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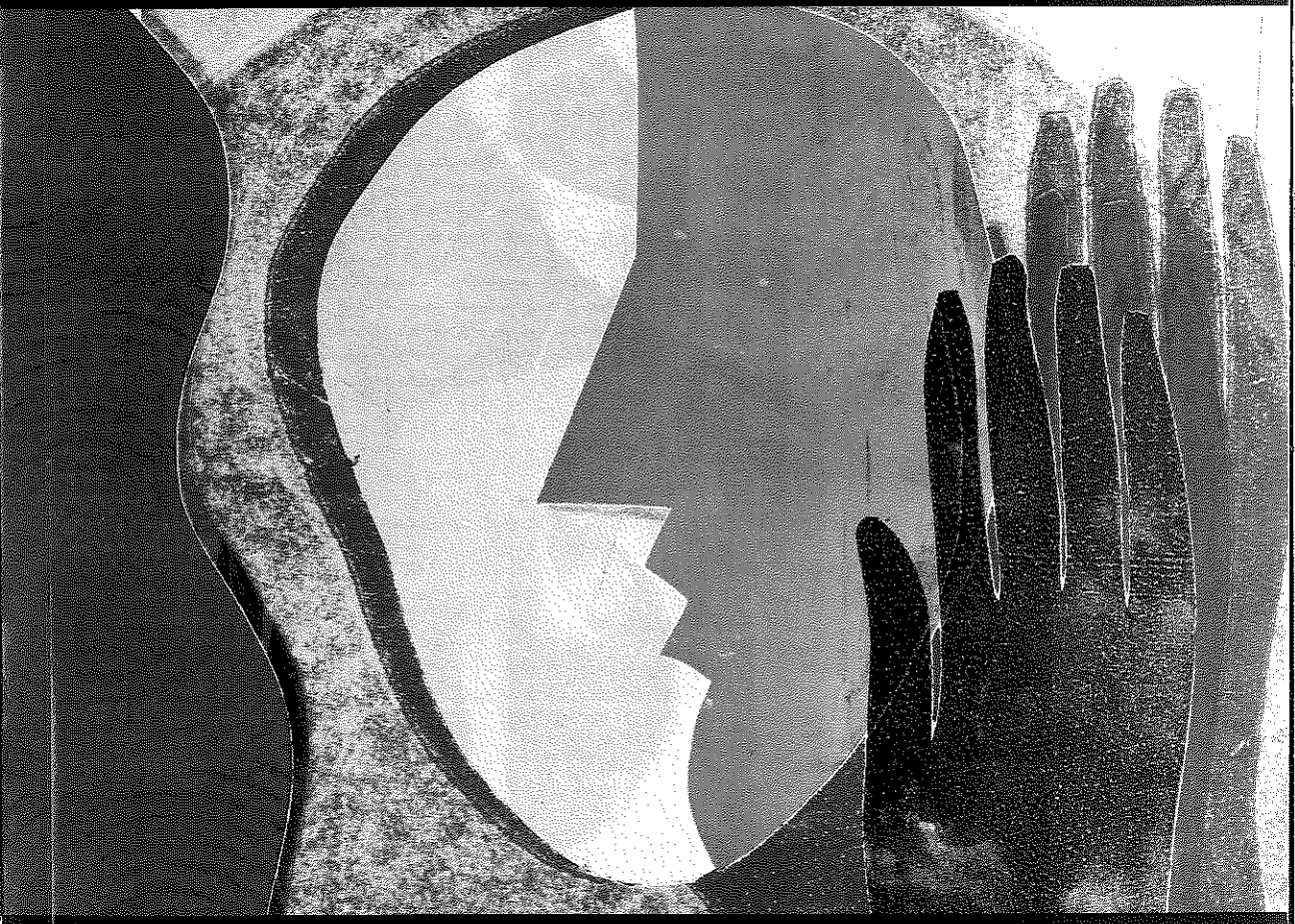
INTERNATIONAL HUMAN RIGHTS LAW



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character also underlines the extent to which international human rights treaties, perhaps especially regional ones, are part of governance structures and, beyond that, one of the normative foundations of political community (for example, that of the Council of Europe in the case of the ECHR). International human rights thus appear as the cement that binds groups of states together in a collective project that is domestic, transnational, and supranational.

Although the special nature of human rights obligations might at first appear to be a mere doctrinal construct, what is remarkable is the extent to which concrete consequences have flowed from this idea. In the sections that follow, we will see some of the manifestations of the special character of human rights obligations, and the considerable impact it has had on the enjoyment of human rights.

