

# **DON'T MIND THE GAP: THE RISE OF INDIVIDUAL COMPLAINT MECHANISMS WITHIN INTERNATIONAL HUMAN RIGHTS TREATIES**

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## **INTRODUCTION**

An iconic message of the London subway system is its warning to passengers to “mind the gap,” or, in other words, to be careful of the space between the platform and the subway train.<sup>1</sup> This simple warning is applicable in many contexts. It has been particularly applicable to individuals in the international human rights law context. Traditionally, there has been a large gap between the human rights afforded to individuals as a matter of international law and the state-based ability to enforce these rights. However, the rise in the creation and use of individual complaint mechanisms as a part of international human rights treaties has created a significant challenge to the maintenance of this gap.

As this article will explain, the increase in the creation of these procedures for specific groups through specific conventions indicates an attempt to close the gap into which individuals with a human rights-based grievance usually have fallen, despite the essential nature of the rights guaranteed in such foundational documents as the Universal Declaration of Human Rights. This rise also indicates that individuals per se are being provided with a greater ability to close the gap by accessing the international human rights law system that has for so long regarded them as only peripheral actors to be given rights rather than as actors having the agency to claim these rights at the international level. In sum, the result is a steady penetration of the international system by individuals. Still, this access is designed by traditional international actors and therefore has

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1. Signs informing passengers to “Mind the Gap” can be seen throughout the London subway system and have spawned an artistic movement centered on their content.

structural limitations. While some gap might indeed remain, increased access has demonstrated that individual complaint mechanisms, and those persons willing to utilize them to claim their international human rights, are closing the gap.

Part I of this article provides a brief discussion of the international human rights system generally and presents the concept of providing for an individual complaint mechanism within an international human rights treaty. Part II then discusses the individual complaint mechanisms that exist—or will exist—within key international human rights law treaties, specifically the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), and the Convention on the Rights of Persons with Disabilities (CRPD).

Part III of this article compares the status, rights, and abilities of individuals under each of the human rights treaties. This Part argues that there is a discernible trend in the increase of asserted rights and claimed abilities of individuals through the expansion of individual complaint mechanisms. With the necessary background and a comparison of individual complaint mechanisms established, Part IV then examines individual access to the international human rights system and discusses the implications of this trend for the individuals themselves and the international human rights law system as a whole.

Although the state-centric nature of the international legal system necessarily results in a state-centric structure for individual complaint systems, Part IV argues that the increasing prominence of the individual in international human rights law is a discernible trend which stands to alter the current understanding of the international system. This prominence is based on a sense of individual empowerment which is greater than any one articulation of individual rights in the traditional sources of international human rights law. This Part goes on to argue that the increase in individual prominence is certainly laudable but that, by attaching this increased individual penetration of the international human rights law system to an ever-increasing series of specialized conventions, there is a significant risk of fragmenting the concept of the international human rights law system.

This Part suggests that a better alternative would be for individuals, as the foundation of international human rights law, to be able to access the system based on their identity as the holder of human rights and human dignity, rather than due to some specialized avenue of redress. This is especially so because these concepts of essential human rights and human dignity are at the core of the entire international human rights law system. This recommendation stresses both the internal status of people as holders of human rights and human dignity while also doing away with the need to create new quasi-judicial structures that are themselves potentially limiting depending on the ways in which they are drafted and function. Whether the appropriate body to handle such a concept is the Human Rights Committee or another body is not the overall concern of this article; rather, this article highlights an important trend in international human rights law and discusses the potential impacts of this trend on the international law system. Underlying this discussion is the overall question of how the ability of an individual to assert his human rights in an international legal context impacts the international community, the idea of state-centricity, and the understanding of international human rights law. At the individual level, the underlying question is whether individual identity, which is reinforced through access to the international human rights law system, is threatened by the fragmentation often related to asserting individual human rights violations.

Finally, the Conclusion summarizes the previous Parts and asserts that the international human rights law system has created a system wherein the individual has been empowered to the point of having a voice. The individual can now use that voice in order to claim a place—however limited—within the realm of international human rights law in a way that is at once quite important structurally and yet can also fragment individual identity when not understood holistically within the international human rights law system.

## I. THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The modern international human rights system is generally regarded as the product of World War II and the immediate post-war era,<sup>2</sup> although the antecedents of this system can be traced to the League of Nations.<sup>3</sup> In the Charter of the United Nations (UN Charter), the foundational document for the United Nations, the concept of human rights, including the

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2. Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?*, 2 U.C. DAVIS J. INT'L L. & POL'Y 111, 112-13 (1996).

3. See League of Nations Covenant art. 23.

recognition of human dignity, is prevalent,<sup>4</sup> and this recognition has filtered through to the current organization and operation of the United Nations.<sup>5</sup>

Several years after the adoption of the UN Charter, the world community endorsed the Universal Declaration of Human Rights (UDHR), a sweeping statement recognizing and valuing the essential human rights and human dignities that are inherent in all persons.<sup>6</sup> The rights recognized in the UDHR include civil, political, economic, social, and cultural rights.<sup>7</sup> Although it is, as a matter of law, a non-binding instrument, the UDHR is regarded as an instrument of customary law and thus is binding on the international community as a whole.<sup>8</sup>

In the years following the adoption of the UDHR, the international community began to enshrine human rights in a series of treaties, most seminally the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>9</sup> A variety of theories exist as to the political and legal motivations for splitting human rights into these two categories for the purposes of legalization,<sup>10</sup> and a full discussion of these theories is outside the scope of this article. What is important to note is that these treaties were wide-ranging individually and also when ratified collectively. The international human rights treaties discussed below state that the principles and essential human rights guarantees made under the two Covenants, as well as the UDHR and the UN Charter, form the backbone of their content.<sup>11</sup>

Each of the international human rights treaties that contains an individual complaint mechanism is overseen in its implementation by a committee that is vested with the ability to decide on individual complaints.<sup>12</sup> A note should be made here that, as with all international treaties and agreements, international human rights treaties are only binding on those states that have consented to be bound by them.<sup>13</sup> Further,

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4. *See generally* U.N. Charter.

5. *See, e.g., Human Rights*, UNITED NATIONS, <http://www.un.org/en/rights/> (last visited July 23, 2011) (providing information on the involvement of the United Nations and its subsidiary agencies in human rights development and protection).

6. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

7. *See id.*; *see also* Arambulo, *supra* note 2, at 112-13 (describing the rights guaranteed by the Universal Declaration of Human Rights).

8. Arambulo, *supra* note 2, at 113.

9. *See Arambulo, supra* note 2, at 113-14.

10. *See Arambulo, supra* note 2, at 114-22.

11. *See infra* Part II.

12. *See infra* Part II.

13. *See* Vienna Convention on the Law of Treaties, art. 11, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

when an individual complaint mechanism is contained within the text of a treaty rather than adopted as an optional protocol, States Parties do not become bound by the individual complaint mechanism provisions unless they specifically express that they intend to be bound upon ratification or afterward.<sup>14</sup>

As a general rule, the purpose of an individual complaint mechanism within a human rights treaty is to allow an individual, or the individual's representative, or, in some circumstances, a group of individuals to complain to the treaty committee regarding alleged violations of the human rights contained within the terms of the treaty.<sup>15</sup> The ability of an individual to bring such a complaint hinges first and foremost on whether the state alleged to have committed the violation is a State Party to the individual complaint mechanism.<sup>16</sup> Once this hurdle has been cleared, the individual then must satisfy the standing and justiciability requirements contained in the text of the instrument creating the individual complaint mechanism.<sup>17</sup> The treaty committee may dismiss the complaint on grounds of inadmissibility, or it may decide to hear the complaint in full, after which it can still dismiss the case on inadmissibility or can decide the case on the merits.<sup>18</sup> There is no appeals process once the treaty committee has made a decision on a complaint, rendering the decision of the treaty committee final.<sup>19</sup>

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14. The terms of each human rights treaty provide the exact methods by which a State Party may agree to be bound under the individual complaint mechanism established in the overall treaty.

15. *See infra* Part II.

16. *See infra* Part II.

17. *See infra* Part II.

