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THE PREVENTION OF GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

NIENKE VAN DER HAVE

THE PREVENTION OF GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

The Prevention of Gross Human Rights Violations Under International Human Rights Law
Ph.D. thesis, University of Amsterdam, the Netherlands

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Cover image: Platon 2012 © Richard Mosse / Foam Collection. The photo series 'Infra' and video installation 'The Enclave' contain images of the conflict in the east of the Democratic Republic of Congo shot with infrared film. As a result, everything that is normally green is turned violet pink, thereby accentuating the absurdity of the conflict.

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THE PREVENTION OF GROSS HUMAN RIGHTS VIOLATIONS
UNDER INTERNATIONAL HUMAN RIGHTS LAW

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LIST OF ABBREVIATIONS

APB	Atrocity Prevention Board
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AComHPR	African Commission on Human and Peoples' Rights
AU	African Union
Basic Principles	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CESCR	Committee on Economic, Social and Cultural Rights
Code of Conduct	Code of Conduct for Law Enforcement Officials
CPA	Coalition of Provisional Authorities
CP rights	Civil and Political Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR	European Court of Human Rights
ESC rights	Economic, Social and Cultural Rights
GA	General Assembly
Genocide Convention	Convention for the Prevention and Punishment of the Crime of Genocide
Hague Regulations	Respecting the Laws and Customs of War on Land
HRCee/HRC (fn)	Human Rights Committee
HRC	Human Rights Council
IAComHR	Inter-American Commission on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice

ICJ Statute	Statute of the International Court of Justice
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IO	International Organization
Maastricht Principles	Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights
MRT	Moldovan Republic of Transdniestria
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
OGPRtoP	Office on Genocide Prevention and the Responsibility to Protect
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP	Optional Protocol
OSAPG	Office of the Special Adviser on the Prevention of Genocide
Rome Statute	Rome Statute of the International Criminal Court
RtoP	Responsibility to Protect
SC	Security Council
TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNMISS	United Nations Mission in the Republic of South Sudan
UNPROFOR	United Nations Protection Force in Bosnia and Herzegovina
US	United States
VCLT	Vienna Convention on the Law of Treaties
VRS	Army of Republika Srpska
WSOD	World Summit Outcome Document

GLOSSARY OF IMPORTANT TERMS

Content and scope of obligations

In the context of this study, the terms “content” and “scope” are used in relation to a state’s obligations, not the human right. The term “content” refers to what measures states are required to take. The term “scope” refers to the extent of these measures in particular circumstances. The two concepts are connected and are sometimes referred to as an obligation’s scope *rationae materiae*.

Capacity (to ensure human rights)

The term “capacity” or “capacity to ensure human rights” is used to refer to any expressions in treaties, case law or other sources of interpretation that take into account a state’s resources, powers or other factors that influence what it is capable of doing to ensure human rights obligations in particular circumstances.

Violation or offence

The term “violation” is sometimes used in a general sense as synonymous to an injurious event, referring to the substantive violation of an individual’s right by either state officials or private individuals. It is also used to refer to a violation of an international obligation attributable to a state. When discussing only the acts of private individuals, who cannot directly violate international obligations, the term “offence” is used.

Trigger (of knowledge)

The term “trigger” or “trigger of knowledge” is used in reference to obligations to prevent that are only incurred by a state when it has a certain degree of knowledge that there is a risk of a violation or continuing violation.

Threshold

The term “threshold” is used in reference to extraterritorial obligations that are only incurred by a state when it exercises extraterritorial jurisdiction or other forms of influence abroad.

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1. INTRODUCTION

Over the past decades, there has been growing attention for a more proactive and preventive approach towards gross human rights violations.[1] This trend can be illustrated with several concrete developments. In 2007, the International Court of Justice (ICJ) held Serbia responsible for its failure to try to prevent the Srebrenica genocide that occurred in Bosnia in 1995.[2] The judgment is remarkable for many reasons, most notably because it is the first time that a state was held responsible for a manifest failure to take measures to prevent genocide in another state. There have also been important developments that are not strictly legal, but have increased the focus at both the national and international level on the prevention of mass atrocities.[3] For example, the concepts of conflict prevention and the responsibility to protect (RtoP) have gained much traction, both promoting a preventive approach towards violent internal state conflicts.[4] Conflict prevention and the RtoP have received a great deal of attention in (legal) scholarship, linking the prevention of atrocities to different human rights obligations.[5]

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[1] Schabas, William A., 'Preventing Genocide and Mass Killing - From a Culture of Reaction to Prevention' (2006) 43(1) UN Chronicle 62.

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case) para 438 and 450.

[3] The term "atrocities" is used in the context of conflict prevention and the RtoP. The term "gross human rights obligations" is used in the context of international human rights law. Both terms are used in a general sense, without referring to an exact subset of crimes or violations.

[4] Commission on Preventing Deadly Conflict, 'Preventing Deadly Conflict: Final Report with Executive Summary' Carnegie Commission (Washington DC 1997) (Report of the Carnegie Commission); Moolakkattu, John S., 'Conflict Prevention' (2007) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1700?rskey=BLuMfG&result=1&prd=EPIL> para 4 and 10-9: The term conflict prevention "denote[s] a number of conflict management-related activities"; International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (International Development Research Centre, Ottawa 2001) (ICISS Report); UN General Assembly Resolution 60/1, '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1 (2005 World Summit Outcome) para 138-9; Winkelmann, Ingo, 'Responsibility to Protect' (2010) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1464?rskey=sDiXW0&result=1&prd=EPIL> para 2: The term 'responsibility to protect' is used in a non-legal sense" and "fix[es] a clear set of rules, procedures, and criteria" relating to the prevention of and intervention in the occurrence of crimes against humanity, war crimes, ethnic cleansing and genocide.

[5] Gattini, Andrea, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18(4) EJIL 695; Cuyckens, Hanne and De Man, Philip, 'The Responsibility to Prevent: on the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention' in Nollkaemper, André and Julia Hoffman (eds), *The Responsibility to Protect* (Pallas Publications, 2011) 111; Gibney, Mark, 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' (2011) 3(2) GR2P 123; Strauss, Ekkehard, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (2009) 1 GR2P 291; Welsh, Jennifer M., 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 GR2P 213;

Despite much scholarly attention for these concrete developments, a cloud of obscurity still surrounds the notion of *international legal obligations* to prevent gross human rights violations.[6] Little in-depth and systematic research has been carried out concerning the questions what states are legally required to do under international human rights law and at what point in time these obligations are triggered.[7] That states have certain legal obligations to prevent gross human rights violations within their territory is undisputed. For example, states have clear and express obligations to take measures to prevent torture, especially for situations of detention.[8] Extraterritorial obligations to prevent gross human rights violations, on the other hand, are more ambiguous. It is by now accepted that states do, under certain circumstances, have extraterritorial obligations based on the human rights treaties to which they are a party.[9] But when government officials act abroad, they usually do not have the same amount of power and resources as within their own territory. At the moment, it is still unclear how such capacity-related factors influence extraterritorial obligations to prevent.

Core questions remain unanswered with regard to the content and scope of obligations to prevent gross human rights violations.[10] For example, what types of obligations to prevent are there? When are such obligations triggered?[11] What do

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Zimmermann, Andreas, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' in Fastenrath, Ulrich, Geiger, Rudolf, Khan, Daniel-Erasumus, Paulus, Andreas, von Schorlemer, Sabine and Vedder, Christoph (eds), *From Bilateralism to Community Interest - Essays in Honour of Bruno Simma* (OUP, 2011) 629.

[6] Gattini, Andrea, 'Breach of International Obligations' in Nollkaemper, André and Plakokefalos, Ilias (eds), *Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art* (CUP, 2014) 25, 38; De Pooter, Helene, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (2009) 17 Afr Yearb Int Law 287.

[7] This study is limited to studying obligations to prevent gross human rights violations under the regime of international human rights law. See Section 1.3.1 Delineation.

[8] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 2(1): "Each State Party shall *take effective legislative, administrative, judicial or other measures to prevent acts of torture* in any territory under its jurisdiction" [emphasis added] and art 10 and 11 on situations of detention.

[9] Milanović, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

[10] The term "content" refers to what measures states are required to take. The term "scope" refers to the extent of these measures in particular circumstances. The two concepts cannot be seen as completely separate and are often used together. Together they are sometimes referred to as an obligation's scope *rationae materiae*. In the context of this study, both terms are used in relation to a state's obligations, not the human right.

[11] *Genocide* case (n 2) para 431: "[A] State's obligation to prevent [...] arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a serious risk"; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (November 2001) UN GAOR Suppl No 10 (A/56/10) chpIVE1 (Articles on State Responsibility) art 14(3): A breach of obligations to prevent occurs at the moment of occurrence of the

they require in terms of concrete measures?[12] What is the content and scope of extraterritorial obligations to prevent and what role does the capacity of states play in that regard?[13] And finally, what trends are relevant for the future development of obligations to prevent gross human rights violations? Without additional clarity on these and related questions, states can all too easily pass the buck and remain bystanders to gross human rights violations.[14]

This research project sets out to systematize and analyze the content and scope of obligations to prevent gross human right violations under international human rights law. For this purpose, a distinction will be made between different temporal phases. The distinction between temporal phases supports the articulation of categories of obligations and offers insight into the triggering role of knowledge for obligations to prevent. A second distinction is made between territorial and extraterritorial obligations. An important element in regard to the latter will be to offer criteria for threshold and capacity that ground extraterritorial obligations to prevent. These steps will be elaborated in the course of this chapter, which will offer context and background information (Sections 1.1 and 1.2), discuss the justifications and method (Section 1.3) and finally set out the research design (Section 1.4) that will lay the groundwork for all of the following chapters.

1.1 Context: Shift Towards Prevention

The concepts of conflict prevention and the RtoP have increased scholarly and political attention for the prevention of mass atrocities.[15] The great normative appeal of these trends illustrates a broader moral and societal shift towards recognizing the importance of prevention with regard to gross human rights violations. There is also

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event; Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 5) 702: Promotes "a more progressive reading of the time factor of the duty to prevent."

[12] *Genocide* case (n 2) para 427 and 429-31: In the context of genocide, prevention implies using all means which are "reasonably available" and "likely to have a deterrent effect"; International Law Commission, Report on the Work of its 51st Session (3 May to 23 July 1999) UN GAOR Supplement No 10 (A/54/10) chp V, para 49–453, chp.10(c) para 178-80, chp.7(c) para 142: In most cases, a duty to prevent will be an obligation of conduct based on due-diligence.

[13] In the context of this research, the term "capacity" or "capacity to ensure human rights" is used to refer to any expressions in treaties, case law or other sources of interpretation that take into account a state's resources, powers or other factors that influence what it is capable of doing to ensure human rights obligations in particular circumstances.

[14] Grünfeld, Fred and Huijboom, Anke, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (BRILL, 2007).

[15] ICISS Report (n 4); 2005 World Summit Outcome (n 4) para 138: The R2P offers a basis for the international community to step in if a state itself is 'unwilling or unable' to protect its population in the case of genocide, war crimes, ethnic cleansing and crimes against humanity; Ackerman, Alice, 'The Prevention of Armed Conflicts as an Emerging Norm in International Conflict Management: The OSCE and the UN as Norm Leaders' (2003) 10(1) PCS 1: A new mixed regime of law and policy in the area of *conflict prevention* has arisen after the cold war.

increasing attention for obligations to prevent in the area of human rights law.

1.1.1 Conflict Prevention

The concept of conflict prevention is best described as an organizational principle aiming to prevent the "*violent expression* of conflicts", because preventing all conflict is impossible.[16] The concept can be traced back to the cold-war-era, but its modern understanding was developed by former Secretary-General (SG) of the United Nations (UN) Boutros Boutros-Ghali in his 1992 report "Agenda for Peace."[17] Conflict prevention involves both structural and operational measures to prevent.[18] The difference being that structural measures are aimed at long-term peace and stability, such as a functioning legal system, good governance and meeting basic human needs.[19] On the other hand, operational prevention is focused on situations where violence is imminent and offers strategies for early engagement, such as preventive diplomacy or deployment of troops.[20]

Key documents in the area of conflict prevention have addressed the important role of the UN.[21] A core goal of the UN has always been the prevention and management of armed conflict and it has developed an impressive infrastructure in that regard.[22] Yet, several crises took place in the 1990's, such as the Rwanda and Srebrenica genocides, in which UN involvement was not perceived to have been very effective. The aftermath of these crises inspired a renewed pledge by UN SG Kofi Annan to move "from a culture of reaction to a culture of prevention" in his 2001 report entitled "Prevention of Armed Conflict.[23] His report stresses that the primary responsibility for conflict prevention rests with states and the main role of the UN is to support national efforts.[24]

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[16] Moolakkattu, 'Conflict Prevention' (n 4) para 3, 5 and 28.
[17] Secretary-General Boutros Boutros-Ghali, 'An Agenda for Peace' (17 June 1992) UN Doc A/47/277 - S/24111; Moolakkattu, 'Conflict Prevention' (n 4) para 1.
[18] Report of the Carnegie Commission (n 4) executive summary xix and xxviii; Secretary-General Kofi Annan, 'Prevention of Armed Conflict' (7 June 2001) UN Doc A/55/985–S/2001/574, executive summary, bullet point 4 and para 8-10 and 169.
[19] Report of the Carnegie Commission (n 4) executive summary xxviii.
[20] Report of the Carnegie Commission (n 4) executive summary xix.
[21] Miyazaki Initiatives for Conflict Prevention, adopted by the G8 Foreign Ministers' Meeting in Miyazaki (13 July 2000, Japan); Report of the Carnegie Commission (n 4) executive summary xi-xliv.
[22] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) preamble, art 1(1) and 3(3).
[23] Report of the Secretary-General on the Work of the Organization, (31 August 1999) UN GAOR A/54/1, 54th session, Supplement No 1; SG Report, 'Prevention of Armed Conflict' (n 18) executive summary.
[24] SG Report, 'Prevention of Armed Conflict' (n 18) executive summary and para 6.

Like the UN, many states and regional organizations have adopted and started mainstreaming conflict prevention into their foreign policies and external relations.[25] There has also been an institutional response at these levels. An example is the Organization of the African Union's Peace and Security Council, tasked with the anticipation and prevention of conflicts.[26] At the state-level, an important example is an initiative taken by President Obama in the United States in 2011, to establish a national Atrocity Prevention Board (APB).[27] The APB was tasked with the specific mandate to devise protocols "to coordinate and institutionalize the Federal Government's efforts to prevent and respond to potential atrocities and genocide" and "creating a comprehensive policy framework for preventing mass atrocities."[28]

There is still much that can be done to make existing frameworks for the prevention of violent conflict more effective. Within the UN, a recent attempt at putting a culture of prevention into practice is the "Rights up Front" initiative.[29] This initiative was taken by the SG in reaction to a 2012 Internal Review Panel's findings on UN failures in Sri Lanka.[30] The idea behind the initiative is that the protection of human rights always comes first in strategic or operational decisions.[31] By and large, it is safe to say that conflict prevention has contributed greatly to an enhanced focus on prevention and human rights in conflict situations.

