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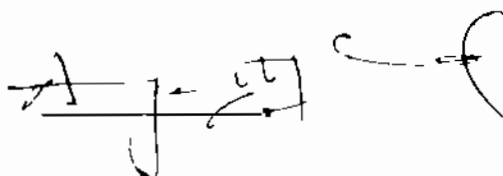
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Name of Student. Syed Muhammad Farrukh Bukhari
Registration No 132-FSL/LLMHRU/F13

Accepted by the Faculty of Shariah & Law
International Islamic University Islamabad

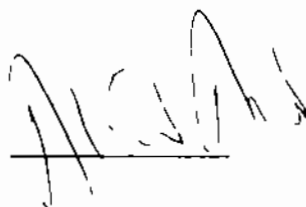
In the partial fulfilment of the requirements for the degree of
MASTER OF LAWS (LL M)
with specialization in Human Rights Law

Viva Voce Committee

Syed Amjad Mahmood
Assistant Professor,
Department of Law
Faculty of Shariah & Law, IIUI
(Supervisor)



Mr Afzal Ahunad
Assistant Professor,
Chairman Department of Law
Faculty of Shariah & Law, IIUI
(Internal Examiner)



Mr Muhammad Ramzan
Assistant Public Prosecutor
Rawalpindi
(External Examiner)



Acc # TK17059

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- (2) International - ...

DECLARATION

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

STATEMENT OF UNDERSTANDING

I, Syed Muhammad Farrukh Bukhari, bearing the University Registration Number 132-FSL/LLMHRL/F13, declare in the name of Allah that my thesis entitled,

“The Role and Enforcement of the Individual Complaint Mechanism: A hard case for International Human Rights Law”

Submitted to the Department of Law, Faculty of Shariah and Law, is a genuine work of mine originally conceived and written down by me under the Supervision of Honorable, Syed Amjad Mahmood (Assistant Professor Department of Law, Faculty of Shariah and Law), by Allah’s will and approbation

I do hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the Hereafter

Syed Muhammad Farrukh Bukhari

LL.M Human Rights Law

Reg. No. 132-FSL/LLMHRL/F13

Signature:

DEDICATION

To my parents for always loving and supporting me I have no words to express my gratitude, have no sentences to pay you the respect and honour which you deserve How much I try but, I could never ever return you the love and care you have showered upon me throughout my life

O Allah! Please grant my parents strength, health and happiness Please make me a light in their life, make me a source of laughter and smile, just as they have been for me Guide them to the straight path, and keep them away from worries and grief

O Allah! Have mercy upon them as they had mercy upon me when I was small Ameen

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All praises for the Almighty, the sustainer of the worlds, the merciful, and the compassionate! May His everlasting blessings and peace be upon Muhammad, the last of His Messengers!

I am deeply indebted to my Supervisor, Syed Amjad Mahmood, for his exemplary guidance and help at every step of my work. He has always been there to provide me with the professional counselling towards the completion of this work. I could not have completed this work without his support and kind directions.

I am also thankful to my parents for providing me an opportunity to study Law in this august University. I always said to my fellows and friends that International Islamic University has the same place in the eyes of the people of Azad Kashmir like the people of Pakistan think of Oxford and Cambridge. It was an amazing time being taught by the most highly qualified and skilled professionals of law at IIUI.

I am also grateful to my teachers at Azad Kashmir University especially Sir Hasanat Gillani and Sir Muddasir Fida Gardezi for motivating me to do LL M which steered me towards the threshold of this noble University.

May Allah Almighty bless them all with His eternal blessings! Ameen

LIST OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1965
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
CRC	International Convention on the Rights of Child, 1989
CRPD	Convention on the Rights of Persons with Disabilities, 2006
ECHR	European Convention on Human Rights, 1950
ECOSOC	Economic and Social Council of the United Nations
EU	European Union
GSP	Generalized System of Preference
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic Social and Cultural Rights, 1966
ICM	Individual Complaint Mechanism
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance, 2006

IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILO	International Labour Organization
IMF	International Monetary Fund
LCCI	Lahore Chamber of Commerce and Industry
LON	League of Nations
O-P	Optional Protocol
UN	United Nations
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
VCLT	Vienna Convention on the Law of Treaties, 1969

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ABSTRACT

This thesis is related to the Individual Complaint Mechanism (ICM), a very important procedure and tool available in most of the Human Rights Instruments. This procedure aims to give an option to the individuals of those states which are parties to any of the UN Human Rights Treaties, to file a petition/complaint before a Committee (established by the respective treaty) of International Jurists in case their treaty rights are violated by their states.

The study highlights that the states frequently reserve the substantive as well as procedural provisions of the treaties. Reservations over procedural provisions such as one dealing with ICM under different treaties block one's access to the Committee thereby making it impossible for the individuals to benefit from the treaties. This work critically analyses the status of such reservations with respect to Human Rights Treaties.

This work also does a comparative study of different Human Rights Enforcement Procedures available under UN Human Rights system and provides an insight into the significance of Individual Complaint Mechanism and compares it with the rest of the Enforcement Procedures of the United Nations.

A special Chapter is dedicated to highlight the relationship of international law and municipal law with reference to implementation of International Human Rights Law in National or Domestic jurisdictions, its limitations, and the problems and impediments in the way of UN Human Rights Enforcement Mechanisms particularly ICM, such as the notion of so-called state sovereignty, principle of State Consent etc., because of which the rights which are incorporated in several of the UN Human Rights Instruments remain unfulfilled promises for a large number of people throughout the world.

CHAPTER ONE

THE EVOLUTION OF INDIVIDUAL COMPLAINT MECHANISM IN INTERNATIONAL HUMAN RIGHTS LAW

Introduction:

International Human Rights Law has significantly developed after the creation of the United Nations. United Nations not only developed several human rights conventions and covenants but also provided for the “means and tools” to realize those rights. Amongst them, one of the most important procedures is Individual Complaint Mechanism (ICM). This procedure gives individuals right to file petitions before United Nation (UN) treaty bodies if their treaty rights are violated. This chapter throws light on the development and incorporation of ICM in International Human Rights Law as well as its significance in United Nations Human Rights Enforcement System. Furthermore, the status of Pakistan with respect to Individual Complaint related treaties is also discussed.

1. The Human Rights Revolution:

It took International Human Rights Law (IHRL) too long to take the shape as we see it today. IHRL, (the law which has become the focus of the modern world affairs) was not as such prior to the creation of the United Nations Organization. In the present day world IHRL has expanded to such an extent that it has found its way even into the internal affairs of the states in a way that it requires the states of the world to observe its principles as “standards” to human respect and dignity. It would not be an

exaggeration if I say that adherence to IHRL has now become the symbol of being more civilized and cultured among the nations of the world

1.1 Effects of the First World War on the Development of Human Rights

The development of modern human rights law and its enforcement mechanisms find their roots in the post-World War II era, but prior to that various efforts had been made by different states and organizations in that direction. Particularly the League of Nations (LON) which was made in response to the massive devastations and destructions of First World War in order to work with the aim that no such horrific incident could ever take place again.¹

The League of Nations was founded on January 10, 1920 at the end of World War I.² It was an intergovernmental organization which provided the basis for human rights protection at international level. It strived too hard against child labour, abolition of slavery and the protection of the rights of minorities. This was a unique step, first of its nature, where the sovereign states were required to respect their international obligations in respect of minorities, slaves, children and different segments of vulnerable *individuals*.

Particularly League of Nations took substantive steps for the protection of minorities because at the end of World War I, when the map of the Europe was redrawn,

¹ Kitty Arambulo, "Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an ideal become reality?" *Journal of International Law and Policy*, 111 (1996)

² "Milestones 1914-1920" *The League of Nations, 1920 Milestones- Office of the Historians*, <https://history.state.gov/milestones/1914-1920/league>, Last accessed April 10, 2015

minorities suffered badly To make things right, League established the most sophisticated system for the protection of minorities

Several General and Special treaties were concluded and at occasions unilateral declarations were made for the protection of minorities for instance in Convention relating to Upper Silesia³ and in the Convention regarding the territory of Memel⁴, different countries including Albania, Estonia, Finland accepted their responsibility to protect rights of minorities

Later on League declared itself to be the guarantor of all the promises made in the treaties concluded under its auspices A “guarantee clause” was inserted in almost all such treaties giving reference to the League of Nations as guarantor of the rights mentioned thereunder. ⁵

The text of the guarantee clauses in several such treaties was in the following words

“ agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, linguistic or religious minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations ”⁶

³ Adopted on May 15, 1922

⁴ Adopted on May 8, 1924

⁵ Peter Hilpold, “The League of Nations and the Protection of minorities – Rediscovering a Great Experiment” *17 Max Planck Yearbook of United Nations Law*, (2013) 87, <http://ssrn.com/abstract=2305920>, Last accessed August 5, 2013

⁶ Text of the relevant treaties which bound the respective states in the same manner can be found at “Publications of the League of Nations C L 110 1927 I Annex”

Consequently different tribunals were established to make sure the compliance of the relevant treaties concluded under the auspices of the League. In *Steiner and Gross v. The Polish State*⁷ before the Upper Silesian Arbitral Tribunal, 1928, the tribunal held that individuals had the right to bring their complaints against their own states before the tribunals for the purposes of adjudication⁸

This was definitely a major breakthrough in the development of International Human Rights Law because an international organization had assumed the role for the supervision of human rights which was until then considered to be the sole function of sovereign states. Moreover a precedent, first of its kind, was set at international level that wherever the minorities happened to be, the government of those states were made bound to deal with them in accordance with certain principles⁹. The protected rights included right to freedom of religion, use of language, maintenance of religious and educational establishments, *a complaint procedure was also instituted, enabling individuals to invoke personal rights in any international forum against the state of which they were nationals*¹⁰

Unfortunately League of Nations could not succeed substantially in its aims and Second World War broke out, causing massive violations of human rights across the globe

⁷ 4 ILR 291

⁸ Roland Portmann, *Legal personality in International Law* (New York: Cambridge University Press, 2010), 73

⁹ Howard B. Calderwood, "Jewish Memory and the Human Right to Petition 1933-1953" *The American Political Science Review* 27, no. 2 (1993): 250

¹⁰ Nihal Jayawickrama, *The Judicial Application of Human Rights Law* (UK, Cambridge University Press, 2000), 130

1.2 Effects of the Second World War on the Development of Human Rights/ Acceptance of “Individuals” as Subjects at International Level

Following the atrocities of World War II, the world has witnessed unparalleled development in International Human rights Law. New legal regimes have emerged that have the *protection of individual's* principle at their core and aim to limit the traditionally exclusive jurisdiction of states over their citizens.¹¹ Personal rights did not remain under the sole and exclusive jurisdiction of the *states* under legal theory and practice. These rights had been recognized and were subject to various actions internationally.¹² These developments happened at the same time at international, regional as well as national level.¹³ Specifically two events completely changed the status of individuals at international level i.e. creation of war tribunals to try war criminals at Nuremburg and Tokyo and making of efforts to stop the recurrence of such atrocities by devising mechanisms for the protection and safeguarding of humanity. The tribunals indicated that international law did not only deal with the actions of states with states rather also imposed obligations on *states* with respect to individuals.¹⁴

1.3 The Doctrine of State Sovereignty

The major obstacle to the development of international law of human rights and specifically its implementation and enforcement was the doctrine of “state sovereignty” as recognized by customary international law. Consequently the states had full and exclusive authority over their subjects. Moreover it was also not possible for any other

¹¹ Christian Tomuschat, *Human Rights Between Idealism and Realism* (New York: Oxford University Press, 2008), 22

¹² David P. Forsythe, “The UN and Human Rights at Fifty: An Incremental but Incomplete Revolution” *Global Governance* 1, no. 3, (1995): 297-318

¹³ Ian Brownlie, *Principles of Public International Law* (UK: Oxford University Press, 1992) 564

¹⁴ Enabulele A. & Bazuaye B, *Teachings on basic topics in Public International Law* (Nigeria: AMBK Press, 2014), 196

state to intervene in the domestic affairs of another state therefore every state was free to deal with its nationals as it liked. There were no restrictions whatsoever on the authority of states over its nationals. In the context of this doctrine it was almost inconceivable that international law could vest an individual with any rights exercisable against his own state¹⁵

This is so because international law system is based on consent. States are legally bound if they agree to be bound by some commitment and even if they say that we are legally bound for something there is still question of enforcement mechanisms. How do we punish for the violations of international law particularly human rights norms? At the end of the day, again, states have to implement their international commitments and obligations in accordance with international human rights standards and principles.

To make states respect and abide by their international obligations it was necessary to establish a set of superior standards to which all national laws must conform¹⁶. That is why it is quite true to state that international human rights law in its modern shape is purposely designed to limit the state sovereignty as it interferes with states domestic activities¹⁷.

¹⁵ Nihal Jayawickrama, *op cit* p 17

¹⁶ John P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers Inc., 1984), 301

¹⁷ Christine Min Wotipka and Kiyoteru Tsutsui, "Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001" *Sociological Forum* 23, No. 4 (Wiley 2008), <http://www.jstor.org/stable/40210388> (Last accessed February 23, 2016)

1.4 Erosion of the Doctrine of State Sovereignty and Incorporation of Human Rights Norms

The doctrine of state sovereignty, in so far as it related to the treatment by a state of its own nationals, started being eroded by the incorporation of certain human rights norms in international law. It was a slow process which began in the early nineteenth century.¹⁸ By the Treaty of Paris 1814, the British and French governments agreed to co-operate to suppress the traffic in slaves. In 1859, a Swiss national Henry Dunant (founder of International Committee of Red Cross) himself witnessed the atrocities committed at the battle of Solferino in northern Italy between the armies of France and Austria, established International Committee for Aid to the Wounded (later renamed as International Committee of the Red Cross). Due to his efforts, a diplomatic conference was convened in Geneva in 1864 at which sixteen European states adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (also known as First Geneva Convention).