18. *See infra* Parts II, III.

19. *See generally* Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter Optional Protocol to ICCPR]; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, Annex, U.N. Doc. A/RES/63/117 (Dec. 10, 2008) [hereinafter Optional Protocol to ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted and opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 16, 1969) [hereinafter CERD]; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Oct. 6, 1999, 2131 U.N.T.S. 83 (entered into force Dec. 22, 2000) [hereinafter Optional Protocol to CEDAW]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter CMW]; Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 39/46, Annex, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter Optional Protocol to CRPD].

In the event that a treaty committee decides in favor of the claimant, it has far less enforcement power than a domestic court.<sup>20</sup> The treaty committee may publicly pronounce that there has been a violation<sup>21</sup> and, depending on the depth of the violation, has issued language condemning the state practice that gave rise to it.<sup>22</sup> The treaty committee may also require that the errant State Party follow up within a stipulated period of time and provide the treaty committee with information on the measures taken to address the violation.<sup>23</sup> A further tool is to declare that the complainant is entitled to financial compensation for the wrongs done,<sup>24</sup> although an exact amount of compensation is not typically stated and such a finding is not enforceable in a domestic or international court.<sup>25</sup> While the individual complaint mechanism exists under the rubric of international law, much of its direct impact on States Parties depends upon the attitude of the States Parties themselves, as some have been far more amenable to bringing the findings of treaty committees into the realm of domestic legal influence.<sup>26</sup>

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20. See generally Optional Protocol to ICCPR, *supra* note 19; Optional Protocol to ICESCR, *supra* note 19; CERD, *supra* note 19; Optional Protocol to CEDAW, *supra* note 19; CAT, *supra* note 19; CMW, *supra* note 19; Optional Protocol to CRPD, *supra* note 19; see also Human Rights Committee, General Comment No. 33: The Obligations of State Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008), at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [hereinafter Human Rights Committee, General Comment No. 33].

21. See Human Rights Committee, General Comment No. 33, *supra* note 20, para. 12; Wade M. Cole, *When All Else Fails: International Adjudication of Human Rights Abuse Claims, 1976-1999*, 84 SOCIAL FORCES 1909, 1911-12 (2006) (discussing the prevalence of public shaming through the finding of a violation as a meaningful method of ensuring State Party compliance with a finding of the Human Rights Committee).

22. See *Judge v. Canada*, Views, Human Rights Comm. 78th Sess., July 14-Aug. 8, 2003, U.N. Doc. CCPR/C/78/D/829/1998 (Oct. 20, 2003) (regarding the deportation of an individual to a state in which he would face the death penalty); *Johnson v. Jamaica*, Views, Human Rights Comm. 56th Sess., Mar. 18-Apr. 4, 1996, U.N. Doc. CCPR/C/56/D/588/1994 (Aug. 5, 1996) (noting the Committee's disapproval of the imposition of the death penalty where the ICCPR's provisions are not respected during the trial).

23. See Human Rights Committee, General Comment No. 33, *supra* note 20, para. 14.

24. See, e.g., *Wilson v. Philippines*, Views, Human Rights Comm. 79th Sess., Oct. 20-Nov. 7, 2003, U.N. Doc. CCPR/C/79/D/868/1999 (Nov. 11, 2003).

25. See, e.g., *id.*

26. See Shotaro Hamamoto, *An Undemocratic Guardian of Democracy – International Human Rights Complaint Procedures*, 38 VICTORIA U. WELLINGTON L. REV. 199, 200 (2007).

## II. INTERNATIONAL HUMAN RIGHTS TREATIES CONTAINING INDIVIDUAL COMPLAINT MECHANISMS

### A. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 and became effective in 1976.<sup>27</sup> Although the provisions of the ICCPR are themselves comprehensive and manifest the collective understanding by the international community regarding the civil and political rights enjoyed by individuals,<sup>28</sup> particularly as linked to the statements in the UDHR,<sup>29</sup> the individual complaint mechanism established for the ICCPR is not contained in its main body.<sup>30</sup> Rather, the individual complaint mechanism is located in the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR Protocol).<sup>31</sup>

The ICCPR Protocol was also adopted in 1966 and became effective in 1976.<sup>32</sup> As of the writing of this article, there are 167 States Parties to the ICCPR<sup>33</sup> and 114 States Parties to the ICCPR Protocol,<sup>34</sup> establishing both the ICCPR and the ICCPR Protocol as two of the most universally ratified conventions within the modern international law system. Under the terms of the ICCPR Protocol, jurisdiction to hear complaints from individuals who assert that they have been victims of violations of human rights guaranteed under the ICCPR is vested in the Human Rights Committee.<sup>35</sup> In order to assert such a complaint against a State Party, an individual must be subject to the jurisdiction of the State Party,<sup>36</sup> the meaning of which has caused no small level of controversy throughout the life of the ICCPR Protocol.<sup>37</sup>

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27. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

28. *See generally id.*

29. *See id.* at pmb1.

30. *See generally id.*

31. *See* Optional Protocol to ICCPR, *supra* note 19, arts. 1 to 5.

32. *See* Optional Protocol to ICCPR, *supra* note 19; *see also* *Optional Protocol to the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg\\_no=IV-5&src=TREATY](http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-5&src=TREATY) (last visited Nov. 8, 2011) [hereinafter *Optional Protocol to ICCPR Summary*].

33. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited July 23, 2011).

34. *Optional Protocol to ICCPR Summary*, *supra* note 32.

35. *Optional Protocol to ICCPR*, *supra* note 19, at pmb1., art. 1.

36. *Optional Protocol to ICCPR*, *supra* note 19, art. 1.

37. For a discussion of these issues, see Orna Ben-Naftali, *The Extraterritorial Application of Human Rights to Occupied Territories*, 100 PROC. OF THE ANN. MEETING (AM. SOC. OF INT'L L.) 90 (2006).

Once a complaint is filed with the Human Rights Committee, the Committee reviews it for admissibility. In order to have standing to bring a complaint under the ICCPR, an individual must have exhausted all domestic remedies that are available to them in the context of the matter giving rise to the complaint.<sup>38</sup> Furthermore, the complaint cannot be submitted by an individual anonymously,<sup>39</sup> cannot fall into either category of “an abuse of the right of submission” or “incompatible with the provisions of the [ICCPR]” as determined by the Human Rights Committee,<sup>40</sup> and cannot be pending before another international body or be the subject of a settlement as determined by an international body.<sup>41</sup> There is an exception to the domestic remedy exhaustion requirement: where the Human Rights Committee decides that there is an unreasonable delay in allowing the complainant to proceed with the requisite domestic remedies, the Committee may waive that prong of standing.<sup>42</sup>

In recent years, there has been another admissibility hurdle where the individual bringing the claim is not the individual whom the State Party is alleged to have harmed.<sup>43</sup> In this regard, the Human Rights Committee has been largely willing to grant standing to immediate family members of the alleged victim—particularly in cases of disappearance,<sup>44</sup> alleged unlawful detention and torture,<sup>45</sup> and extrajudicial killings<sup>46</sup>—but has been far more

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38. Optional Protocol to ICCPR, *supra* note 19, art. 2.; see also Mireille G.E. Bijnsdorp, *The Strength of the Optional Protocol to the United Nations Women’s Convention*, 18 NETH. Q. HUM. RTS. 329, 331 (2000) (discussing the tie between resources available to potential claimants and their actual tendency to both follow the requisite domestic procedures and file international claims).

39. Optional Protocol to ICCPR, *supra* note 19, art. 3.

40. Optional Protocol to ICCPR, *supra* note 19, art. 3.

41. Optional Protocol to ICCPR, *supra* note 19, art. 5.

42. Optional Protocol to ICCPR, *supra* note 19, art. 5.

43. See *infra* notes 44-48.

44. See, e.g., Grioua, née Atamna v. Algeria, Views, Human Rights Comm. 90th Sess., July 9-27, 2007, U.N. Doc. CCPR/C/90/D/1327/2004 (July 10, 2007); Kimouche, née Cheraitia v. Algeria, Views, Human Rights Comm. 90th Sess., July 9-27, 2007, U.N. Doc. CCPR/C/90/D/1328/2004 (July 10, 2007); Bousroual v. Algeria, Views, Human Rights Comm. 86th Sess., Mar. 13-31, 2006, U.N. Doc. CCPR/C/86/992/2001 (Mar. 15, 2006); Bautista v. Colombia, Views, Human Rights Comm. 55th Sess., U.N. Doc. CCPR/C/55/D/563/1993 (Oct. 27, 1995); Izquiero v. Uruguay, Views, Human Rights Comm. 15th Sess., U.N. Doc. CCPR/C/15/D/73/1981 (Apr. 1, 1982).