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[25] Aggestam, Karin, 'Conflict Prevention: Old Wine in New Bottles?' (2003) 10(1) Int Peacekeeping 12; Cuyckens and De Man, 'The Responsibility to Prevent: on the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention' (n 5) 115-7; See generally: Walraven, Klaas van, Vlugt, Jurjen van der, 'Conflict Prevention and Early Warning in the Political Practice of International Organizations' (Clingendael, 1996) available at: <http://www.clingendael.nl/sites/default/files/19960000_cru_paper.pdf>.

[26] Declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution (28 to 30 June 1993) adopted by the 29th Ordinary Session of the Assembly of Heads of State and Government of the OAU held in Cairo, Egypt; Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) available at: < http://www.peaceau.org/uploads/psc-protocol-en.pdf> art 3b; AU Commission, 'Peace and Security Department at a Glance', available at: <http://www.peaceau.org/uploads/au-booklet.pdf>; Moolakkattu, 'Conflict Prevention' (n 4) para 19.

[27] Barrack Obama, Presidential Study Directive on Mass Atrocities (4 August 2011) PSD-10, available at: <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>.

[28] Presidential Study Directive on Mass Atrocities (n 27).

[29] Secretary-General Ban Ki-Moon, 'Renewing Our Commitment to the Peoples and Purposes of the United Nations' (22 November 2013) statement available at: <http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2068#.VnFSCdLhDIU>; For more information, visit the website at: < https://www.un.org/sg/en/content/ban-ki-moon/human-rights-front-initiative>.

[30] Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka (November 2012) available at: <http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf> para 75 onwards on United Nations Failure.

[31] Rights up Front Summary, available at: < http://www.un.org/News/dh/pdf/english/2016/Human-Rights-up-Front.pdf >.

1.1.2 Responsibility to Protect

The historic development of the concept of the RtoP shows a significant overlap in terms of language, framework and instruments with that of conflict prevention.[32] In the wake of the crises in Rwanda and Srebrenica, UN SG Kofi Annan in his millennium report famously challenged the international community to find a way to reconcile sovereignty with preventing and intervening in gross and systematic violations of human rights.[33] In response, the Canadian government set up the International Commission on Intervention and State Sovereignty (ICISS) in 2000, which issued a report on "The Responsibility to Protect" a year later.[34] The report submits that outside intervention is only warranted if the home state is *unable or unwilling* to protect its people from mass atrocities.

The RtoP has been a vehicle for the gradual acceptance of international involvement in the prevention of and reaction to grave humanitarian crises. Where the notion of humanitarian intervention always remained controversial, the novelty of rephrasing sovereignty in terms of responsibility and strong emphasis on prevention instead of military intervention seemed to slowly bend the will of the international community of states in favor of concerted action.[35] In 2005, the RtoP was accepted in non-binding form in the World Summit Outcome Document (WSOD).[36] The WSOD was unanimously adopted by heads of state and government and is, so far, the most authoritative source proclaiming the RtoP. The WSOD specified the crimes to which the RtoP applies as genocide, war crimes, crimes against humanity and ethnic cleansing.

[32] Cuyckens and De Man, 'The Responsibility to Prevent: on the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention' (n 5).
[33] Secretary-General Kofi Annan, 'We the Peoples - The Role of the United Nations in the 21st Century' (Millennium Report March 2000) UN Doc A/54/2000.
[34] ICISS Report (n 4).
[35] ICISS Report (n 4); Although the distinction between humanitarian intervention and the RtoP is not strict and their history is mostly shared, see: Hilpold, Peter, "And with Success Comes Pardon Hand in Hand': Some Essential Features of R2P and Humanitarian Intervention Drawn from History of International Law' (23 March 2014) SSRN, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413184>; Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (2014) available at: <http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf> 2 and 4: The earlier action is taken, the cheaper it will be.
[36] 2005 World Summit Outcome (n 4) para 138-9: Whereas the ICISS left the door slightly open to the use of force without Security Council (SC) authorisation, the WSOD shut that door and declared the SC as the ultimate authority to decide on any form of military intervention; On the drafting history, see: Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 5) 293-9.

Following the adoption of the WSOD, the path began towards consolidating a shared understanding and putting the RtoP into practice.[37] An important impulse in that regard comes from the UN SG reports on the RtoP. The 2009 SG report on the implementation of the RtoP, introduced a three-pillar structure that became very influential. The three pillars are: (i) States' responsibility to protect their own population; (ii) The international community's responsibility to assist states in meeting their pillar one responsibilities; and (iii) The international community's responsibility to take timely and decisive action if a state is manifestly failing in regard to its pillar one responsibilities.[38] Another significant impulse for implementation of the RtoP was the establishment of a joint office for the UN Special Advisers on the Prevention of Genocide and the Responsibility to Protect in 2007. In 2014, the Office on Genocide Prevention and the Responsibility to Protect (OGPRtoP) introduced a "Framework of Analysis for Atrocity Crimes - A Tool for Prevention."[39] The framework maps different risk factors for RtoP crimes and thereby aims to support prevention strategies.

Although it is unlikely that the RtoP will become fully accepted as customary law, it may influence the development of international law in other ways.[40] As Alex Bellamy has aptly argued, the RtoP cannot offer a strong compliance pull to catalyze third pillar action that states would not otherwise be willing to undertake.[41] It is in its function as "a policy agenda in need of implementation" that it is likely to have an added value and influence the development of law.[42] The RtoP can offer guidance in the realm of systematizing prevention efforts and strengthening the focus on human rights in (potential) mass atrocity situations.[43]

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[37] Luck, Edward C., 'The Responsibility to Protect: the First Decade' (2011) 3(4) GR2P 387.

[38] Secretary-General Ban Ki-Moon, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677: summary, 10, 15 and 22.

[39] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 35).

[40] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art 38 (1) b; Shaw, Malcolm N., *International Law* (6th edn CUP, 2008) 70; Salomon, Margot E., *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, 2007) 89: Although the RtoP was not adopted in legally binding form, General Assembly resolutions can spark or indicate processes of the development of new rules of customary international law; Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 5) 293-12: A review of the negotiation process of the WSOD and the subsequent practice of the GA and SC show little to no intention of laying down a new rule of international law; Bellamy, Alex J. and Reike, Ruben, 'The Responsibility to Protect and International Law' (2010) 2 GR2P 267, 274: There is an important difference in the "legal quality" of the RtoP pillars described in the SG report. The first pillar of the RtoP, responsibilities of states towards their own population, is grounded in many pre-existing human rights treaties prohibiting arbitrary deaths, torture, genocide and international humanitarian law treaties prohibiting war crimes. The same cannot be said for the second and third pillars.

[41] Bellamy, Alex J., 'The Responsibility to Protect – Five Years On' (2010) 24(2) Ethics Int Aff 143, 161-2: This is largely due to the norm's indeterminacy.

[42] Bellamy, 'The Responsibility to Protect – Five Years On' (n 41) 158 and 162-6.

[43] Rosenberg, Sheri P., 'Responsibility to Protect: A Framework for Prevention' (2009) 1(4) GR2P 442, 459 and 463.

1.1.3 International Human Rights Law

Quite a few express obligations to prevent violations of human rights exist in international human rights treaties. Express means that the word "prevent" is used in the treaty text in relation to a potential violation. For example, state parties to the relevant conventions are expressly obligated to prevent genocide, torture, enforced disappearances, segregation and apartheid.[44] Sometimes the obligation to prevent is very general and generic.[45] Other times, the obligation is more specific or specified in later provisions.[46] The type of injury that such express obligations to prevent seem to focus on, are violations in relation to a person's life, body or dignity.

Obligations to prevent have found their way into the interpretative discourse of many courts and supervisory bodies.[47] As mentioned above, an important case that has sparked much scholarly attention and attention from other courts and supervisory bodies for obligations to prevent is the 2007 ICJ *Genocide* case.[48] Even if an obligation to prevent is not stated expressly in the treaty text, courts and supervisory bodies have found that due diligence obligations to prevent certain violations are

[44] Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 1; Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (CAT Optional Protocol); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) art 12, 22, 23 and 25; International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, art 4 and 8.

[45] See for example the Genocide Convention (n 44) art 1.

[46] See for example the framework of obligations to prevent in the CAT (n 8), which is further explained in Chapter 2.1.

[47] A few examples are: *Velásquez Rodríguez v. Honduras* (Merits) Judgment of July 29, 1988, I/A Court HR (Ser C) No. 4 (1988) para 166 and 188: The IACtHR determined that the general obligation under the Convention to ensure the rights therein, also includes an obligation to prevent violations; *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para 116: The ECtHR interpreted the right to life as sometimes warranting a state to take preventive operational measures; *Opuz v. Turkey*, no. 33401/02, ECHR 2009, para 169-70 and 176: The ECtHR interpreted the prohibitions of torture as sometimes warranting a state to take protective measures for the purpose of deterrence; *Genocide* case (n 2) para 438: The ICJ interpreted art 1 of the Convention as giving rise to a separate obligation to prevent genocide.

[48] *Genocide* case (n 2) para 438: Article 1 of the Genocide Convention contains an obligation to "prevent and punish" genocide. The ICJ not only explained that the obligation to prevent is a separate obligation, it also interpreted it as broad in scope; See for cross reference: *Mothers of Srebrenica against the State* (16 July 2014) The Hague District Court, C/09/295247 / HA ZA 07-2973, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748> para 4.9 and 4.178; Ruvebana, Etienne, *Prevention of Genocide under International Law – An Analysis of the Obligations of States and the UN to Prevent Genocide at the Primary, Secondary and Tertiary Levels* (Intersentia, 2014).

sometimes implied.[49] For example, in the *Velásquez Rodríguez v. Honduras* case the Inter American Court on Human Rights proclaimed the existence of a due-diligence obligation to prevent violations as inherent to the obligation to ensure the rights in the Convention.[50] Additionally, specific human rights have been interpreted by courts or supervisory bodies as including a due-diligence obligation to prevent violations.[51] For example, the European Court of Human Rights (ECtHR) has read an obligation to take operational measures to prevent arbitrary deaths into the provision on the right to life.[52]

Also in non-judicial interpretation or application practices, there has been attention for prevention in relation to human rights violations. Treaty bodies or special rapporteurs are well placed to monitor situations and give early warning of potential violations.[53] Human rights treaty bodies address obligations to prevent for example in their general comments and reports.[54] Special rapporteurs likewise sometimes call attention for obligations to prevent violations.[55] Finally, the International Law Commission (ILC) has since 2014 been working on the formulation of Draft Articles

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[49] Human Rights Committee, 'General Comment 31 - Nature and the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev1/Add13, para 8: States may be obligated to make preventive efforts with regard to risks of violations of certain rights by other individuals within their jurisdiction, such as the right to life or the prohibition of torture. The HRC also interprets art 2 of the ICCPR as encompassing a general legal obligation of the art 2 obligation imposed on state parties as including an obligation to prevent recurrence of violations; *Velásquez Rodríguez v. Honduras* (n 47) para 166: Describing a general obligation to "organize the governmental apparatus [...] so that [it is] capable of juridically ensuring the free and full enjoyment of human rights", which also entails an obligation to prevent.

[50] *Velásquez Rodríguez v. Honduras* (n 47) para 166 and 188: "These rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in the violation of that right." This case concerned offences by private individuals.

[51] Koivurova, Timo, 'Due Diligence' (August 2007) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?rskey=q47EQh&result=1&prd=EPIL>.

[52] *Osman v. the United Kingdom* (n 47) para 111: The obligation to respect the right to life may also "imply […] a positive obligation on the authorities to take preventive operational measures."

[53] Shaw, Malcolm N., *International Law* (5th edn CUP, 2003) 312: In the conclusion of a chapter on treaty bodies he states that the development of preventive procedures and systems of early warning by the treaty bodies is to be 'particularly noted.'

[54] See for example: Subcommittee on Prevention of Torture, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (30 December 2010) UN Doc CAT/OP/12/6-A/HRC/18/24, para. 8; Committee on the Elimination of Discrimination Against Women and Committee on the Rights of the Child, 'Joint Convention on the Elimination of All Forms of Discrimination against Women General Recommendation No. 31/ Convention on the Rights of the Child General Comment No 18 on Harmful Practices' (14 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18.

[55] OHCHR press release, 'UN rights expert calls all States to establish a 'Femicide Watch'' (25 November 2015) available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16796&LangID=E>.

for an International Convention on the Prevention and Punishment of Crimes Against Humanity, with prevention as a central focus.[56] These developments have not gone unnoticed and in 2015, the Office for the High Commissioner on Human Rights (OHCHR) upon the request of the Human Rights Council (HRC) published a report on the role of prevention in the promotion and protection of human rights.[57] This increase in attention for obligations to prevent fits within the broader moral and societal shift towards recognizing the importance of prevention in relation to gross human rights violations.

1.2 The Problem: The Content and Scope of Obligations to Prevent

So far, state obligations to prevent in the context of human rights law in general and obligations aiming to prevent gross human rights violations more specifically have not received much structured attention in scholarship. As mentioned above, many core questions related to their territorial and extraterritorial content, scope, triggers and the role of capacity remain unanswered. The legal practice is confusing and in any case has not been well studied.[58] The lack of attention for obligations to prevent gross human rights violations is problematic, especially bearing in mind the shift described in the previous section. Despite rhetorical political support for prevention in the context of conflict prevention and the RtoP, there is often a lack of political will to invest in prevention in practice.[59] If the content and scope of obligations to prevent gross human rights violations are more clearly articulated, states can more

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[56] Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity (August 2010) Whitney R. Harris World Law Institute, available at: <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>: The Washington University School of Law took a Crimes Against Humanity Initiative, which led to a proposed convention drafted by a Steering Committee; International Law Commission, Report on the Work of its 66th Session (5 May–6 June and 7 July–8 August 2014) UN GAOR Supplement No. 10 (A/69/10) chp.14(a) para 1: "At its 3227th meeting, on 18 July 2014, the Commission decided to include the topic "Crimes against humanity" in its programme of work and to appoint Mr. Sean D. Murphy as Special Rapporteur." Crimes against humanity has been included by the ILC under the topic of criminal law, because the definition of the crime originates in criminal law; Special Rapporteur Sean D. Murphy, 'First Report on Crimes Against Humanity' (17 February 2015) 67th session of the ILC, UN Doc A/CN4/680, chp.5(a) Obligation to prevent crimes against humanity.

[57] Office of the United Nations High Commissioner for Human Rights, 'Summary Report on the Outcome of the Human Rights Council Panel Discussion on the Role of Prevention in the Promotion and Protection of Human Rights' (10 December 2014) UN Doc A/HRC/28/30; Office of the United Nations High Commissioner for Human Rights, 'The Role of Prevention in the Promotion and Protection of Human Rights' (16 July 2015) UN Doc A/HRC/30/20: Among other things, the report seeks to "provide further content to the concept of prevention of human rights violations."

[58] *Genocide* case (n 2); De Pooter, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (n 6); A few positive exceptions in recent studies are: Ruvebana, *Prevention of Genocide under International Law* (n 48); OHCHR, 'The Role of Prevention in the Promotion and Protection of Human Rights' (n 57).

[59] Bellamy, Alex J., 'Conflict Prevention and the Responsibility to Protect' (2008) 14 GG 135,143: The hallmark of successful prevention efforts is that the results are largely invisible, which makes it hard to garner (financial) support for prevention efforts.

easily implement them and be held legally responsible for failures to prevent and there will be less flexibility for a lack of political will to prevail.