These incidents indicate that efforts not only from countries but also from individuals were on their way to mobilize the conscience of world community to take steps for the protection of human rights in times of peace as well as in times of war.

Most importantly after the end of First World War as I earlier mentioned when the map of Europe was redrawn as part of the peace settlement of 1919 of which League of Nations was made a guarantor for the protection of rights of minorities living within the newly carved boundaries, the most important step for the protection of rights of

¹⁸ Ibid p 18

individuals had been taken. Particularly in September 25, 1926 a convention was adopted by the name of "Convention to Suppress the Slave Trade and Slavery" by the LON for the mere purpose of suppressing slavery and slave related practices. Consequently the states were required not to indulge in these evil practices relating to slave trade.

Prior to this International Labour Organization¹⁹ (ILO) was already formed in 1919 which adopted a number of Conventions such as Forced Labour Convention, 1930, Abolition of Forced Labour Convention, 1957 etc for the betterment of "international labours" which helped a lot resolving labor related issues.

These were some of the areas in which the doctrine of state sovereignty had begun to erode and international community started at least to express its concern at the government's treatment of its own citizens. But after the devastating atrocities of Second World War by those in power of their own citizens, it became evident how inadequate was the international law on this issue.²⁰

International law still respects sovereignty but it is the people's sovereignty rather than the sovereign's sovereignty. Under the older notions, International human rights were subject to domestic sovereignty but now no serious scholar will support the argument that human rights conditions are essentially within the domestic jurisdiction of any state and hence immune from international law. International law still protects sovereignty but the object of protection is to strengthen the continuing capacity of a

¹⁹ ILO, formed in 1919 is now an agency of United Nations which strive for maintaining the standards of "Labors" world-wide.

²⁰ Nihal Jayawickrama, op cit p 20

population freely to express and effect choices about the identities and policies of its governors²¹ In the words of Farrokh Jhabvala,²² the term “human rights” basically describes and relates to the relationship between a State or its government and its own people, a relationship that is second to none in being ‘domestic’²³

Later on when United Nations was created, it worked exhaustively to frame a set of Conventions/Covenants to engage states progressively to work for better human rights conditions through co-operation, and history shows that states at San Francisco had eventually started making their ways to get into the affairs of Sovereign States in the name of human rights

1.5 Enforcement and International Legal Regime

Enforcement of International Human Rights Law has two aspects and dimensions Basically it is categorized into categories and subcategories at different forums and levels UN is also an active player for the enforcement of human rights through its Charter based and Treaty based mechanisms whereas different regions of the world have also developed their own system of protection and enforcement of human rights such as European and Inter-American Human Rights Systems

1.5.1 Creation of the United Nations

In 1945, representatives of fifty countries met in San Francisco to draw up the United Nations Charter The Charter was signed on June 26, 1945 by the representatives

²¹ W M Riesman, “Sovereignty and Human Rights in Contemporary International Law” *The American Journal of International Law*, (1990) 869, http://archives.cerium.ca/img/pdf/reisman_1990.pdf, Last accessed July 25, 2014

²² Professor of International Relations Florida International University, Miami, United States

²³ Farrokh Jhabvala, “The Drafting of the Human Rights Provisions of the UN Charter” *Netherlands International Law Review*, (1997) 7

of the fifty countries. The United Nations officially came into existence on October 1945.²⁴ There are as many as seven different places referring to human rights in the Charter but none of them is specific upon the implementation or enforcement of human rights. These are as follows:

- Firstly the Preamble describes the purposes of U.N in the words “we the peoples of the United Nations reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women”
- Secondly it provides that it is one of the purposes of the UN “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”²⁵
- Thirdly mentioning the responsibility of the General Assembly to initiate studies and make recommendations for the purpose of “promoting international co-operation in the economic, social, cultural, education and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”²⁶
- Fourthly, “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”

²⁴ “History of the United Nations” *United Nations*, <http://www.un.org/en/aboutun/history/>. Last accessed January 20, 2015

²⁵ Article 1 of UN Charter

²⁶ Ibid Article 13(1) (b)

Article 55 charters the U N to promote “universal respect for, and observation of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”²⁷

- Article 56 further strengthens the above mentioned provision under which “all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55”²⁸

These provisions were of paramount importance but the controversy was that whether these provisions created binding obligation on the member states to give their subjects access to the UN in case of violation of these provisions. It appears that Charter’s clauses only contain a pious injunction to co-operate and do not impose any solid obligations which could make states answerable before it. Furthermore what are those rights mentioned under the provisions of the UN Charter as UN Charter does not speak of any right in a normative way. It just points out that human rights are to be respected and protected but there is deep silence as to which human rights these provisions refer to. This paved the way for the adoption of the Universal Declaration of Human Rights, 1948. But as apparent from the title, it was a “declaration”, hence had only aspirational value. Therefore UN later on adopted International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) so as to make morally motivated provisions of Universal Declaration legally binding by incorporating them into ICCPR and ICESCR. These

²⁷ Ibid Article 55 (c)

²⁸ Ibid Article 56

covenants made states parties to them answerable at least before the respective Committees established under the same

1.5.2 Codification of the Newly Recognized Enforceable Human Rights

This was the next phase of the development of the modern human rights conventions, which was to make them enforceable. This happened both at regional and international level. At regional level provisions for the systematic review and development of progressive improvement in human rights compliance were made part of the main Charters or Conventions whereas at International level additional Protocols were documented and adopted covering implementation and compliance aspects²⁹

Following is the brief sketch of United Nations Institutions/ Organs for the enforcement of human rights. Special mention shall be made as to what place does ICM occupy under this UN Enforcement System

1.5.3 United Nations Enforcement System and Individual Complaint Mechanism

United Nations has two types of enforcement systems/ mechanisms

- a Enforcement through Charter based institutions/ organs
- b Enforcement through Treaty based institutions

²⁹ Thomas R. Vandervot, *International Law and Organization an Introduction*, (New Delhi: Sage Publications, 1998), 97

A. Charter Based Enforcement

This type of enforcement is carried on through the organs or institutions which are the creation of the UN Charter itself. For instance United Nations General Assembly (UNGA), United Nations Economic and Social Council (ECOSOC) and Human Rights Council.³⁰ Charter based organs deal mainly with the states instead of individuals. Their decisions are taken through majority voting and they rely heavily on NGO inputs.³¹

It will be a matter of interest to mention here that Human Rights Council has devised a complaint procedure of its own. It adopted a very important Resolution No 5/1 on June 18, 2007.³² This resolution contains a procedure which gives right to individual victims, groups or non-governmental organizations to submit communications to Human Rights Council against gross violations of the human rights and fundamental freedoms. It does not matter where the victim is or who violated his rights. Even if somebody has reliable or direct knowledge of the violations, he may complain.

B. Treaty Based Enforcement

There are nine core Human Rights Treaties adopted by the United Nations General Assembly on various themes of human rights. They offer different procedures for human rights enforcement. The mechanism operates through respective Human

³⁰ Human Rights Council (2006) is an inter-governmental body of 47 different countries which holds its session once a year to discuss the human rights situation in the world and also makes recommendations on them. Works under United Nations.

³¹ Barrister Zafarullah Khan, Human Rights Theory and Practice (Lahore: Pakistan Law House, 2007), 45.

³² Office of the High Commissioner for Human Rights, *Human Rights Council Complaint Procedure*, <http://www.ohchr.org/en/hrbodies/hrc/complaintprocedure/pages/hrccomplaintprocedureindex.aspx>. Last accessed April 27, 2014.

Rights Committees established by their treaties. The committees happen to be quasi-judicial forums and are responsible for the monitoring and compliance of the treaty provisions consisting of specific human rights by the states parties to them.

Normally three treaty based enforcement options are available

These are

1 Individual Communications

2 State to State Complaints &

3 Inquiries

Committees receive petitions from the individuals if their states have acknowledged their jurisdiction in this regard. For instance UN has adopted an *International Covenant on Civil and Political Rights* on December 16, 1966 which entered into force on March 23, 1976. First Optional Protocol (O-P) to ICCPR has established a procedure whereby an individual whose state has signed and ratified the Covenant and the Protocol may bring a petition before the HRC created by the treaty itself³³ against his/her state in case his state has violated any of the rights provided in the Covenant.

Besides ICM, states may also file petitions before the HRC and accuse other states of such violations³⁴. In this situation both the states should be party to the

³³ Article 1, Optional Protocol-I to International Covenant on Civil and Political Rights, 1966

³⁴ Article 21 of CAT, Article 32 of CED, Article 74 of CMW, and Article 10 of OP to ICESCR and Article 12 of OP to CRC (not yet enforced) sets a procedure where one state may file a petition against another state if the other state is not fulfilling the obligations under any of these treaties before the respective Committee.

Covenant/O-P and must not have reserved the relevant provisions enabling them to file petition against one another

Inquiries are another important tool for checking up states compliance with treaty provisions. If Human Rights Committees find any systematic, gross and serious violations of the rights by any state party to the conventions they monitor, may on their own initiative, start an inquiry in this regard.³⁵

Then there is another obligation upon the states (as the treaty requires) to submit *annual³⁶ or periodic reports* to the respective human rights committees³⁷ Article 40, ICCPR requires member states to submit their reports on the measures they have taken to give effect to the rights available in the treaty

All these procedures aim to help getting human rights enforced through state compliance but usually it is noticed that member states do not join either Optional Protocols or reserve the relevant treaty provision which enables or recognizes individual's rights to approach HRC for justice. Rather states feel more comfortable with reporting system as an alternative. This syndrome is all with the Third World Countries, whereas if we look at European Human Rights system, it has a very powerful, vibrant and active individual complaint procedure,³⁸ through which thousands and thousands of people from Europe file petitions to secure their rights

³⁵ Article 20 of UNCAT, Article 8 of OP to CEDAW, Article 6 of OP to CPRD Article 33 of C.F.D, Article 11 of ICESCR, and Article 13 of OP to CRC (not yet effective) give respective Human Rights Committees to inquire gross violations of human rights on their own initiative

³⁶ Article 45, International Covenant on Civil and Political Rights

³⁷ Ibid Article 40

³⁸ Philip Alston, *Appraising the United Nations Human Rights Regime: A Critical Appraisal* (Oxford Clarendon Press, 1992), 4

1.6 Evolution of Individual Complaint Mechanism (ICM) at International Level

At the international level the human rights regime has developed under the auspices of the United Nations³⁹ As mentioned the protection of human rights was one of the principle purposes of the UN⁴⁰ Prior to the creation of the United Nations in 1945, apart from a few infrequent and rare cases, individuals were not the subjects of rights and duties under international law⁴¹ Universal Declaration of Human Rights, 1948 (UDHR) was the first step taken by the United Nations for the recognition and protection of human rights which came into force in 1948 through a General Assembly resolution⁴² It recognized both civil and political rights and economic, social and cultural rights As (UDHR) was an aspirational document having no binding force, the UN adopted two separate covenants in 1966, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴³ Together with the UDHR they are called as the International Bill of Human Rights⁴⁴

Together with the ICCPR the Optional Protocol to the ICCPR was also adopted It established an opportunity for individuals from states that have ratified the Optional

³⁹ Jack Donnelly, *International Human Rights* (USA: West View Press, 1998), 5

⁴⁰ Art 1(3) of the United Nations Charter, 1945

⁴¹ Louis B Sohn, "The New International Law: Protection of the Rights of Individuals rather than States" (College de France 1982), 9

⁴² UN General Assembly resolution 217A (III) of the 10th of December, 1948

⁴³ UN General Assembly resolution 2200A (XXI) of the 16th December, 1966

⁴⁴ Moeckli, Daniel, et al, *International Human Rights Law* (United Kingdom: Oxford University Press, 2010), 106

Protocol 1 to complain to a committee (Human Rights Committee or HRC) within the UN, in case their rights have been violated, against their own states.⁴⁵

It is worth mentioning here that ICCPR was not the first covenant which established ICM. The first Convention which established ICM was **International Convention on the Elimination of All forms of Racial Discrimination, 1965**⁴⁶

Another thing to note here is that in CERD, the right to complain was provided with in the principal treaty unlike ICCPR where it is provided under its OP-1

Now coming back to ICCPR, the purpose of making Optional Protocol-I to ICCPR is very much clearly found from the preamble of it which states that.