45. See, e.g., Bondonga v. Democratic Republic of the Congo, Views, Human Rights Comm. 96th Sess., July 13-31, 2009, U.N. Doc. CCPR/C/96/D/1483/2006 (July 30, 2009); Khuseynova & Butaeva v. Tajikistan, Views, Human Rights Comm. 94th Sess., Oct. 13-31, 2008, U.N. Doc. CCPR/C/94/D/1263-1264/2004 (Oct. 20, 2008); Izquiero v. Uruguay, *supra* note 44; Khudayberganova v. Uzbekistan, Views, Human Rights Comm. 90th Sess., July 9-27, 2007, U.N. Doc. CCPR/C/90/D/1140/2002 (Aug. 7, 2007); Aber v. Algeria, Views, Human Rights Comm. 90th Sess., July 9-27, 2007, U.N. Doc. CCPR/C/90/D/1439/2005 (Aug. 16, 2007).

46. See, e.g., Bazarov v. Uzbekistan, Views, Human Rights Comm. 87th Sess., July 10-28, U.N. Doc. CCPR/C/87/D/959/2000 (Aug. 8, 2006); Bautista v. Colombia, *supra* note 44; Camargo v.

reticent to grant standing to those claiming to speak for a particular community or even where a physician or lawyer has lodged a claim on behalf of a patient<sup>47</sup> or client.<sup>48</sup> In these cases, the Human Rights Committee typically has been unable to substantiate that those other than immediate family members have the appropriate agency to speak for the alleged victim.<sup>49</sup> What this practice highlights is that the ICCPR Protocol and the Human Rights Committee are focused on the individual and those directly affected by violations, rather than outside persons or groups.

If a complaint survives the initial admissibility decision, it then goes before the Human Rights Committee for a decision on the merits. These decisions focus on the strength of the allegations made and, in light of the additional evidence that is provided at that point, frequently return to the issue of admissibility.<sup>50</sup> In particularly dire situations, the Human Rights Committee has interpreted its mandate under the ICCPR Protocol to include the ability to request that the accused State Party take interim measures to guarantee the protection of the claimant.<sup>51</sup> These requests have been prevalent in complaints involving the imposition of the death penalty.<sup>52</sup>

The ICCPR Protocol permits a state to renounce its status as a party to the Protocol provided that it follows a specific procedure.<sup>53</sup> The renunciation is not legally effective until three months after notification and

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Colombia, Views, Human Rights Comm. 15th Sess., U.N. Doc. CCPR/C/15/D/45/1979 (Mar. 31, 1982).

47. See, e.g., L.A. & U.R. v. Uruguay, Views, Human Rights Comm. 18th Sess., U.N. Doc. CCPR/C/18/D/128/1982 (Apr. 6, 1983).

48. See, e.g., Palma v. Panama, Decisions, Human Rights Comm. 51st Sess., U.N. Doc. CCPR/C/51/D/436/1990 (July 26, 1994); Thompson v. Panama, Decisions, Human Rights Comm. 52nd Sess., U.N. Doc. CCPR/C/52/D/438/1990 (Oct. 21, 1994); Simons v. Panama, Decisions, Human Rights Comm. 52nd Sess., U.N. Doc. CCPR/C/52/D/460/1991 (Oct. 25, 1994); Leach v. Jamaica, Views, Human Rights Comm. 57th Sess., July 8-26, 1996, U.N. Doc. CCPR/C/57/D/546/1993 (Aug. 1, 1996); Y. v. Australia, Decisions, Human Rights Comm. 69th Sess., July 10-28, 2000, U.N. Doc. CCPR/C/69/D/772/1997 (Aug. 8, 2000); Padilla v. Philippines, Views, Human Rights Comm. 70th Sess., Oct. 16-Nov. 3, 2000, U.N. Doc. CCPR/C/70/D/869/1999 (Oct. 19, 2000).

49. See L.A. v. Uruguay, *supra* note 47; Palma v. Panama, *supra* note 48; Thompson v. Panama, *supra* note 48; Leach v. Jamaica, *supra* note 48; Y. v. Australia, *supra* note 48; Padilla v. Philippines, *supra* note 48.

50. See, e.g., K.L. v. Denmark, Views, Human Rights Comm. 10th Sess., July 14-Aug. 1, 1980, U.N. Doc. CCPR/C/10/D/72/1980 (July 31, 1980).

51. Bijnsdorp, *supra* note 38.

52. For a discussion of this trend in regards to complaints brought against Jamaica, Trinidad and Tobago in particular, and the resulting actions taken by these states to avoid agreement with the Human Rights Committee's decisions, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

53. Optional Protocol to ICCPR, *supra* note 19, art. 12.

does not void the applicability of the Human Rights Committee's jurisdiction over cases already pending against the State Party.<sup>54</sup>

## B. International Covenant on Economic, Social & Cultural Rights

The International Covenant on Economic, Social & Cultural Rights (ICESCR) was adopted in 1966 and became effective in 1976.<sup>55</sup> At the time of writing, there are 160 States Parties to the ICESCR.<sup>56</sup> While there are many points at which the ICESCR mirrors the ICCPR, it is widely held that the terms of the ICCPR are quantifiable and thus subject to quasi-judicial oversight,<sup>57</sup> while the rights guaranteed under the ICESCR are more fluid and essentially aspirational, making them inappropriate for quasi-judicial oversight.<sup>58</sup> At the time they were adopted, there were also concerns that the rights contained in the ICESCR were new, or at least largely uncodified, at the national level, whereas the rights guaranteed under the ICCPR were typically found in the national laws of UN member states.<sup>59</sup> As a result, unlike the ICCPR, the ICESCR did not contain direct provisions or a protocol creating an individual complaint mechanism.<sup>60</sup>

Throughout the history of the ICESCR, and particularly over the past few decades, a mounting chorus of civil society actors, the Committee on Economic, Social and Cultural Rights (ICESCR Committee), and some governments began to pressure the international community to create an individual complaint mechanism within the ICESCR context.<sup>61</sup> In particular, the ICESCR Committee asserted that an individual complaint mechanism was necessary in order to develop an understanding of the terms contained in the ICESCR, to establish how these terms should be implemented, and to create an effective method for and forum in which

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54. Optional Protocol to ICCPR, *supra* note 19, art. 12.

55. *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last visited July 23, 2011).

56. *Id.*

57. See Tara J. Melish, *Introductory Note to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 48 INT'L L. MATERIALS 256, 256-57 (2009); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 464-67 (2004); Wouter Vandenhole, *Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights*, 21 NETH. Q. HUM. RTS. 423, 431 (2003).

58. See Melish, *supra* note 57, at 256-57; Dennis & Stewart, *supra* note 57, at 464-67.

59. Arambulo, *supra* note 2, at 116.

60. See Melish, *supra* note 57, at 256-57; Arambulo, *supra* note 2, at 113-17.

61. See Melish, *supra* note 57, at 256; Vandenhole, *supra* note 57, at 425.

individuals could voice alleged violations of their rights.<sup>62</sup> Others argued that the ICESCR would be unable to give effect and credence to the rights it created without an individual complaint mechanism.<sup>63</sup>

Many of the issues associated with acceptance of an individual complaint mechanism focus on the collective or community-based nature of the rights provided for under the ICESCR.<sup>64</sup> There is still a good deal of debate as to whether this will be detrimental to the implementation of a respected and well-functioning individual complaint mechanism under the ICESCR or whether the individual complaint mechanism will serve as a means to clarify that the rights and guarantees under the ICESCR are in fact primarily and essentially individual in nature.<sup>65</sup>

During the drafting process that led to the creation of the ICESCR Protocol text, prominent human rights scholars attempted to draw distinct categories within each right under the ICESCR, such that there would be an obligatory element that could be made the subject of an individual complaint.<sup>66</sup> These scholars asserted that the system would establish a softer set of elements and recommended state practices that would be beneficial to the implementation of each particular right but which would not create an obligation that would be sufficient to use as the basis for a complaint.<sup>67</sup> Other arguments centered on the idea of establishing minimum levels of rights protections based on the importance of certain rights within the ICESCR.<sup>68</sup> The ICESCR Protocol negotiation proceedings generated several other similar formulas regarding the levels of immediate and future state obligations for the purposes of justiciability.<sup>69</sup> At heart, they all establish that there is such a dichotomy and that the ICESCR Protocol is intended to allow for an individual complaint mechanism that at the very

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62. See Melish, *supra* note 57, at 257.