There is no univocal definition of obligations to prevent in international law.[60] The ordinary meaning assigned to the word "prevention" is:

> "The action of stopping something from happening or arising."[61]

The word "obligation" in the context of international law is related to the sources as expressed in Article 38 of the ICJ Statute.[62] The primary sources of obligations under international law are treaties and custom. Roberto Ago has offered a useful description of the meaning of the terms taken together, stating that obligations (based on treaties or custom) to prevent (stopping something from happening) are aimed at preventing an "injurious event", meaning an act, damage or any other form of injury that has been qualified as prohibited or unwanted in international law.[63] Other than this very basic description, it is hard to find unifying factors among obligations to prevent in international law. Andrea Gattini writes that "there is uncertainty and disagreement on almost every aspect of an obligation to prevent, concerning the scope of the obligation *ratione personae*, *loci*, *materiae*, and *temporis*."[64]

Uncertainty surrounding the content and scope of obligations to prevent has become apparent for example in connection with the question at which moment in time they are breached. Article 14 of the Articles on States Responsibility proclaims that a breach of obligations to prevent takes place at the moment the injurious event occurs and for as long as it continues.[65] It thereby made the occurrence of an injurious event a necessary condition for a breach of an obligation to prevent. At the same time, the

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[60] A review of several handbooks of international law showed that the term prevention is used in very diverse ways. See for example: Aust, Anthony, *Handbook of International Law* (2nd edn CUP, 2010) 306-7: Mentions the concept of prevention in the context of the precautionary principle as a basis for risk prevention in environmental law; Brownlie, Ian, *Principles of Public Internationd Law* (7th edn OUP, 2008) 745: Mentions the concept of prevention in the context of humanitarian intervention; Cassese, Antonio, *International Law* (OUP, 2001) 264-5: Notes that there is a "general obligation of international cooperation for [the] prevention and punishment" of at least "the most odious international crimes such as, in particular, genocide and crimes against humanity"; Schachter, Oscar, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991) 368 onwards: Schachter identifies prevention as the centerpiece of environmental law and describes how it is qualified differently in different documents addressing different issue area.

[61] Oxford Dictionaries Pro, 'Prevention' (OUP, 2010), available at: <http://oxforddictionaries.com/definition/prevention>.

[62] ICJ Statute (n 40) art 38(1) a and b.

[63] Special Rapporteur Roberto Ago, 'Seventh Report on State Responsibility' (1978) 30th session of the ILC, UN Doc A/CN4/307 and Add 1-2 and Add2/Corr 1, chp.3(8), para 15: Ago further distinguished between obligations which have prevention as their direct object and obligations which have prevention as a side effect.

[64] Gattini, 'Breach of International Obligations' (n 6) 38.

[65] Articles on State Responsibility (n 11) art 14(3).

ILC also claimed in the Commentary of the Articles that, in most cases, a duty to prevent is an obligation of conduct based on due-diligence.[66] This claim stands in strange comparison to its decision that a breach occurs at the moment that the injurious event occurs, because obligations of conduct are not aimed at a certain result, in this case non-occurrence of an injurious event.[67] One would expect an obligation of conduct to be breached once the required conduct stays out, regardless of the consequences.[68] Furthermore, there are in fact many examples of obligations to prevent that are obligations of result and can be breached without the occurrence of the injurious event which they aim to prevent, such as the obligation to enact legislation or investigate violations.[69] The ILC's approach therefore gives too simplistic a view of obligations to prevent and their timeframe.

It is submitted that treating obligations to prevent as a non-context-specific and undifferentiated group hampers attempts to further clarify their content and scope.[70] That obligations to prevent are aimed at preventing an injurious event, means that it is hard to understand them outside of the context of a specific regime of international law or specific type of injury. In the context of environmental law, for instance, obligations to prevent are aimed at preventing environmental damage and have developed in a very different way from obligations to prevent in the context of human rights law. For example, states have drafted framework treaties that set forth specific targets for the reduction of the emission of greenhouse gases through subsequent

[66] Articles on State Responsibility (n 11) Commentary to Article 14(3) para 14: "Obligations of prevention are usually construed as best efforts obligations […] without warranting that the event will not occur"; ILC, Report on the Work of its 51st Session (n 12) chp.10(c) para 178-80, chp.7(c) para 142: The reports covering the drafting history of the Articles contain a more nuanced view, stating that obligations to prevent can be of both conduct and result.

[67] Articles on State Responsibility (n 11) Commentary to Article 12, para 11 and 12.

[68] Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 5) 702; Gattini, 'Breach of International Obligations' (n 6) 37: "Undoubtedly this rule becomes unpalatable under certain circumstances. This is the reason why, in most criminal codes, the concept of crimes of abstract danger (*Gefährungsdelikte*) has been introduced, in order to punish dangerous conduct, regardless of the occurrence of the damaging event."

[69] For example: CAT (n 8) art 2 jo 4: The obligation to ensure that torture is an offence under criminal law, as a part of the broader obligation to introduce effective legislative safeguards to prevent torture; *Trail Smelter Arbitration (United States v Canada)* 3 RIAA 1905-1982 (16 April 1938 and 11 March 1941) 1965; Declaration on the Environment and Development (12 August 1992) UN Doc A/CONF/151/26/Rev1 (Vol I) (Rio Declaration) Principle 2; Soljan, Lada, 'The General Obligation to Prevent Transboundary Harm and its Relation to Four Key Environmental Principles' (1998) 3(2) ARIEL 209, 211 onwards; Bratspies, Rebecca M., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (CUP 2010) 112: An important customary obligation in environmental law is the prevention of significant transboundary harm. It is a compound obligation, consisting of a set of quite specific subsidiary obligations of result such as carrying out an impact assessment and notifying and consulting with potentially affected states.

[70] The ILC took such a general undifferentiated approach from the viewpoint of its task to codify general rules for international state responsibility. But attempts to understand obligations to prevent as an undifferentiated group can also be found in other places, see for example: Gattini, Andrea, 'Breach of International Obligations' (n 6).

amendments to mitigate the threats posed by global warming.[71] Such preventive framework treaties do not exist in the area of human rights law.[72] Furthermore, the type of injury obligations seek to prevent also influences the identification of risks and mitigating factors and therefore the chosen measures and timeframe of obligations to prevent.[73] All is to say that the type of injury strongly influences the way obligations to prevent are shaped.[74]

To avoid the pitfall of taking an undifferentiated outlook, this study will focus specifically on obligations to prevent under human rights law aimed at particular types of injury caused by gross human rights violations.[75] It will build on: i) A more inclusive timeframe than the one used in Article 14 of the Articles on State Responsibility, leading from long-term prevention to the prevention of recurrence;[76] and ii) Three spatial dimensions to address obligations in territorial and extraterritorial settings.[77] By taking an approach that differentiates in time and space, a map of obligations to prevent gross human rights violations can unfold that gives detailed insight into their triggers, content and scope. The capacity of states to ensure human rights will prove to be an important factor informing the basis, content and scope of obligations. Existing terminological distinctions between types of obligations, such as conduct and result, positive and negative and the respect, protect, fulfill typology will sometimes be used to describe obligations, but they will also be criticized where their use has led to overgeneralizations.[78] The point of this study is to offer alternative

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[71] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.
[72] Nowak, Manfred, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers, 2004) 285: Although it could be argued that "each tool for the protection of human rights is preventive by its very nature."
[73] OHCHR, 'The Role of Prevention in the Promotion and Protection of Human Rights' (n 57) para 5 and 8-10.
[74] Articles on State Responsibility (n 11) art 31: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State, sustained as a result of the wrongful act." The terms injury and damage will be used interchangeably.
[75] See Section 1.3.1 Delineation: The types of injury chosen for this study are torture, arbitrary death and genocide.
[76] See Section 1.3.2 Temporal Phases: Long-term obligations to prevent, short-term obligations to prevent, obligations to prevent the continuation of a violation, obligations to prevent recurrence.
[77] See Section 1.3.3 Territory, Jurisdiction and Beyond.
[78] Articles on State Responsibility (n 11) Commentary to Article 12, para 11 and 12: Obligations of conduct require a certain form of conduct, whereas obligations of result require that a certain result is effectuated regardless of the means used; Commentary to Article 41 para 3: A positive obligation requires action, whereas a negative obligation requires abstinence; Henry Shue, *Basic Rights* (2nd edn, Princeton UP, 1996) 52: Most human rights do not give rise to one single correlative duty, but rather to the intertwined duties to respect, protect and fulfill. The obligation to respect entails that a state must refrain from interfering with the enjoyment of human rights. The obligation to protect entails that a state must protect individuals or groups against human rights abuses. The obligation to fulfill entails that a state must facilitate the enjoyment of human rights.

categories that better serve the context of obligations to prevent gross human rights violations.

1.3 Research Question, Design and Method

The main research question is:

What is the content and scope of state obligations to prevent gross human rights violations under international human rights law?

Three sub questions will be dealt with in the three substantive chapters following the introduction:

1. *What is the content and scope of state obligations to prevent gross human rights violations within their territory in four temporal phases?*
2. *How do territorial state obligations to prevent gross human rights violations in the four temporal phases translate to extraterritorial obligations based on jurisdiction?*
3. *What is the content and scope of state obligations to prevent gross human rights violations extraterritorially beyond jurisdiction and what are relevant trends for the future development of obligations to prevent gross human rights violations beyond jurisdiction?*

The research design and method are both part of the methodology used to answer these research questions. Section 1.3.1 to 1.3.3 predominantly concern the research design. Section 1.3.4 concerns the method used to determine the content and scope of obligations within the context of that design.

1.3.1 Delineation

The research addresses obligations to prevent "gross human rights violations", which already implies a delineation.[79] The study will be limited to obligations to prevent *torture, arbitrary death* and *genocide* under international human rights law. The three prohibitions are the mirror images of the rights to be free from torture and genocide and the right to life. Therefore, the primary focus is on international human rights law, but not every obligation to prevent within this regime will be addressed. Zooming in on obligations to prevent violations of three specific prohibitions will allow for a more in depth analysis of their content and scope. All three prohibitions are widely recognized as being of primary importance in international human rights law and their

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[79] When an obligation is described as "preventing a violation", violation is meant in a factual manner and not as a legal qualification. It is used similarly to the term "injurious event."

violation is undeniably considered to be a gross human rights violation.[80] It was mentioned above that most express obligations to prevent in human rights law treaties are aimed at preventing injury in relation to a person's life, body or dignity.[81] The selected prohibitions fit neatly within this focus. As such, their analysis can be considered representative for the focus of obligations under human rights law to prevent gross human rights violations. Furthermore, mass atrocities as described in the context of conflict prevention and the RtoP often involve torture and arbitrary deaths. Genocide is in fact one of the crimes recognized as a mass atrocity crime under the RtoP. Analyzing these three prohibitions can therefore also add further clarity to the debate surrounding the approaches to preventing mass atrocities.

The study is framed as a whole in the context of conflict prevention and the RtoP, which begs the question how armed conflict may influence the application and scope of the obligations discussed. This study sets out to clearly define obligations to prevent gross human rights violations under the regime of international human rights law.[82] While the potential influence of armed conflict on the capacity to ensure human rights and content and scope of obligations will be duly explored, the study does not engage the question of the relationship or interaction between human rights law and humanitarian law. Undeniably, obligations under human rights law are sometimes influenced by the (co-)applicability of international humanitarian law.[83] However, this is an issue outside the scope of this study. In general, the two regimes are considered to be complementary and both in principle apply in situations of armed conflict. It is assumed that, even if humanitarian law is sometimes considered *lex specialis*, human

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[80] These prohibitions and corresponding rights have all been included in a range of human rights treaties, have customary law status and the prohibitions of torture and genocide are *jus cogens*. This will be discussed in more detail in the following chapter. See generally: Human Rights Committee, 'General Comment 6 - The Right to Life (Article 6)' (30 April 1982) UN Doc CCPR/C/GC/6, para 3; Committee Against Torture, 'General Comment 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2, para 1; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6, para 64; Articles on State Responsibility (n 11) Commentary to art 40, para 7 and 8: In the context of a Chapter III on Serious Breaches Of Obligations Under Peremptory Norms Of General International Law, the ILC clarifies that the word "gross" means that a "certain order of magnitude of violation is necessary." This study takes a different and broader approach, where any violation of the three selected prohibitions is considered a gross violation.

[81] See Section 1.1.3 International Human Rights Law.

[82] As an exception to the primary focus on human rights law, Chapter 4 also considers several obligations from the regimes of humanitarian law and state responsibility and obligations to ensure economic, social and cultural rights.

[83] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) common art 3: Contains a prohibition of "violence to life and person, in particular murder of all kinds" of civilians and persons *hors de combat*; The prohibition of arbitrary death entails different obligations in the two regimes. To determine whether the right to life has been violated under humanitarian law, it matters whether someone is a combatant or a civilian. This distinction plays no role under human rights law.

rights law may still have a complementary function or influence the interpretation of obligations under humanitarian law.[84] Others can use the outline of obligations to prevent gross human rights violations under international human rights law when exploring the content and scope of obligations in situations where both international human rights law and humanitarian law apply.[85] An exception is made for the consideration of the influence of the law of occupation on the content and scope of extraterritorial obligations in Chapter 3, because it marks a unique situation in which a state may have a form of prescriptive jurisdiction abroad.[86]

Finally, this research will focus on states as the primary duty-bearers of obligations to prevent gross human rights violations. There has been criticism that an exclusively state-centric focus does not do justice to the limited power states have over the large amount of other actors that impact the enjoyment of human rights.[87] For example, many scholars have argued that International Organisations (IOs) are separately bound by human rights obligations, either because they have legal personality and are bound by customary rules contained in human rights treaties (even though they are not formally a party), or based on the IO's status as a collection of states which are all individually bound.[88] However, it is still under debate exactly what obligations IOs

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[84] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (7 August 2015) UN Doc A/70/ 303, para 62-4; Ben-Naftali, Orna and Shany, Yuval, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 Isr L Rev 17, 103-5.

[85] Whether obligations discussed in this research are defeated by humanitarian law as *lex specialis* in particular situations is left up to the doctrinal discussion on that topic: Crawford, Emily, 'Convergence of Norms Across the Spectrum of Armed Conflicts – International Humanitarian and Human Rights Law' (2012) Sydney Law School Legal Studies Research Paper No. 12/17, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028791>; Dennis, Michael J., 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99(1) AJIL 119; Matthews, Hannah, 'The Interaction Between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts' (2013) 17(5-6) IJHR 633.

[86] Kamminga, Menno T., 'Extraterritoriality' (November 2012) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=Srx94t&result=2&prd=EPIL> para 1: Prescriptive jurisdiction refers to a state's "authority to lay down legal rules"; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) International Peace Conference, The Hague, Official Records (Hague Regulations) art 42-3.

[87] Vandenhole, Wouter and Genugten, Willem van, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?' in Vandenhole, Wouter, *Challenging Territoriality in Human Rights Law – Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015) 1.

