

Respect-Protect-Fulfil

I. Introduction

[1] During the time of the Cold War, an ideological battle between Western and Socialist states, to some extent also involving states of the Global South, determined the human rights discourse in the United Nations. Under the direct influence of the Nazi Holocaust and a certain anti-fascist consensus immediately after World War II, the → United Nations managed to adopt the 1948 → Universal Declaration of Human Rights (UDHR), which can be regarded as a synthesis of the different human rights concepts. However, when the United Nations started to draft a legally binding universal convention on human rights, the Western states succeeded in splitting this convention into two different → treaties with two different sets of state obligations and international monitoring mechanisms (UNGA, *Res 543(VI)* [1952]). After long and highly controversial negotiations, both treaties were finally adopted in 1966 and entered into force in 1976.

[2] The → International Covenant on Civil and Political Rights (ICCPR) reflects the Western concept of human rights, which were at that time considered as ‘negative rights’, i.e. as rights against state interference. The → International Covenant on Economic, Social and Cultural Rights (ICESCR), on the other hand, represents the Socialist concept of human rights, i.e. of ‘positive rights’ that required positive state measures to be implemented (→ Negative and Positive Obligations). This allegedly ‘inherent difference’ between different categories of human rights also inspired the theory of the ‘three generations of human rights’ (Karel Vašák), namely civil and political rights of the ‘first generation’, economic, social and cultural rights of the ‘second generation’ with → collective and group rights of → peoples, such as the right of peoples to → self-determination in

common Article 1 of both Covenants as a ‘third generation’ attributed to the Global South (→ Generations of Human Rights).

[3] In legal terms, the difference in state obligations in relation to the first and second ‘generation’ of human rights is expressed in Article 2 of both Covenants. According to Article 2 ICCPR, each state party undertakes ‘to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’, without any discrimination. According to Article 2 ICESCR, on the other hand, each state party only undertakes

to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures [→ Core Obligations and Progressive Realization].

[4] These legal differences in state obligations nurtured many human rights theories which alleged that only civil and political rights were proper human rights that were directly applicable and needed to be immediately respected and ensured by states. If states failed to respect or ensure such rights, they would commit a human rights violation and could be held accountable before domestic courts or before the Human Rights Committee (HRCttee) as the international monitoring body of the ICCPR, in the context of the → state reports or the → individual and collective communication or complaint procedures under the First Optional Protocol to the ICCPR. Economic, social and cultural rights, on the other hand, were only considered as ‘programme rights’, which were not → justiciable rights, as states only had a very vague obligation to take steps towards progressively achieving the full realization of such rights in the future. As a consequence, Article 16 ICESCR did not foresee the establishment of a treaty monitoring body similar to the HRCttee in Article 28 ICCPR, but simply entrusted the Economic and Social Council (ECOSOC) of the United Nations with the task of examining state reports.

[5] Although this ideology-based distinction between the legal value of civil and political rights as opposed to economic, social and cultural rights is based on a number of false assumptions, it did influence the theory and practice of human rights considerably. It was only during the second World Conference on Human Rights, held in Vienna in June 1993 (→ Vienna Declaration and Programme

of Action), that the United Nations finally acknowledged the universality, equality, interdependence and indivisibility of all human rights (→ Universalism and (Cultural) Relativism), which led to the gradual recognition of economic, social and cultural rights as equal to civil and political rights, which were often argued (mainly by Western states) to be more important. Already, in 1985, ECOSOC had decided to establish an independent expert Committee on Economic, Social and Cultural Rights (CESCR) (ECOSOC, *Res 1985/17* [1985]), but it was not until 2008 that the United Nations finally adopted an Optional Protocol to the ICESCR, which entrusts the CESCR with also receiving and considering individual communications, similar to the HRCttee.