“In order further to achieve the purposes of the International Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate to enable the Human Rights Committee to *receive and consider communications from individuals* claiming to be victims of violations of any of the rights set forth in the Covenant”⁴⁷

This method of implementation is available only to the individuals who are subject to the jurisdiction of the States Parties who have ratified the Protocol. The right to communicate with the committee is conferred upon the individuals claiming to be the victims of a violation, irrespective of their nationality or lack of it

⁴⁵ Article 1 of the Optional Protocol-I to International Covenant on Civil and Political Rights, 1966

⁴⁶ Article 14 of International Convention on the Elimination of all forms of Racial Discrimination, 1965

⁴⁷ Preamble of Optional Protocol-I to International Covenant on Civil and Political Rights, 1966

By Optional Protocol-1 to ICCPR, United Nations has made *individuals* subjects of international law having rights enforceable against states

Like ICCPR we have eight other Core Human Rights treaties developed by the UNGA addressing the need of the time and specific themes. The idea behind the whole saga was to make it crystal clear that human beings have different types of rights which should be respected and protected by everyone. Therefore we see that after ICCPR various other treaties were adopted by the UNGA, addressing different themes, establishing separate committees under each of the treaties for better realization and observance of those rights by the state parties by incorporating ICM mechanisms in almost all of the treaties either in the main text of the treaty or its Optional Protocol.

Following is a table highlighting nine core Human Rights Treaties adopted by the United Nations General Assembly and showing their dates of adoption, entry into force, and most importantly whether or not ICM is available, and the relevant provisions.

The table has been prepared chronologically hence first Convention from the date of adoption is displayed on the top followed by the others which were adopted later on in sequence. The table shows as to how international human rights law has developed over decades, and how every treaty acknowledged the importance and relativity of Individual Complaint by incorporating it in the treaties as a tool to achieve those rights.

Individual Complaint Mechanism under Nine Core Human Rights Treaties

Serial No	Name of the Treaty	Date of adoption	Entry into Force	ICM Availability	Relevant Provision
1	CERD ⁴⁸	December 1965	January 4, 1969	Yes	Article 14
2	ICCPR	December 16, 1966	March 23, 1976	Yes	OP-I ⁴⁹
3	ICESCR	December 16, 1966	January 3, 1976	Yes	OP ⁵⁰
4	CEDAW	December 18, 1979	September 3, 1981	Yes	OP ⁵¹
5	CAT ⁵²	December 10, 1984	June 26, 1987	Yes	Article 22
6	CRC ⁵³	November 20, 1989	September 2, 1990	Yes ⁵⁴	OP-III ⁵⁵
7	CMW ⁵⁶	December 18, 1990	July 1, 2003	Yes ⁵⁷	Article 77
8	ICPED ⁵⁸	June 29, 2006	December 23, 2010	Yes	Article 31
9	CRPD ⁵⁹	December 13, 2006	May 3, 2008	Yes	OP ⁶⁰

⁴⁸ International Convention on the Elimination of All Forms of Racial Discrimination, 1965

⁴⁹ Adopted on the same date of its principal treaty i.e. December 16, 1966

⁵⁰ Adopted by UNGA on December 10, 2008. Entered into Force on May 5, 2013

⁵¹ Adopted on October 6, 1999 and entered into Force on December 22, 2000

⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

⁵³ International Convention on the Rights of Child, 1989

⁵⁴ ICM under the Convention has not entered into force yet. It will become operative once at least 10 State Parties ratify Optional Protocol having ICM

⁵⁵ This was the third OP adopted by the UNGA on December 19, 2011, which allowed individual children to complain about the rights available to them under CRC and its two OP's i.e. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000 and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

⁵⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

⁵⁷ ICM under the Convention has not entered into force yet

⁵⁸ International Convention for the Protection of All Persons from Enforced Disappearance, 2006

⁵⁹ Convention on the Rights of Persons with Disabilities, 2006

⁶⁰ Adopted by UNGA on December 13, 2006. Entered into force on May 3, 2008

1.6.1 Justifiability Requirements for Individual Complaint Mechanism

The right to approach appropriate Human Rights Committee is not that easy. It requires a lot of formalities to be fulfilled. These are more or less same under almost all the core Human Rights Conventions. A person who wants to avail the right of Individual Petition must satisfy the relevant treaty body i.e. the Committee that the applicant for instance has undergone and fulfilled all the requirements before approaching the Committee and could not get justice through national justice system ⁶¹

Following is a brief sketch of these requirements.

- The complaint must be about the actual violation of the treaties rights of an identified person ⁶²
- Before communicating with the Committee, the individual concerned must first exhaust all domestic remedies ⁶³
- It must be submitted within one year after exhaustion of domestic remedies ⁶⁴
- An anonymous communication or one which the committee considers to be an abuse of the right of petition or incompatible with the treaty provisions is inadmissible ⁶⁵

⁶¹ As to what should be the form and format of a communication, the address as well as the mode of sending it i.e., (email, fax or by post), two annexes have been added to this work to show how a communication should look like before it is sent to any of the relevant Human Rights Committee

⁶² Article 1 to OP-1 to ICCPR, Article 22 (1) of CAT Article 2 of OP to ICESCR

⁶³ Article 5 (b) of ICCPR, Article 3 (1) of OP to ICESCR

⁶⁴ Article 3 (a) of OP to ICESCR

⁶⁵ Ibid Article 3 (g)

- Moreover, no communication shall be considered by the Committee⁶⁶ unless it has ascertained that the matter is not being investigated under another international investigatory or settlement procedure⁶⁷

1.6.2 Procedure after Admissibility

The Committee is required then to bring any communication submitted to it to the attention of the State Party concerned which on its part, undertakes to provide the committee with a written explanation of the matter and the remedy, if any, that it might have taken. Meeting in closed session, the committee will consider individual communication in the light of all written information made available to it by the individual and by the State Party concerned.

1.6.3 What Happens When Committee Decides a Case

When the committee decides a case it is then transmitted to the aggrieved party concerned and the state simultaneously. A separate note is appended with the decision in case of difference of opinion between the members of the committee. The decisions of the committee although form authoritative interpretation yet are not binding on the states parties. Usually these contain recommendations addressed to the state for taking steps to remedy the situation. The decision of the Committee is also sent to the Office of High Commissioner for Human Rights and published on its website. There is no right to appeal against the decision of the committee.⁶⁸

⁶⁶ Article 5 (2) (a) of OP to ICCPR, Article 3 (2) (c) of OP to ICESCR

⁶⁷ L N TANDON and S K KAPOOR, *International Law*, (Lahore Mansoor Book House, 2010), 361

⁶⁸ "Office of the High Commissioner for Human Rights", *United Nations*, accessed April 15, 2015, <http://www.ohchr.org/en/hrbodies/tbpetitions/pages/individualcommunications.htm>

Normally all the treaty bodies have established various procedures usually called as “follow-up” procedures to monitor whether the state party has taken steps for the implementation of its decisions or not ⁶⁹

Presently there are nine United Nations Human Rights treaties that have complaint mechanism (only five active) ⁷⁰ in international law and a lot of others that have human rights elements and they are part of human rights system but don't have active mechanisms of implementation or enforcement that individual can go for. Basically international human rights law is based on consent given by states. States are only bound if they agree to be bound. The status/position of individual in international law is very narrow and limited.

When the United Nations General Assembly was working on the draft of International Bill of Rights which included both ICCPR and ICESCR, faced the problem as to how to give the provisions of these instruments a legally binding character so it introduced different procedures to address the issue. Some of them were mandatory like state reporting, and some were Optional like Individual Complaint. To give individuals access to Committee under ICCPR, United Nations General Assembly adopted a separate “Optional Protocol”.

A protocol in international law is a part of main treaty and addresses specific issues like enforcement mechanism of the main treaty. But states happen to be parties

⁶⁹ Ibid

⁷⁰ International Covenant on Civil and Political Rights, 1966, Convention on the Elimination of All forms of Racial Discrimination, 1965, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Convention on the Elimination of All forms of Discrimination against Women, 1979, International Covenant on Economic, Social and Cultural Rights, 1966

to the treaties but not to their optional protocols. This happens a lot.⁷¹ Normally states ratify the treaty to save their faces at international level but when it comes to give means and meanings to achieve those rights they play games and do not sign the protocols or in situations where ICM like procedures are inbuilt in the principal treaty itself, reserves them, which actually are means for the full realization of the rights mentioned in the treaties.

1.7 Significance of Individual Complaint Procedure

Human rights remain unfulfilled promises for large number of people throughout the world, despite their recognition in national constitutions and in international treaties because of the lack of access to enforcement mechanisms.⁷² The right of individuals to complain about alleged violations of their human rights to expert bodies established under United Nations human rights instruments is one of the major achievements of UN efforts aimed at the protection and promotion of human rights.⁷³

It is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a

⁷¹ For instance, Pakistan has signed ICCPR on April 17, 2008 and ratified the same on June 23, 2010 with a lot of reservations but is not party to Protocol-1 of ICCPR which gives individuals access to Human Rights Committee established under ICCPR.

⁷² Charles Olufemi Adekoya, "Human Rights Enforcement by People living in poverty: Access to Justice in Nigeria", *Journal of African Law* 54, no. 2 (2010): 258.

⁷³ Fraser P. Davidson, "Individual Human rights Complaints Procedures Based on United Nations Treaties and the need for Reform", *Cambridge Journals Online*, <http://journals.cambridge.org/action/displayAbstract?fromPage=online>, Last accessed July 8, 2014.

person's real-life situation, the standards contained in international human rights treaties find their most direct application⁷⁴

Without relevant mechanisms and specific means of implementation, human rights theory and norms could remain mere rhetoric on paper⁷⁵ Effective mechanisms and means of implementation lead to the practical realization of human rights in the lives of human beings It is often argued in that regard that the hurdles to implementation are much higher than those of norms and standard setting under international human rights law

This is the only procedure available in the UN Human Rights treaty system in which an ordinary person is given the opportunity to bring the state before an international authority (i.e. the Committee) to answer about the wrongs which the state has done Moreover this procedure affords to address an individual case of violation by a state party of its human rights obligations under the treaty This is a whole different from those procedures which are general in nature, mostly state related, and do not address a particular violation of a right against individual like ICM does In this sense, this procedure works in a similar manner to domestic legal proceedings

The advantage of making an individual complaint is that a person who believes his or her rights have been violated has an opportunity to receive assistance from an international expert body that supports his or her claim that violation has occurred and help him in getting adequate remedy from the state Although the recommendations of

⁷⁴ "Human Rights Treaty Bodies -- Petitions", *Human Rights Treaty Bodies*, <http://www2.ohchr.org/english/bodies/petitions/individual.htm>, Last accessed March 12, 2015

⁷⁵ Mashood Baderin and Manisuli Ssenyonjo, *International Human Rights Law Six Decades after the UDHR and Beyond* (United Kingdom: Ashgate Publishing, 2010), 17

the UN human rights treaty bodies are not legally binding, the treaty bodies have been given the authority by states parties to express their expert views as to whether any violation of rights, and the states international obligations to protect those rights, has occurred ⁷⁶

The expertise and jurisprudence of the committees have been developed over decades of monitoring the implementation of the treaties. The treaty bodies expect states parties to implement their decisions, and call upon states to provide the victim with an appropriate remedy. Notwithstanding that there is no international police force to ensure its implementation, a decision of an international expert body does carry heavy weightage as states become legally and morally bound to respect the decisions of the respective treaty bodies and implement those once they sign and ratify the relevant treaties or provisions in good faith ⁷⁷

Office of the United Nations High Commissioner for human rights provides at *thinternet ohchr org* (its official website) hundreds and hundreds of communications received from across the globe by the aggrieved nationals of those states which have ratified ICM related provisions/ protocols under several UN Human Rights Treaties whereupon the relevant committees adopted their opinions/view and states accepted their opinions/views and remedied the situation accordingly

⁷⁶ "How to complain about human rights treaty violations' *Introduction to Complaint Procedures*, http://www.bayefsky.com/complain_9_procedures.php, Last accessed March 12, 2015

⁷⁷ Ibid

1.8 Status of Pakistan with Respect To the Signing/ Ratification of ICM related Treaties

Unfortunately Pakistan has a poor record when it comes to United Nations Human Rights treaties. For instance, ICCPR, the most important among other human rights treaties which contains civil and political rights was adopted by the United Nations on December 16, 1966 and it became effective after 10 years on March 23, 1976 whereas Pakistan signed it on April 17, 2008 after 42 years of its adoption and ratified on June 23rd, 2010. Pakistan is also not party to the *First Optional Protocol to ICCPR* which established individual complaint procedure that allows individuals to approach the Committee in case the respective country has violated its obligations under the treaty and thereby violated the right of the individual.

Pakistan is under legal obligation from the date of ratification of ICCPR to take positive meaningful steps in order to make sure that the rights in the covenant are enforceable domestically and also to change its present laws where they go against the same.