[88] Glanville, Luke, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) HRLR 1, 21-3; Toope, Stephen J., 'Does International Law Impose a Duty upon the United Nations to Prevent Genocide' (2000) 46 McGill LJ 187: The provisions of the Genocide Convention oblige the UN to act to prevent genocide. "Beyond this, however, there is an erga omnes obligation owed by the United Nations to the international community to prevent gross violations of human rights. (…) It extends to the United Nations as a collection of states, all subject to this obligation to prevent crimes against humanity. The result of this is that the United Nations is legally and morally obliged to address genocide"; Jorgensen,

have.[89] Furthermore, options to hold IOs accountable for violations are still very limited, because they are immune from prosecution by domestic courts and there are hardly any separate (judicial) mechanisms of oversight.[90] Apart from IOs, there has been a strong push to include transnational corporations in the human rights law framework.[91] In 2014, the HRC decided to establish an open ended working group to elaborate a binding treaty on business and human rights.[92] As it currently stands, however, states still have the most central role in ensuring human rights. Human rights treaties address state parties as the primary duty-bearers and most existing frameworks of accountability for human rights violations are focused on states as the potential wrong-doers.[93] Therefore, it makes sense to focus first on the obligations of states. Follow-up research could be envisaged into relevant questions related to obligations of other actors and the influence this may have on the scope of state obligations.

1.3.2 Temporal Phases

The analysis of obligations will rest on a timeline with four temporal phases. There seems to be agreement among scholars working on obligations to prevent under human rights law, conflict prevention and the RtoP that it is useful to divide or group measures based on the factor of time.[94] For example, the original ICISS report on the

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Nina H. B., '"The Next Darfur" and Accountability for the Failure to Prevent Genocide' (2012) 81 NJIL 407, 430-3: "Like states, international organizations with the capacity to influence are under a duty to act the instant they learn, or should have learned, of the serious risk that genocide will be committed."

[89] See for example: Genugten, Willem van, 'The World Bank Group, the IMF and Human Rights: About Direct Obligations and the Attribution of Unlawful Conduct' in Vandenhole, *Challenging Territoriality in Human Rights Law* (n 87) 44 onwards for a discussion of the human rights obligations of the World Bank Group and the IMF.

[90] Jorgensen, '"The Next Darfur" and Accountability for the Failure to Prevent Genocide' (n 88) 430-3: In recent decades there has been a shift of focus from purely moral forms of IO responsibility to formal liability. Jorgensen mentions the *Mothers of Srebrenica* case aimed at UN (even though the UN was held to have immunity from domestic prosecution), the Draft Articles on the Responsibility of International Organizations, the Independent inquiry into UN's failings with respect to Rwanda and the SG report on fall of Srebrenica.

[91] See Chapter 4.3.2 Corporations Acting Abroad; Cernic, Jerney L., 'Corporate Responsibility for Human Rights: Towards a Pluralist Approach' in Vandenhole, Wouter, *Challenging Territoriality in Human Rights Law – Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015) 69.

[92] Human Rights Committee, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (14 July 2014) UN Doc A/HRC/RES/26/9.

[93] Vandenhole and Genugten, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?' (n 87) 1.

[94] ICISS Report (n 4); Cuyckens and De Man, 'The Responsibility to Prevent: on the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention' (n 5) 115; OHCHR, 'The Role of Prevention in the Promotion and Protection of Human Rights' (n 57) para 9 and 10; Ruvebana, *Prevention of Genocide under International Law* (n 48).

RtoP divides measures into the responsibility to prevent, react and rebuild.[95] Within the responsibility to prevent, it further distinguishes between root cause prevention and direct prevention.[96] In conflict prevention theory, a conflict cycle is used to identify different stages and strategies for the prevention and management of conflict.[97] The OHCHR report on the role of prevention in the promotion and protection of human rights distinguishes between direct prevention/mitigation and indirect prevention/non-recurrence.[98] In this research, the timeline is built around the cycle of occurrence of a gross human rights violation. Initially based on a preliminary review and confirmed by later use, it is submitted that treaty obligations and accompanying case law involving obligations to prevent gross human rights violations can best be categorized according to the following four phases:

i) The first phase commences before any indication or knowledge of a possible violation exists (*long-term prevention*).[99] Long-term obligations to prevent come into play for a state under customary international law and/or under a treaty as soon as that state is bound by the relevant obligation. They are not triggered by knowledge of any particular risk.[100] Long-term obligations to prevent are not targeted at a single violation and seek to have a more general deterrent effect. Therefore, long-term preventive measures usually lie in the area of training and education, ensuring that the proper (legal) structures are in place and monitoring.

ii) The second phase commences when a certain degree of knowledge of a risk has been reached, but the injurious event has not yet started occurring (*short-term prevention*).[101] Obligations in this phase arise when it has become foreseeable or ought to be foreseeable for a state that a particular violation will take place. They are targeted at preventing a specific violation and can involve physical protection and operational measures.

iii) The third phase commences after the injurious event has started and as long as it continues to occur (*preventing continuation*).[102] Therefore, a

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[95] ICISS Report (n 4) 19, 29 and 39.

[96] ICISS Report (n 4) 22 and 23.

[97] Cuyckens and De Man, 'The Responsibility to Prevent: on the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention' (n 5) 115.

[98] OHCHR, 'The Role of Prevention in the Promotion and Protection of Human Rights' (n 57) para 9 and 10.

[99] The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.

[100] The instrument may contain a clause allowing the state party a reasonable period of time after ratification to adjust its laws or the state may make a declaration to that effect.

[101] *Genocide* case (n 2) para 430.

[102] Articles on State Responsibility (n 11) Commentary to art 14, para 14: States are under an obligation of cessation of a wrongful act if the injurious event is of a continuing character; Ackerman 'The Prevention of Armed Conflicts as an Emerging Norm in International Conflict Management: The OSCE and the UN as Norm Leaders' (n 15) 9: In conflict prevention this phase is referred to as preventing escalation or containment and measures are usually based on situation-specific agreements

prerequisite for this phase to exist is that the violation is of a continuing character.[103] Obligations in this phase are targeted at halting the on-going violation and mitigating the effects as far as possible. Measures can range from investigation, operational measures to prosecution and punishment. The phases of short-term prevention and preventing continuation are the more acute phases of prevention, which deal with the risk or occurrence of a particular violation.

iv) The fourth phase commences after the violation has ended (*preventing recurrence*).[104] Obligations in this phase are aimed at taking remedial measures and ensuring the violation does not recur. The types of measures lie in the area of investigation, prosecution and punishment, but also taking systematic measures to ensure future abidance. For example, sometimes courts or supervisory bodies prescribe measures to prevent recurrence that go beyond remedying the particular violation at hand.[105]

The introduction of temporal phases is useful for the following reasons: (i) The timeline is a tool to reveal a clear picture of s state's obligations to prevent as a certain (pattern of) violation(s) unfolds; (ii) Obligations to prevent in these phases are mostly based on different legal foundations;[106] and (iii) The separation can give insight into the triggering role of knowledge to incur certain obligations to prevent gross human rights violations.[107] The timeline is a tool employed to offer an informative overview,

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concluded after the initial injurious event; ICISS Report (n 4) 29: Under the R2P this phase corresponds to the element of reaction.

[103] Articles on State Responsibility (n 11) Commentary to Article 14, para 14.

[104] Articles on State Responsibility (n 11) art 30 (b) assurances of non-repetition may be afforded "if circumstances so require"; Moolakkattu, 'Conflict Prevention' (n 4) para 12: In conflict prevention policies, this corresponds to peacebuilding on the basis of situation-specific agreements; ICISS Report (n 4) 39: Under the R2P this corresponds to the element of rebuilding, which is expressly aimed at preventing recurrence; HRC, General Comment 31 (n 49) para 8: The HRCee interprets art 2 as encompassing a general legal obligation to prevent the recurrence of violations; In the language of human rights law, prevention and punishment are closely related and the latter is assumed to have some form of deterrent effect. See generally: Scharf, Michael, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 Law & Contemp Probs 41.

[105] HRC, General Comment 31 (n 49) para 8 and 17: "[I]t has been a frequent practice of the Committee (…) to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question"; *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V: Example of judicial practice instructing a state to address a structural problem to prevent future violations; Articles on State Responsibility (n 11) art 30 and Commentary to art 30 para 6; OHCHR, 'The Role of Prevention in the Promotion and Protection of Human Rights' (n 57) para 10.

[106] An exception is the legal basis for obligations in the first and last phase, which partly overlap because they are both based on the primary obligation to ensure a certain right and arguably would have to be taken regardless of a violation.

[107] Short-term obligations to prevent, for example, usually have a knowledge-requirement. This can be an objectivized or factual standard: *Genocide* case (n 2) para 430: Example of an objectivized standard: "*learns of, or should normally have learned of*"; International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Adopted at its 53rd

but cannot be used as a legal blueprint describing the exact moment at which a state incurs certain obligations. For example, the measures states are obligated to take in the long-term and short-term phases, remain applicable as relevant in other phases. Differing triggers of knowledge and measures typically required will be addressed within the four different phases.[108]

1.3.3 Territory, Jurisdiction and Beyond

The research takes place against the background of an evolving system of international law. There is growing agreement that state boundaries cannot contain the effects of human rights violations and state sovereignty is characterized as responsibility. [109] The research will build upon a modern-day understanding of sovereignty as primarily bestowing obligations upon a state towards individuals within its territory and, occasionally, obligations towards individuals outside its territory.[110] Extraterritorial obligations will be dealt with in two layers. First of all, states may accrue extraterritorial obligations on the basis of jurisdiction.[111] Second, a state may have extraterritorial obligations beyond its jurisdiction.[112] Ultimately, this leads to research in three layers, which will be dealt with in separate chapters: obligations to prevent territorially, extraterritorially based on jurisdiction and extraterritorially beyond jurisdiction. The prevention of torture, arbitrary deaths and genocide will imply a different subset of obligations in the first two versus the third layer.[113]

The point of departure will be an outline and analysis of obligations to prevent torture, arbitrary deaths and genocide within a state's own territory. The state has the most intricate web of obligations to prevent within its own territory, where it usually has

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Session in 2001, UN GAOR Suppl No 10 (A/56/10) Commentary to art 1, para 14: "The notion of risk is thus to be taken *objectively*, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had."

[108] Hakimi, Monica, 'State Bystander Responsibility' (2010) 21(2) EJIL 341: Hakimi describes different responsibilities of bystander states and analyzes which triggers are common to these responsibilities. To a certain extent, this study will do the same, attempting to respect the line between law and claiming the existence of cross-cutting triggers which, in reality, do not exist.

[109] ICISS Report (n 4) 12-14: In the context of the RtoP, the character of sovereignty as responsibility was emphasized, instead of control. The human rights law system offers standards of conduct for states.

[110] Higgins, Rosalyn, 'Ethics and International Law' (2010) 23(2) LJIL 277, 282-87; Peters, Anne, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) EJIL 513, 514-26.

[111] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, para 130-40: Contracting states of the European Convention on Human Rights (ECHR) are obligated to secure the full range rights in cases where they exercise effective control over a territory and the rights relevant to a situation in cases of authority and control over an individual abroad.

[112] *Genocide* case (n 2) para 430 last sentence.

[113] Under most human rights treaties, the same obligations in principle apply when a state has extraterritorial jurisdiction, as within its own territory. Therefore, the difference between obligations in the first two layers will primarily be a difference in scope. The third layer, however, has a different set of obligations that were never limited based on jurisdiction in the first place.

full jurisdictional control. The categories of obligations uncovered in the territorial layer will offer a foundation for the other chapters. Although there is a move away from a strictly territorial applicability of human rights, most human rights treaties do not depart from the controlling notion of jurisdiction.[114] Therefore, the next step will be to translate territorial obligations to prevent torture, arbitrary deaths and genocide to an extraterritorial setting based on jurisdiction. Extraterritorial obligations based on jurisdiction are acquired by carrying out some level and form of control over territory or individuals abroad.[115] Examples are the obligation of an occupying power to prevent violations in occupied territory or the obligation to prevent violations of the rights of arrested or imprisoned individuals under a state's extraterritorial authority and control.[116] Obligations to prevent often differ in content and scope from those within state territory, because government officials acting abroad usually do not have the same level of power or resources.[117] Third, the research will outline and analyze extraterritorial obligations to prevent torture, arbitrary deaths and genocide beyond a state's jurisdiction and discuss what trends are relevant for the future development of this layer of obligations to prevent gross human rights violations. In the *Genocide* case, instead of the concepts of territory and jurisdiction as the traditional bases for obligations under human rights law, the ICJ used "the capacity to influence effectively" to ground the extraterritorial obligation to prevent genocide.[118] It will be explored if other gross human rights violations have to be prevented from occurring without the necessity of a jurisdictional link. There are developments that seem to suggest there is momentum in that direction.[119]

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[114] Wenzel, Nicola, 'Human Rights, Treaties, Extraterritorial Application and Effects' (May 2008) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819?rskey=Cf3gOD&result=4&prd=EPIL> para 5- 7: Jurisdictional limitations are inserted in human rights treaties since states are not considered to be able to "secure human rights for persons all over the world." Nevertheless, human rights (instruments) have been applied extraterritorially both based on jurisdiction and beyond jurisdiction; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 9) Chp IV.

[115] *Al-Skeini v. the United Kingdom* case (n 111) para 130-40.

[116] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 34, para 179; *Al-Skeini v. the United Kingdom* case (n 111) para 137.

[117] *Al-Skeini v. the United Kingdom* case (n 111) para 137: In cases of authority and control over an *individual* abroad, member states are obligated to secure the rights and freedoms "that are *relevant* to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored"."

[118] *Genocide* case (n 2) para 430; Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 5) 700; Glanville, 'The Responsibility to Protect Beyond Borders' (n 88) 18: The obligation to prevent genocide is "borne by *every* state to a greater or lesser degree." [emphasis added]

[119] Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' (n 5): discusses treaty based sources of obligations to prevent crimes against humanity and war crimes; Cassese, *International Law* (n 60) 264-5: Notes that there is a "general obligation of international cooperation for [the] prevention and punishment" of at least "the most odious international crimes such as, in particular, genocide and crimes against humanity"; Articles on State Responsibility (n 11) art 41: Article 41 of the Articles on State Responsibility does contain a progressively developing collective obligation to "cooperate to bring to an end", or in other words prevent the continuation of, grave

The various obligations that have been separated in these three layers can in fact overlap and interact, since multiple states may have the same or similar obligations in relation to one particular situation of gross human rights violations.[120] When this is the case, it can influence what each state is able and/or required to do.[121] Several principles can help sort out such interactions. For example, the ECtHR has on multiple occasions established that, when a territorial state loses authority over parts of its territory or people, for example because a foreign state exercises extraterritorial jurisdiction there, it still has positive obligations to try and regain control and ensure respect for human rights in those areas.[122] When multiple states exercise extraterritorial jurisdiction over the same territory or people abroad, for example in the context of multinational operations, agreements addressing structures of operational control and the division of labor between the participating states can help indicate which state is obligated to ensure human rights in which area/towards which individuals.[123] In regard to extraterritorial obligations beyond jurisdiction, there are not yet any clear principles to help sort out interactions between multiple duty-bearing states.[124] Although the influence of overlapping obligations on the scope of individual

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breaches of peremptory norms, which implies such obligations may also exist in other cases than genocide.