63. Dennis & Stewart, *supra* note 57, at 462; *but see id.* at 466 (stating the author's views that the rights contained in the ICESCR are not in fact better off in a judicial setting and that empowering the ICESCR Committee to render judgments on the extent of obligations under the ICESCR is potentially dangerous as a practice).

64. See Melish, *supra* note 57, at 259.

65. Melish, *supra* note 57, at 259.

66. See Arambulo, *supra* note 2, at 130-31.

67. Arambulo, *supra* note 2, at 131. It should be noted that, despite the deeply held differences in state opinion regarding the justiciability of the rights guaranteed under the ICESCR, the international community and the states that comprise it do, with near unanimity, agree that the rights created under the ICESCR itself are essential human rights. See Vandenhole, *supra* note 57, at 430.

68. Vandenhole, *supra* note 57, at 437-438.

69. Vandenhole, *supra* note 57, at 443 (discussing several forms of obligation dichotomies, particularly the idea of the obligations to respect, to protect, and to fulfill); Cees Flinterman, *Appendix II: The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 15 NETH. Q. HUM. RTS. 244, 247 (1997).

least holds States Parties accountable under the minimum obligation standards.<sup>70</sup>

The preamble to the ICESCR Protocol depends heavily on the terms and guarantees of the UDHR and the ICCPR, as well as the ICESCR, emphasizing the individual and the rights guaranteed to him as a result of his essential human dignity.<sup>71</sup> All States Parties agree to and recognize that “[c]ommunications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.”<sup>72</sup> Those drafting the ICESCR Protocol specifically chose the term “victim” to ensure that the individual complaint mechanism would not be read narrowly in terms of standing, and to guarantee that the mechanism would have a broad construction into the future.<sup>73</sup> In terms of standing, the ICESCR Protocol provides that an agent is only allowed to submit a complaint on behalf of another person with that person’s consent or, in the event that consent cannot be established, that the complainant provide a justification as to why consent is unavailable.<sup>74</sup> Jurisdiction over individual complaints brought under the ICESCR Protocol is vested in the ICESCR Committee.<sup>75</sup>

Under the ICESCR Protocol, an individual complaint is not admissible if: all appropriate domestic remedies have not been exhausted (unless “the application of such remedies is unreasonably prolonged”);<sup>76</sup> the complaint was submitted more than a year after the final exhaustion of appropriate domestic remedies (unless the complainant was demonstrably unable to comply with this limitation);<sup>77</sup> the facts upon which the complaint is based occurred before the relevant State Party became legally bound by the terms of the ICESCR Protocol (unless the acts continued after the State Party became bound by the ICESCR Protocol);<sup>78</sup> the subject of the complaint is pending before another international body or there was an examination of the subject of the complaint by another international body;<sup>79</sup> the terms of the complaint are “incompatible with the provisions of the Covenant;”<sup>80</sup>

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70. Vandenhoe, *supra* note 57, at 443.

71. Optional Protocol to ICESCR, *supra* note 19, at pmbl.

72. Optional Protocol to ICESCR, *supra* note 19, art. 2.

73. Arambulo, *supra* note 2, at 132.

74. Optional Protocol to ICESCR, *supra* note 19, art. 2.

75. See Optional Protocol to ICESCR, *supra* note 19, art. 1; Melish, *supra* note 57, at 257.

76. Optional Protocol to ICESCR, *supra* note 19, art. 3(1).

77. Optional Protocol to ICESCR, *supra* note 19, art. 3(2)(a).

78. Optional Protocol to ICESCR, *supra* note 19, art. 3(2)(b).

79. Optional Protocol to ICESCR, *supra* note 19, art. 3(2)(c).

80. Optional Protocol to ICESCR, *supra* note 19, art. 3(2)(d).

there is insufficient evidence presented to substantiate the complaint or the complaint is “exclusively based on reports disseminated by mass media;”<sup>81</sup> “[i]t is an abuse of the right to submit a communication;”<sup>82</sup> or, the complaint is submitted anonymously or not in writing.<sup>83</sup> The Protocol requires that a complaint allege a particular, individual harm, however there are certain limited circumstances in which this requirement can be softened to allow for admissibility where the ICESCR Committee decides that the complaint alleges “a serious issue of general importance.”<sup>84</sup>

The ICESCR Protocol vests the ICESCR Committee with the ability to request that the State Party involved in a complaint take steps necessary to protect the life, integrity, and security of the complainant until there is a final decision on the complaint.<sup>85</sup> Further, the Protocol explicitly requires that States Parties “take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee.”<sup>86</sup>

The ICESCR Protocol provides that States Parties are able to renounce their status as a party to the ICESCR Protocol and to withdraw from the ICESCR Protocol with the limitation that the renunciation does not become effective for six months.<sup>87</sup> During that six-month time period, the ICESCR Committee may consider existing complaints against the renouncing State Party.<sup>88</sup>

Due to the nature of the rights contained in the ICESCR, the ICESCR Protocol allows the ICESCR Committee to use a reasonableness standard when addressing whether a particular State Party is fulfilling its obligations.<sup>89</sup> Additionally, the Protocol vests the ICESCR Committee with the ability to consult UN and other relevant bodies to receive information appropriate to its determinations.<sup>90</sup>

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81. Optional Protocol to ICESCR, *supra* note 19, art. 3(2)(e).

82. Optional Protocol to ICESCR, *supra* note 19, art. 3(2)(f).

83. Optional Protocol to ICESCR, *supra* note 19, art. 3(2)(g).

84. Optional Protocol to ICESCR, *supra* note 19, art. 4.

85. Optional Protocol to ICESCR, *supra* note 19, art. 5(1).

86. Optional Protocol to ICESCR, *supra* note 19, art. 13.

87. Optional Protocol to ICESCR, *supra* note 19, art. 20(1).

88. Optional Protocol to ICESCR, *supra* note 19, art. 20(2).

89. Optional Protocol to ICESCR, *supra* note 19, art. 8(4).

90. Optional Protocol to ICESCR, *supra* note 19, art. 8(3).

### C. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted in 1965 and entered into force in 1969.<sup>91</sup> Although the CERD has been widely ratified by the global community,<sup>92</sup> the individual complaint mechanism established under it has not been as successful in attracting States Parties.<sup>93</sup> Indeed, the CERD individual complaint mechanism only became effective in 1982, when it received the requisite number of States Parties.<sup>94</sup>

As with the ICESCR Protocol, states are concerned with the potentially broad and difficult to define (as well as limit) jurisdiction of an individual complaint mechanism established to hear alleged violations of the CERD, which has been drawn in a fluid manner to allow for a high amount of flexibility in its overall application.<sup>95</sup> Interestingly, the opening paragraph of the CERD preamble contains a broad statement regarding the essential human rights and dignities of individuals and their place in non-discrimination laws and protections, which itself can be seen as a vehicle to support the expansion of the role of the individual in the international system where violations of the CERD's provisions occur.<sup>96</sup>

The individual complaint mechanism is set out in Article 14 of the CERD.<sup>97</sup> Under the terms of this mechanism, both individuals and groups of individuals have standing to bring complaints against States Parties to the CERD Committee, provided that the offense occurred within the jurisdiction of the relevant State Party and pertains to an alleged violation of the rights contained in the CERD.<sup>98</sup> Unlike other international human rights treaties with individual complaint mechanisms, the CERD requires that a State Party indicate a domestic body that will be charged with examining the complaint first.<sup>99</sup> In the event that there is no satisfaction

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91. *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-2&chapter=4&lang=en) (last visited July 23, 2011) [hereinafter CERD Summary].

