brought onto CEDAW's agenda the most compelling issues in addressing real and deeply-ingrained discrimination against women.

Even where it can be argued that the subject-matter is properly a matter falling within the scope of gender-based discrimination, it can hardly be said that the issues raised in the cases declared inadmissible (or the one communication declared partly admissible but not found to have violated CEDAW) went to the very heart of fundamental inequalities affecting women: financial settlement in pending divorce proceedings, inheritance of titles of nobility, claims for maternity pay at full equivalent to employment income or to retroactive recognition of nationality, and dismissal from employment on account of refusal to adhere to workplace dress regulations have not featured with any real profile in CEDAW monitoring reports.

On the other hand, and fifth, the same cannot be maintained in relation to the four cases in which violations were established, that is, the cases concerning sterilisation without informed consent and the failure to protect women from real threats of violence from their partners. Each case involved a significant violation of fundamental human rights of the women involved.

The communication involving sterilisation is undoubtedly a particularly serious abuse of authority by hospital staff; the three cases involving domestic violence help emphasise the Committee's insistence that domestic violence must be seen as a form of gender-based discrimination. These findings of violations of CEDAW clearly serve to emphasise the importance of the Convention and the need to ensure that public authorities and officials act with due regard to the treaty. They are of considerable symbolic value, and may well have a practical effect in helping ensure changes in the delivery of public services not only in the territories of the State Parties but elsewhere. They help prove, in short, that the intentions behind the introduction of the Optional Protocol can be realised, at least in these two areas.

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<sup>34</sup> Communication no 2/2003, para 5.7.

## 5.2 Other channels of redress

It is not inappropriate, however, to note that the communications concerning sterilisation without informed consent and the failure to protect women from real threats of violence from their partners could also have been raised through existing complaints mechanisms. In other words, even in respect of these cases, there may have been little (if any) 'add-on value' from the individual's perspective. Further, as already noted, potentially enhanced outcomes from the perspective of the complainant in terms of payment of 'just satisfaction' and monitoring of State response to the finding of violations may have been achieved through the European Convention on Human Rights.

A detailed analysis of the approach taken by various bodies under various international and regional charters would be of considerable complexity. However, even the most superficial consideration of other means of grievance-raising indicates that there is considerable overlap in the scope of protection available. This issue in turn raises two obvious points in any consideration of whether there should be recognition of additional complaints procedures by the United Kingdom.

First, individuals (and relevant NGOs) may find themselves increasingly with a choice of international or regional complaints mechanism,<sup>35</sup> and since there are restrictions imposed upon choice of forum, it is to be expected that complainants and their advisers will probably select the procedure regarded as the more advantageous. In other words, recognition of additional rights of communication may bring minimal benefit to individuals (but also little 'cost' to States).

Second, in consequence of the duplication (or multiplicity) of fora, there may exist some possibility that international and regional complaints bodies adopt different approaches in the resolution of complaints in light of differing jurisprudence, reflecting differing policy aims of adjudicatory bodies (bearing in mind that a specific intention behind the adoption of CEDAW was to advance the protection of women so as to enable their full equality with men, a distinct focus not necessarily replicated elsewhere).

This first point – the increasing duplication of channels of complaint and the likelihood that individuals or their advisers will choose with care – is certainly apparent in the area covered by CEDAW. Even although all complaints to date have involved European States, the fact that even in this region there has been such minimal use made of the Optional Protocol may be attributable to a greater trust in established European regional instruments rather than a lack of familiarity with the Optional Protocol.

- It would certainly have been possible for all but one of the communications to have been raised under the ICCPR complaints machinery, including complaints relating to article 26's prohibition of discrimination on the grounds of sex.<sup>36</sup> Substantial numbers of complaints have been raised under the ICCPR by women seeking to challenge discriminatory laws or practices (indeed, the factual basis giving rise to one of the Communications

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<sup>35</sup> Even at UN-level: cf. Bayefsky *How to Complain to the UN Human Rights Treaty System* (2003), pp 136-147.