[120] An example is the Srebrenica genocide. Genocide Convention (n 44) art 1: Bosnia had an obligation to prevent and not commit genocide as the territorial state; *Mothers of Srebrenica* case (n 48) para 5.1: The Netherlands had obligations to prevent based on the presence of state officials on Bosnian territory; *Genocide* case (n 2) para 438: Serbia was under an obligation to prevent, based on its capacity to effectively influence the situation.

[121] See for example: *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para 331, 441, 448, 453: Both Moldova and Russia were ruled to have jurisdiction over the Transdniestrian region and held responsible for their respective failures to prevent the ill-treatment of the applicant.

[122] *Ilaşcu and Others v. Moldova and Russia* (n 121) para 333-5: "[T]he applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but […] its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention." "The State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention." The scope of these positive obligations is related to "the material opportunities available to the State Party to change the outcome of events"; Confirmed in: *Ivantoc a.o. v Moldova and Russia,* no. 23687/05, 15 November 2011, para 105-8; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012, para 109.

[123] *Al-Skeini and Others v. the United Kingdom* (n 111) para 147: The ECtHR took the structures of command and the fact that the United Kingdom assumed responsibility for security in the region into account when establishing the United Kingdom's jurisdiction over the applicants; *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014, para 144-9: The Netherlands was acting under a Security Council mandate and had assumed responsibility for the security in South-Eastern Iraq and "retained full command over its contingent there."

[124] De Schutter, Olivier and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084, Principle 30 and Commentary to Principle 31 para 8: It has been suggested in the context of economic,

state obligations will be discussed where it has come up in relation to the prevention of gross human rights violations, it is an issue of broader relevance for human rights obligations generally and is not one of the main objects of this study.

1.3.4 Determining the Content and Scope of Obligations to Prevent

This study sets out to assess the law as it is. The determination of the content and scope of obligations to prevent gross human rights violations under human rights law is based on the primary sources of international law, as expressed in art 38 ICJ Statute.[125] The starting point for the determination of the content and scope of obligations to prevent torture, arbitrary death or genocide is a review of treaty provisions containing these prohibitions and searching for related obligations to prevent. Unlike in the field of humanitarian law, there is no authoritative indexation of customary human rights obligations that can be used for such a purpose. Moreover, taking treaty provisions as the point of departure is in line with the assumption in human rights scholarship that "it is quite unlikely that states have assumed more extensive obligations under customary human rights law than they have done under treaty law [and e]ven if they did, there is rarely any forum for enforcing such obligations directly."[126] Where possible, the status of prohibitions and obligations as customary law or *jus cogens* will be indicated, based on authoritative statements to that effect by courts or supervisory bodies.

The texts of treaty provisions are short and phrased in very general, open-ended terms and meaning is attributed to these provisions through interpretation. The rules on treaty interpretation prescribe that treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", unless this leads to ambiguous or unreasonable outcomes.[127] Unfortunately, the texts of treaties and their *travaux préparatoires* do not often elaborate much on the content and scope of obligations to prevent and the practice of states is hard to access and review.[128] Throughout the research, much weight is attached to case law of courts and supervisory bodies, because it is often the most accessible, prolific and authoritative source of information to determine the law

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social and cultural rights that states have a procedural obligation to devise a system of allocation for obligations to assist and cooperate.

[125] ICJ Statute (n 40) art 38 (1) a, b and c.

[126] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 9) 3.

[127] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31-2.

[128] *Travaux préparatoires* are also less important for the interpretation of human rights treaties, because they are living instruments subjected to autonomous interpretation in light of current living conditions. See among others: *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, I/A Court HR Series C No. 79 (2001) para 146; *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts) para 272-82.

in this area.[129] In general, only the case law of the body or court that is authorized to interpret a specific treaty and pertaining to a specific prohibition will be used to make pronouncements on the content and scope of obligations to prevent. However, decisions may sometimes be of undeniable analogous relevance for other treaties or prohibitions and can represent general trends in interpretation practices. For example, there is a broad practice of cross-referencing among human rights supervisory bodies and courts.[130]

In areas where the treaty texts and related documents or case law do not offer sufficient guidance to determine the law, the study will take position based on independent critical analysis, supported by the teachings of the most highly qualified publicists. [131] For example, the reasoning in cases addressing extraterritorial obligations based on jurisdiction is often ambiguous and sometimes even straight-out contradictory.[132] Therefore, in Chapter 3 on extraterritorial jurisdiction, a theoretical framework resting on threshold and capacity is developed, to help analyze the content and scope of obligations in that particular layer.[133] Furthermore, the four temporal phases and categories of obligations to prevent uncovered in the territorial layer are used as a tool to analyze obligations. Chapter 4 will also elaborate on several developing obligations and related theories relevant to obligations to prevent gross human rights violations beyond jurisdiction.

Finally, a few normative assumptions underlying the research need to be made explicit, to allow readers to better understand its strengths and limitations.[134] First of all, the research is based on the assumption that international human rights law can play a positive role in the prevention of gross human rights violations because it offers a universal legal framework. This is not to say that human rights law is per definition a good thing. Human rights law can both challenge and sustain power that

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[129] ICJ Statute (n 40) art 38 (1) d: Article 38 ICJ Statute designates judicial decisions and the teachings of the most highly qualified publicists as subsidiary means of determining the law.

[130] See for example: *Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of January 31, 2006, I/A Court HR Series C No 140, para 124: Citing a paragraph from a judgment of the ECtHR; *Zimbabwe Human Rights NGO Forum v. Zimbabwe,* AComHPR, Communication No. 245/02 (15 May 2006) para 145: refers to the IACtHR; *Article 19 v. The State of Eritrea*, Afr Comm HPR, Communication No. 275/2003 (2007) para 97 and 99: refer to the ECtHR; *Pillai v. Canada*, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 473 (HRC, Mar. 25, 2011) para 11.4: The HRCee diverted from its own previous case law and brought the ICCPR standard of knowledge for non-refoulement in line with that of the CAT.

[131] ICJ Statute (n 40) art 38 (1) d.

[132] See Chapter 3.1; For example, a case that received much criticism and of which many points were watered down/ overturned in later case law is: *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

[133] See Chapter 3.1: The case law of the ECtHR is assumed to have more general effect beyond the confines of the ECHR and its member states, because its case law and typologies on jurisdiction are most elaborate and refined.

[134] See generally: Maxwell, Joseph A., *Qualitative Research Design: An Interactive Approach* (Sage, 2012) para 97 and 99: refers to the ECtHR.

is used to violate human rights and is an inherently ambivalent system. As such, it can also be used to negatively influence (potentially) violent situations. States may avoid using certain human rights terms to label situations, like genocide, so as to try and avoid the obligations associated with that term.[135] Using human rights in peace negotiations has even been argued to sometimes prolong conflicts by its strong focus on aspects like fact-finding and accountability over reconciliation, for example in the case of Bosnia and Herzegovina.[136] Nevertheless, states have almost universally agreed through human rights treaties on the importance of certain core values and people across the world can use human rights law to communicate about these values. As such, I believe human rights law offers a valuable tool that is worth fully understanding and exploiting. Therefore, this research is based on the belief that clarifying obligations to prevent gross human rights violations will at the very least add clarity to the debate in that area and can at best induce efforts of implementation and enforcement.

1.4 Structure

In the following chapters, the first step will be to assess territorial obligations to prevent torture, arbitrary death and genocide according to the four temporal phases (Chapter 2). This will give insight into the content and scope of obligations within state territory, the triggering role of knowledge to incur and limiting role of capacity to the scope of certain obligations. Based on the many similarities between the obligations to prevent required in the context of all three prohibitions, the chapter brings to light certain crosscutting categories of obligations to prevent gross human rights violations. There are also interesting differences to be noted in the measures required in the context of the different prohibitions, which underlines the importance of the specific type of injury for the way obligations to prevent are modeled. The categories of obligations to prevent, combined with a theoretical framework of threshold and capacity, will then be used to analyze the content and scope of extraterritorial obligations based on jurisdiction (Chapter 3). The resulting overview will give insight into different ways that an extraterritorial setting influences the content and scope of obligations and the important role played by a state's capacity to ensure human rights in that regard. To complete the overview, the content and scope of extraterritorial obligations beyond jurisdiction will be discussed and what trends are relevant for their future development (Chapter 4). Apart from the obligation to prevent genocide, there are very few existing extraterritorial obligations to prevent

[135] Jacobs, Dov, 'Moving Beyond the Genocide Debate: Mass Atrocities and the International Community' (Presented at the ISA Annual Convention 2010, New Orleans) SSRN, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564901>.

[136] Anonymous, 'Human Rights in Peace Negotiations' (1996) 18(2) HRQ 249; The notion of law as a language or argumentative practice stems mostly from the work of Koskenniemi, Martii, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2006) 563; Parlevliet, Michelle, 'Embracing Concurring Realities: Revisiting the Relationship between Human Rights and Conflict Resolution' (PhD Thesis, University of Amsterdam, 2015).

torture and arbitrary deaths beyond jurisdiction. There is, however, increasing attention for developing obligations that require states to prevent and bring to an end gross human rights violations abroad, based on forms of influence beyond jurisdiction.

2. OBLIGATIONS TO PREVENT WITHIN STATE TERRITORY

Under international human rights law, states' obligations are directed first and foremost towards ensuring the rights of people on their territory; therefore it may be assumed that states have the most intricate web of obligations to prevent gross human rights violations within their own territory.[1] The primary responsibility of each state to protect people on its territory and the importance of the territorial protection of human rights to build national resilience against atrocity crimes is affirmed in the context of the RtoP and conflict prevention.[2] Nevertheless, human rights law as a territorial system of preventing gross human rights violations has remained relatively unexplored. There is little insight into the types of obligations to prevent that states have at different points in time, the measures they are required to take, the triggering role of knowledge and the influence of capacity on the scope of obligations.

This chapter contains an overview and in-depth analysis of obligations to prevent torture, arbitrary deaths and genocide within state territory (hereinafter: the three prohibitions).[3] First, each prohibition will be separately introduced with an outline of the related legal framework (Section 2.1). Obligations to prevent torture, arbitrary deaths and genocide will then be studied in more detail based on the timeline of prevention, leading from long-term prevention to the prevention of recurrence (Section 2.2).[4] The conclusion of this chapter will present an overview of the territorial set of obligations to prevent gross human rights violations under human rights law and evaluate the roles of knowledge and capacity in that context (Section 2.3). The resulting overview demonstrates that there are certain crosscutting

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[1] Vandenhole, Wouter and Genugten, Willem van, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?' in Vandenhole, Wouter, *Challenging Territoriality in Human Rights Law – Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015) 1; This chapter is built on the assumption of a situation in which a state has full jurisdictional control over its entire territory. In reality, this is not always the case; See for example: Milanović, Marko, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (OUP 2011) Chp IV – 1C4: Explains that the territorial state's jurisdiction, seen as effective control over a territory, may be excluded by the exercise of jurisdiction by another state.

[2] Secretary-General Ban Ki-Moon, 'Responsibility to Protect: State Responsibility and Prevention' (9 July 2013) UN Doc A/67/926-S/2013/399, para 2 and 5: Emphasizes the primary responsibility of each state to protect its populations by preventing atrocity crimes; United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' United Nations (2014) <http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf> 3: Refers to the importance of the territorial protection of human rights for building national resilience to atrocity crimes.

[3] See Chapter 1.3.1 Delineation: The term "prohibitions" is used to refer to the prohibition of torture, arbitrary death and genocide and the corresponding right to be free from torture, right to life and right to be free from genocide. The term "prohibitions" is used rather than "rights", because it refers more directly to state obligations and the injurious event that is to be prevented.

[4] See Chapter 1.3.2 Temporal Phases.

categories of obligations to prevent gross human rights violations.[5] There are also several more specific and context-dependent requirements for measures to prevent the different prohibitions. Describing the obligations to prevent these prohibitions in the territorial layer will offer a foundation to explore their extraterritorial content and scope based on jurisdiction in Chapter 3.

2.1 Introduction to the Prohibitions and Obligations to Prevent

Each of the prohibitions will be introduced by discussing their legal status, treaty provisions containing the prohibition, explicit or implied obligations to prevent and existing international mechanisms focused on prevention. This provides the reader with general background information for the later analysis of the content and scope of obligations to prevent based on the timeline.

2.1.1 Torture

The prohibition of torture is a rule of customary law with *jus cogens* status.[6] This means that no derogation is permitted whatever the circumstances and the rule can only be modified by a subsequent norm that also has *jus cogens* character.[7] A range of treaties has been devised specifically addressing the prohibition of torture and corresponding obligations, such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) and the Inter-American Convention to Prevent and Punish Torture (IACPPT).[8] The prohibition of torture has also been included in all general universal and regional human rights instruments, such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and

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[5] The term “crosscutting obligations” is used to describe obligations to prevent that are similar in the context of all three of the prohibitions.

[6] Committee Against Torture, ‘General Comment 2: Implementation of Article 2 by States Parties’ (24 January 2008) UN Doc CAT/C/GC/2, para 1; *Prosecutor v. Furundzija*, International Tribunal for the Former Yugoslavia in case IT-95-17/1-T, judgement of 10 December 1998 (March 1999) 38 ILM 2; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (November 2001) UN GAOR Suppl No 10 (A/56/10) chpIVE1 (Articles on State Responsibility) Commentary to art 26, para 6 and art 40 para 5.

[7] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 53.

[8] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (CAT Optional Protocol); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS 126 (ECPT); Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67 (IACPPT).

Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR) and the African Convention on Human and Peoples' Rights (ACHPR).[9] Finally, more specified provisions prohibiting torture and ill-treatment have been included in instruments protecting vulnerable groups, such as the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).[10]

Both the CAT and the IACPPT expressly state in the treaty text that there is an obligation to prevent torture and ill-treatment and elaborate on the content and scope of this obligation in a range of provisions.[11] For example, Article 2 of the CAT reads:

> "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[12]

The CAT Committee, the supervisory mechanism established under the treaty, has interpreted this obligation to be wide-ranging and dynamic.[13] What acts are considered torture or what methods are used for torture may change, thus what constitutes "effective measures to prevent" may also evolve and expand.[14] It is often impossible to predict the level of intensity that ill-treatment will reach beforehand, therefore the obligation to prevent torture in Article 2 is seen as overlapping with the obligation to prevent cruel, inhuman and degrading treatment or punishment (ill-treatment) contained in Article 16 of the CAT.[15] Articles 3 to 15 of the CAT all, to some extent, constitute specific obligations to prevent.[16] However, the CAT

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[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 24 March 1976) 999 UNTS 171 (ICCPR) art 7; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) art 3; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 5; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 5.

[10] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1588 UNTS 3 (CRC) art 19; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 15.

[11] CAT (n 8) art 2 and 16; IACPPT (n 8) art 1.

[12] CAT (n 8) art 2; The CAT had been ratified/ acceded by 158 states by January 2016.

[13] CAT, General Comment 2 (n 6) para 3.

[14] CAT, General Comment 2 (n 6) para 3, 14 and 25.

[15] CAT (n 8) art 16; CAT, General Comment 2 (n 6) para 3: Despite the legally significant difference between torture and other cruel inhuman and degrading treatment for the assessment of the violation ex-post facto, the CAT Committee has stressed that the required 'effective measures to prevent' for torture and for other forms of ill-treatment overlap, since 'the definitional threshold' is often unclear in practice.