92. To date, there are 175 States Parties to the CERD. See CERD Summary, *supra* note 91.

93. See *id.* (providing the statements of States Parties that have become part of the individual complaint mechanism); see also William F. Felice, *The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights*, 24 HUM. RTS. Q. 205, 213 (2002).

94. Rüdiger Wolfrum, *The Committee on the Elimination of Racial Discrimination*, 3 MAX PLANCK Y.B. U.N. L. 489, 511-13 (1999).

95. Felice, *supra* note 93, at 213.

96. See CERD, *supra* note 19, at pmb1.

97. CERD, *supra* note 19, art. 14.

98. CERD, *supra* note 19, art. 14(1).

99. CERD, *supra* note 19, art. 14(2).

from this body, the CERD Committee may then exercise jurisdiction over the matter.<sup>100</sup> Some States Parties elected to bypass this step and declare that the CERD Committee has jurisdiction without having to go through a domestic body first—a step which is allowable under the CERD and arguably promotes individual access to the international system since it results in an international body having jurisdiction.<sup>101</sup>

The only justiciability requirement is that a complainant must have exhausted all applicable domestic remedies prior to bringing the complaint to the CERD Committee.<sup>102</sup> This requirement can be waived when “the application of the remedies is unreasonably prolonged.”<sup>103</sup>

States Parties are allowed to withdraw their assent to the CERD Committee’s jurisdiction over individual complaints without the usual waiting period for effectiveness,<sup>104</sup> although the CERD ensures that a withdrawal may not impact any of the complaints pending before the CERD Committee prior to withdrawal.<sup>105</sup>

#### D. Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) entered into force in 1981 without any provisions relating to an individual complaint mechanism.<sup>106</sup> In subsequent years, the idea of creating an individual complaint mechanism for CEDAW began to gain popularity, resulting in several high-level international workshops and meetings which sought to frame a potential optional protocol that would establish an individual complaint mechanism.<sup>107</sup>

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100. CERD, *supra* note 19, art. 14(5).

101. CERD Summary, *supra* note 91.

102. CERD, *supra* note 19, art. 14(7)(a).

103. CERD, *supra* note 19, art. 14(7)(a).

104. CERD, *supra* note 19, art. 14(3).

105. CERD, *supra* note 19, art. 14(3).

106. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; *see also* *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited July 23, 2011) [hereinafter CEDAW Summary].

107. Kwong-Leung Tang, *The Leadership Role of International Law in Enforcing Women’s Rights: The Optional Protocol to the Women’s Convention*, 8 GENDER & DEV. 65, 67-69 (2000); Bijnsdorp, *supra* note 38, at 330; *see also* Felipe Gomez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women’s Human Rights*, 20 ARIZ. J. INT’L & COMP. L. 291, 305 (2003) (discussing the generally accepted idea among the international community that it would be easier to craft an optional protocol for CEDAW to implement an individual complaint mechanism than to amend CEDAW itself).

Interestingly, the many official justifications for the proposed optional protocol tended to focus on benefits that would accrue to society and women's rights as a whole, while largely overlooking the effects of bringing the individual herself into the realm of international human rights.<sup>108</sup> Ultimately, these efforts bore fruit, and in 1999 an optional protocol providing for an individual complaint mechanism as part of CEDAW (CEDAW Protocol) was adopted.<sup>109</sup> The CEDAW Protocol subsequently went into effect in 2000<sup>110</sup> and currently has 102 States Parties.<sup>111</sup>

The preamble to the CEDAW Protocol places heavy emphasis on the role of CEDAW and other key international human rights documents (particularly the UN Convention, the UDHR and the combination of the ICCPR and ICESCR) in crafting the system of international law under which the individual complaint mechanism for CEDAW could be created.<sup>112</sup>

The CEDAW Protocol begins by establishing that States Parties recognize the CEDAW Committee as having the ability to receive complaints and also to make decisions regarding these complaints.<sup>113</sup> Specifically, the CEDAW Protocol provides that complaints "may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party."<sup>114</sup> The CEDAW Protocol requires that complainants acting on behalf of another individual or group establish that they have received the consent of the person or group on whose behalf they claim to be acting. Nevertheless, a complainant is permitted to proceed if he is able to provide a sufficient explanation as to why he is acting without the appropriate consent.<sup>115</sup>

The justiciability requirements for those seeking to bring complaints under the CEDAW Protocol are similar to those contained in other instruments establishing individual complaint mechanisms. All appropriate domestic remedies regarding the subject matter of the complaint must have been exhausted prior to bringing a claim under the CEDAW Protocol

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108. Tang, *supra* note 107, at 69.

109. Optional Protocol to CEDAW, *supra* note 19.

110. CEDAW Summary, *supra* note 106.

111. CEDAW Summary, *supra* note 106.

112. Optional Protocol to CEDAW, *supra* note 19, at pmb1.; *see also* Tang, *supra* note 107, at 67 (discussing the gender violence protections attributed to other international human rights instruments but not to CEDAW).

113. Optional Protocol to CEDAW, *supra* note 19, art. 1.

114. Optional Protocol to CEDAW, *supra* note 19, art. 2.

115. Optional Protocol to CEDAW, *supra* note 19.

“unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.”<sup>116</sup> In addition, the same issue cannot have been brought before another international body, nor can it be pending before another international body at the time the complainant brings the CEDAW Protocol-based complaint.<sup>117</sup> Furthermore, the complaint cannot be “incompatible with the provisions of the Convention;”<sup>118</sup> it cannot be “manifestly ill-founded or not sufficiently substantiated;”<sup>119</sup> it cannot be “an abuse of the right to submit a communication;”<sup>120</sup> and the facts upon which the complaint is based cannot have occurred before the State Party was legally bound under the CEDAW Protocol, except in instances where the complained-of facts continued to occur after the State Party became legally bound under the CEDAW Protocol.<sup>121</sup>

The CEDAW Protocol allows the CEDAW Committee to request that the State Party at issue take interim measures to protect the complainant(s) from harm until the outcome of the complaint.<sup>122</sup> In a further step, the CEDAW Protocol explicitly requires that “[a] State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.”<sup>123</sup> Additionally, the CEDAW Protocol requires States Parties to provide their citizens with information on the Protocol, its terms, and the results of complaints brought before the CEDAW Committee that involve the State Party,<sup>124</sup> thus empowering individuals through the dissemination of information.

The CEDAW Protocol requires States Parties to give six months notice prior to renouncing and withdrawing from the Protocol.<sup>125</sup> During that six-month period, complaints submitted to the CEDAW Committee prior to the notification date may still be decided.<sup>126</sup>

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116. Optional Protocol to CEDAW, *supra* note 19, art. 4(1).