<sup>36</sup> As noted, Turkey only ratified the ICCPR Optional Protocol in 2006 (Communication 8/2005 was lodged in August 2004).

considered under the CEDAW Optional Protocol<sup>37</sup> had already been examined by the Human Rights Committee). Further, equality in the provision of social security benefits has already been examined by the (former) Human Rights Commission in respect of the International Covenant on Economic, Social and Cultural Rights.<sup>38</sup>

- Furthermore, even in the area of equality between the sexes, another UN body established under the auspices of the Economic and Social Council, the Commission on the Status of Women, is also competent to receive complaints (on a confidential basis) with a view to helping identify global trends and patterns concerning women's rights. While this is not designed to provide redress to individuals, it shares some common features in the handling of communications.<sup>39</sup>
- More particularly, the European Convention on Human Rights could well have been used in several (but admittedly not all) of the cases decided to date. It is readily possible to 'map' the subject-matter of the communications considered to date onto the ECHR to indicate the extent of any overlap:

*a. Complaints raised under the Optional Protocol which would have been likely to have given rise to a successful individual application under the European Convention on Human Rights:*

Ineffective protection against domestic violence, including cases resulting in unlawful killing; and sterilisation without informed consent.

*b. Complaints raised under the Optional Protocol which if the subject-matter of an application under the ECHR, would have been likely to have been (or actually were) deemed inadmissible by the Court on the particular facts, but which could still have given rise to an admissible complaint on different material facts:*

Threatened deportation following denial of asylum.

*c. Complaints raised under the Optional Protocol which if the subject-matter of an application under the ECHR, would have been unlikely to have given rise to a successful individual application and have been deemed inadmissible ratione materiae:*

Succession to title of nobility; dismissal from public service for wearing of headscarf; and child's nationality determined by that of its father, rather than its mother.

*d. Complaints raised under the Optional Protocol which if the subject-matter of an application under the ECHR, would have been unlikely to have given rise to a successful individual application as the complainant would not have been able to establish 'victim status':*

Child's nationality determined by that of its father, rather than its mother.

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<sup>37</sup> See Communication no 7/2005, para 4.

<sup>38</sup> E.g., Communication no 172/1984, *Broecks v Netherlands*.

<sup>39</sup> A working group draws the Commission's attention any appearance of 'a consistent pattern of reliably attested injustice and discriminatory practices against women'; in turn the Commission reports to the Economic and Social Council making whatever recommendations it feels appropriate.

*e. Complaints raised under the Optional Protocol which if the subject-matter of an application under the ECHR, would have been unlikely to have given rise to a violation even if an interference had been established on account of application of the State's 'margin of appreciation':*

Financial settlement upon divorce; and financial provision during maternity leave.

### 5.3 Compatibility of CEDAW determinations on the merits with other human rights treaty bodies

Potential duplication of complaints mechanisms in relation to subject-matter also raises the issue of whether the Committee is liable to take a decision on the merits which would be consistent with the conclusion that another complaints body would arrive at if it were considering the same issue. The problem of inconsistent determinations is not yet a major one, but it is now increasingly being recognised as a potential concern in respect of inconsistencies between international and (European) regional approaches.<sup>40</sup> Forum-shopping is not inconceivable.<sup>41</sup>

From the perspective of the State, too, there is the risk that a UN-treaty complaints body may take an approach incompatible with established European case-law.

There is already one hint of this possibility in the Committee's disposal of the merits in the two Austrian cases concerning ineffective protection against domestic violence. The State had attempted to argue that in the particular cases the issue of an arrest warrant to prevent further domestic violence against the women involved would have been 'disproportionately invasive',<sup>42</sup> reference being made to (apparently

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<sup>40</sup> See Wildhaber 'The Case-Law of the European Court on Human Rights' in Delas, Côté, Crépeau and Leuprecht *Les Jurisdictions Internationales: Complémentarité ou Concurrence?* (2005) pp 3–8 at 3–4 (wording of ICCPR, Optional Protocol, Art 5(2)(a) and ECHR Art 35(2)(b) suggest that an applicant who raises an issue first under the Optional Protocol is precluded from raising the matter before the Court, but not vice versa, noting 17512/90, *Fornieles and Mato v Spain* (1992) DR 73, 214, where the Commission declared inadmissible a complaint since this was simultaneously being examined by the UN Human Rights Committee). See further Phuong 'The Relationship between the European Court of Human Rights and the Human Rights Committee: Has the 'Same Matter' Already been 'Examined'?' (2007) 7 HRLR 385.