[6] With these gradual changes in practice, the respective human rights theories also changed. Rather than thinking in the categories of ‘negative and positive rights’, contemporary human rights theories accept that all human rights entail negative and positive obligations by states. In general, these state obligations are defined as obligations to *respect*, to *protect* and *fulfil* all human rights (see the report by Special Rapporteur Eide to the HRCttee [1987]; Nowak [2003]). The obligation to respect is a ‘negative’ obligation as it requires states to refrain from unduly interfering with a particular human right. If such interference is not justified by a permissible limitation, then the state violates the respective human right. The obligation to fulfil human rights, on the other hand, is a ‘positive obligation’ as it requires states to take positive legislative, administrative, judicial, political and other practical measures to properly implement the respective human right. The obligation to protect is also a ‘positive obligation’, as it requires states to protect individuals by positive measures against interference with their human rights by other private parties (→ Non-state Actors). While ‘negative obligations’ are immediately applicable and a failure to respect a particular human right leads to a human rights violation, the ‘positive obligations’ to fulfil and protect human rights are subject to the principle of ‘progressive implementation’ and thereby subject to the → ‘due diligence test’. States only violate such a ‘positive obligation’ if they are considered not to have taken all measures that can be reasonably expected from them in order to properly fulfil a particular human right or to protect an individual against interferences by other private parties.

[7] In the following sections, the differences between these state obligations will be discussed in relation to a number of selected civil, political, economic, social and cultural rights.

II. Respect-protect-fulfil in the context of specific human rights

1. *Right to life*

[8] According to the old theory of ‘negative rights’ against state interference, the right to life could only be violated if state agents (usually the police or other security forces) would arbitrarily kill an individual. A typical form of a gross violation of the → right to life would be summary and arbitrary executions by the military and police, as often happened in military and other dictatorships. In democratic countries based on the → rule of law and human rights, killings by state security officials are, however, not the main reason for the unnatural deaths of human beings. Many more people are killed as a result of violent crimes, including → domestic violence, of car and sports accidents, of epidemics and endemic diseases (→ Infectious Diseases), malnutrition or a deficient health care system. This is where the state obligations to fulfil and protect the right to life come into play. As early as 1982, the UN HRCtee adopted a → General Comment on the right to life in which it ruled that

the protection of this right requires that states adopt positive measures. In this connection, the Committee considers that it would be desirable for states parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics (*GC No 6: Life* [1982] para 5).

If a police officer kills an individual without a proper justification (such as self-defence), the state violates its negative obligation to respect the right to life. If in a particular country, there is a high rate of violent crimes and the state (police, administration of justice, etc.) fails to take any effective measures to fight these crimes, the state might violate its obligation to protect the right to life against common or → organized crime. If many people die of epidemic diseases and the state fails to take reasonable measures within the public health system (such as vaccinations), then it may be found to have violated its obligation to fulfil the right to life in accordance with the principle of ‘due diligence’.

2. *Prohibition of slavery*

[9] Although the prohibition of → slavery and the slave trade is one of the oldest civil rights, it was never conceived as a ‘negative right’ against state interference. On the contrary, slave owners and

slave traders were always private individuals, who exploited slave labour for their own private gains. The → prohibition of slavery, servitude and forced labour and the slave trade is therefore a typical state obligation to protect slaves against private slave owners and slave traders. In addition, states are required to fulfil this important human right by enacting relevant legislation, by applying criminal law and by ensuring in practice that slaves found on boats are in fact becoming free and empowered by the state through positive measures to start a new life in freedom. Finally, states are, of course, also required to respect the prohibition of slavery by state agents not being actively involved in the slave trade or complicit with the crimes committed by slave owners and traders. This applies equally to modern forms of slavery, such as trafficking in human beings and organs (→ Human Trafficking).

3. *Freedom of assembly*

[10] A state violates its negative obligation to respect → freedom of assembly if its authorities prohibit a demonstration without a proper justification or if the police violently break up a public gathering which was lawfully organized and registered with the authorities. But the police also have a number of positive obligations to fulfil and protect freedom of assembly. In order to ensure that people can demonstrate in the streets, the police have to re-route traffic and ensure that people can exercise their human right to freedom of assembly without any major obstacles. If other people organize a counter-demonstration in order to disturb or stop a lawful public gathering, the police have the positive obligation to protect the demonstrators against interference by hostile private parties.

4. *Right to vote*

[11] The right to vote is one of the most important of political rights, which are essential for the proper functioning of any democratic society (→ Elections and Government, Right to Participate in). The state has the negative obligation not to unduly interfere with the right to vote and the right to be elected, e.g., by preventing certain candidates running for election or by arbitrarily stripping citizens of their right to vote in such elections. At the same time, the state has a number of positive obligations in fulfilling the right to vote by properly preparing the elections, by ensuring that all voters can cast their ballot in accordance with the principles of free and secret voting and by ensuring that

all votes are properly counted and that the results of the vote are respected by the political authorities. It also has the obligation to protect voters against undue intimidation by other powerful private actors, such as family members or powerful political groups, and against all forms of election fraud.