117. Optional Protocol to CEDAW, *supra* note 19, art. 4(2)(a).

118. Optional Protocol to CEDAW, *supra* note 19, art. 4(2)(b).

119. Optional Protocol to CEDAW, *supra* note 19, art. 4(2)(c).

120. Optional Protocol to CEDAW, *supra* note 19, art. 4(2)(d).

121. Optional Protocol to CEDAW, *supra* note 19, art. 4(2)(e).

122. Optional Protocol to CEDAW, *supra* note 19, art. 5.

123. Optional Protocol to CEDAW, *supra* note 19, art. 11.

124. Optional Protocol to CEDAW, *supra* note 19, art. 13.

125. Optional Protocol to CEDAW, *supra* note 19, art. 19(1).

126. Optional Protocol to CEDAW, *supra* note 19, art. 19(2).

### E. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted in 1984 and entered into effect in 1987.<sup>127</sup> Currently, there are 149 States Parties to the CAT, and sixty-five of these have also agreed to be bound by its individual complaint mechanism.<sup>128</sup> The CAT itself provides for an individual complaint mechanism under Article 22.<sup>129</sup> In line with the general trend, the preamble to the CAT reinforces the universality of human rights and dignities, especially those set forth in earlier international human rights law tenets.<sup>130</sup>

States Parties to the CAT recognize the ability of the CAT Committee to consider complaints from individuals, or made on behalf of individuals, who are subject to the jurisdiction of the state and who allege that they are victims of a violation of the CAT by the State Party.<sup>131</sup> In terms of justiciability, the CAT Committee cannot hear complaints that are made anonymously,<sup>132</sup> complaints which it finds “to be an abuse of the right of submission . . . or incompatible with the provisions of [the CAT],”<sup>133</sup> complaints where the complainant has not exhausted all relevant domestic remedies, unless “the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation;”<sup>134</sup> or where the subject matter of the complaint has been or is being heard by another international body.<sup>135</sup>

States Parties to the CAT are able to withdraw from the individual complaint mechanism at any time, although withdrawal does not prevent the CAT Committee from considering complaints that had been lodged at the time of the withdrawal.<sup>136</sup> Found in a separate section of the CAT, Article 13 requires that States Parties against whom an individual makes a complaint of torture or related activities provide protection for that

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127. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last visited July 23, 2011) [hereinafter CAT Summary].

128. CAT Summary, *supra* note 127.

129. *See* CAT, *supra* note 19, art. 22.

130. CAT, *supra* note 19, at pmbl.

131. CAT, *supra* note 19, art. 22(1).

132. CAT, *supra* note 19, art. 22(2).

133. CAT, *supra* note 19.

134. CAT, *supra* note 19, art. 22(4)(b).

135. CAT, *supra* note 19, art. 22(4)(a).

136. CAT, *supra* note 19, art. 22(8).

individual “against all ill-treatment or intimidation.”<sup>137</sup> These protections are also extended to witnesses in such claims.<sup>138</sup>

#### F. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) was adopted in 1990 and entered into force in 2003.<sup>139</sup> An individual complaint mechanism was created under its core terms.<sup>140</sup>

States Parties to the CMW individual complaint mechanism agree to allow the CMW Committee to hear complaints from or on behalf of individuals who are within the State Party’s jurisdiction and assert that they have been the victim of a CMW right-based violation by the State Party.<sup>141</sup> In order to be justiciable, a complaint brought before the CMW cannot be brought anonymously.<sup>142</sup> The complaint cannot, in the view of the CMW Committee, be “an abuse of the right of submission . . . or [] be incompatible with the provisions of the [CMW].”<sup>143</sup> Further grounds for non-justiciability include where the same subject matter has been brought or is before another international body,<sup>144</sup> and where all relevant domestic remedies have not been exhausted (although this requirement can be waived where the CMW Committee finds that “the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual”).<sup>145</sup>

The CMW provides that a State Party to the individual complaint mechanism can withdraw from it at any time, although a withdrawal will not terminate complaints pending against the State Party at the time of the withdrawal.<sup>146</sup>

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137. CAT, *supra* note 19, art. 13.

138. CAT, *supra* note 19, art. 13.

139. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en) (last visited July 23, 2011).

140. CMW, *supra* note 19, art. 77.

141. CMW, *supra* note 19, art. 77(1).

142. CMW, *supra* note 19, art. 77(2).

143. CMW, *supra* note 19, art. 77(2).

144. CMW, *supra* note 19, art. 77(3)(a).

145. CMW, *supra* note 19, art. 77(3)(b).

146. CMW, *supra* note 19, art. 77(8).

### G. Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006 and entered into effect in 2008.<sup>147</sup> The CRPD itself does not contemplate an individual complaint mechanism;<sup>148</sup> instead, the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD Protocol) was adopted as a separate instrument and also entered into effect in 2008.<sup>149</sup> Of the 106 States Parties to the CRPD,<sup>150</sup> 64 are currently parties to the individual complaint mechanism.<sup>151</sup>

There was widespread international questioning as to the need for the CRPD since essentially it addresses rights that have already been enshrined as human rights.<sup>152</sup> However, proponents successfully argued that these already existing rights were too broad to provide full protections to those with disabilities in particular.<sup>153</sup> It should be noted that even proponents of the CRPD assert that the terms of the CRPD are impossible for most States Parties to implement immediately given that its terms run the gamut of civil, political, economic, cultural, and social rights.<sup>154</sup> Thus, there is arguably a level of uncertainty regarding whether rights are best decided in a quasi-judicial setting that is similar to that of the ICESCR Protocol. Regardless of the stance one takes on this issue, however, it is difficult to deny that the CRPD and the CRPD Protocol represent a large step in advancing the individual within the sphere of international human rights law by allowing the individual to penetrate the international human rights law system in a meaningful way.<sup>155</sup>

States Parties to the CRPD Protocol agree to recognize the jurisdiction of the CRPD Committee to hear complaints brought against them by either individuals or groups of individuals who are within the State Party's

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147. *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV15&chapter=4&lang=en) (last visited Nov. 8, 2011) [hereinafter CRPD Summary].

148. *See generally* Convention on the Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

149. Optional Protocol to CRPD, *supra* note 19; *see also* *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en) (last visited Nov. 8, 2011) [hereinafter Optional Protocol to CRPD Summary].

150. CRPD Summary, *supra* note 147.

151. Optional Protocol to CRPD Summary, *supra* note 149.

152. Don MacKay, *The United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 323, 323 (2007).

153. *Id.* at 326-28.

154. *Id.* at 330.

155. *See generally id.*

jurisdiction and who allege a violation of the CRPD.<sup>156</sup> The requirements for justiciability of a complaint are that the complaint not be made anonymously;<sup>157</sup> that the complaint is not “an abuse of the right of submission” and is not “incompatible” with the CRPD;<sup>158</sup> that the complaint has not been examined or is not under present examination by another international body;<sup>159</sup> that all domestic remedies have been exhausted unless the exhaustion of these remedies is unreasonable or not likely to bring about meaningful relief to the complainant;<sup>160</sup> that the complaint is not “manifestly ill-founded or not sufficiently substantiated;”<sup>161</sup> and that the events involved in the complaint happened after the date on which the State Party became bound by the CRPD Protocol, unless the events complained of continued to occur after the date on which the State Party became bound by the CRPD Protocol.<sup>162</sup>

Following the trend in individual complaint mechanism creation, the CRPD Protocol allows the CRPD Committee to request that a State Party implement interim measures for the protection of the complainant prior to the CRPD’s final decision in a complaint.<sup>163</sup> States Parties to the CRPD Protocol are able to denounce the CRPD Protocol and withdraw from it, although the renunciation will not become effective for a year.<sup>164</sup>

### III. CONVENTION COMPARISONS

It is evident from Part II that there are many procedural similarities among the international human rights law treaties that contain individual complaint mechanisms. Indeed, there are telling similarities for the individual beyond the fact that the individual has the ability to bring a complaint before the relevant committee.

Generally, the same standing requirements apply across the international human rights treaties, namely that the individual must be under the jurisdiction of a State Party to bring a complaint and that the violation alleged must be of a right contained in the appropriate treaty.<sup>165</sup> This requirement places limits on the individual’s ability to complain and

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156. Optional Protocol to CRPD, *supra* note 19, art. 1.