<sup>41</sup> See O'Boyle 'Ne Bis in Idem For the Benefit of States?' In Caflisch, Callewaert, Liddell, Mahoney and Villiger eds, *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views* (2007) pp 329–346 at 331–334, (discussion of *De Matos v Portugal* (dec) 2001-XII (complaint under ECHR, Art 6(3)(c) concerning refusal to allow accused to defend himself dismissed as manifestly ill-founded; subsequently, his communication to the Human Rights Committee, Communication 1123/ 2002 (28 March 2006) was examined under the First Optional Protocol to the International Covenant on Civil and Political Rights, the Committee holding that his rights under ICCPR, Art 14(3)(d) had not been respected).

<sup>42</sup> See Communication no 6/2005, para 8.4; and Communication no 5/2005, at para 8.17: 'protecting women through positive discrimination by, for example, automatically arresting, detaining, prejudging and punishing men as soon as there is suspicion of domestic violence, would be unacceptable and contrary to the rule of law and fundamental rights'.



unspecified) case-law of the European Court of Human Rights.<sup>43</sup> The Committee's disposals suggest a lack of appreciation of the content of the obligation to protect against arbitrary deprivation of liberty arising under other human rights instruments. The Committee merely reiterated its comments made in an earlier Hungarian decision that while it is important to consider whether detention would be disproportionate, 'the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity'.<sup>44</sup> While the Strasbourg Court may have determined on the particular facts of each case that the detention of the perpetrator would indeed have been appropriate, it would have done so only after careful assessment of the circumstances; in contrast, the Committee's conclusions as to whether detention would have been disproportionate was disposed of in one sentence in each case.

#### 5.4 'Add-on value' and Committee determinations on the merits

In contrast to the suggestion that consistency in standard-setting is to be prized, there is a powerful argument supporting the establishment of case-law which is indeed to some extent *incompatible* with existing norms, for a right of communication resulting in decisions which merely replicates existing standards would not add value and simply confirm disposals by other treaty bodies. The primary rationale for the Optional Protocol seems to have been to address suggestions that the issue of human rights for women was not being given a high enough profile.<sup>45</sup> It was expected that the introduction of a complaints mechanism allowing the determination that violations had occurred in individual cases would thereby enhance both the status of women's rights generally and the standing of the CEDAW Committee in particular. First, it was hoped that women's human rights would be advanced through the development of jurisprudence concerning State obligations. This jurisprudence would in turn influence the determinations of other treaty bodies and thus at the same time help 'mainstream' women's rights. A particular expectation was that the protocol would help advance the particular issue of violence against women.<sup>46</sup> It was thus expected that the Committee's decisions on the merits would

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<sup>43</sup> The reference, though, is clearly to cases such as *Osman v United Kingdom*, RJD 1998-III, paras 116 and 121 (at para 121: the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.)

<sup>44</sup> Communication no 5/2005, para 12.1.5. In this case involving Hungary, the State had readily accepted that the legal and institutional system was still inadequate to ensure 'the internationally expected, coordinated comprehensive and effective protection and support for the victims of domestic violence' (at para 7.4) The Committee ruled that, although steps were being taken by the authorities, in the specific instance the impossibility of obtaining temporary protection pending criminal proceedings against her partner together with the lengthy delay associated with these proceedings had resulted in violations of CEDAW's guarantees. It is not inconceivable that the same approach would be taken by the European Court of Human Rights: cf *MC v Bulgaria* ECHR 2003-XII.

<sup>45</sup> See eg O'Hare 'Ending the 'Ghettoisation': The Right of Individual Petition to the Women's Convention' [1997] 5 Web Journal of Current Legal Issues.