[16] Gaer, Felice D., 'Opening Remarks: General Comment 2' (Summer 2008) 11 NYCLR 187; CAT (n 8) art 3: *Non-refoulement*, art 4: Criminalize acts of torture, art 5: Establish jurisdiction over offences, art 6: Take into custody or otherwise ensure the presence of offenders, art 7: Prosecute by submitting the case to the competent authorities, art 8: Extradition arrangements for offenders, art 9: Assist other states in criminal proceedings related to acts of torture, art 10: Educate and inform law enforcement personnel, art 11: Systematically review regulations and practice surrounding detention, art 12:

Committee has stressed that the general obligations to prevent in Articles 2 and 16 transcend these clauses and may require more or different measures.[17] The IACPPT, like the CAT, contains an express obligation to prevent in Article 1 and a range of provisions comprising a non-exhaustive list of obligations linked to the prevention of torture and ill-treatment.[18] Of the instruments protecting vulnerable groups, the CRC and CRPD also contain express references to obligations to prevent in relation to the torture and ill-treatment of children and people with disabilities.[19]

The general universal and regional human rights instruments all dedicate a provision to the prohibition of torture.[20] While none of these instruments make express reference to an obligation to prevent torture, it is inherent to being able to ensure the right to be free from torture and obligations to prevent have accordingly been read into the different provisions by the respective supervisory bodies and courts.[21] With regard to Article 7 ICCPR, the Human Rights Committee (HRCee) has stated that state parties should inform the Committee of "legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment."[22] The Inter-American Court of Human Rights (IACtHR) proclaimed in the *Velásquez-Rodríguez* case that the obligation to ensure the rights, as formulated in Article 1 of the ACHR, taken together with a substantive right in the Convention, in this case Article 5 containing the right to humane treatment, requires states to "prevent, investigate and punish" violations of that right.[23] It further stated that this duty to prevent may include "all those means of a legal, political, administrative and cultural nature that promote the protection of human rights" and that it is impossible to devise an exhaustive list of such measures.[24] Likewise, the

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Investigate, art 13: Ensure the right of complaint in the context of accusations of torture, art 14: Ensure fair trial and the right of redress, art 15: Prohibition of using evidence obtained as the result of torture.

[17] CAT, General Comment 2 (n 6) para 3 and 25.

[18] IACPPT (n 8) art 1: Obligation to prevent torture, art 6: Obligation to criminalize acts of torture, art 7: Educate law enforcement personnel, art 8: Obligation to ensure the right of complaint and fair trial in the context of accusations of torture, art 9: Obligation to effectuate legislation for providing compensation, art 10: Obligation not to use evidence obtained as the result of torture, art 11, 13 and 14: Extradition arrangements for offenders, art 12: Establish jurisdiction over offences.

[19] CRC (n 10) art 19(2); CRPD (n 10) art 15(2).

[20] ICCPR (n 9) art 7: Statest that "noone shall be subjected to torture [etc]"; ECHR (n 9) art 3: Contains a prohibition of torture; ACHR (n 9) art 5: Contains a right to humane treatment and states that "noone shall be subjected to torture [etc]"; ACHPR (n 9) art 5: Contains a "right to the respect of the dignity inherent in a human being" and states that torture shall be prohibited.

[21] Arab Charter on Human Rights (adopted 15 September 1994, not yet in force) reprinted in 18 Hum Rts LJ 151 (1997) art 13: Of the human rights instruments with a general focus, only the Arab Charter on Human Rights, which is not yet in force, explicitly prescribes states to take "effective preventive measures."

[22] ICCPR (n 9) art 7; Human Rights Committee, 'General Comment 20 - Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7)' (10 March 1992) UN Doc CCPR/C/GC/20, para 8.

[23] *Velásquez Rodríguez v. Honduras* (Merits) Judgment of July 29, 1988, I/A Court HR (Ser C) No. 4 (1988) para 166.

[24] *Velásquez Rodríguez v. Honduras* (n 23) para 175.

European Court of Human Rights (ECtHR) has found that the obligation of states to secure the rights in the Convention under Article 1 in conjunction with Article 3, includes a duty to take "reasonable steps to prevent ill-treatment."[25] Finally, the African Commission on Human and Peoples' Rights (AComHPR) has also acknowledged the need for preventive measures in the context of the prohibition of torture as contained in Article 5 of the ACHPR.[26]

The importance attached to obligations to prevent torture is reaffirmed by the existence of a range of institutional mechanisms aimed at preventing torture at the international level. The mandate of the United Nations (UN) Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment has existed since 1985, including the possibility to make urgent appeals with regard to people at risk of torture and carry out fact-finding missions.[27] In 1987, the ECPT was adopted, establishing an at the time unique preventive mechanism at regional level, authorizing an independent Committee to carry out periodic and ad-hoc visits to places of detention.[28] It is considered the first human rights supervisory mechanism with a truly pro-active preventive focus.[29] Based on this model, the Optional Protocol to the CAT introduced a mechanism allowing for visits to places of detention at the universal level in 2002.[30] The Optional Protocol not only introduced a Subcommittee which carries out visits to places of detention, but also requires that state parties institute national bodies to carry out such visits.[31] Member states of the Optional Protocol therefore have an obligation to establish national bodies for the prevention of torture and member states of both the Optional Protocol and the ECPT have an obligation to cooperate with the respective Committees.[32] Both Committees make observations and recommendations based on their visits to centers of detention and can also offer general advice. The Subcommittee for the Prevention of torture has *inter alia* established guiding principles for the prevention of torture by states, outlining risk factors and (procedural) guarantees.[33]

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[25] *Z. and Others v. the United Kingdom* [GC], no 29392/95, ECHR 2001-V, para 73; *Mahmut Kaya v. Turkey*, no 22535/93 (Sect. 1) ECHR 2000-III, para 116.

[26] *Amnesty International and Others v. Sudan*, AComHPR, Communication No. 48/90, 50/91, 52/91, 89/93 (15 November 1999) para 56: "Punishment of torturers is important, but so also are preventive measures […]."

[27] Commission on Human Rights, 'Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' (13 March 1985) UN Doc E/CN4/RES/1985/33; Human Rights Council, 'Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: Mandate of the Special Rapporteur' (24 March 2014) UN Doc A/HRC/25/L25.

[28] ECPT (n 8) art 1.

[29] Kriebaum, Ursula, 'Prevention of Human Rights Violations' (1997) 2(2) ARIEL 155, 160 onwards and 188; Cassese, Antonio, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture' (1989) 83(1) AJIL 128.

[30] CAT Optional Protocol (n 8).

[31] CAT Optional Protocol (n 8) art 3.

[32] ECPT (n 8) art 2, 3 and 8(2); CAT Optional Protocol (n 8) art 2(4), 3, 4(1), 12, 14 and 17-23.

[33] Subcommittee on Prevention of Torture, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or

2.1.2 Arbitrary Deprivation of Life

The right to life and more in particular the prohibition of the arbitrary deprivation of life are considered to be part of customary international law.[34] The prohibition centers on the word arbitrary, because there are situations in which the taking of life is considered lawful under the respective human rights treaties. Examples are deaths resulting from self-defense, lawful acts of war or the death penalty applied after a fair trial in non-abolitionist states.[35] The right to life is therefore not absolute, but the prohibition of arbitrary deaths is. It is considered non-derogable, which means that states cannot make an express derogation from it even in situations of widespread disorder or violence.[36] It can be argued that at least a core part of the right to life has *jus cogens* status, for example the prohibitions of targeted killings, war crimes and genocide.[37] The right to life has, in slightly different forms, been included in all universal and regional human rights treaties, such as the ICCPR, the ECHR, the ACHR and the ACHPR.[38] More specified provisions containing the right to life have also been laid down in instruments protecting vulnerable groups, such as the CRC and CRPD.[39]

While the general universal and regional human rights treaties do not contain an express obligation to prevent arbitrary deaths, obligations to prevent are commonly understood to inhere in the obligation to ensure the right to life. States have to take

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Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (30 December 2010) UN Doc CAT/OP/12/6-A/HRC/18/24.

[34] Petersen, Niels, 'Life, Right to, International Protection' (Oct 2010) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e841>, para 1; Human Rights Committee, 'General Comment 6 - The Right to Life (Article 6)' (30 April 1982) UN Doc CCPR/C/GC/6, para 1-3: The right to life is considered of fundamental importance as the very first and basic human right, without which no other individual rights can exist.

[35] ICCPR (n 9) art 6.

[36] ICCPR (n 9) art 4(2); ECHR (n 9) art 15(1): Noting the exception of deaths resulting from the lawful acts of war; ACHR (n 9) art 27(2); The ACHPR does not contain a derogation clause; *Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of January 31, 2006, I/A Court HR Series C No 140, para 134 and 146.

[37] Petersen, 'Life, Right to, International Protection' (n 34) para 1: This article claims that the majority of legal scholarship believes that the right to life has *jus cogens* status, but it is perhaps safer to assume that only some parts of the prohibition may have attained a jus cogens status. See also: Ramcharan, Bertrand, G., *The Right to Life in International Law* (Martinus Nijhoff Publishers, 1985) 15.

[38] ICCPR (n 9) art 6; ECHR (n 9) art 2; ACHPR (n 9) art 4; ACHR (n 9) art 4: Of the above instruments, only the ECtHR does not use the word "arbitrary" but "intentional." In the case law of the ECtHR, however, the provision has been interpreted as prohibiting the arbitrary deprivation of life roughly along the same lines as the other treaties. The clauses also differ slightly in their formulation of the parameters set to determine when the deprivation of life is considered arbitrary. For instance, art 2(2) of the ECHR explicitly mentions certain circumstances in which deprivation of life can be legal, such as self-defence. By contrast, art 4 of the ACHPR is drafted in very general terms and the definition of arbitrariness has been further crystallized in case law.

[39] CRC (n 10) art 6; CRPD (n 10) art 10.

measures to ensure the right to life, which extends to obligations to prevent arbitrary deaths.[40] The HRCee, in its General Comment on the right to life, declared that states must take measures to prevent the arbitrary deprivation of life by their own security forces and by criminal acts of non-state actors.[41] It further proclaimed that states "should take specific and effective measures to prevent the disappearance of individuals, something which […] leads too often to arbitrary deprivation of life" and "have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life."[42] The IACtHR has applied the *Velásquez-Rodríguez* formula mentioned in the previous section, requiring states to prevent, investigate and punish human rights violations, in the context of arbitrary deprivations of life.[43] It thereby stressed the primary importance of the right to life and affirmed that states have the obligation to prevent arbitrary deprivation of life by its own security forces and private criminal acts.[44] The ECtHR has likewise held that states must prevent the arbitrary deprivation of life by state officials and "take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[45] The AComHPR endorsed the existence of an obligation to prevent the arbitrary deprivation of life with reference to the case law of the IACtHR and ECtHR.[46]

In 1982, a mandate was established for the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.[47] The mechanism was called into existence because national procedures to prevent and investigate arbitrary deaths can become ineffective in circumstances where there is potential involvement of state officials in the violations.[48] The Special Rapporteur can receive individual complaints and transmit urgent appeals in case of a credible threat to the right to life, enter into dialogue with governments, conduct country visits and draw the attention of the Human Rights Council (HRC) and UN High Commissioner for Human Rights to

[40] HRC, General Comment 6 (n 34) para 5.
[41] HRC, General Comment 6 (n 34) para 3.
[42] HRC, General Comment 6 (n 34) para 2 and 4.
[43] *Velásquez Rodríguez v. Honduras* (n 23) para 166.
[44] *19 Tradesmen v. Colombia* (Merits) Reparations and Costs, Judgment of July 5, 2004, I/A Court HR Series C No 109, para 153; *Juan Humberto Sánchez v. Honduras* (Preliminary Objection, Merits, Reparations and Costs) Judgment of June 7, 2003, I/A Court HR Series C No. 99, para 110.
[45] *Opuz v. Turkey*, no. 33401/02, ECHR 2009, para 128-30; *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324.
[46] *Zimbabwe Human Rights NGO Forum v. Zimbabwe,* AComHPR, Communication No. 245/02 (15 May 2006) para 144; In light its recent existence, the ACtHPR has not yet pronounced itself on this matter.
[47] Commission on Human Rights, 'Summary or Arbitrary Executions' (11 March 1982) UN Doc E/CN4/RES/1982/29; Economic and Social Council Resolution 1982/35, 'Summary or Arbitrary Executions' (7 May 1982) UN Doc E/RES/1982/35.
[48] Weissbrodt, David and Rosen, Teri, 'Principles Against Executions' (1990) 13 Hamline L Rev 579, 580.

situations that warrant immediate attention.[49] The role of the Special Rapporteur as an early warning mechanism for atrocity crimes has been acknowledged by the HRC.[50] Apart from the above-mentioned legal bases for the right to life, the Special Rapporteur also draws on several non-binding instruments. The most important are the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions adopted by the Economic and Social Council (ECOSOC) and the accompanying Manual, setting out practical standards of conduct for states.[51] Principle 8 focused on prevention makes mention of the role of intergovernmental mechanisms in the investigation of possible executions and enjoins states to cooperate with such international investigations.[52]

2.1.3 Genocide

The prohibition of genocide is a rule of customary international law and is unequivocally recognized to have *jus cogens* status.[53] Obligations to prevent and punish genocide were codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The Convention has a different character than most human rights treaties, because it does not directly attribute rights to individuals, but is formulated in terms of obligations of states.[54] It also does not have a specific monitoring body. Other human rights instruments do not contain separate provisions prohibiting genocide, although Article 6 of the ICCPR does refer to the Genocide Convention in the context of the right to life.[55] The Genocide Convention contains an express reference to prevention in its very first Article:

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[49] Human Rights Council, 'Mandate of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions' (11 July 2014) UN Doc A/HRC/RES/26/12.

[50] HRC, 'Mandate of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions' (n 49) 2.

[51] Economic and Social Council, 'Resolution 1989/65: Economic and Social Council Resolution 1989/65, 'Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (24 May 1989) UN Doc E/1989/89; UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12.

[52] ECOSOC, Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (n 51) Principle 8; Weissbrodt and Rosen, 'Principles Against Executions' (n 48) 599-601.

[53] *Reservations to the Convention on Genocide and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, p 23: The ICJ declared the "principles underlying the Convention" are a part of customary international law; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6, para 64.

[54] The Genocide Convention is most similar to the CAT and IACPPT.

[55] ICCPR (n 9) art 6.