Article 2 to ICCPR provides

“1 Each State Party to the present Covenant undertakes *to respect and to ensure* to all within its territory and subject to its jurisdiction the rights recognized in the present Convention without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2 *Where not already provided for by existing legislative or other measures,* each state Party to the present Covenant *undertakes to take the necessary steps,* in

accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant ”

Similarly Pakistan is also not party to the Optional Protocols to Convention on the Rights of Child (O-P III)⁷⁸, International Covenant on Economic, Social and Cultural Rights, 1966 and Convention on the Rights of Persons with Disabilities, 2006 all of which are ICM specific i.e. specifically provide individual petition procedure

Following is a very interesting and informative table showing the status of Pakistan with respect to nine core human rights treaties as to when Pakistan signed and ratified the treaty and particularly whether Pakistan is party to the OP's establishing ICM or not, and, in case of ICM being part of the principal treaty whether Pakistan has made reservations or declarations over the relevant provisions or not

⁷⁸ Optional Protocol III to Convention on the Rights of Child, 1989 was adopted by the United Nations General Assembly on December 2011. It specifically deals with the Individual Complaint Procedure under the Convention

Status of Pakistan With Respect To Human Rights Treaties

Signing/Ratification/ICM Status⁷⁹

Serial No	Name of the Treaty	Signature Date	Ratification/Accession Date	Status as to ICM
1	CERD	September 19, 1966	September 21, 1966	Article 14 not reserved
2	CRC	September 20, 1990	November 12, 1990	Not party to OP-III
3	CEDAW		March 12, 1996 ⁸⁰	Not Party to OP
4	ICESCR	November 3, 2004	April 17, 2008	Not Party to Optional Protocol
5	ICCPR	April 17, 2008	June 23, 2010	Not Party to OP-1
6	UNCAT	April 17, 2008	June 23, 2010	Article 22 not reserved
7	CRPD	September 25, 2008	July 5, 2011	Not Party to OP
8	ICPED ⁸¹	N/A	N/A	N/A
9	CMW ⁸²	N/A	N/A	N/A

⁷⁹ Data presented is gathered from UN Treaty Bodies Database under the head "Reporting Status for Pakistan" at http://tinternet.ohchr.org/_layouts/treatybodyexternal/countries.aspx?countrycode=pak&lang=en Also <http://indicators.ohchr.org/> and <http://treaties.un.org/>. Last accessed April 14, 2015

⁸⁰ Accession took place

⁸¹ Pakistan is not Party to this Convention, <http://indicators.ohchr.org/>. Last accessed April 14, 2015

⁸² Pakistan is not party to this Convention United Nations Treaty Collection Database, https://treaties.un.org/Pages/ViewDetails.aspx?src=1RLATY&mtdsg_no=IV-13&chapter=4&lang=en. Last accessed April 14, 2015

So far Pakistan has ratified most of the human rights conventions which is commendable but also made lot of reservations over them particularly those kind of reservations which directly go against the object and purpose of the respective treaties Those provisions are specifically hit which allow individuals to have recourse to the relevant treaty committee for redress.

The only Conventions which are signed and ratified by the Pakistan which also provide for ICM are International Convention on the Elimination of All Forms of Racial Discrimination (1965) and Convention against Torture & other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

CERD was signed by Pakistan on September 19, 1966, & immediately ratified on September 21, 1966 Article 14 of CERD established ICM which is not reserved CERD belongs to the third generation category of Human Rights and was adopted by the UNGA on December 21, 1965 This convention aims to prevent and suppress discrimination on the basis of race It strongly prohibits racial hate speeches and demands complete ban on racist organizations

UNCAT was signed on April 17, 2008 & ratified on June 23, 2010 Article 22 of UNCAT speaks of ICM which is also not reserved. This convention is one of the most important one in the series of other conventions adopted by the United Nations It addresses a very important issue which is the prohibition of torture and any other kind of cruel, inhuman or degrading treatment to anybody across the globe

These above mentioned two i.e (CERD & UNCAT) are the only UN Human Rights instruments out of nine in which Pakistan has not gone for reservations or declarations

T/17/55/1

as to ICM whereas Pakistan should take the same policy measure with the rest of HR
Conventions

CHAPTER TWO

ESTABLISHING STATE RESPONSIBILITY FOR THE BREACH OF HUMAN RIGHTS AND POSSIBLE REMEDIES

Introduction

International Human Rights Law not only offers rights embodied in a series of Conventions/Covenants, but also provides the “means” and “tools” to realize those rights. Amongst them some are binding in nature such as “State Reporting Procedure” and some are mere Optional such as “Individual Complaint Mechanism” (ICM) ICM is one of the most important procedures which are available in a number of human rights instruments which allows individuals to file petition before the treaty bodies established under various Human Rights instruments. Unfortunately due to its optional nature and consequently non adoption of it or reservations on the relevant provisions/ Articles/ Protocols of the Conventions, individuals are restricted to exercise their “right to petition” This chapter is an attempt to highlight that the reservations on the procedures designed to realize the rights enshrined under the Human Rights Conventions are not valid as these go against the object and purposes of the Conventions and it is indispensable for the states to provide individuals access to relevant committee’s because it is the only procedure which bears substantial significance for the ‘individuals’ compared to the rest of the available options

2.1 The Concept of State Responsibility and Obligations

The concept of state responsibility and its obligations has been evolving since decades. Under the present norms states can be held liable for a number of issues. Codification of International Humanitarian Law in the form of Hague Conventions, 1907 and Geneva Conventions, 1949, establishment of International Criminal Court are some key events in that direction.⁸³

After the UN started legislating over human rights, the whole horizon took a dramatic change.⁸⁴

Earlier it was only states which could claim rights against other states and demand certain obligations or duties towards that end, but now not only states but individuals are also given the option to bring their own states to answer for any violation of the human rights secured to them through international legislation.⁸⁵

International law sets standards to be followed by those states adhering to the respective 'legal instruments' that they must behave with their subjects in a certain way. That, certain rights must be ensured by states in respect of their subjects and where the states violate their obligations, international human rights law gives each and every individual an opportunity to approach an international body i.e. Human Rights Committee such as Committee formed & established under International Covenant on Civil and Political

⁸³ Ineke Boerefijn, "Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties", *Netherlands International Law Review* 56, 167 <http://journals.cambridge.org/abstract/S016507x09001673>, Last accessed February 01, 2015

⁸⁴ Ibid

⁸⁵ "United Nations Fact Sheet Number 7, Rev 1", *Complaint Procedures*, http://www.humanrights.is-the-human-rights-project/humanrightscasesandmaterials/generalcomments/unfactsheets/NO_7complaintprocedure/, Last accessed February 2, 2015

Rights, 1966, International Covenant on Economic, Social and Cultural Rights, 1966, Convention against Torture and other Inhuman or Degrading Treatment or Punishment, 1984, Convention on the Elimination of Discrimination against women, 1979, etc., which are composed of neutral and highly skilled jurists of International Human Rights Law for the determination of their matter

“Access of individuals to justice at the international level, by means of the exercise of the right of individual petition, a concrete expression has been given to the recognition that human rights to be protected are inherent to the human person and do not derive from the state”⁸⁶

2.1.1 Obligations under International Covenant on Civil and Political Rights (ICCPR), 1966

Article 2 of International Covenant on Civil and Political Rights states that

“1 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

2. Where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of present Covenant, to adopt

⁸⁶ Antonio Augusto Cancado Trindade, “The Historical Recovery of the Human Person as Subject of the Law of Nations”, *Cambridge Journal of International and Comparative Law* (2012) 43. <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199580958.001.0001/acprof-9780199580958-chapter-1>, Last accessed February 3, 2015

such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant

3 Each State Party to the present Covenant undertakes

a to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity,

b to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy,

c to ensure that the competent authorities shall enforce such remedies

2.1.2 Obligations under International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 and Its Optional Protocol, 2008

ICESCR puts following obligations upon the states parties to it

- The states undertake to take steps individually and with international assistance in the technical and educational fields for the progressive realization of the rights mentioned in this Covenant ⁸⁷

Later on Optional Protocol to ICESCR was adopted by the UNGA on December 10, 2008 and Individual Complaint Mechanism was given under it Preamble of the Optional Protocol to ICESCR designates ICM as a means to “achieve the purposes

⁸⁷ Article 2, International Covenant on Economic, Social and Cultural Rights, 1966

of this Covenant” and for that it incorporates the procedure to access the Committee established under the Covenant, in Article 1 of the Optional Protocol to ICESCR

Same is the case with the rest of the UN human rights instruments and those all put obligations upon states parties to fulfil their commitments and to provide all means through which their subjects can exercise their rights as enshrined under the treaties and above all to provide them with ‘effective remedy’ where their rights get violated

Now, a situation may arise where a state though party to a treaty, is not fulfilling its obligations. It is usually observed that states do not fulfil their obligations under the treaties despite the fact that they are parties to a treaty. The states often reserve the Articles which they find hard to act upon. Sometimes States do not adopt Optional Protocols to the treaties which provide for the mechanisms for the enforcement of treaty provisions and realization of rights. As per the experiences of the Human Rights Committee, “the states do not always respect their obligations”⁸⁸

Same is the case with Pakistan, either it has reserved the provisions granting individuals access to human rights committees or not adopted the Optional Protocols. This practice is a glaring violation of international principles, precedents and standards.

Basically this was the very reason behind the inclusion of Individual Complaint Mechanism that the United Nations General Assembly thought it fit to incorporate ICM related provisions in the treaties or in some cases made additional Protocols so that a

⁸⁸ General Comment Number 33, CCPR/C/GC/33, page 2, www2.ohchr.org/English/bodies/hrc/docs/CCPR_C_GC_33.pdf, Last accessed February 3, 2015

procedure could be established for individuals to approach Committees for the enforcement of human rights enshrined in the respective Instruments

2.1.3 Obligations under the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)

Article 2 of the Convention casts following obligations upon member states

- States undertake to embody the principles of the equality of men and women in their national constitutions or other appropriate legislation
- States must adopt appropriate legislative and other measures, including sanctions where appropriate
- States must establish national tribunals and other public institutions to provide effective protection to women under this Convention
- That they will refrain from any act or practice of discrimination against women
- That they will take all appropriate measures, including legislation, modifications or abolishing existing laws which constitute discrimination

2.1.4 Obligations under Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (UNCAT)

Article 2 of Convention against Torture states

“1 Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”

2.2 Individual Complaint Mechanism as a Means “To Achieving the Purposes of the International Covenant on Civil and Political Rights, 1966”

It is worthwhile to quote the preamble of the Optional Protocol to ICCPR which states that the purpose of the Optional Protocol is “further to achieve the purposes” of

the Covenant by enabling the Human Rights Committee, which has been established under the treaty "to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant"

Another interesting point should be noted here, that, the obligations and responsibilities of the state parties to specific human rights conventions do not end with the positive steps which they must take but also include and require the states parties to refrain from anything which could possibly make it practically impossible for the realization of the rights for instance if any state would reserve the provision granting individuals access to the committee's aid, or not adopt the Protocol in this behalf, how a person can claim his right, which is given by the Covenant

Therefore International Court of Justice has stated in its advisory opinion in the reservations upon the Genocide Convention⁸⁹ case of 1951 that reservations are only acceptable where a) they are permissible by the treaty itself and b) they do not go against the objects and purposes of the convention. Furthermore if any state has undertaken to adopt those measures which are necessary to give effect to the provisions of the convention, then it is more reasonable, logical and expected that it must refrain from those measures hindering or creating an obstacle in the way of full realization of objects and purposes of the Convention ⁹⁰ Meaning thereby that whatever human rights instrument it is, if the procedure to realize the rights under it is hindered or barred like

⁸⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 1948

⁹⁰ ICJ REP 15,29 (May 28, 1951)

ICM under ICCPR, then those rights are mere words on paper having no significance what so ever

2.3 Status of Invalid Reservations Restricting States Obligations and Responsibilities under Human Rights Treaties

As to reservations, the Vienna Convention on the Law of Treaties, 1969 (VCLT), allows a state to declare or reserve any provision or set of provisions while adopting, signing or ratifying a treaty but along the way also provides that the reservations or declarations must be within the purview of the relevant treaty and must not be against the objects and purposes of the treaty⁹¹ Therefore where any declaration or reservation has been made which is against the objects and purposes of the treaty, or which goes against the spirit of the treaty, VCLT, does not recognize it⁹²

Article 19 of VCLT states

“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless

(a) The reservation is prohibited by the treaty,

(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made, or

(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty ”

⁹¹ Jan Klabbers, *An Introduction to International Institutional Law* (United Kingdom Cambridge University Press 2002), 84

⁹² Article 18, Vienna Convention on the Law of Treaties, 1969

2.3.1 International Jurisprudence on Reservations

There are three comments normally forwarded by different commentators of international law regarding an invalid reservation or declaration. These are following:

- a) That the state shall not be bound in respect of that Article or Provision reserved but it shall remain bound by the rest of the treaty.
- b) That the state by act of reservation (which is inconsistent with the objects and purposes of the treaty) has rendered whole of the treaty inapplicable thereby ceased to be a party to that treaty any more.
- c) That the invalid reservation does not affect either the treaty or the provision itself, thereby making the whole of the treaty applicable including the reserved Article or provision. Majority of the jurists have gone for the third option.⁹³

Thus, reserving ICM related provisions (where they are in the principal treaty itself) and Protocols (which are specially made to provide for ICM), as the case may be, is null and void according to VCLT and also according to the views of the leading jurists of human rights, as the ICM is the mean and the way for the realization of the rights enshrined in the respective covenants. Therefore the obligation and the responsibility of the States subsist and individuals may file a petition before the respective committees against their States if their rights are affected.⁹⁴

⁹³ Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent", *The American Journal of International Law*, Vol. 96, Page 532, http://www.law.harvard.edu/faculty/rgoodman/pdfs/GoodmanHuman_RightsTreaties_Invalid_Reservations.pdf, Last accessed November 11, 2014.

⁹⁴ General Comment Number 24, CCPR/C/21/Rev 1

- International community has also declared reservations over human rights treaties highly improper.⁹⁵ Vienna Declaration and Programme of Action affirmed plainly that “all the States are encouraged to accede to the international human rights instruments and all the States are encouraged to avoid, as far as possible, the resort to reservation”⁹⁶

In its General Comment number 24, the Committee under ICCPR at paragraph 11 states that “The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some Operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable”⁹⁷. It also urged the states to “accept the full range of obligations because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being”⁹⁸. Therefore guarantees like ICM are an integral part of human rights instruments which provide for the means to secure rights enshrined under them.