<sup>46</sup> O'Hare, above, noting that much of the drive towards the adoption of the Optional Protocol was prompted by the issue of violence towards women, particularly after CEDAW had defined

seek to challenge and to provoke other treaty bodies. (In another context, the Committee has referred to the process of seeking a harmonised but 'progressive interpretation' of treaties by the respective bodies.)<sup>47</sup>

In consequence, within the context of the elimination of discrimination against women, and bearing in mind that a specific intention behind the adoption of CEDAW was to advance the protection of women so as to enable their full equality, the CEDAW Committee should indeed be more adventurous in developing its case-law in the expectation that the focus and expertise of the Committee will permeate into the thinking and thus decision-making of other human rights treaty bodies at international and regional levels.<sup>48</sup> A body which added nothing of significance to human rights thinking would have failed to meet up to the expectations of the proponents of recognition of a right of communication. If the CEDAW Committee were to adopt more progressive and demanding standards than (in the European context) the European Court of Human Rights, for example, individuals would make more use of this alternative machinery. In turn, regional (and domestic) bodies would in time be likely to reflect this emerging case-law in their own determinations.

The evidence of such 'add-on' value in this respect is, however, minimal. At the most, it exists as noted in the suggestion that a perpetrator's rights should not 'trump' those of a woman subject to domestic violence. As discussed, this could cause some difficulty in respect of protection against arbitrary deprivation of liberty, but this difficulty is entirely ignored, and the suggested revision unexplored and unexplained in the Committee's decisions. It is unlikely to impress.

Of course, the possibilities for creativity have been hamstrung by the minimal use made of the right of communication. Further, the communications considered to date have involved States that are members of the Council of Europe and also have largely involved issues concerning which Strasbourg case-law is relatively well-defined. There has been no consideration of complaints arising from other parts of the world, in particular from countries or regions where the status of women may be even less assured. This has denied the Committee the opportunity to make any new breakthrough.

It is nevertheless still not clear whether the Committee in any event would (or even should) seek to use the opportunities presented by the Optional Protocol in this way. At the time of drafting of CEDAW, most States had not been convinced of the need or desirability of any supervisory body to monitor women's rights, in particular, on account of the culturally-specific background to their realisation.<sup>49</sup> This concern

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violence against women (including domestic violence) as a form of discrimination against women : General Recommendation No. 19 (UN Doc. A/47/38).

<sup>47</sup> Thirty-fifth session (15 May-2 June 2006) *Towards a harmonized and integrated human rights treaty bodies system*, para 5.

<sup>48</sup> Cf Flinerman 'Some Reflections of a CEDAW-Member' (2003) 21 NQHR 621 at 623 'There should be room for diversity and creativity. It is, however, important that treaty bodies and Charter bodies show in their activities that they are fully aware of the approaches of the other bodies and that they are involved in a continuous process of dynamic interpretation and application of human rights norms within their mandate.'

<sup>49</sup> See, eg Reanda who suggests, 'a deeply held view that the condition of women, embedded as it is in cultural and social tradition, does not lend itself to fact-finding mechanisms and complaints procedures such as those developed in the human rights sphere' (Reanda, 'The Commission on the Status of Women', in Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (1995: Clarendon Press), p 274, quoted by O'Hare, in 'Ending the

remains a valid one: the possibility of utilising an adjudicatory-style procedure in order to advance what in many cases are 'rights' not of a civil or political nature may be fraught with too much difficulty.

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'Ghettoisation': The Right of Individual Petition to the Women's Convention' [1997] 5 Web Journal of Current Legal Issues. See also Freeman 'The Human Rights Of Women Under The CEDAW Convention: Complexities And Opportunities Of Compliance' in (1997) 91 Am. Soc'y Int'l L. Proc. 377 at 378:

'Effective compliance requires analysis of social and economic systems, confrontation of traditional social and cultural attitudes, and intelligent use of legal and political systems to establish a social framework in which women can readily exercise their human rights. ... Because compliance with the CEDAW Convention requires systemic and structural change, assessment of women's status and measurement of compliance are complex. They require attention to contextual issues such as traditional attitudes and accessibility of infrastructure in addition to statistical indicators and content of law and policy.'