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." [56]

Subsequent provisions of the Convention contain more specific obligations to prevent in relation to genocide. For example, Article 5 requires states to enact the necessary legislation under their domestic legal systems.[57] Article 8 allows states to call upon the UN to take action to prevent and suppress acts of genocide.[58] Finally, the rules surrounding punishment of acts of genocide are also widely considered to have a deterrent effect.[59]

The general obligation to prevent genocide contained in Article 1 was authoritatively interpreted for the first time by the ICJ in the 2007 *Genocide* case.[60] Even though the judgment concerns a situation of extraterritorial application, it contains interpretations that are similarly relevant for the territorial obligation to prevent genocide. First of all, the ICJ stated that the obligation to prevent is not synonymous with the obligation to punish and has a separate legal existence.[61] The Court interpreted the reference to prevention in Article 1 of the Genocide Convention as entailing an obligation of state parties once they "learn of, or should normally have learned of, the existence of a serious risk that genocide will be committed" to prevent the occurrence of genocide by "employ(ing) all means reasonably available to them, so as to prevent genocide so far as possible."[62] The ICJ also read the obligation not to commit genocide into Article 1 of the Convention even though this is not made explicit in the treaty text, based on the purpose of the Convention combined with the fact that genocide is recognized as "a crime under international law" and that it would be paradoxical to require states to prevent genocide but not prohibit them from committing it.[63]

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[56] Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 1.
[57] Genocide Convention (n 56) art 5.
[58] Genocide Convention (n 56) art 8.
[59] Genocide Convention (n 56) art 3 jo 4 jo 6; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case) para 426: "It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment […] one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent."
[60] *Genocide* case (n 59) para 438; Gattini, Andrea, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18(4) *EJIL* 695.
[61] *Genocide* case (n 59) para 427; Economic and Social Council Resolution 77 (V), 'Genocide' (6 August 1947) UN Doc E/573; UN Secretariat, 'First Draft of the Genocide Convention' (May 1947) UN Doc E/447, art 1: This conclusion is supported by the draft Convention, which mentions only the purpose of prevention; Etienne Ruvebana, *Prevention of Genocide under International Law – An Analysis of the Obligations of States and the UN to Prevent Genocide at the Primary, Secondary and Tertiary Levels* (Intersentia, 2014) 92.
[62] *Genocide* case (n 59) para 427 and 430.
[63] *Genocide* case (n 59) para 166 and 382.

The most important international mechanism aimed at the prevention of genocide is the UN Office of the Special Adviser on the Prevention of Genocide (OSAPG), established by the Secretary General (SG) in 2004.[64] The OSAPG is assigned with different tasks, amongst which acting as a system of early warning and making recommendations to the UN Security Council (SC) through the SG.[65] The OSAPG is informed in its work by the Framework of Analysis for Atrocity Crimes - A Tool for Prevention.[66] The Framework addresses three atrocity crimes: genocide, crimes against humanity and war crimes.[67] It contains fourteen risk factors, each with their own indicators.[68] Eight of these risk factors count for all atrocity crimes and the rest are specific to the different atrocity crimes. The risk factors specific to genocide are: (risk factor 9) Intergroup tensions or patterns of discrimination against protected groups; and (risk factor 10) Signs of an intent to destroy in whole or in part a protected group.[69] Protected groups refer to the members of a national, ethnical, racial of religious group.[70] The OSAPG collects information and monitors situations where there may be a risk of genocide based on its appreciation of these risk factors. It can engage with governments about its concerns privately or, if it is considered to help the situation, issue public statements.

2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory

This section analyses the content and scope of territorial state obligations to prevent torture, arbitrary deaths and genocide based on the timeline.[71] For each temporal

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[64] Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council (13 July 2004) UN Doc S/2004/567: informing the Security Council of the decision to appointing Juan Méndez as the first Special Adviser on the Prevention of Genocide; Letter dated 13 July 2004 from the President of the Security Council addressed to the Secretary-General (13 July 2004) UN Doc S/2004/568: taking note of the Secretary General's decision; Many governments and non-governmental organizations have also taken the mission of genocide prevention to heart and focus on clarifying and implementing genocide prevention. A few examples are the Budapest Centre for the International Prevention of Genocide and Mass Atrocities and the United States (US) Genocide Prevention Task Force, which released its final report in 2008. See generally: <http://www.genocideprevention.eu/> and <http://www.usip.org/publications/genocide-prevention-task-force>.

[65] Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council (n 64).

[66] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2).

[67] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 1-2.

[68] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 6.

[69] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 9 and 18-9.

[70] Genocide Convention (n 56) art 2; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 1.

[71] See Chapter 1.3.2 Temporal Phases: The temporal phases are not strictly legally demarcated. Rather they are tools used to reveal a clear picture of various types of state obligations to prevent and the roles of knowledge and capacity as a violation unfolds.

phase, a general description of the risk factors and types of measures that could have preventive effect is followed by a mapping exercise of what states are legally required to do to prevent torture, arbitrary death and genocide. In the introduction to each phase, crosscutting categories of obligations to prevent will be outlined that are similar for all three of the prohibitions.[72] This is followed by a discussion in the sub-sections of how the crosscutting categories of obligations are elaborated in the context of the different prohibitions. The sub-sections will also include discussion of any existing specific obligations to prevent that do not fit within te crosscutting categories.

A. Long-Term Prevention

Long-term obligations to prevent address root causes of human rights violations and seek to have a general deterrent effect.[73] The phase of long-term prevention starts before there is knowledge of a concrete risk and the obligations continue to be relevant regardless of any particular violation.[74] Obligations in this phase arise immediately once a state is legally bound by the relevant obligations under customary law or a treaty. Root causes and risk factors for gross human rights violations are usually related to a general lack of respect for human rights and the rule of law, social division, economic weakness or regime weakness.[75] These broad and sometimes deeply anchored root causes are to a large extent determined by social, cultural, economic and political factors. Approaches that could be instrumental in addressing

[72] Attention will be paid to the diverse interpretations of obligations to prevent under different treaties. Human rights treaties each have a different set of member states and may have a different geographical applicability. Furthermore, the case law of the United Nations treaty bodies is formally non-binding as opposed to the judgments of the regional courts, which are binding. Exceptions are: ACHR (n 9) art 50 and ACHPR (n 9) art 53 and 59: The Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights may only issue recommendations. This does not necessarily mean that non-binding judgments are less authoritative, but perhaps such bodies are freer in their deliberations and therefore interpret rights more widely.
[73] See Chapter 1.3.2 Temporal Phases.
[74] The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.
[75] Subcommittee on Prevention of Torture, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (n 33) 5a: "The prevalence of torture and ill-treatment is influenced by a broad range of factors, including the general level of enjoyment of human rights and the rule of law, levels of poverty, social exclusion, corruption, discrimination, etc."; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 3 and generally risk factors 1, 3 and 6: "Prevention is an ongoing process that requires sustained efforts to build the resilience of societies to atrocity crimes by ensuring that the rule of law is respected and that all human rights are protected, without discrimination […]"; Bellamy, Alex J. and McLoughlin, Stephen, 'Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation', Asia Pacific Centre for the Responsibility to Protect' (8 June 2009) available at: <https://r2pasiapacific.org/filething/get/1281/Causes%20and%20Paths%20of%20Escalation%20Report%20June%202009.pdf>: Describes as preconditions for genocide or mass atrocities: social division, regime weakness, economic weakness.

root causes are focused on installing stable rule of law systems and promoting equality and respect for human rights. To some degree, long-term preventive obligations have been included in international human rights law. The type of measures required usually lie in the area of ensuring that the proper legal and administrative structures are in place, procedural safeguards, monitoring, training and education.

There is one crosscutting category of long-term obligations to prevent for all three prohibitions: states must put in place a legislative and administrative framework that offers effective deterrence against violations. This framework has to make it (at least theoretically) possible to abide by the relevant prohibition and related requirements under international human rights law.[76] Very broadly speaking, this entails an obligation to organize the state apparatus in a manner that deters violations.[77] More concretely, it requires states to incorporate international standards and requirements for the prohibition and prevention of torture, arbitrary deaths and genocide in their national legal frameworks. For one, states must make offences related to the prohibitions punishable by law, both for state officials and non-state actors.[78] Although the preventive effect of both national and international criminal law remains speculative, making offences punishable by law is reasoned to have a long-term deterrent effect on potential perpetrators and lays the groundwork for a system that is capable of tracking and punishing violations.[79] States are also required to introduce special guarantees to protect vulnerable groups, because the risk that they will be subjected to violations is generally higher.[80] Often, treaties attach requirements to the introduction and diligent implementation of the legislative framework in the area of monitoring, training and education.[81] The level of law reform that may be required

[76] CAT (n 8) art 2; ICCPR (n 9) art 2(2) jo 6 and 7; ECHR (n 9) art 1 jo 2 and 3; ACHR (n 9) art 1 jo 4 and 5; ACHPR (n 9) art 1 jo 4 and 5; Genocide Convention (n 56) art 1 jo 5.

[77] *Velásquez Rodríguez v. Honduras* (n 23), para 158; *Godínez-Cruz v. Honduras* (Merits) Judgment of January 20, 1989, I/A Court HR Series C No 5, para 166: "[D]uty to organize the State in such a manner as to guarantee the rights recognized in the Convention."

[78] Non-state actors can be private individuals or officials of a third state acting on its territory; CAT (n 8) art 4; IACPPT (n 8) art 6; HRC, General Comment 20 (n 22) para 8; Genocide Convention (n 56) art 5.

[79] See generally: Andenaes, Johannes, 'The General Preventive Effects of Punishment' (1966) 114(7) UPaLRev 949; Smidt, Michael L., 'The International Criminal Court: An Effective Means of Deterrence?' (2001) 167 Mil L Rev 156; Buitelaar, Tom, 'The ICC and the Prevention of Atrocities: Criminological Perspectives' (2016) 17(3) Human Rights Rev 285.

[80] CAT, General Comment 2 (n 6) para 22: Indicates sensitization programs for the protection of women from torture; CRC (n 10) art 37: Juveniles are treated differently than adult criminals and detainees.

[81] CAT (n 8) art 10 and 11: State parties to the CAT must carry out "systematic review [of] interrogation rules, instructions, methods and practices as well as arrangements for […] custody"; CAT, General Comment 2 (n 6) para 4: State parties of the CAT states must regularly review their national laws to ensure they remain up to standard; IACPPT (n 8) art 7: State parties must put emphasis on the prohibition of torture in the training of officials responsible for people in custody; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (27 August – 7 September 1990) adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held in

depends on the degree to which the legislation in any particular state meets the requirements under international human rights law at the moment that it becomes legally bound by the relevant obligations.[82] Several areas of focus in terms of shaping the legislative and administrative framework will be discussed for each prohibition.

A.1 Torture

Shaping the legislative and administrative framework to deter torture requires that states make acts of torture and ill-treatment punishable by law, whether committed by state officials or non-state actors.[83] The CAT and IACPPT both include a separate provision containing the obligation to criminalize acts of torture and ill-treatment, in line with the definition of these acts in the respective treaties.[84] In other instruments, the obligation to criminalize acts of torture is implied by the obligation to ensure the right to be free from torture.[85] Installing the proper legislative arrangements to allow perpetrators to be punished is linked to, but also distinct from, the obligation to actually investigate and punish offences. The CAT Committee states in its General Comment 2 that codifying the crime has a deterrent effect, enhances the possibility to track the crime and empowers the public to monitor and challenge state actions.[86] The IACtHR also underwrites the importance of criminalizing acts of torture and ill-treatment, considering that impunity fosters chronic recidivism.[87] An additional and specific form of criminalization is required under the CAT, namely the enactment of

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Havana, Cuba, art 18-20: There are certain training requirements for law enforcement officials on the use of force and firearms.

[82] Aust, Helmut P. and Nolte, Georg, 'International Law and the Rule of Law at the National Level' in Zum, Michael, Nollkaemper, André and Peerenboom, Randy (eds), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (CUP 2014) 48: Evaluates the potential of a converged minimum standard of justice and rule of law as informed by basic procedural guarantees for individuals.

[83] See Section 2.1.1: Whenever the prevention of torture is discussed, the prevention of ill-treatment is silently implied; CAT, General Comment 2 (n 6) para 3: Despite the legally significant difference between torture and other cruel inhuman and degrading treatment for the assessment of the violation ex-post facto, the CAT Committee has stressed that the required 'effective measures to prevent' for torture and for other forms of ill-treatment overlap, since 'the definitional threshold' is often unclear in practice.

[84] CAT (n 8) art 4; IACPPT (n 8) art 6; CAT and IACPPT also contain provisions prescribing the installment of proper arrangements for the extradition of offenders: CAT (n 8) art 8; IACPPT (n 8) art 11, 13 and 14; The obligation to criminalize and exercise criminal jurisdiction is broader under the CAT and IACtHR than under other treaties, because it requires states to also prosecute and punish alleged perpetrators who have committed their acts abroad. This extraterritorial aspect is dealt with in Chapters 3 and 4, but it may also have the effect of preventing torture on a state's own territory, since the suspected torturer is present on the territory and making provision for prosecuting such individuals prevents them from committing similar acts: CAT (n 8) art 6 and 7; IACPPT (n 8) art 12.

[85] HRC, General Comment 20 (n 22) para 8; *Cestaro v. Italy*, no. 6884/11, 7 April 2015, para 219-225.

[86] CAT (n 8) art 4; CAT, General Comment 2 (n 6) para 8 and 11.

[87] *Blake v. Guatemala* (Reparations and Costs) Judgment of January 22, 1999, I/A Court HR Series C No 48, para 64: The court proclaims that states must use all legal means at its disposal to combat impunity, as it fosters chronic recidivism.

rules on superior liability.[88] Provision has to be made in criminal law to hold higher officials criminally liable for acts of torture by their subordinates, if they knew or ought to have known of these acts. The threat of criminal punishment for superiors instils an incentive towards a high degree of vigilance in chains of command with regard to the conduct of subordinates. Finally, a general requirement related to the criminalization of torture is that statements or confessions obtained through torture are not allowed to be used in judicial proceedings, which may further discourage law enforcement officials from using tortuous methods of interrogation.[89]

The legal and administrative framework should further include procedural safeguards to deter torture and ill-treatment in situations of detention. Individuals deprived of their liberty are at risk of torture, and that risk is enhanced when individuals are held incommunicado. The different instruments and supervisory mechanisms provide for rules, regulations and procedural safeguards in relation to all phases of detention, because access to medical and legal assistance, and judicial supervision mitigate the risk of torture.[90] Under the CAT, a range of provisions address the requirements for the protection of detainees, such as ensuring the right to complaint and to investigate where there is reason to believe that torture was committed.[91] Special guarantees required to prevent torture and ill-treatment of detainees under the CAT also include "maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability (…) of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights and to challenge the legality of their detention or treatment."[92] Besides introducing appropriate rules and regulations, states should also 'systematically review' the continued effectiveness

[88] CAT, General Comment 2 (n 6) para 26; *Ireland v. the United-Kingdom*, no. 5310/71, 18 January 1978, series A no 25, para 159: Under the ECHR, state "authorities are strictly liable for the conduct of their subordinates ; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected." This does not necessarily imply that superiors should be held criminally liable for violations by their subordinates.

[89] CAT (n 8) art 15; IACPPT (n 8) art 10; HRC, General Comment 20 (n 22) para 12; *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, para 115.

[90] CAT (n 8) art 10-13 and 15; IACPPT (n 8) art 7; CAT Optional Protocol (n 8) establishing the Subcommittee on Prevention; ECPT (n 8) establishing the Committee for the Prevention of Torture; CAT (n 8) art 11; *Ali Bashasha v. Libya*, Comm. 1776/2008, No. CCPR/C/100/D/1776/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 504 (HRC, Oct. 20, 2010) para 7.4: The Committee stresses the importance of contact with the outside world for the prevention of torture and therefore states must prevent unnecessary and lengthy incommunicado detention; *Juan Humberto Sánchez v. Honduras* (n 44) para 83-4: The Court stresses the importance of prompt judicial control of the legality of the detention to prevent torture; *İlhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII (27.6.00) para 86: The case highlights the importance of providing for prompt medical attention.