Office of the United Nations High Commissioner on Human Rights categorically stated that by being party to the human rights covenant the states assume

⁹⁵ David S. Jonas and Thomas N. Saunders, “The Object and Purpose of a Treaty: Three Interpretive Methods”, *Vanderbilt Journal of Transnational Law*, Vol. 43, (2010) 574 http://works.bepress.com/david_jonas/, Last accessed November 11, 2014.

⁹⁶ Vienna Declaration and Programme of Action, Part 1, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>, Last accessed November 15, 2014.

⁹⁷ General Comment number 24, by Committee on International Covenant on Civil and Political Rights, On issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), <https://www1.unm.edu/humanrts/gencomm/hrcom24.htm>, Last accessed December 5, 2015.

⁹⁸ Ibid at paragraph 4 of General Comment 24.

their responsibility and obligation to respect, protect and fulfil human rights by taking all the possible measures at national level for instance making rules, laws and regulations, taking all the judicial or executive steps for the protection and safeguard of rights. And where the states have not taken any steps in pursuance of this obligation, the mechanisms and procedures available at international level such as individual petitions and communications are there to ensure that the human rights standards are protected, implemented and enforced at national level⁹⁹

According to this interpretation of Office of the United Nations High Commissioner for Human Rights, where the states do not take appropriate steps particularly legislative to fulfil their obligations under Human Rights Covenants they should at least grant their subjects the right to petition i.e. individual complaint so that the Committees could entertain the petitions and play their adequate role according to the respective treaty

2.4 Possible Avenues for the Enforcement of Treaty Rights

The UN system of human rights has various mechanisms for the enforcement of human rights obligations arising from UN made human rights law. These are either Charter based or treaty based enforcement mechanisms

2.4.1 Features of Charter Based Enforcement Mechanisms

Charter based mechanisms are general in nature, they deal with states, take inputs from NGO'S and international media houses. Decisions are taken through

⁹⁹ International Human Rights Law, *Office of the High Commissioner*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>, Last accessed September 10, 2015

majority voting. Prominent examples are General Assembly of the United Nations, Economic and Social Council, and Human Rights Council.¹⁰⁰ Charter based human rights enforcement addresses gross human rights violations in broader sense. They do not deal with abuse of individual's human rights rather specific themes like slavery, apartheid, genocide etc. are taken notice of. Resolutions are normally passed to highlight and condemn the violations committed by the states and sanctions of different kinds are also imposed. For instance "1235 Procedure", which seeks to hold annually a public debate internationally to discuss major Human Rights problems, abuses and violations happening in the world.

2.4.2 Features of Treaty Based Enforcement Mechanisms

Treaty based mechanisms have a limited range of procedural options normally a consensus-based decision-making and a non-adversarial relationship with states. The procedures for the enforcement of treaty based human rights are either compulsory such as "state reporting" or optional such as "Individual Complaint Mechanism". The procedures deal with specific violation of human rights of the individuals under treaty based enforcement system.¹⁰¹

Following are the prominent enforcement mechanisms within UN human rights treaty regime

¹⁰⁰ John Charvet and Elisa Kaczynska Nay, *The Liberal Project and Human Rights, the Theory and Practice of a New World Order* (New York: Cambridge University Press, 2008), 224

¹⁰¹ Barrister Zafarullah Khan, *op cit* p. 45

2.4.2.1 Reporting

Reporting feature is part and parcel of all the core human rights treaties.¹⁰² It aims at making states submit reports on regular basis from time to time (as mentioned under the respective treaties) about the steps which the states have taken after the ratification for the implementation of the treaty. Normally states do not submit reports on time and those which do, do not depict the real situations and circumstances happening. Reporting procedure is loose, time taking, inefficient and cumbersome.¹⁰³

2.4.2.2 State to State Complaints

This comprises of one state party to the covenant or treaty complaining against other state party before the respective human rights committee for the alleged violation of its treaty rights. This procedure becomes operative only when both the states have accepted the competency of the respective committee and made a declaration in this

¹⁰² Article 40, International Covenant on Civil and Political Rights, 1966, Article 16, International Covenant on Economic Social and Cultural Rights, 1966, Article 19, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 18, Convention on the Elimination of All Forms of Discrimination against Women, 1979, Article 9, International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Article 73, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, Article 35, Convention on the Rights of Persons with Disabilities, 2006, Article 44, Convention on the Rights of Child, 1989, Article 29, International Convention for the Protection of All Persons from Enforced Disappearance, 1992.

¹⁰³ Monitoring implementation of the international human rights instruments: an overview of the current treaty body system, Background conference document prepared by the Office of the UN High Commissioner for Human Rights, Conference held from 24 January- to February 2005, <http://www.un.org/esa/socdev/enable/rights/ahc5ohchr.doc>, Last accessed August 15, 2015.

behalf.¹⁰⁴ The respective committees try to resolve the issue through negotiations and conciliations¹⁰⁵

2.4.2.3 Inquiries

If the respective committees receive any reliable information regarding gross, systematic and grave violations of the provisions of the human rights treaties by the states parties, may on their own initiative conduct inquiries for taking notice of the issue. The information must be well-founded and must refer to the systematic and gross violations of the provisions of the respective treaties by any state party to it. Inquiry procedure is a very lengthy procedure and takes much time to arrive at a proper end. The committees usually appoint neutral persons to conduct inquiries which may include visiting the territory of the states, of course with the permission of the states, and once report is submitted, the states are required to submit their reply to the report normally in six months. The procedure is confidential in nature and based highly on the cooperation of the states¹⁰⁶

¹⁰⁴ Article 41, International Covenant on Civil and Political Rights, 1966, Article 21 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 74 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, Article 32 International Convention for the Protection of All Persons from Enforced Disappearance, 1992, Article 10 of the Optional Protocol to International Covenant on Economic Social and Cultural Rights, 2008, Article 12 of Optional Protocol to Convention on the Rights of Child on the Sale of Child, Child Prostitution and Child Pornography, 2000

¹⁰⁵ "Human Rights Treaty Bodies Complaint Procedures", *Office of the High Commissioner for Human Rights*, <http://www.ohchr.org/EN/HRBodies/TBPClaims/Pages/HRTBPetitions.aspx>, Last accessed September 15, 2015

¹⁰⁶ Article 20 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 Article 8 of Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Women, 1979 Article 6 of Optional Protocol to Rights of Persons with Disabilities Article 33 of International Convention for the Protection of All Persons from Enforced Disappearance, 1992 Article 11 of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008 Article 13 of Optional Protocol to Convention on the Rights of Child on Communication Procedure (OP III), 2011

2.4.2.4 Individual Complaint Mechanism (ICM)

Individual complaint mechanism is by nature different from all of the procedures mentioned above. It aims solely at seeking or obtaining redress for an individual from his state where state has been found in violation of any of the rights in respect of the complainant individual. This procedure empowers individuals to bring claims of the violations of their treaty rights against their own governments.

For instance ICCPR provides a number of Civil and Political rights such as right to life, property, education, marriage, work, voting rights, forming of associations etc., these are specific rights and whenever any single or more rights, of a person whose state is a party to this treaty and has also allowed its 'subjects' to send communication before the Committee under ICCPR, are violated, may use this procedure after fulfilling certain requirements such as exhausting of all domestic remedies when he thinks that justice is not done to him and he is still aggrieved.

2.5 Comparison of the Available Enforcement Procedures and Overriding Significance of the Right to Individual Petition

If we carefully analyze the avenues for the enforcement of human rights, we shall arrive at the conclusion that none of the procedures available in different covenants are as simple, fast, practical and realistic as individual complaint mechanism. Therefore of all the other options available for the enforcement of International Human

Rights Law which are scattered in different conventions, the right of individuals to petition has been of immense importance.¹⁰⁷

First of all this right has given an ordinary citizen an option to actualize his rights against his own 'mighty state' which was next to impossible in the past. To put it simple the weaker one has been given a chance against the powerful. The person has been made an international subject which was once the status and prerogative of the 'states'.¹⁰⁸

ICM has given birth to a new solution, certainly a better-one as compared to its counterparts.¹⁰⁹ A person can get his remedy sooner if compared with the rest of the enforcement procedures which are time taking, tedious and very general in nature. In other words ICM has specificized the enforcement procedure while procedures like 'state-to-state' complaints and inquiries are too general and non-productive.

It has denationalized the concept of protection of human rights and provided the people with an option unique in its nature to claim, secure and exercise their rights under the umbrella of international human rights law whereas prior to this, the rights could only be the interests granted and taken away by 'states' through domestic legislation only.

¹⁰⁷ Janusz Symonides, Access of Individuals to International Tribunals and International Human Rights Complaints Procedures (Instituto De Investigaciones Juridicas), 488, http://biblio.juridicas.unam.mx/libros/5/2454_31.pdf, (Last accessed November 11, 2015)

¹⁰⁸ Antonio Augusto Cancado Trindade "Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present state and Perspectives at the Turn of the Century", *Columbia Human Rights Law Review*, (1998) 18

¹⁰⁹ A. Byrnes, "An Effective Complaints Procedure in the Context of International Human Rights Law, The UN Human Rights Treaty System in the 21st Century", The Hague, *Kluwer Law International* (2000) 139

The whole concept of protection of human rights has been given a new shape from 'separate endeavors' to that of 'collective guarantee' spirit and states are made answerable for their actions concerning and affecting their subjects

The significance of this right in general is perhaps best understood in *Klyakhin versus Russia* where the European Court of Human Rights stated that

"Of the utmost importance for the effective operation of the system of individual application instituted by Article 34 that applicants should be able to communicate freely with the court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints"¹¹⁰

It would be interesting to note that Article 34 of the European Convention for the protection of Human Rights and Fundamental Freedoms, 1950, which allows any person, any non-governmental organization or group of individuals to file petitions/complaints states in this regard that

"The High Contracting parties undertake not to hinder in any way the effective exercise of this right"

The UN Human Rights bodies may learn a lot from the workable experiences of regional Enforcement Procedures particularly European ¹¹¹

The document adopted in the second World Conference on Human Rights (1993) by the name of "the Declaration and Programme of Action of Vienna" also

¹¹⁰ *Klyakhin versus Russia* before the European Court of Human Rights, June 6, 2005

¹¹¹ Antonio Augusto Cançado Trindade *The Access of Individuals to International Justice*, (New York Oxford University Press, 2011), 28

highlighted the relevance and importance of this procedure and urged its adoption, as an “additional method of protection, by means of Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women and to the Covenant on Economic, Social and Cultural Rights Declaration and Programme of Action of Vienna of 1993 also recommended state parties to human rights treaties, the acceptance of all available optional procedures of individual petitions or communications”¹¹²

What mentioned above as the example from European Human Rights system was an attempt to show that their laws and precedents have made ICM a part and parcel of their human rights protection system and give it, its due place but unfortunately in UN human rights system ICM has not been given so strict application Even then, in spite of its leniency, many states hesitate to sign it or ratify it including Pakistan

If we look even from the states side, the other mechanisms in fact are detrimental to the state’s so called respect and prestige This is so because the Charter-based procedures are open and public procedures which render a state in violation if found so openly at international conferences and debates for instance “1253 Procedure” and the results and resolutions upon the conclusion of these debates and speeches are later on published and circulated/disseminated across the globe which also damage the image of the state world-wide

¹¹² Antonio Augusto Cancado Trindade, “the Historical Recovery of the Human Person as Subject of the Law of Nations”, *Cambridge Journal of International and Comparative Law* (2012) 43 <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199580958.001.0001/acprof-9780199580958-chapter-1> Last accessed February 6 2015

2.5.1 "Procedure 1235"

This procedure was established by the resolution number 1235 of Economic and Social Council of the United Nations ¹¹³ This procedure entitled Human Rights Commission¹¹⁴ to hold a public debate annually to focus on gross violations of the human rights in various countries.

The observation and discussion during this public debate could result in the following

- A debate embarrassing a country
- NGO's find opportunity to put pressure on the governments.
- Passing of resolutions condemning the governments for human rights abuses
- Chairman of the Council may issue a statement of exhortation
- The governments may be called to answer for the gross violations of human rights.
- Council passing a resolution calling the governments to take concrete and solid measures for protection of human rights
- Special Rapporteurs may be appointed to dig out the real situation
- Above all, that Council may call upon the Security Council to consider the issue ¹¹⁵

Treaty-based enforcement procedures also have such options of general nature such as inquiry procedures and state-to-state complaints which are often politically

¹¹³ Resolution number XLII of 1967

¹¹⁴ United Nations replaced Human Rights Commission with Human Rights Council on March 15, 2006 Human Rights Council is a body of 47 member states who are responsible for the protection as well as promotion of the Human Rights across the globe

¹¹⁵ Barrister Zafarullah Khan, op cit p 48

motivated Inquiry procedure often involves a panel of international experts going into the state for investigating the state of affairs of massive and grave violations of human rights which ends in a *report* which is published later on thus highlighting the state across the globe ¹¹⁶

State-to-state complaints also *internationalize* the situation of human rights and the activities done by states for deteriorating the same. Because states so often accuse one another of the violation of treaty rights and this procedure not only highlights the state of affairs at global level but is also considered harmful for the mutual relationship of the states

The only procedure left is ICM, which does not highlight or *internationalize* the things with the same intensity like other procedures and works strictly in a judicious manner so that none of the parties i.e. states or individuals feel embarrassed and ensures that individuals get their right from the states amicably ¹¹⁷

In spite of all this many states including Pakistan have not adopted this mechanism. Pakistan has been party to number of human rights treaties but it has either reserved ICM enabling provision or not adopted the Optional Protocol to ICCPR which allows it, thereby rendering the realization of those rights next to impossible

¹¹⁶ Monitoring Implementation of the International Human Rights Instruments. An overview of the Current Treaty body System, Background Conference document prepared by Office of the UN High Commissioner on Human Rights, Fifth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2007 www.un.org/esa/socdev/enable/rights/ahc5ohchr.doc, Last accessed January 7, 2016

¹¹⁷ Antonio Augusto Cancado Trindade, op cit p 46

Another card played by the states is that they sign the treaty and pledge their commitment to nationalize it and submit reports with intervals. This attitude is totally absurd. First of all, state-reporting and process involved in it are mere formalities which have no mitigating effects in real terms as to the violation of human rights. Moreover, this policy of the states to submit reports does not contribute to mitigate the effects in real terms as to the violation of human rights which go on as usual.