## 6. Conclusion

I summarise my conclusions:

1. *Identification of any practical benefits which have resulted from ratification of the Optional Protocol*

- There is undoubtedly an important symbolic value in a State's recognition of the right of complaint under the Optional Protocol. This symbolism helps emphasise a commitment to human rights generally.
- In respect of the CEDAW Optional Protocol, the two issues in which the Committee has established violations have also helped emphasise the real importance of ensuring an effective response to serious and repeated instances of domestic violence and of protecting women against medical treatment without informed consent.
- These factors apart, it is otherwise difficult to identify any real practical benefits from such recognition in the case of the United Kingdom. Only two communications have sought to challenge aspects of British law and practice. Both were clearly inadmissible.
- Nor can it be said that use of the Optional Protocol has had any wider impact upon policy-making. The Optional Protocol has not been used to highlight systemic problems of discrimination against women, nor has it led to the breakthrough in advancing women's rights or to their 'mainstreaming' in the work of international UN-treaty bodies or regional bodies.

2. *Whether the Optional Protocol is likely to remain under-utilised*

- The minimal utilisation of the right of communication and the lack of success of the majority of communications suggest a widespread lack of awareness or understanding of the Optional Protocol on the part of individuals. However, on the assumption that NGOs are likely to be aware of the Optional Protocol, the near-absence of engagement by NGOs may not unreasonably be considered to reflect a lack of trust or confidence in the efficacy of the right of communication. The expectation that NGOs would engage with the Committee has proven hopelessly optimistic.<sup>50</sup> Until the

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<sup>50</sup> See eg Freeman 'The Human Rights Of Women Under The CEDAW Convention: Complexities And Opportunities Of Compliance' in (1997) 91 Am. Soc'y Int'l L. Proc. 377 at 382:

'An Optional Protocol to the CEDAW Convention will provide an entirely new avenue for NGO action to promote compliance. It also will provide a new challenge for NGOs, to use the process effectively. If the NGO experience in using the reporting process is any indication, the NGO community will need only a few years to make the Optional Protocol its own.'

The reluctance of NGOs to use the Optional Protocol is unexplained. As far as individuals are concerned, not Koukoulis-Spiliotopoulos *From Formal to Substantive Gender Equality* (2001), at p 22 (in discussing ECJ and domestic cases involving EU law):

'levels of gender equality litigation are very low in relation to existing discrimination and inequalities, which mainly affects women. This is because women, owing to lack of information and support and to the socio-economic context, which still promotes

initiative is taken to address the reasons for this lack of recourse to the Optional Protocol, it is unlikely that the intentions behind the adoption of the Optional Protocol will be realised.

*3. Assessment of the costs to the taxpayer of handling any applications to the UN committee that oversees the Convention*

- The resources required in responding to those Communications involving the United Kingdom have been calculated at just over £4k per application.<sup>51</sup>

*4. Identification of any wider implications for government policy of future use of the protocol*

- It is not inappropriate to suggest that adjudication by the Committee in respect of admissibility issues can appear somewhat inconsistent and thus potentially unsatisfactory. This may not necessarily encourage States to develop trust in the complaints machinery.
- The existence of multiple complaints mechanisms does carry the potential risk that the Committee's disposal of communications may in certain cases be inconsistent with the case-law of other bodies charged with the disposal of complaints under other international treaties.
- The theoretical possibility at least exists that the Committee may help in the development of new and more ambitious standards in the area of discrimination against women, which in time may become reflected in the determinations of other treaty bodies. However, indications that the Committee may seek 'add-on value' in its determination of communications are – at present – difficult to discern, and some doubt still exists as to whether the Optional Protocol in any event is an appropriate mechanism to achieve more authoritative determinations on tackling systemic issues in societies preventing the realisation of equality between the sexes.

*5. Observations on the consideration of recognising the competence of other United Nations committees (including the Committee on the Rights of Persons with Disabilities) to receive petitions from individuals in the United Kingdom.*

- The question whether it is possible to extrapolate from the experience of the CEDAW Optional Protocol any relevant considerations helping determine whether the United Kingdom should recognise the competence of other UN treaty-bodies to receive complaints is essentially one for others.