5. *Right to fair trial*

[12] This is one of the most comprehensive civil rights, which is essential for the rule of law in a democratic society. In all civil and criminal matters, everyone shall be entitled to a fair and public hearing before a competent, independent and impartial tribunal established by law (→ Fair Trial, Right to (Civil Proceedings); → Fair Trial, Right to (Criminal Proceedings); → Fair Trial, Right to (Administrative Proceedings)). This means that, first of all, states have the positive obligation to fulfil this right by enacting relevant laws for the administration of justice, including criminal and civil codes and codes of procedure, by establishing courts, by hiring and training a sufficient number of judges, prosecutors and other justice-related personnel, by ensuring that all persons are equal before the courts and tribunals and enjoy equal → access to justice and, finally, by ensuring that all stakeholders (the claimant and defendant in a civil suit as well as the public prosecutor and the accused in a criminal trial) enjoy a fair trial and equality of arms (→ Right to be Recognized as a Person). States also have an obligation to protect individuals in the administration of justice against powerful private stakeholders. For example, wealth and the ability to engage the most expensive lawyers should not play a decisive role and poor people should be supported by effective legal aid and pro bono lawyers in order to receive a fair trial. States shall also enforce the presumption of innocence against powerful media and political influence in order to ensure a fair trial before impartial judges who have not been unduly swayed. Finally, states have a number of detailed obligations to respect the right to a fair trial. If judges do not respect the equality of arms or are biased, the state is violating the right to a fair trial. The accused in a criminal trial have a number of specific rights which need to be respected by judges and other justice-related personnel, such as to be informed promptly of any charge, to have adequate time and facilities to prepare their defence, to be tried without undue delay, to examine witnesses, to have the free assistance of an interpreter etc.

6. *Right to education*

[13] The → right to education is the most important cultural right and therefore belongs to the so-called 'second generation' of human rights. States are required to ensure free and compulsory primary education for all → children up to the age of 14 or 15, free secondary education, including technical and vocational education and equal access to higher education for all, on the basis of capacity and by the progressive introduction of free education. In addition, states shall encourage fundamental education and life-long learning for all. As with the civil right to a fair trial, these are primarily positive obligations that states are to fulfil. First of all, states shall establish a sufficient number of public primary, secondary and vocational schools as well as universities and other institutions of tertiary education. They shall employ and train a sufficient number of teachers at all levels of education to ensure that all children are actually enrolled in schools. All these educational services have to be provided free of charge because the right to education requires free and compulsory primary education as well as the progressive introduction of free secondary and tertiary education. States also have an obligation to protect children against their own parents, who might perhaps prefer that their children contribute to the family income through child labour. States shall also protect children against teachers who apply corporal punishment and other inhumane disciplinary measures. Finally, states must also respect the right to education. If states, for example, discriminate against children from certain → minorities, or → refugee or → migrant children by denying them equal access to public schools, they violate the right to education. Although states shall provide education primarily through public schools, the human right to education also explicitly provides for the right and liberty of individuals and bodies to establish and direct private schools and universities, subject to the minimum standards and principles of education laid down by the state. Similarly, parents have the explicit right to choose private schools for their children and to ensure religious and moral education of their children in conformity with their own convictions. If states prohibit all private schools and deny parents the right to educate their children in conformity with their own religious convictions, then they violate their obligation to respect. On the other hand, excessive privatization of public schools and outsourcing of education to the for-profit sector can easily lead to a violation of the

positive obligation of states to fulfil the right to free, quality education in public schools.