Indoor sessions normally held at intervals of four years are not a justification rather a poor defence for lingering on the deteriorating situations of human rights.

NGO's (the most dependable source of information for the Committees) can be bribed easily as to the happenings and circumstances of situations.¹¹⁸ Years pass on with no solid results.

These mechanisms also do not address the specific issues of ordinary men and women. These are by nature political and cumbersome with more or less general horizon while ICM is the only available procedure which is for the ordinary people. It is the only procedure which gives the provisions real meanings and purposefulness.

So the question arises that what should be done to make states realize their responsibilities and obligations towards adopting and acknowledging this procedure. In order to do that, there are various options through which states may be reminded of their treaty obligations for instance through International condemnations or imposition

¹¹⁸ Adeeba Aziz Khan, "NGOs, the Judiciary and Rights in Bangladesh: Just another Face of Partisan Politics?" *Cambridge Journal of International and Comparative Law*, (2012) 260 <http://journals.cjicl.org.uk/journal/article/53>, Last accessed January 7, 2016

of sanctions in the name of bad human rights records and practices so that the states could be pressurized to mend their ways

2.5.2 Element of International Condemnation

As highlighted above, states do not fulfil their human right obligations normally, unless they are pressurized. There were occasions where international law even allowed intervention in those states which were violating human rights massively and systematically.¹¹⁹ With the inception of the modern era of human rights law, various changes have been seen inducing respect to human rights treaties.

For instance, United Nations has adopted and employed several measures to make states respect and fulfil their human rights obligations, such as “1235 procedure” of public condemnation which has been discussed in great detail in the foregoing. These kinds of activities like passing or adoption of resolutions regarding human rights situations at international conferences, seminars and meetings build pressure over the states of international community which becomes driving force for the states to take positive steps for the protection of human rights and fundamental freedoms.

Similarly International Human Rights Organizations like Amnesty International, and Human Rights Watch, play a pivotal role for the protection of human rights by conducting exhaustive inquiries and investigations figuring out the state of violation in different countries across the globe. They also recommend steps to be taken by the government for fulfilling their domestic and international obligations and

¹¹⁹ L N Tandon and S K Kapoor, op cit p 223

responsibilities originating from both national and international law regimes. Their reports are highly relied upon by UN and its agencies.

2.5.3 Sanctions “As Means” To Induce Respect For Human Rights Obligations

Another trend which has emerged as powerful tool for inducing enforcement of human rights is imposition of sanctions.¹²⁰ International sanctions are powerful international tools which are employed by either International Organizations (like UN), powerful countries (like USA and UK), or powerful groups of Countries (like European Union) for obtaining desired results. International sanctions are of different types such as

- Economic Sanctions
- Political Sanctions
- Military Sanctions
- Humanitarian Sanctions

Most of the sanctions are politically motivated but UN has now frequently resorted to put sanctions for obtaining compliance with human rights treaty regimes. For instance the UNSC sanction against Iraq in the wake of its attack on Kuwait in 1990.¹²¹ A glaring example of the sanction is the US-Sanction upon South-Africa on account of its apartheid practices.¹²² Discrimination on account of colour or race is a

¹²⁰ James H. Lebovic, Erik Voeten, “The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators” *Journal of Peace Research*, (2009) 79-97, <https://blogs.commonsgorgetown.edu/erikvoeten/files/2011/10/Journal-of-Peace-Research-2009-Lebovic-79-97.pdf>, Last accessed November 15, 2015

¹²¹ Baek, Buhm Suk, “Economic Sanctions Against Human Rights Violations” *Cornell Law School, Inter-University Graduate Student Conference Papers*, Paper number 11, (2008) http://scholarship.law.cornell.edu/lps_elacp/11 Last accessed January 7, 2016

¹²² *Ibid* p. 50

human rights violation and therefore US imposed economic sanctions on South Africa so that it could mend its ways and end this evil practice through taking necessary steps

2.6 European Union Steps for Inducing Respect for Human Rights

European Union is also following the same path rather with more vigour and productivity. Apart from introducing economic sanctions European Union (EU) also offers inducements of various nature to oblige respect for international and regional human rights treaty regimes.¹²³ For instance EU has linked the benefits of duty free trade across the European Countries (for the developing countries) with their signing and ratifying the respective human rights covenants and conventions. Those who wish to acquire Generalized System of Preferences (GSP) PLUS,¹²⁴ status must also do the same.

2.6.1 Pakistan Granted Generalized System of Preference (PLUS) Status

Pakistan was granted Generalized System of Preference (GSP) status by EU on its ratifying the UNCAT, and withdrawing most of its declarations and reservations from ICCPR and UNCAT respectively. GSP Plus status is a scheme of concessions on tariffs on the exports of a country to European Union States

¹²³ Philip Alston, *The EU and Human Rights* (Oxford: Oxford University Press, 1999) 747

¹²⁴ This status is granted by European Union to developing countries to help them export their products in the European Union Markets. It helps developing countries to participate in International Trade and generate more revenue which could be utilized for the eradication of poverty. Usually the countries are charged with less duties on their products which enter EU Markets. Recently Pakistan was granted GSP PLUS status because of which Pakistan had been exempted from paying any sort of duty whatsoever for a particular period of time.

According to Daily Dawn¹²⁵, EU has linked the granting of this status with strict compliance with 27 human rights conventions, both UN and Regional

According to a report published by Lahore Chamber of Commerce and Industry (LCCI)¹²⁶, these 27 Conventions are categorized as under

- Eight of the conventions are environmental related
- Other Eight relate with the rights of Labours and their conditions
- Seven are Human Rights Conventions (mostly UN)
- Three are narcotics related Conventions
- And one Convention deals with Corruption

European Union is also discussing the issue of capital punishment with the government officials.¹²⁷

These economic inducements and in other cases sanctions play an important role for obtaining state's respect for human rights treaties International Organizations and forums must also insist, in addition to stressing and insisting upon ratifications of HR instruments, that states must give their individuals access to those means and procedures which are important for the realization of rights under various human rights covenants and conventions

¹²⁵ EU delegation discusses Pakistan GSP Plus status, death penalty remains concern, *Report by Mateen Haider*, <http://www.dawn.com/news/1169340>, Last accessed March 13, 2015

¹²⁶ "Status of GSP Plus Its Implications and benefits for Pakistani Industries", 2015 http://www.commerce.gov.pk/?page_id=3422, Last accessed March 20, 2015

¹²⁷ European Union-EEAS (European External Action Service), EU reiterates its principle stand against the death penalty, World and European Day against the death penalty, http://eeas.europa.eu/delegations/pakistan/press_corner/all_news/news/2015/20102015_01_en.htm, Last accessed November 15, 2015

Even World Bank, now takes into account human rights situations in a country before granting loan or entering into any economic engagement ¹²⁸ Multinational companies and investors do not invest in a country with poor human rights records

All these things and other measures like non-investment, blocking of aids and donations, cessation of international trade and sanctions are very powerful incentives and tools to secure the compliance with states human rights obligations

Perhaps this is high time for the states to realize that the concept of sovereignty has changed. International human rights law has taken deep roots into the domestic activities of the States, Countries follow “International legal order”, and customary international practices All the countries have become interdependent in this global age and the common driving factor of relationship between civilized nations is “human rights” ¹²⁹

We adhere to the economic policies of International Monetary Fund (IMF) and take huge loans from World Bank and yet our sovereignty remains intact We frequently recourse to arbiters and negotiators for the resolution of international disputes and we submit to their jurisdiction and yet our sovereignty remains intact We receive military aid and give our soil to international forces without losing our sovereignty How then, a panel of eighteen independent, impartial and highly qualified members of Human

¹²⁸ Varun Gauri and Siri Gloppen, “Human Rights Based Approaches to Development Concepts, Evidence, and Policy Research” Working Paper, (January 2012) <http://www.gsdrc.org/document-library/human-rights-based-approaches-to-development-concepts-evidence-and-policy/>, (Last accessed, March 30, 2015)

¹²⁹ Oona A Hathaway, “Do Human Rights Treaties Make a Difference?” (2002) *Faculty Scholarship Series Paper 839*, http://digitalcommons.law.yale.edu/fss_papers/839 Last accessed November 15, 2015

Rights Committee under ICCPR or under other Human Rights treaties, could possibly violate our sovereignty?

States must understand that the moment they ratify any human rights instrument, they assume obligations and responsibilities and become bound by the provisions of the treaty. They undertake to take all appropriate steps for the realization of rights enshrined under the Instruments, they undertake to provide "effective remedy" in case the provisions got violated, and they also undertake to create no obstacle in giving effect to the provisions of the Covenants. Therefore the states must accept the jurisdiction of the Committees and enable their individuals to access international justice by ratifying the ICM related provisions or Protocols as the case may be. Because rights in papers have no meaning without "means" to realize them.

CHAPTER THREE

HUMAN RIGHTS ENFORCEMENT THROUGH INDIVIDUAL COMPLAINT MECHANISM; A HARD CASE FOR INTERNATIONAL HUMAN RIGHTS LAW

Introduction

Despite the availability of basic human rights law and consensus over the importance of the same, there are serious problems of its enforcement and implementation. Although United Nations (UN) offers various mechanisms for human rights enforcement but, the treaty bodies enforcement system is much better than its counterparts of the Charter based enforcement and implementation. It is said that, Human Rights Committees unlike Human Rights Council “have proved a success and are performing a valuable and important role in the field of human rights procedures”, but this is not same for every country. The most important implementation procedure i.e. Individual Complaint Mechanism (ICM), is declared ‘optional’ in the relevant treaties hence ‘committees’ are helpless until and unless states become parties to those procedures and their relevant provisions which enable people to access committee for the redress of their rights. Therefore it is an acknowledged fact that human rights treaties have *weak institutional mechanisms and procedures of enforcement* because of which they are not positively contributing towards any enjoyment. This is due to a number of reasons some within the UN Structure for instance, ‘Powerless Human Rights Committees’ and some outside it for instance ‘States so-called Sovereignty’ etc. What are those reasons because of which implementation of International Human Rights law is hindered shall be discussed in this Chapter.

3.1 Limitations of International Human Rights Law With Respect To Its Enforcement

International law works with the 'free will' of the states 'Free Consent' theory postulates this thing very clearly that a state becomes bound by an International rule or regulation only if it has given its consent to be bound by it To put it simple, consent of the state forms the basis of their responsibilities and obligations under International Human Rights Law, otherwise there is no international policing which could coercively compel a state to follow any international custom or principle even with respect to human rights Jus Cogens¹³⁰ being the only exception and International Human Rights enforcement mechanisms or procedures are far from being recognized as Jus Cogens because of difference of opinion upon it

Human rights treaties being part of International law in general also suffer from this shortcoming and it is up to the states to consider them binding over them or not ¹³¹ Theory of 'Auto-Limitation' also furthers and supplements this contention that it is state which can limit itself as to commitment with any International obligation We have seen that due to this shortcoming even the United Nations General Assembly (UNGA) has made Human Rights and their certain enforcement procedures such as Individual Complaint *optional* thereby leaving it free for the states to decide to assume obligations under it or not and states often refuse to assume upon them any International obligations

¹³⁰ Also known as "preemptory norms" are one of the most important and basic principles of international law which is accepted by the comity of nations collectively and from which no derogation is permitted as such There are very few norms which have got this status for instance prohibition of slavery in any form or shape is a jus cogen, torture, piracy, genocide are all Jus Cogens

¹³¹ W. Ofori-Kodjoe, *Human Rights and Societies in Transition Causes, Consequences, Responses* (USA: United Nations University Press, 2004), 108

with respect to their 'subjects' The dilemma is that UN calls ICCPR and ICESCR legally binding instruments and even then it provides the states with opportunity to reserve or denounce the treaty provisions as and when they wish For instance Article 12 of First Optional Protocol to International Covenant on Civil and Political Rights, 1966, states that "Any state party may denounce the present protocol at any time by written notification addressed to the Secretary-General of the United Nations "¹³² Article 20 of International Covenant on Economic, Social and Cultural Rights, 1966, repeats the same thing that a state may denounce the present protocol at any time.¹³³ The soft nature of these so called *legally binding instruments* has made it highly impossible to secure implementation and enforcement of the rights enshrined and incorporated in them

Moreover the greatest lacuna of International Human Rights Law is that it lacks an executive authority to enforce its decisions The glaring example of this are the Committees formed under various International Human Rights Treaties such as Committee under International Covenant on Civil and Political Rights (ICCPR), Committee under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), etc

¹³² Article 12, First Optional Protocol to International Covenant on Civil and Political Rights, 1966 It should be noted here that Optional Protocol I to ICCPR, gives Human Rights Committee established under it the power to receive petitions and complaints from the individuals of the countries who are parties to it

¹³³ Article 20 of Optional Protocol to International Covenant on Economic, Social and Cultural Rights 2008 This Protocol too like ICCPR's gives power to the Committee established under it to receive petitions and communications from the individuals of the countries who are parties to it

3.2 Enforcement Problems with the United Nations Human Rights System

3.2.1 Weaknesses of Human Rights Committee

Today, we have dozen of International Human Rights instruments which do have within themselves different procedures for the implementation of their provisions but all those procedures or mechanisms which are effective like ICM are 'optional' as highlighted before, creating a paradoxical situation. It's like we have the necessary 'Substantive Law' but lack the 'Procedure' to activate it. To put it simple, if there be a law defining a crime does not provide a mechanism to complain or lodge an F I R in case of its being committed, how on earth that *mere* defining the crime would be useful.