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then image of women as dispensable workers and perpetuates the feminisation of poverty and social exclusion, are reluctant to claim their rights.'

<sup>51</sup> Communications required in each case the combined input of 8.5 days of the time of officials and legal advisers, with the bulk of costs incurred by fees paid to counsel. It is estimated that the average cost was just over £4k.

- It may be argued that the rather disappointing outcomes to date are attributable to particular factors affecting the work of the CEDAW Committee.
- It has been argued that it makes little sense merely to replicate channels of complaint without some indication of 'add-on value' for individual citizens (particularly as recourse to UN mechanisms may be to the ultimate detriment of the individual in the event of a finding of a violation). Again, it may be prudent to wait to consider whether the CEDAW Committee (and other UN committees) can indeed produce case-law which indeed advances practical realisation of human rights for client groups. At present, the outcomes of the CEDAW Optional Protocol are distinctly underwhelming.

Jim Murdoch

October 2008.

## **Appendix: Predictability of decision-making by the Committee – brief discussion of cases declared inadmissible**

The tentative suggestion above that the quality of reasoning advanced is in certain instances not entirely convincing is discussed in this appendix.

### *Non-exhaustion of domestic remedies (art 4(1))*

While the test of ‘exhaustion of domestic remedies’ appears to require a complainant to have raised specifically in a domestic forum the allegation of sex discrimination, this appears to be particularly harsh in cases in which the allegation is clearly implicit in the complaint.

- In Communication no 8/2005 concerning the dismissal of a teacher for wearing a headscarf, the Committee noted that the complainant had not sought to rely upon arguments based upon allegations of sex discrimination before making use of the Optional Protocol: at domestic level, her case had turned on ‘political and ideological issues’<sup>52</sup> and the domestic tribunals had not had the opportunity to consider this aspect of her case. At the same time, the Committee chose not to rule on whether the dismissal of a teacher for her refusal to desist wearing an headscarf did indeed fall within the scope of CEDAW, the complainant’s case merely being (as the Committee put it) that the complainant claimed to be a victim of art 11 of CEDAW ‘for wearing... a piece of clothing that is unique to women’.
- In Communication no 10/2005, the Committee accepted the State Party’s submissions that as the complainant had never formulated any allegation of sex discrimination in her case against expulsion, neither the domestic authorities nor the courts had thus had the chance to consider this matter. In consequence, the complainant was considered not to have exhausted domestic remedies. This approach seems unduly narrow: the very heart of her complaint was that she ran the risk of serious violence at the hands of her former husband if returned to Pakistan, but the Committee appeared unwilling to accept that allegations of violence by a former partner fell within the scope of the definition of ‘discrimination’ in terms of its own general recommendation 19.

### *Same matter already examined by international institution (art 4 (2) (a))*

The issue of whether a matter raised in a communication has been considered by ‘another procedure of international investigation or settlement’ appears to be treated as a necessary and preliminary test by the Committee (albeit not in every case)<sup>53</sup>, even when the matter has not been raised (and indeed, the admissibility conceded) by the State party.<sup>54</sup> In three cases, the State specifically but unsuccessfully argued that the matter in question had already been considered by another international institution. In each instance, the State submission was not entirely unreasonable. In

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<sup>52</sup> Communication no 8/2005, para 7.6.

<sup>53</sup> Communication no 7/2005.

<sup>54</sup> As in Communication no 2/2003, para 8.2.

each case (although the strength of the State's submissions does vary), the Committee can be criticised for failing to seize the opportunity afforded by the State submission to lay down any clear guidance:

- In Communication no 7/2005, the State Party submitted that the same question (restrictions on the transmission of titles of nobility through the male line only) had been considered by the Human Rights Committee<sup>55</sup> and by the European Court of Human Rights,<sup>56</sup> the complainant in response claiming that the scope and right to equality under art 26 of ICCPR differed from the right to equality under CEDAW (and similarly, under the ECHR).<sup>57</sup> The issue was simply ignored, the Committee merely noting that it 'saw no reason to find the communication inadmissible' on this (and other grounds).<sup>58</sup>
- In Communication no 8/2005 concerning the dismissal of an individual for refusing to desist from wearing a headscarf, the State unsuccessfully argued that the matter should be declared inadmissible in light of the *Leyla Sahin v Turkey* judgment of the European Court of Human Rights. Here, at least, the Committee confirmed it was applying the notion of 'same matter' in a manner consistent with that taken by the Human Rights Committee: that is 'the same claim concerning the same individual'.<sup>59</sup> There was, however, no attempt to distinguish the facts in the *Leyla Sahin* case. Where *Leyla Sahin* was determinative of a question whether the wearing of an Islamic headscarf in the 'public sphere' gave rise to a violation of the European Convention on Human Rights, that was not *the* question raised by the communication. CEDAW is not directly concerned with freedom of thought, conscience and religion. The Committee's disposal again seems poorly thought out.
- In Communication 10/2005, an asylum-seeker claiming to fear for her life at the hands of her former husband if returned to Pakistan (and for the future of her two sons and their education in such circumstances) submitted an application without legal representation and without specific reference to any particular provision of CEDAW. She did so after having had an application under the European Convention on Human Rights rejected as inadmissible. The detailed submissions of the United Kingdom on whether the communication was inadmissible under art 4(2) (a) (submissions backed up with references to decisions of the Human Rights Committee) were again avoided entirely with reiteration of the formula that 'the Committee sees no reason to find the communication inadmissible on any other grounds'<sup>60</sup>. That this should have been so in the sole case in which an individual had sought to use two systems of international complaints machinery to examine the same factual basis is highly unsatisfactory. Again, the Committee clearly wished to

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<sup>55</sup> That is, in Communications nos 1008/2001 and 1019/2001 (indeed, the complainant's legal representatives had also been the representatives in one of these communications to the Human Rights Committee).

<sup>56</sup> Appl nos 41127/98 etc *De la Cierva Osorio de Moscoso and others v Spain* (dec) (28 October 1999).

<sup>57</sup> Communication no 7/2005, paras 4, 5.1, and 8.3.

<sup>58</sup> Communication no 7/2005, para 11.6.

<sup>59</sup> Communication no 8/2005, para 7.3, citing *Fanali v Italy* (Communication no 075/1980)).

<sup>60</sup> Communication no 10/2005, para 7.4.



avoid giving any opinion on the matter (even by adopting the reasoning in 8/2005, for example, that the two treaties focus upon different legal issues).

*Factual basis occurred prior to the OP's entry into force re. the State Party (unless the facts have continued after that date): (art 4(2) (e))*

A communication must be declared inadmissible if the factual basis occurred before the entry into force of the Optional Protocol in respect of the State involved. Certain decisions appear eminently reasonable. For example, Communication no 3/2004 involved the failure to pay certain maternity benefits during two 16 week periods of maternity leave, the second period ending 6 days after the entry into force of the Optional Protocol in respect of the State Party: the Committee declared the Communication insofar as it involved this second period admissible *ratione temporis* for this reason.

However, other decisions are perhaps open to criticism in giving an unduly wide interpretation to the exception that the Committee may not consider a matter occurring before the entry into force of the Optional Protocol 'unless those facts continued after that date'. Such decisions seem to give undue favour to the complainant of a communication:

- In Communication no 8/2005, the author had been dismissed as a civil servant on account of her repeated refusal to desist from wearing a headscarf in the school in which she was employed as a teacher. The dismissal occurred some 30 months before the Protocol had entered into force in respect of Turkey. Nevertheless, the Committee considered that the communication was admissible *ratione temporis* in light of the 'effects of the loss of her status [of civil servant], namely her means of subsistence to a great extent, the deductions that would go towards her pension entitlement, interest on her salary and income, her education grant and her health insurance'<sup>61</sup>.
- In Communication no 4/2004, the Committee ruled that it could consider the issue of the sterilisation of a woman even although the operation took place before the date of entry into force of the Optional Protocol on the grounds that sterilisation was considered irreversible and its effects were thus continuing.

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<sup>61</sup> Communication no 8/2005, para 7.4.