7. *Rights to health and social security*

[14] The right to the enjoyment of the highest attainable standard of physical and mental health and the → right to social security are important social rights. States have an obligation to create conditions which assure all individuals can access medical service and medical attention in the event of sickness. This means, first of all, that states have the positive obligation to fulfil the → right to health by establishing public health services, from primary and emergency health centres to public hospitals and by employing and training a sufficient number of doctors, nurses and other medical staff in order to ensure that everyone, in the event of sickness, accidents or old age, has equal access to medical services. Since medical attention is not to be a privilege of the rich, the right to health is closely related to the right to social security and social insurance. States have a positive obligation to establish a social security system by pooling resources and re-distributing such resources on the basis of the principle of solidarity, from the healthy to the sick, from the wealthy to the poor, from the employed to the unemployed and from the younger to the older generations. Not all medical services must be provided by the state, but the state has an obligation to protect individuals against discrimination in their access to private health services, essential medicines, vaccinations etc. Excessive privatization of public health services and social security systems may easily lead to a situation where the state violates its obligation to fulfil the rights to health and social security. This is particularly important with respect to the prevention, treatment and control of epidemics and endemic diseases, as we were reminded during the 2020 COVID-19 pandemic. Finally, states have an obligation to respect the right to health by not discriminating against vulnerable groups, such as → refugees and → migrants, members of → minorities and → indigenous peoples, or the poor (→ poverty) and → homeless, in their access to public health care and social security.

8. *Rights to work and in work*

[15] The most important economic rights are the → right to work, which includes the right of all people to the opportunity to gain their living by work which they freely choose or accept and the right to the enjoyment of just and favourable conditions of work,

which includes fair wages, equal pay for equal work, safe and healthy working conditions, rest, leisure and reasonable limitation of working hours and periodic holidays with pay. States have an obligation to fulfil these rights by developing the conditions for full and productive employment, by assisting people in the job market, by providing social security in case of unemployment and by adopting labour laws that guarantee safe, healthy and fair working conditions etc. These positive obligations overlap with the obligation of states to protect workers against economic exploitation by their employers by granting them minimum wages, paid holidays and a maximum number of working hours per week as well as minimum standards regarding safe and healthy working conditions. The human right to form and join → trade unions plays an important role in assisting workers to enjoy these rights vis-à-vis their employers. As one of the main employers, the state has, of course, also the obligation to respect all these rights for governmental employees.

III. Conclusions

[16] The different examples discussed above clearly show that states have an obligation to respect, protect and fulfil all human rights. For some rights, such as the right to privacy, the obligation to respect seems most important, while for others, such as the prohibition of slavery, the obligation to protect is in the foreground. For most human rights, including the rights to life, vote, fair trial, education, work, health and social security, the obligation to fulfil these rights by a variety of legislative, administrative, political and practical measures is definitely the most important objective. This shows that, contrary to some early human rights theories, the domestic implementation of international human rights is one of the most important, if not the most important, task of governments (→ Domestic Enforcement of Human Rights). This task is not cost-free, as was also often asserted, but on the contrary requires considerable financial and other public resources. Most of the budgetary resources of states are in fact spent to fulfil human rights obligations, from the administration of justice to the education and health sector, labour and social services. Even expenditures for the military (if not excessive) and police can be derived from the obligation of states to fulfil the human → right to (personal) security. This means that the fulfilment of human rights remains the most important task of governments and provides governments with legitimacy.

[17] The most difficult task for courts and other human rights monitoring bodies is to assess

whether, in a specific situation, a particular state violates its obligations to respect, protect or fulfil a certain human right. Courts have most experience in assessing the ‘negative’ obligation to respect human rights. If a state agency interferes with a human right, which is not an absolute right, courts have to assess whether this interference is provided by law, is in the interest of an explicit public goal, such as national security, public order, public health or morals or the protection of the rights of others, whether this interference is necessary in a democratic society to protect such a goal and whether it is proportionate in the particular circumstances of the case (→ Limitations and Restrictions of Rights). If all these conditions are met, then the interference by a public authority is justified and does not amount to a human rights violation. If one of these conditions is not met, in particular if the interference is not proportional, then it is excessive and amounts to a human rights violation. The assessment of whether the failure to take certain positive measures to protect or fulfil a particular human right amounts to a human rights violation is more difficult and we have less experience so far in case law. Courts must apply the ‘due diligence test’, i.e. assess whether in the particular circumstances of the case, states have taken all necessary steps that can reasonably be expected from them, taking also into account their available resources. If states have failed to take these steps that aim at the progressive realization of the right in question, they are in violation of this right. Apart from exceptional situations, such as a national emergency, retrogressive measures are prohibited. Similarly, states shall always ensure that the minimum core content of a specific right is fulfilled, such as equal access to emergency health care in case of acute sickness or accidents.

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