Today as it happens, the human rights treaty bodies which are charged with the responsibility to ensure the compliance of treaty provisions are helpless if 'states' do not accept their jurisdiction and authority in that regard.

Moreover even if states accept the jurisdiction or authority of Committees to receive complaints from the citizens of a particular country which has allowed them to do so, even then its decision's and comments are of persuasive or aspirational value and are not binding upon the states to carry them out in letter and spirit.

Other procedures or working methodology of the Human Rights Committees are also not effective and fruitful for securing compliance of the states for Human Rights Treaty provisions. Article 40 of the International Covenant on Civil and Political Rights, 1966, speaks of a procedure where the states are required to submit reports to the Human Rights Committee established under the Covenant about the "measures they have adopted to give effect to the rights recognized" under the Covenant and "the progress made in the enjoyment of those rights". On receiving those reports the

Committee shall study them and then pass such general comments, as it may consider appropriate thereon¹³⁴ But the Covenant is silent as to the scope and authority of those General Comments which it shall give or the nature, significance and status of the same i.e whether they shall be binding on the state or not These loopholes in the Covenant make it very difficult for the process to work effectively and efficaciously

3.2.1.1 Committees Are Not 'Courts'

A 'court' as defined by Black's Law Dictionary¹³⁵ is, "a governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice" If we go by this definition, human rights committees are not courts because they are called as "Panel of Experts" rather than "Judges" and their so-called decisions are called as "Opinions or Views"¹³⁶ not "judgment" which of course are aspirational therefore it's a very basic problem in the way of enforcement or obtaining compliance from the states.¹³⁷ So much so that the "process of filing complaint" is not designated as "petition" rather as "communication"¹³⁸. Probably the makers of the Optional Protocol had thought the word "communication" to be less harsh, gentle and easily digestible than the word "petition" by the sovereign states This shows quite clearly how soft the status of International Human Rights Law is in terms of enforcement.

¹³⁴ Article 40, International Covenant on Civil and Political Rights, 1966

¹³⁵ Henry Campbell Black, Black's Law Dictionary (USA Bryan A Garner- Editor in Chief 2001), 8th Edition, 1068

¹³⁶ Article 5(4) of the Optional Protocol-I to International Covenant on Civil and Political Rights, 1966

¹³⁷ Raluca David, *Comparative Study of Three International Human Rights Systems and their Enforcement Mechanisms*, <http://ssrn.com/abstract=1566495>, Last accessed November 23, 2015

¹³⁸ This word has been used as such in various places of the Optional Protocol-I of the International Covenant on Civil and Political Rights, 1966 for instance in the Preamble, and also in Article 1

This is true of all the human rights committees i.e. none of the Committees is in a position to enforce or to compel a state to carry out its recommendations or opinions. The committees also lack the power to impose sanctions, in case of non-compliance on the part of states.¹³⁹ Probably limitations on the powers of the Committees are intended to lure maximum of the states to become parties to the treaties but the limited powers of Committees become a serious issue when it comes to implementation and enforcement of the treaty provisions.

3.3 Applicability of International Human Rights Law and Issues of Nationalization of Human Rights Treaties

Another problem and impediment in the way of enforcement of International Human Rights Law is "nationalization of international human rights instruments". This basically relates with the theory as to whether International Human Rights Law directly applies to a state or it has to go through certain domestic procedures such as adoption and making of draft "Acts/ necessary domestic legislations" to incorporate it into domestic legal system.

Relationship between international law and state law has been a matter of discussion for decades. Before the modern development of International law it was considered that this law only regulated the relationship among states whereas the municipal law or the law of the state regulated the relationships of individuals with their

¹³⁹ John Charvet and Elisa Kaczynska Nay, *The Liberal Project and Human Rights, the Theory and Practice of a New World Order* (New York: Cambridge University Press, 2008), 237.

state and individuals inter se Now, this discussion has raised different theories regarding the applicability of International Law into the domestic jurisdiction of a state

As a matter of fact, present international law not only regulates and manages the relationships of states but it also takes into consideration the affairs, interests, advantages and disadvantages of individuals i.e. international law has expanded to the level where it now considers 'individuals' as its 'subjects' and as such extends its applicability to them

This discussion involves two very important theories which are monism and dualism

3.1.1 Monism and Dualism

Monists believe that municipal or domestic law and international law are basically two facets of the same phenomenon meaning thereby that both the types of law are not separate rather they are unified. In a state which believes in monism, international law needs not be made part of domestic law through necessary legislation

Once a state becomes party to a treaty, that treaty becomes enforceable immediately. There is no need to get ratification of the sovereign body of a country in respect of a treaty if the country is monistic. Ratification automatically makes the treaty part of domestic law. The citizens of the monistic nation may invoke the provisions of that treaty before the domestic courts and the judges become empowered to take into consideration that treaty and as such give their judgments accordingly. It goes on so

much so that a judge in a monistic state may declare a national law null and void if the same goes against an International treaty to which his/her state is a party ¹⁴⁰

In Germany, International law (any treaty to which Germany is a party) has the same status as the national law. To view this from human rights perspective, it's very beneficial because if any country is monistic and also is a party to a human rights treaty, say, Convention on the Elimination of All Forms of Discrimination Against Women, violates its provision, the aggrieved person may go before municipal court by invoking this law but the problem arise when the country is not monist, which means, that it believes in dualism

As it happens most of the countries of the world are "Dualistic"¹⁴¹ including Pakistan and they have to nationalize the international commitments under any treaty to give it effect in the domestic sphere. Had Pakistan been a monistic country, Human Rights Treaties and their relevant enforcement mechanisms would have activated as soon as Pakistan became the party but the story is otherwise

Under the Constitution of Islamic Republic of Pakistan in Article 97 under the head "Extent of executive authority of Federation", it states that

"Subject to the Constitution, the executive authority of the federation shall extend to the matters with respect to which [Majlis-e-Shoora (Parliament)] has power

¹⁴⁰ Prominent monistic states includes inter alia France, Greece, Austria, Netherlands, Belgium, Japan, Switzerland, Spain, Portugal, Russia, Turkey etc

¹⁴¹ Prominent dualistic states includes inter alia United Kingdom, Australia, Pakistan, Iran, Saudi Arabia, India, Israel, Sweden, Italy, Norway etc

to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan”¹⁴²

If we link this Article with “Clause 32” of the Fourth Schedule to the Constitution, things get clear as to the authority which has the powers to legislate or make commitments regarding International Treaties and Conventions. Clause 32 basically enumerates the powers of the Parliament to legislate regarding International Conventions and Treaties. It runs as follows

“International treaties, conventions and agreements and International arbitration”¹⁴³

Therefore Pakistan like many other countries of the world is a dualistic country because an International Treaty or Convention does not automatically start applying on its territories unless the same has been translated as such by the Parliament of Pakistan as highlighted above. That is why, whenever Pakistan becomes party to an instrument, it has to get it ratified through Parliament or Majlis-e-Shoora to give effect to the provisions of the treaty and the procedures of implementation or enforcement given under it. This also corresponds with “Specific Adoption Theory” for the implementation of international human rights law into the domestic sphere which says that International Human Rights law cannot be directly enforced in the field of state/municipal law and in order to get it enforced it is indispensable to make its specific

¹⁴² Article 97, Constitution of Islamic Republic of Pakistan, 1973

¹⁴³ Clause 32 in Fourth Schedule-Part I, Constitution of Islamic Republic of Pakistan, 1973

adoption To put it simple International law only applies in any country if that country adopts it through proper channel ¹⁴⁴

Now, the situation is as already discussed that International Law generally and International Human Rights Law being part of International Law particularly gives much more importance than needed to 'state's consent' Human Rights Law aims to secure the rights of humans irrespective of the enforcement mechanism or procedure through which it happens The states when they become party to any treaty undertake certain responsibilities and obligations such as to effectively implement the provisions of the treaties or making sure the availability of those human rights as incorporated in International Human Rights instruments to their subjects For these purposes they pledge to carry out certain measures such as making of necessary legislation in national parliaments or law making body to give effect to those rights (dual-ism)

Now as the practices of the states shows, to demonstrate their so called love, respect and support for the cause of human rights states undertake to take necessary steps in that direction and to legislate whereas they do not The question is that what if the states do not *nationalize* or *legislate* domestically any International Human Rights instrument, but remain parties to the treaty

My contention and stance is that where the states are monistic that is to say where they do not need internal legislation, International Human Rights Law directly applies on them and they become subject after becoming parties to it and where they need to incorporate International norms in the form of municipal law they should do it

¹⁴⁴ LN Tandon and SK Kapoor, op cit p 141

on priority basis or else *they should allow Human Rights Committee's to consider Individual Complaints to give effect to the treaty provisions unless and until national legislation in that direction is undertaken*

3.4 State Sovereignty as an Impediment to Individual Complaint Mechanism

Sovereignty as is normally understood, is the authority of a governing body to govern without any sort of interference from outside or external sources or to the exclusion of all external elements. In common words a state is deemed to be sovereign when it regulates, and is not regulated in its internal affairs.

If we look at International Human Rights Law from this perspective, we would come to know that it is purposely designed to limit state sovereignty. International legal system of human rights questions and put limitations on states practices with respect to human rights, it gives preference to individuals rather than states, and it believes that states were made for one purpose which is the protection and enforcement of human rights of its subjects. It gives individuals rights and grounds to claim those rights, privileges, and fair treatment against their own state.

It qualifies the absolute jurisdiction of states over their subjects, it makes states answerable before international bodies specifically established for these purposes.

This accountability goes against the absolute sovereignty principle of states. States usually do not want any assistance (not to talk about dictation) in its internal matters particularly human rights. States do not want to be made answerable before a panel of jurists working under any human rights committee say Committee established under International Covenant on Civil and Political Rights (ICCPR). States do not want any checks and questions over whatever they do with reference to their subjects. States

insist that human rights of the individuals, minorities or indigenous people should not be of a matter of concern to international legal system. All this is claimed by the states in the name of "sovereignty"

Highly paradoxical nature of International Human Rights Law appears to have no place to stand against it rather the consent-based theory of obligations proves to be a stalemate because states would only be bound when they wish to and even after expressing this wish they are free to raise objections, put reservations and declarations where they feel insecure about so-called sovereignty being violated.

Therefore, the principle of 'state sovereignty' has proven so far the biggest obstacle to the implementation and enforcement of International Human Rights Law and normative strength of this branch of law has been greatly curtailed due to restricted access to enforcement procedures

3.5 Misgivings, Skepticism and Concerns of Third World States

Third world states have their own ideals and perceptions about human rights. They consider the procedure and enforcement mechanisms a tool and method to intervene in the affairs of these socio-economically backward countries. There are a lot of misgivings about it. Third world countries do not want to be part of this procedure as they think there are various other things which should be worked upon on priority basis.¹⁴⁵ Economic and social conditions of most of the third world countries do not permit them to go for this change. Poverty, hunger, development are their core concerns and right of access to international justice through individual complaint or individual

¹⁴⁵ W. Ofori-Kodjoe, *op cit* p. 112

petition-like ideal modalities are very low on their list of priorities. Most of the governments of third world countries have been under the suzerainty of First world countries, many of them still have dictators and monarchs who pay no heed to these principles enshrined in the covenants. It's very hard to expect positive signals from even the democratic governments of third world countries what to talk about those in which there is autocracy or where the decision making powers rest with authoritarian rulers and dictators. Therefore underdeveloped or developing countries of the third world would never accept this principle blindly as they have their own reservations and fears. They also accuse UN for taking sides with the powerful blocks of the world where human rights violations are not addressed and it seems that UN could only see and be concerned with those violations happening in the third world countries. Muslims world is particularly subjected to this kind of discrimination.

For instance, in Indian occupied Kashmir, massive abuses of human rights are being committed since decades. People are tortured, kidnapped and abducted, killed, women being raped. Systematic genocide is committed by Indian army. Thousands and thousands of unmarked graves have been discovered. International Human Rights Organizations and NGOs such as Amnesty International and Human Rights Watch have conducted exhaustive investigations and made it crystal clear that India has been in violation of the most basic human rights of the people of Kashmir but the United Nations seem not concerned with these glaring violations, instead India is looking forward to grab permanent seat in the Security Council of the UN to further its malicious aims in this region particularly and in the world generally. Any sanction from UN or USA? Any notice by the mighty powers of the west (the torch bearers of human rights)? No. On the other hand UN, USA and the rest of the west take very little time if

any to impose sanctions of all kinds including economic and military to stop Pakistan or Iran despite of dozen clarifications and assurances that these are for the peaceful developments in the field of nuclear technology US has always found dictatorship more convenient to pursue its goals in Pakistan and as such supported all the military leaders throughout the history but its representatives never stop speaking about the blessings of democracy. Is this not a hypocrisy and worst form of discrimination?