3 IMPLEMENTATION OF HUMAN RIGHTS OBLIGATIONS

Typically, under traditional international law the manner in which an obligation is supposed to be discharged is not specified. States simply have to do what they commit themselves to do, and considerable discretion is left as to the means by which they do so. When it comes to human rights, this traditional, laissez-faire, approach will not do. International human rights law has thus come up with a complex concept of how obligations are to be discharged. An entirely new vocabulary of obligations has emerged. Typically, states are supposed to 'respect and ensure rights to all individuals'.[11] However, this is a very broad obligation and in practice the UN human rights treaty bodies have adopted a tripartite typology of how human rights obligations should be secured. According to that typology, states must respect, protect, and fulfil human rights.

3.1 RESPECT

The duty to secure human rights is, perhaps first and foremost, a duty to 'respect' human rights. Thus, states have a negative obligation not to take any measures that result in a violation of a given right. They should not consciously violate rights, either through their organs (for example, parliament or the executive) or through their agents (such as, civil servants, the police, or the army).

3.2 PROTECT

In addition, and this phrase is becoming ever more important, states must 'protect' individuals from human rights violations. This means that the state needs to

[11] eg ICCPR, Art 2.

proactively ensure that persons within its jurisdiction do not suffer from human rights violations at the hands of third parties. This is much more akin to creating an environment in which rights are enjoyed. Of course, the state does not become liable for every adverse interference with individuals' rights by private actors. However, the state is liable for those failures that can be traced to its shortcomings in protecting individuals from other individuals, for example because it has adopted a law that made the violation possible, or because it has failed to do something that would have prevented the violation from happening.[12] This is known as the indirect horizontal effect of human rights. States have been found liable for failing to protect demonstrators from third parties,[13] for failing to protect an individual from murder despite the fact that the police knew the victim's life had been threatened,[14] and, in cases of domestic violence, for failing to provide adequate structures or legal protection to abused women.[15] As the Inter-American Court of Human Rights put it in the landmark case of *Velásquez Rodríguez v Honduras*, which involved the forced disappearance by unidentified abductors of a student activist:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention..... [The state is liable when it] allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.[16]

3.3 FULFIL

The obligation to 'respect' human rights is a primarily negative one (to not actively violate rights). Treaty bodies, however, have long emphasized the existence of an obligation to 'fulfil' human rights, by which it is understood that states should proactively engage in activities that have as a consequence the greater enjoyment of rights. Some civil and political rights, such as the right to vote, are meaningless if the state does nothing to implement them. Similarly, the right to be free from torture entails not only an obligation not to torture but also an obligation to adopt all types of concrete measures to prevent and sanction torture.[17]

In formal terms, the obligation to fulfil involves an obligation on states to adopt appropriate laws that implement their international undertakings. This may involve incorporating the very rights protected by the international instrument into domestic law. However, treaty bodies, confronted with claims by states that rights were

[12] eg *X and Y v The Netherlands* (1986) 8 EHRR 235; *Young, James and Webster v UK* (1982) 4 EHRR 38. See also Chapter 7, below.
[13] *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204.
[14] *Osman v UK* (2000) 29 EHRR 245; *William Eduardo Delgado Páez v Colombia*, CCPR/C/39/D/195/1985 (12 July 1990).
[15] *AT v Hungary* A/60/38 (Part I) Annex III (26 January 2005).
[16] *Velásquez Rodríguez v Honduras* (*Merits*), IACtHR Series C No 4 (29 July 1988), paras 172 and 176.
[17] See Chapter 10, below.

effectively protected simply because they were formally protected in the constitution, have insisted that the duty to secure human rights includes an obligation to adopt, not just legislative measures, but also 'judicial, administrative and educative and other appropriate measures',[18] and an obligation to organize the structure of the state apparatus in a way that ensures the full exercise of human rights.

In particular, the obligation to fulfil entails provision of a remedy, whether judicial or administrative, to all victims of human rights violations. In the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights insisted that:

> The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[19]

Economic and social rights are the prime example of rights which entail a positive obligation to adopt specific measures and where 'not doing anything' is not an option. The obligation to fulfil has been understood in the context of the right to food as entailing both an obligation on states to *facilitate* individuals' ability to access resources and means to ensure their livelihood and an obligation to *provide* them with adequate food whenever they are unable to enjoy the right to food 'for reasons beyond their control'.[20] At its most general, the obligation to fulfil is considered to also involve an obligation to *promote* human rights, which means that states should adopt policies that promote rights, both domestically (for example, human rights education) and internationally (such as a foreign policy conducive to human rights).