157. Optional Protocol to CRPD, *supra* note 19, art. 2(a).

158. Optional Protocol to CRPD, *supra* note 19, art. 2(b).

159. Optional Protocol to CRPD, *supra* note 19, art. 2(c).

160. Optional Protocol to CRPD, *supra* note 19, art. 2(d).

161. Optional Protocol to CRPD, *supra* note 19, art. 2(e).

162. Optional Protocol to CRPD, *supra* note 19, art. 2(f).

163. Optional Protocol to CRPD, *supra* note 19, art. 4.

164. Optional Protocol to CRPD, *supra* note 19, art. 16.

165. *See supra* Part II.A-G.

requires that the State Party itself demarcate who constitutes a person within its jurisdiction. Indeed, this issue has caused much debate at the international level in those situations where an individual, by asserting a violation, has triggered a massive juridical and theoretical undertaking to determine what it means to be within a state's jurisdiction.<sup>166</sup>

There is a split in the international human rights law treaties between those that only allow individuals to bring complaints,<sup>167</sup> those that allow third parties to complain on behalf of individuals provided that certain circumstances are met,<sup>168</sup> and those that allow individuals, groups of individuals, or groups acting on behalf of groups or individuals to bring complaints.<sup>169</sup> In part, this procedural break could be a result of differences in the rights protected by each treaty: some human rights violations are essentially individual in nature, whereas others, such as racial discrimination, can be perpetrated against a group as well as against one individual. Regardless of these procedural differences, individual complaint mechanisms serve to reinforce the agency of the individual and the extent to which the individual, whether as a single claimant or as part of a group of individual claimants, has accessed international legal remedies. Additionally, those conventions which do require consent for agency representation reiterate the importance of the individual by seeking to ensure that complaints are not brought in a manner that could be regarded as frivolous or otherwise detracting from the seriousness of the allegations raised.

Much the same can be said for the justiciability requirements that are standard across most of the international human rights law treaties discussed above.<sup>170</sup> In several instances, international human rights law treaties contain fewer bars to justiciability,<sup>171</sup> which increases the ability of individuals to assert their rights. Across the instruments, the justiciability provisions which allow the exhaustion of relevant domestic remedies requirement to be waived where a strict application of the requirement would in essence bar the individual from bringing a complaint are protective measures for the complainant.<sup>172</sup> These provisions are crucial to

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166. See Ben-Naftali, *supra* note 37.

167. See *supra* Part II.A (explaining that the general standing requirement under the ICCPR is centered on an individual); *supra* Part II.F.

168. See *supra* Part II.A (explaining a recent spike in third parties given standing to assert claims when the injured party has been proven to be unavailable through no fault of his own); *supra* Part II.B, II.E.

169. See *supra* Part II.C-D, II.G.

170. See *supra* Part II.

171. See *supra* Part II.C, II.F.

172. See *supra* Part II.

enabling the individual to assert his rights at the international level when that individual's ability to assert his rights domestically is thwarted by the State Party itself.

At the same time, the common treaty provisions which bar an individual from bringing his claim before more than one international rights body at a time serve a dual purpose.<sup>173</sup> As a purely practical matter, these provisions ensure that multiple cases will not be filed with multiple bodies, thus resulting in an uneven or confused outcome. The second consideration is discussed at greater length in Part IV below. By allowing an individual to bring his claim before only one international body, the combined international human rights treaties require the individual to select a single facet of his harm or identity under which to raise his claim, rather than allowing him to bring a holistic complaint that recognizes the entirety of his identity and the harms that he has suffered.

Several international human rights law treaties contain provisions which either require States Parties to protect complainants and witnesses when they make assertions of wrongdoing at the international level,<sup>174</sup> or allow the appropriate treaty committee to request that the State Party take interim measures to protect the complainant until the complaint is fully decided by that treaty committee.<sup>175</sup> Perhaps the importance of these provisions to the individual is obvious. At the same time, these provisions are essential to the overall availability of the international human rights law system to individuals because they recognize the unique status of individuals as potential targets of state or state-sponsored retaliation or repression, whereas the same is not true in state-to-state complaints in other legal arenas. By allowing for these protections, the international human rights law treaties attempt to ensure some level of equality between states and individuals in terms of potential harms as a result of a treaty-based complaint.<sup>176</sup>

The common provisions of the international human rights treaties that relate to the ability of a State Party to renounce and withdraw from the

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173. *See supra* Part II.

174. *See supra* Part II.B, II.D, II.G.

175. *See supra* Part II.A-B, II.D-E.

176. Of course, to think that these provisions would automatically provide protection to those individuals who come forward with complaints would be naïve, especially in situations where the state is accused of gross human rights violations such as extra-judicial killings or disappearances. However, as a matter of drafting, these provisions do give an important window into the place of the individual as protected within the international human rights law system. These provisions also demonstrate the importance of the individual's ability to assert his rights and to penetrate the international human rights law system.

individual complaint mechanism,<sup>177</sup> and the effect that this has on pending individual complaints,<sup>178</sup> is perhaps less obviously related to the penetration of the individual into the international human rights law system. Clearly, the terms of these provisions reflect the continued primacy of states in international law. They also reflect the importance attached to the international obligations undertaken by states in the international human rights realm in that they do not allow State Parties to suddenly withdraw from the jurisdiction of the relevant committee and also do not allow State Parties to use withdrawal as a way to stop the investigation of a complaint that has already been filed. In addition, they reflect the importance of the relevant treaty committee's ability to consider individual complaints even where the State Party seeks to shield itself from such considerations.

The more recent human rights treaties establishing individual complaint mechanisms tend to allow their respective committees to examine information from UN agencies and entities deemed relevant, as well as from other human rights organizations and even regional entities.<sup>179</sup> This further contributes to the fragmentation of the individual discussed in Part IV because it focuses the treaty committee's attention on a particular facet of an individual's identity and leads the committee to disregard other facets that may be relevant to the human rights violation.

All of the international human rights law treaties that have individual complaint mechanisms share a common weakness in that the decisions of their respective committees cannot reliably be enforced at the domestic level.<sup>180</sup> As such, it is widely acknowledged that the punitive and coercive abilities of these treaty committees are limited to shaming States Parties by announcing their culpability for human rights violations.<sup>181</sup> Some states do have strong track records of implementing at least a good portion of treaty committee findings at the domestic level, while others are generally apathetic to the incorporation of these findings at the state level, often citing issues of sovereignty.<sup>182</sup> Dismissing the punitive weaknesses of the individual complaint mechanism structure disregards the importance of the structure to the place of the individual within the international system. The individual's ability to penetrate the international system lies not in his ability to receive compensation—monetary or non-monetary—from the State Party at the treaty committee's request, but rather in the ability of the

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177. *See supra* Part II.

178. *See supra* Part II.

179. *See, e.g., supra* Part II.B.

180. *See supra* Part II.

181. *See supra* Part II.

182. *See* Helfer, *supra* note 52, at 1894.

individual to bring a state to account for its violations before an international body and an international audience. In this sense, the ability of the individual to complain against a state and to receive a finding from a treaty committee that is critical of the state and that acknowledges to the world the violations committed by the state is in itself a unique remedy.

On a more theoretical level, it has been argued that the rise of international human rights law treaties which target certain issues or groups creates a “pluralization” within international human rights law, whereby the particular requirements of a group defined by a certain trait or standing within the community—for example those with disabilities—are given special protections beyond the existing human rights conventions.<sup>183</sup> Under this model, there is an essential clash between human rights per se, which are defined as centering on “sameness and unity,”<sup>184</sup> and more specific, group-oriented conventions with human rights law, which can be viewed as centering on the “difference and pluralism” of the groups being protected.<sup>185</sup> From this supposition, it is then surmised that human rights themselves may also be used as instruments to examine the concept of identity as well as dignity within groups rather than within humanity itself.<sup>186</sup> This is important to the comparison of the international human rights law treaties with individual complaint mechanisms because it applies as much to them and to the jurisprudence which they produce as to the overall international human rights treaty system.

#### IV. ANALYSIS OF INDIVIDUAL PENETRATION OF INTERNATIONAL HUMAN RIGHTS LAW

The idea of individual human rights, particularly as an outgrowth of the human rights violations that savaged the world during World War II, has become an anchor of the international legal system.<sup>187</sup> As a field, international human rights law is centered on asserting the rights of all mankind and, subsequently, on ensuring that states guarantee and respect these rights.<sup>188</sup> A primary way in which the system holds states accountable has been to grant individuals stature within the international community to

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183. Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 495 (2008).

184. *Id.* at 496.

185. *Id.*

186. *Id.*

187. Cole, *supra* note 21, at 1912 (“Postwar world culture endows individuals with tremendous amounts of moral worth and agency . . . . It also invests them with universal human rights, admonishes states to respect and protect those rights, and, when necessary, authorizes individuals to defend their rights against state infringement.”).