To add to this highly discriminative behavior International Criminal Court (ICC), indicted Omar-al-Bashir under three heads of the crimes i.e. genocide, crime against humanity and war crimes and also issued his arrest warrant but never thought to indict Honorable Israeli premiers for the devastation and havoc they caused to innocent Palestinians

These double standards are also a big impediment for the developing or under-developed states generally and Islamic states particularly to adhere to the lofty principles these instruments offer which ultimately affect the United Nations Human Rights Enforcement mechanisms

3.6 Reservations; an Obstacle to Human Rights Enforcement

In Chapter two, the status of reservations under International Human Rights law has been discussed at length Here it will be appropriate to highlight another dimension of this frequently adhered to practice of the states that they so often reserve those provisions of the human rights instruments which they find hard to act upon Once they reserve them, the provisions stops being applicable to the states and they go scot-free from any liability whatsoever which they might have assumed, had they not reserved those provisions

Human Rights Committee, formed under ICCPR, in its General Comment¹⁴⁶ no 24 discussed in great detail the issues relating to reservations or the declarations made by the states parties upon ratification or accession to the principal covenants or their protocols. It strongly asserted in the first paragraph of the General Comment that “the number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of states parties”¹⁴⁷ This is so because once a state reserved any provision or a set of provisions of a treaty, it means that the state does not accept any responsibility or obligations whatsoever to the extent of those provisions and hence the body established to monitor the compliance of the treaty or superintend its effectiveness feels handicapped as to questioning the *reserving state* about the commitments which were there in those provisions which the state has reserved, thereby creating a weird situation

As it happens, with reference to International Human Rights Law, state's practices show that they have become parties to the treaties like ICCPR, or ICESCR but they have either reserved the provision granting the Committees established under those treaties the power to receive communications from the people of that country complaining about the violation of their rights, or, they are not party to the relevant Optional Protocol which provides the detailed framework as to how ICM will work

¹⁴⁶ Adopted by the Committee at its 1382nd meeting (fifty-second session) on November 2, 1994

¹⁴⁷ General Comment 24, by Committee on International Covenant on Civil and Political Rights, on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U N Doc CCPR/C/21/Rev 1/Add 6 (1994) <http://www1.umn.edu/humanrts/gencomm/hrcom24.htm>, Last accessed December 5 2015

Unfortunately the reasons lie with the very nature of the International Human Rights Law which itself provides states to make reservations or even to denounce it after they have ratified it

CONCLUSION AND RECOMMENDATIONS

Conclusion

Human Rights Law has seen remarkable changes after the creation of the United Nations UN which was created in the wake of Second World-War has brought to surface a number of Conventions for maintaining peace of the world and particularly for the protection of the rights of 'individuals' from their own states These conventions work as a standard for the states to follow in their national jurisdictions These conventions are not mere substantive in nature rather they also provide for a number of procedural options through which the rights provided in the conventions may be realized

Practices of the states show that they generally become parties to the treaties but also reserve besides substantive many of the procedural provisions thereby blocking the channels and modes through which the rights were expected to be claimed and secured Individual Complaint/Communication is one of those important procedural tools to "achieve the purposes" of human rights treaties

Unfortunately present International Human Rights Law is not binding stricto sensu It is a soft law hence has various shortcomings and lacunas for instance the too frequent practice of the states to put reservations upon the human rights treaties and denunciation clauses within the treaties depict the soft, loose and non-binding nature of IHRL

Reserving a substantive provision is though allowed but reserving a 'procedural provision' to benefit from the rest of the treaty is in no way in accordance with the accepted International Jurisprudence upon Human Rights Treaties According to the

Vienna Convention on the Law of Treaties, 1969, such reservations which are against the 'object and purposes' of the treaty have no legal effect

States also take shelter behind their so-called sovereignties to avoid international checks and ignore the basic fact that the purposes behind the concept of 'state' itself was nothing else but to protect and secure respect for human beings and their rights

In present times, Individual Complaint Mechanism is working first, under the UN frame-work and second, under the Regional Human Rights Regimes such as European Union or African Union Unlike the UN Human Rights Enforcement System, Regional Human Rights Mechanisms are successfully working across the respective regions because the states co-operate without any prejudice or reservations Thousands of people register complaints against their own governments for the violations of their rights granted to them by the regional human rights conventions and not a single government blocks this basic right to petition This right of Access to Justice is however blocked by the developing states because their so-called sovereignties are more sacred and human rights conditions praiseworthy

It should be realized by the 'sovereign states' of the developing nations that ICM is the most harmless and important procedure among those available and does not violate their 'honour' The Committees mandated to carry out the purposes of the Human Rights Treaties do not put sanctions on the States rather they assist, aid and help 'individuals' get their rights back from the very state which violated it by requesting the State itself

Without relevant mechanisms and specific means of implementation, human rights theory and norms could remain mere rhetoric on paper. The hurdles to implementation are much higher than those of norms and standard setting under International Human Rights Law and it is always the effective mechanisms and means of implementation which lead to the practical realization of human rights in the lives of human beings.

Recommendations

- Individual Complaint Mechanism should be made *compulsory* rather than *optional* in the Covenants and Conventions like that of State-Reporting procedure
- All the respective Human Rights Committees under their Covenants and Conventions should be given the powers similar to that of the court and their jurisdiction and authority should be made compulsory upon the states
- States should not reserve Individual Complaint Procedure being the only viable procedural tool for the proper realization of the rights enshrined under UN Human Rights Treaties
- Pakistan should become party to core ICM related Optional Protocols of UN Human Rights Treaties
- National governments should co-operate with the Human Rights Committees in place of avoiding this harmless procedure
- National Courts must follow all the judicial principles in doing justice so that the people do not feel aggrieved and recourse to other methods and channels for vindication of justice
- Asian Countries should build a consensus upon making its own regional human rights setup seeking guidance from European or Inter-American Human Rights Systems for better protection of Human Rights where access to justice is easy and available to everyone

ANNEXES

ANNEX A¹⁴⁸

Model Complaint Form

For communications under

- Optional Protocol to the International Covenant on Civil and Political Rights
- Convention against Torture, or
- International Convention on the Elimination of Racial Discrimination

Please indicate which of the above procedures you are invoking

Date

I. Information on the complainant:

Name First name(s)

Nationality Date and place of birth

Address for correspondence on this complaint

Submitting the communication:

on the author's own behalf

on behalf of another person

¹⁴⁸ www2.ohchr.org/english/bodies/docs/annex1.pdf

[If the complaint is being submitted on behalf of another person]

Please provide the following personal details of that other person

Name	First name(s)
Nationality	Date and place of birth
Address or current whereabouts	

If you are acting with the knowledge and consent of that person, please provide that person's authorization for you to bring this complaint

Or

If you are not so authorized, please explain the nature of your relationship with that person and detail why you consider it appropriate to bring this complaint on his or her behalf.

II State concerned/Articles violated

Name of the State that is either a party to the Optional Protocol (in the case of a complaint to the Human Rights Committee) or has made the relevant declaration (in the case of complaints to the Committee against Torture or the Committee on the Elimination of Racial Discrimination)

Articles of the Covenant or Convention alleged to have been violated

III. Exhaustion of domestic remedies/Application to other international procedures

Steps taken by or on behalf of the alleged victims to obtain redress within the State concerned for the alleged violation – detail which procedures have been pursued, including recourse to the courts and other public authorities, which claims you have made, at which times, and with which outcomes.

If you have not exhausted these remedies on the basis that their application would be unduly prolonged, that they would not be effective, that they are not available to you, or for any other reason, please explain your reasons in detail

Have you submitted the same matter for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Commission on Human and Peoples' Rights)?

If so, detail which procedure(s) have been, or are being pursued, which claims you have made, at which times, and with which outcomes

IV. Facts of the complaint

Detail, in chronological order, the facts and circumstances of the alleged violations

Include all matters which may be relevant to the assessment and consideration of your particular case Please explain how you consider that the facts and circumstances described violate your rights.

Author's signature

[The blanks under the various sections of this model communication simply indicate where your responses are required You should take as much space as you need to set out your responses]

V. Checklist of supporting documentation (copies, not originals, to be enclosed with your complaint):

- Written authorization to act (if you are bringing the complaint on behalf of another person and are not otherwise justifying the absence of specific authorization)
- Decisions of domestic courts and authorities on your claim (a copy of the relevant national legislation is also helpful)
- Complaints to and decisions by any other procedure of international investigation or settlement
- Any documentation or other corroborating evidence you possess that substantiates your description in Part IV of the facts of your claim and/or your argument that the facts described amount to a violation of your rights

If you do not enclose this information and it needs to be sought specifically from you, or if accompanying documentation is not provided in the working languages of the Secretariat, the consideration of your complaint may be delayed

ANNEX B¹⁴⁹

MODEL FORM FOR SUBMISSION OF COMMUNICATIONS TO THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN UNDER THE OPTIONAL PROTOCOL OF THE CONVENTION

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women entered into force on 22 December 2000. It entitles the Committee on the Elimination of Discrimination against Women, a body of 23 independent experts, to receive and consider communications (petitions) from, or on behalf of, individuals or a group of individuals who claim to be victims of violations of the rights protected by the Convention

To be considered by the Committee, a communication

- must be in writing,
- may not be anonymous,
- must refer to a State which is a party to both the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol,
- must be submitted by, or on behalf of, an individual or a group of individuals under the jurisdiction of a State which is a party to the Convention and the Optional Protocol. In cases where a communication is submitted on behalf of an individual or a group of individuals, their consent is necessary unless the person submitting the communication can justify acting on their behalf without such consent

A communication will *not* normally be considered by the Committee

- unless all available domestic remedies have been exhausted,
- where the same matter is being or has already been examined by the Committee or another international procedure,
- if it concerns an alleged violation occurring before the entry into force of the Optional Protocol for the State

¹⁴⁹ <http://www.un.org/womenwatch/daw/cedaw/opmodelform.html>

In order for a communication to be considered the victim or victims must agree to disclose her/their identity to the State against which the violation is alleged. The communication, if admissible, will be brought confidentially to the attention of the State party concerned.

* * *

If you wish to submit a communication, please follow the guidelines below as closely as possible. Also, please submit any relevant information which becomes available after you have submitted this form.

Further information on the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, as well as the rules of procedure of the Committee can be found at <http://www.un.org/womenwatch/daw/cedaw/index.html>

Guidelines for submission

The following questionnaire provides a guideline for those who wish to submit a communication for consideration by the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Please provide as much information as available in response to the items listed below.

Send your communication to:

Committee on the Elimination of Discrimination against Women

c/o Division for the Advancement of Women, Department of Economic and Social

Affairs United Nations Secretariat

2 United Nations Plaza

DC-2/12th Floor

New York, NY 10017

United States of America

Fax 1-212-963-3463

I. Information concerning the author(s) of the communication

- Family name
- First name
- Date and place of birth
- Nationality/citizenship
- Passport/identity card number (if available)
- Sex
- Marital status/children
- Profession
- Ethnic background, religious affiliation, social group (if relevant)
- Present address
- Mailing address for confidential correspondence (if other than present address)

- Fax/telephone/e-mail
- Indicate whether you are submitting the communication as
 - Alleged victim(s) If there is a group of individuals alleged to be victims, provide basic information about each individual

- On behalf of the alleged victim(s) Provide evidence showing the consent of the victim(s), or reasons that justify submitting the communication without such consent

2. Information concerning the alleged victim(s) (if other than the author)

- Family name
- First name
- Date and place of birth
- Nationality/citizenship
- Passport/identity card number (if available)
- Sex
- Marital status/children
- Profession
- Ethnic background, religious affiliation, social group (if relevant)
- Present address
- Mailing address for confidential correspondence (if other than present address)
- Fax/telephone/e-mail

3. Information on the State party concerned

- Name of the State party (country)

4. Nature of the alleged violation(s)

Provide detailed information to substantiate your claim, including

- Description of alleged violation(s) and alleged perpetrator(s)
- Date(s)
- Place(s)
- Provisions of the Convention on the Elimination of All Forms of Discrimination against Women that were allegedly violated If the communication refers to more than one provision, describe each issue separately.

5. Steps taken to exhaust domestic remedies

Describe the action taken to exhaust domestic remedies, for example, attempts to obtain legal, administrative, legislative, policy or programme remedies, including

- Type(s) of remedy sought
- Date(s)
- Place(s)
- Who initiated the action
- Which authority or body was addressed
- Name of court hearing the case (if any)
- If domestic remedies have not been exhausted, explain why

Please note Enclose copies of all relevant documentation

6. Other international procedures

Has the same matter already been examined or is it being examined under another procedure of international investigation or settlement? If yes, explain

- Type of procedure(s)
- Date(s)
- Place(s)
- Results (if any)

Please note Enclose copies of all relevant documentation

7. Date and signature

Date/place _____

Signature of author(s) and/or victim(s) _____

8. List of documents attached (do *not* send originals, only copies)

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