In practice, the obligations to 'respect', 'protect', and 'fulfil' are closely interrelated issues and it may not always be easy to make a clear-cut distinction between these different aspects. Nevertheless, the typology is a helpful conceptual device to identify the various ways in which states can and must discharge their obligations under international human rights law.

3.4 MARGIN OF APPRECIATION

Whereas general international law obligations are typically not susceptible to fine-tuning by states, international human rights law has been at the forefront of efforts to develop a geographically and culturally plural notion of implementation. Particularly in the European context, there is no expectation of absolute uniform implementation, rather that a certain minimum standard should be achieved, while respecting the cultural, legal, and political specificity of each state. The European Court of Human Rights has pioneered the idea of states having a 'margin of appreciation' in how they

[18] HRC, General Comment 31, HRI/GEN/1/Rev.9 (Vol I) 243, para 7.
[19] *Velásquez Rodríguez*, n 16, para 176.
[20] CESCR, General Comment 12, HRI/GEN/1/Rev.9 (Vol I) 55, para 15.

implement their obligations, taking into account their historical, social, political, and legal specificities.

The margin of appreciation is the idea that, although states are bound by the same standards, they also have leeway in assessing what these standards imply domestically. As the European Court put it:

> the main purpose of the Convention is 'to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction'. This does not mean that absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws.[21]

This is often related to the jurisdictional notion that 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights'.[22] The European Court does view the margin as 'go(ing)…hand in hand with a European supervision'.[23]

One rationale for the margin of appreciation is that states and domestic courts are better suited to assess local peculiarities and that there is simply too much uncertainty about how human rights are to be implemented for international supervision to exercise more than relatively minimal control. Issues of legitimacy also arise, as international bodies might provoke political backlash if they delve too deeply in matters that are seen as culturally specific.

The idea of the margin of appreciation is not universally accepted beyond the European context. The Human Rights Committee, in particular, has expressed scepticism about a 'margin of appreciation' in at least one context.[24] It has been criticized as leading to an excessively relativistic application of human rights that may even contain the seeds of the project's dissolution.

Nonetheless, margin of appreciation reasoning has featured prominently in cases involving sexual minorities,[25] corporal punishment,[26] and the place of religion in society,[27] to mention only a few examples. It contains both a temporal and a spatial dimension. Temporally, the margin of appreciation is something that can evolve over time in relation to a certain subject. For example, states parties to the ECHR may have had a considerable margin of appreciation 50 years ago when it came to criminalizing homosexuality, but the very same treaty today is interpreted in a radically different way that suggests that criminalizing same-sex relations between consenting adults is a violation of several rights. The spatial element to the margin of appreciation involves an assessment of the degree of consensus (a minimum common denominator) about

[21] *Sunday Times v UK* (1979–80) 2 EHRR 245, para 61.
[22] *'Belgian Linguistics' Case* (1979–80) 1 EHRR 241.
[23] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979–80) 1 EHRR 711, para 49.
[24] *Länsman v Finland*, CCPR/C/52/D/511/1992 (30 October 1996).
[25] *Handyside v UK* (1979–80) 1 EHRR 737; *Frette v France* (2004) 38 EHRR 21; *Goodwin v UK* (2002) 35 EHRR 18.
[26] *Costello Roberts v UK* (1995) 19 EHRR 112.
[27] *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34; *Wingrove v UK* (1997) 24 EHRR 1, para 57; *'The Last Temptation of Christ' v Chile* (*Olmedo Bustos et al*), IACtHR Series C No 73 (5 February 2001), para 64.

a certain practice across member states. In the absence of such consensus and, more importantly, in the presence of divisions, the European Court will hesitate to impose on a minority (let alone a majority) of states a particular understanding of rights.

One of the consequences of this is that the margin of appreciation militates in favour of a conservative international assessment of rights. The European Court of Human Rights, for example, has often been less of a pioneer than a safe endorser of existing trends and developments. But on a more positive note, the margin of appreciation also reinforces the sense of human rights being rooted in a community of reference (which is also a community of interpretation), dynamic in time, and a product of a constant interaction between rights and ideas about society and justice.