188. *See* Helfer, *supra* note 52, at 1842.

charge their governments with human rights violations. Thus, unlike other regimes of international law, there is an automatic place for the individual within the international human rights law system.<sup>189</sup>

At least theoretically, the individual complaint mechanisms used in international human rights law allow individuals to bring their claims to a body that is regarded as less biased than domestic courts.<sup>190</sup> These bodies also allow individuals whose voices are frequently not given attention or value at the domestic level to have greater power and influence in asserting their rights and claiming personal agency over the acts committed against them.<sup>191</sup> The growth of the individual complaint mechanism within well-accepted international human rights law treaties has resulted in the placement of the individual in a different sphere than has been traditionally accepted as part of the international system;<sup>192</sup> and, consequently, has empowered a new set of international actors to gain a place of primacy.

As an international actor in the human rights system, the individual is able to express his voice directly without the need to seek representation from a state or non-governmental organization. Specifically in this context, the individual has done more than equal traditional international actors; he has gained a place of primacy. Indeed, by definition, the individual is at the center of the individual complaint mechanism. Accordingly, a determination of the violations done to the individual takes precedence over other considerations which often characterize international legal adjudications, such as the wishes of the states involved.

Some authors have studied the international human rights law system and argued that it is becoming “overlegalized,” creating a situation in which States Parties are under pressure to sign treaties but have difficulty fulfilling the legal responsibilities therein.<sup>193</sup> This is particularly true where the treaty has been operative for a number of years and has been subject to interpretation by an oversight body.<sup>194</sup> Although this argument has great merit in some respects, it tends to ignore, or at least undervalue, the place of the individual in the international human rights law system. It does this by placing the onus on the applicable oversight body as the instrument of change and treaty construction over time, and neglecting the impact of

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189. *Id.* (describing the right of individuals under human rights law to enforce international legal commitments through recourse to international courts and quasi-judicial bodies).

190. *See supra* Part I.

191. *See* Bijnsdorp, *supra* note 38, at 337.

192. *See* Tang, *supra* note 107, at 67-68.

193. *See generally* Helfer, *supra* note 52; *id.* at 1854-55.

194. *Id.* at 1854-55.

individuals on both the relevant State Party and the international system as a whole.

Some have asserted that the creation of new international human rights law treaties, and associated individual complaint mechanisms, works to reinforce the rights granted to individuals by fostering a series of interlocking understandings of international human rights law.<sup>195</sup> In the same vein, it has been asserted that these systems work together and indeed must do so given the nature of the rights that are protected.<sup>196</sup> However, this argument, while attractive, tends to undermine the idea of the universality of individual human rights and norms that is associated with such seminal documents as the ICCPR.<sup>197</sup> Rather than creating a system in which the individual, though given a prominent role within the human rights system, is potentially subject to the jurisdiction of multiple treaties and their oversight bodies, perhaps the international community ought to amend the foundational documents of international human rights law, such as the ICCPR or the ICESCR, so that they cover a wider—or at least more in-depth—spectrum of individual rights and protections.

As has been noted, scholars have criticized the pluralization of international human rights law by treaties which create various communities or violations.<sup>198</sup> This is an important observation and leads one to question the point at which the inviolable rights germane to all of mankind as envisioned by original human rights treaties ceases to be uniform and begins to fragment into sub-classifications of various human rights-based identities.<sup>199</sup>

The rise of the individual as more than simply a passive subject and holder of rights, but rather as an entity that is able to assert—and thereby make a claim to—these rights demonstrates an evolution in the dynamics of the actors involved in the international rights law system. However, this evolution has been carefully tailored by the international human rights law system, as is evidenced by the justiciability and standing requirements which are nearly universal to the individual complaint mechanisms discussed above. A careful tailor can craft something that is as deceptive from the outside as it is from the inside. Similarly, a careful crafter of any

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195. See, e.g., Bijnsdorp, *supra* note 38, at 332 (describing the positive, stimulating influence which bodies dealing with the same issue of discrimination against women have on one another).

196. Bijnsdorp, *supra* note 38, at 330-31.

197. For an argument specifically discussing the overlaps in individual complaint mechanism bodies, see Dennis & Stewart, *supra* note 57, at 501-04.

198. See Mégret, *supra* note 183 (analyzing the pluralization of human rights under the CRPD).

199. *Id.*

international instrument can create a document that is at once expansive at first glance yet restrictive in terms of its actual implementation procedure.

To the outside, individual complaint mechanisms are a state-centered way to ensure that States Parties are accountable for the obligations that they undertook as part of the international human rights law system. On the inside, however, the mechanism is a powerful tool for the individual—whether directly or through representatives where necessary—to actively assert and claim his human rights. It cannot be denied that the punitive aspects of individual complaint mechanisms in the international human rights law context are weak and most often rely on the power of shame and international condemnation. This does not, however, defeat the importance of the ability of the individual to bring these cases in the first place and to at least generate some form of discussion on these topics. The importance of this individual role is perhaps best evidenced by the fact that, regardless of the treaty, states are unwilling to bring human rights law based complaints against other states.<sup>200</sup> Thus, without the individual complaint mechanism, the horrors of state enforced disappearances and extra-judicial killings that have occurred under a variety of dictatorships would not be as well known to the world. It is only through this knowledge that the international community is forced to see many of the unpleasant truths that occur within it and to understand the impacts of these human rights violations on a very personal and intimate level that state-to-state dialogue does not generate.

At the same time that individual infiltration of the international human rights law system is beneficial, it creates a danger of fragmentation. Here, the threat lies in the plethora of international human rights law treaty committees to which an individual might complain. Much as pluralization in the group context has a dangerous element to it, fragmentation of essential human rights and dignities into many international human rights law treaties with many venues for individuals to complain does not create a greater unity of understanding or guarantee of human rights. Nor does it allow the individual to fully assert and claim all of the human rights and dignities to which he is entitled.

For example, a woman might also be disabled, be part of a national minority group that is barred from voting, and be tortured by the state in which she lives. Many of her essential human rights have been violated, but how is she to know which individual complaint mechanism to use? She qualifies under several different international human rights treaties and

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200. Laboni Amena Hoq, *The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, 32 COLUM. HUM. RTS. L. REV. 677, 685 (2001).

identifying her by only one of her traits or allowing her to assert one set of her rights denies her both individual identity and agency over the human rights that the international community recognizes are vested in her. By asking her to choose which aspects of her identity she wishes to express and which of her human rights she wishes to assert, the international human rights law system is in fact denying her the active ability to assert herself, her full identity and her human rights, and is, in effect, reducing the benefits that it has created through the establishment of individual complaint mechanisms as accepted tools of international human rights law.

Essentially, this example demonstrates that the more specific international human rights treaties perpetuate the very harm they claim to remedy: the broad human rights treaties' failure to recognize the full identity of the individual. The flaw here, however, is in a fragmentation of identity rather than an overly broad or non-specific notion of rights protection. Ultimately, this diminishes the gains made by individuals in achieving access to the international human rights system by preventing them from enforcing the totality of the rights granted them by that system.

### CONCLUSION

Human rights are at once a concern of all mankind and intensely personal rights that touch the core of individuality. They are in need of protection from violation by states and yet also are intangible entities that are individual in nature. This sense of duality permeates the key international human rights law treaties, which provide or will provide a place for the individual to assert and claim his human rights on the international stage.

This article established the fundamental background of international human rights law, discussed the provisions of various individual complaint mechanisms contained in key international human rights law treaties, and then compared these mechanisms in order to highlight their importance. This discussion demonstrated the many points at which individuals are able to access international human rights law through individual complaints mechanisms.

Next, this article argued that, while the prominence of the individual is crucial to assert and claim human rights, the plethora of international human rights law treaties threatens to fragment individual identity. In the process, several arguments and theories regarding the place of the individual in international human rights law were evaluated, with the benefits and pitfalls of these arguments analyzed.

Rather than allow an ever more specialized international human rights treaty system to force the fragmentation of individual identity, this article

suggests that it is better to attend to the full array of individual identities that could be protected and asserted through already existing international human rights treaties. In this way, the international human rights law system could stave off the threat of a fragmented relationship to individuals by acknowledging all elements of the individual's identity.