[91] CAT (n 8) art 10-15.

[92] CAT, General Comment 2 (n 6) para 13; See also: HRC, General Comment 20 (n 22) para 11.

of these rules.[93] Like the CAT, the IACPPT contains several provisions ordering states to ensure the rights to complaint and fair trial.[94] Both instruments contain provisions requiring states to educate and train officials who are responsible for detaining individuals.[95]

In other instruments containing the prohibition of torture, due process and other guarantees to protect detainees are subsumed under more general provisions on the rights of people deprived of their liberty and the right to a fair trial.[96] These rights transcend the context of the prohibition of torture, but their relevance for the prevention of torture is widely recognized. For example, the HRCee has emphasized the great importance of taking action against incommunicado detention for the prevention of torture and ill-treatment of detainees.[97] In the case law of the IAComHR, the link between *habeas corpus* rights and the prevention of torture and ill-treatment has been stressed endlessly, going so far as to state that "*habeas corpus* represents the ideal means" to protect detainees against torture.[98] The ACtHPR, referring to the HRCee case law, has also highlighted the importance of contact with the outside world and taking action against incommunicado detention.[99] In their interpretation of the required safeguards surrounding detention, treaty bodies and courts sometimes make use of guidelines such as the Standard Minimum Rules for the Treatment of Prisoners adopted by the Economic and Social Council and the Istanbul Protocol published by the Office of the UN High Commissioner on Human Rights (OHCHR) in its Professional Training Series.[100] These documents outline a broad range of relevant preventive safeguards, such as adopting measures against overcrowded prisons.[101] States also have an obligation to prevent torture by non-state

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[93] CAT (n 8) art 11; CAT, General Comment 2 (n 6) para 23; HRC, General Comment 20 (n 22) para 11.

[94] IACPPT (n 8) art 8-10.

[95] CAT (n 8) art 10; IACPPT (n 8) art 7.

[96] ICCPR (n 9) art 9-11; ECHR (n 9) art 5 and 6; ACHR (n 9) art 7 and 8; ACHPR (n 9) art 6 and 7.

[97] *Ali Bashasha v. Libya* (n 90) para 7.4; *Mbongo Akwanga v. Cameroon*, Comm. 1813/2008, No. CCPR/C/101/D/1813/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 553 (HRC, Mar. 22, 2011) para 7.2-7.3: Demonstrates the link between art 7 and 10 (fair trial).

[98] *Bámaca-Velásquez v. Guatemala* (Merits) Judgment of November 25, 2000, I/A Court HR Series C No. 70, para 192; *Habeas Corpus in Emergency Situations* (Arts 27(2) and 7(6) of the American Convention on Human Rights) (Advisory Opinion) I/A Court HR OC-8/87, January 30, 1987 (Ser A) No 8 (1987) para 33; ACHR (n 9) 27(2) last sentence: "Essential judicial guarantees for the protection of the non-derogable rights" cannot be suspended, even in times of emergency.

[99] *Article 19 v. The State of Eritrea*, Afr Comm HPR, Communication No. 275/2003 (2007).

[100] Economic and Social Council Resolutions 663C(XXIV) and 2076(LXII), 'Standard Minimum Rules for the Treatment of Prisoners' (31 July 1957 and 13 May 1977) UN ESCOR, Supp. No. 1, at 11, UN Doc E/3048 (1957), amended by UN ESCOR, Supp. No. 1, at 35, UN Doc E/5988 (1977); Office of the United Nations High Commissioner for Human Rights, 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Professional Training Series' (9 August 1999) UN Doc HR/P/PT/8/Rev.1 (Istanbul Protocol); *Mbongo Akwanga v. Cameroon* (n 97) para 7.3.

[101] Due-diligence obligations are understood to be measures which are often not codified as such, but are obligations of effort necessary to ensure the effectiveness of either a treaty obligation or customary

actors, which in the context of the long-term prevention of torture of detainees means that states must ensure that the same guarantees against torture exist in prisons or other detention facilities that are run by private enterprises.[102]

Aside from detainees, the state must also introduce special guarantees to protect minorities, women, children and people with disabilities from torture and ill-treatment.[103] The ECtHR stated in the case of *A. v. the United Kingdom* that the existence of a legal framework and application thereof must offer "effective deterrence" in particular in regard to vulnerable individuals.[104] It was explained above that the right to complain and the right to a fair trial are particularly important for the prevention of torture and ill-treatment of detainees. In similar fashion, the prohibition of discrimination and the right to equality are of particular importance in the context of preventing torture and ill-treatment of vulnerable groups other than detainees.[105] The CAT Committee has emphasized that states should take into account how violations of the Convention affect specific "sectors of the population."[106] The provisions prescribing the prevention of torture in the CRC and CRPD make clear that ensuring equality in practice may require taking special legislative and regulatory measures in relation to vulnerable groups.[107] There exist different long-term obligations to establish monitoring frameworks, complaints procedures and assistance and sensitization programs.[108] For the detention of children, for example, state parties to the ICCPR, CRC and CAT are required to install more elaborate safeguards than

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norm. The term is used differently by different authors and even in this understanding it remains a broad and flexible category of norms, the bindingness of which may be disputed. Standard Minimum Rules for the Treatment of Prisoners (n 100) 9(1).

[102] *Cabal & Bertran v. Australia*, Comm. No 1020/2001, UN Doc CCPR/C/78/D/1020/2001 (HRC Sept. 19, 2003) para 7.2: "[…] the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant […]"; Human Rights Committee, 'General Comment 21 - Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Article 10)' (10 April 1992) UN Doc HRI/GEN/1/Rev.1 at 33 (1994) para 2; Human Rights Committee, Fourth Periodic Report of State Parties Due in 1995: New Zealand (17 July 2002) UN Doc CCPR/C/NZL/2001/4, para 137: New Zealand's 1954 Penal Institutions Act "requires a contractor to comply with the requirements of the NZ Bill of Rights Act 1990 and the United Nations Standard Minimum Rules for the Treatment of Prisoners as if the institution was managed by the Department of Corrections"; McBeth, Adam, 'Privatising Human Rights: What Happens to the State's Human Rights Duties When Services are Privatised?' (2004) 5(1) Melb J Int'l L 133, II C.

[103] CAT, General Comment 2 (n 6) para 18, 20, 21 and 24: The protection of vulnerable groups requires extra attention. Examples mentioned by the HRC are sensitization training and eliminating employment discrimination.

[104] *A. v. the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VI, para 22-4.

[105] CAT, General Comment 2 (n 6).

[106] CAT, General Comment 2 (n 6) para 22-4.

[107] CRC (n 10) art 19; CRPD (n 10) art 15.

[108] CRC (n 10) art 19; CRPD (n 10) art 16; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534, art 7 - 8; Implied under the CAT and ICCPR, see: CAT, General Comment 2 (n 6) para 18, 20, 21 and 24 and HRC, General Comment 20 (n 22) para 11.

for adults.[109] As mentioned above, states must also prevent torture or ill-treatment by non-state actors, which in the context of special guarantees to protect vulnerable groups means that the state should install effective safeguards to deal with violence against women in the domestic sphere.[110]

A.2 Arbitrary Death

Similar to the context of torture, shaping a legislative and administrative framework capable of deterring arbitrary death requires that states make acts that result in arbitrary deprivation of life punishable by law.[111] This entails introducing a system that makes it possible to track and punish offences by both state officials and non-state actors. Apart from making murder and other offences against a person's right to life punishable by law, shaping the legislative and administrative framework also requires the regulation of possible life-harming practices, such as disappearances, medical malpractice or epidemic outbreaks.[112] The ECtHR stated in the *Oneryildiz v. Turkey* case that the obligation "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life [...] indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to

[109] ICCPR (n 9) art 10 (1)b and (3): Juveniles shall be kept separately from adults, brought for adjudication as speedily as possible and treated according to their age and legal status; CRC (n 10) art 37: Juveniles shall be treated according to the needs of children their age, shall be separated from adults and detention shall only be used as a measure of last resort and for the shortest period of time possible; CAT, General Comment 2 (n 6) para 11; Also in the case law of the IACtHR, the fact that additional measures are needed to adequately protect children in detention is stressed: *The "Street Children" (Villagrán-Morales et al.) v. Guatemala* (Merits) Judgment of November 19, 1999, I/A Court HR Series C No. 63, para 197.

[110] Copelon, Rhonda, 'Gender Violence as Torture: The Contribution of CAT General Comment No. 2' (2007) 11 NY City L Rev 229, 257-63; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 12 - Violence Against Women' (Eighth session 1989), available at: <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_5831_E.pdf>; CAT, General Comment 2 (n 6) para 22-4: States must build a "culture of respect for women."

[111] *Mahmut Kaya v. Turkey* (n 25) para 85; *Pueblo Bello Massacre v. Colombia* (n 36) para 62; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan,* AComHPR, Communication No. 279/03-296/05 (27 May 2009) para 147; ECOSOC, Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (n 51) under 1.

[112] HRC, General Comment 6 (n 34) para 5; Human Rights Committee, 'Draft General Comment 36 – Article 6: Right to Life' (1 April 2015) UN Doc CCPR/C/GC/R36, A6: The HRCee is currently preparing a new General Comment on the right to life, which will elaborate on the meaning of "protected by law" in art 6 of the ICCPR.

human lives."[113] States should therefore regulate dangerous and possibly life-harming activities on its territory, by requiring those involved in such activities to take measures to protect endangered individuals and requiring state officials that know of the risks to inform the public.

Shaping a legislative and administrative framework capable of deterring arbitrary deaths further requires the introduction of a framework regulating the use of force and firearms by state officials.[114] Because states have a monopoly on the use of force within their own territory, it is important that limitations to this prerogative are specified to prevent state officials from too easily resorting to (excessive) acts of force that could result in arbitrary deprivation of life. The HRCee stated in its General Comment on the right to life, that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by [state] authorities."[115] The framework must be based on the principles of necessity and proportionality. The outlines of the framework have been elaborately explored in the case law of the ECtHR. In the *Makaratzis v. Greece* case, the ECtHR explained that "a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms" which must offer "adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident."[116] In the *Nachova v. Bulgaria* case, the Court decided that Bulgaria breached the right to life on account of its general failure to put in place a framework on the use of force and firearms, containing "clear safeguards to prevent the arbitrary deprivation of life."[117] Similar requirements for a framework on the use

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[113] *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004 – XII, para 89-90: "They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."

[114] *Makaratzis v. Greece* [GC] no. 50385/99, ECHR 2004-XI, para 31; *Juan Humberto Sánchez v. Honduras* (n 44) para 112; There is no express statement of this obligation under the African Human Rights System; HRC, General Comment 6 (n 34) para 3; *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, Communication no 295/04 (12 October 2013) available at: <http://www.achpr.org/files/sessions/51st/comunications/295.04/achpr51_295_04_eng.pdf>; UN General Assembly Resolution 34/169 'Code of Conduct for Law Enforcement Officials' (17 December 1979) UN Doc A/RES/34/169, art 3; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81) first provision; Secretary-General Kofi Annan, 'Extrajudicial, Summary or Arbitrary Executions' (5 September 2006) UN Doc A/61/311, para 33 onwards: Noting that necessity and proportionality are important principles to help determine when the use of force with potential lethal effect by state agents is warranted. While the Code of Conduct and Principles on the Use of Force are not binding, art 3 of the former and art 9 of the latter containing the principles or necessity and proportionality, are considered to reflect binding international law.

[115] HRC, General Comment 6 (n 34) para 3.

[116] *Makaratzis v. Greece* (n 114) para 58-9.

[117] *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII, para 99-100 and 102.

of force and firearms exist under other human rights instruments.[118] The requirements are reflected in the non-binding but authoritative Code of Conduct for Law Enforcement Officials (Code of Conduct) adopted by the UN General Assembly (GA) and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles) adopted at the eighth UN Congress on the Prevention of Crime and the Treatment of Offenders.[119] In the 2013 *Zimbabwe Human Rights NGO Forum v. Zimbabwe* case, the AComHPR referred to the Code of Conduct and Basic Principles as "authoritative statements of international law that set out the principles on the use of force by the police."[120] The Basic Principles detail that law enforcement officials should only be allowed to use force to protect themselves or others when they are in imminent danger of death or serious injury.[121]

Several long-term obligations are attached to the diligent implementation of the required framework regulating the use of force and firearms by state officials. The ECtHR has proclaimed that it is of particular importance that law enforcement officials are trained to assess whether it is necessary to use firearms.[122] The training requirement is also elaborately addressed in the Basic Principles.[123] Furthermore, policing operations that could potentially result in the deprivation of life have to be diligently planned and controlled, also if there is not yet a concrete or immediate risk of a violation.[124] In the *McCann v. the United Kingdom* case rendered by the ECtHR, a group of soldiers fired to kill a group of terrorist suspects during an operation, who supposedly had a car bomb and detonator in close reach. This proved to be false information, but as the soldiers had "an honest belief which is perceived, for good reasons, to be valid at the time" that the use of force was necessary to protect themselves and others, the state did not violate the right to life on account of its short-term obligations attached to the right to life.[125] The Court instead held the United Kingdom (UK) responsible for the lack of a margin of error for its intelligence assumptions and the fact that a possibility to intervene at an earlier stage without having to kill the suspects was ignored by those planning and monitoring the

[118] See for example: HRC, General Comment 6 (n 34) para 3: "[T]he law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."

[119] Code of Conduct for Law Enforcement Officials (n 114); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81).

[120] *Zimbabwe Human Rights NGO Forum v Zimbabwe* 2013 (n 114) para 110 and 141-3: The communication is based on four examples of abuse of police power and excessive use of force in Zimbabwe.

[121] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81) art 2, 3, 9 and 10: States are also required to develop non-lethal weapons.

[122] *Nachova and Others v. Bulgaria* (n 117) para 97.

[123] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81) art 18-20.

[124] *McCann and Others v. the United Kingdom* (n 45) para 202-14; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81) art 20.

[125] *McCann and Others v. the United Kingdom* (n 45) para 200.

operation in the long-term phase, which in effect meant that "the scene was set in which the fatal shooting (…) was a foreseeable possibility if not a likelihood."[126]

Similar to the context of torture, detainees are particularly vulnerable to violations of their right to life, which is why states have to introduce guarantees to protect them.[127] This entails by and large the same *habeas corpus* and due process type of obligations as in the context of torture prevention, such as maintaining an official register, access to a lawyer, prompt judicial control, medical assistance etc.[128] States also have to take measures to prevent and deal with emergency situations in detention centers, such as fires or riots.[129] The IACtHR has proclaimed that state parties should "draw up and implement a prison policy for the prevention of emergency situations" which includes "systems of fire detection and extinction" and "emergency protocols."[130] Furthermore, states have to carry out a diligent screening of new arrivals in detention centers, to prevent prisoner on prisoner violence that could result in arbitrary death. In the case of *Paul and Audrey Edwards v. the United Kingdom*, a man was killed by his highly violent cellmate. The ECtHR held the UK responsible for the "failure of the agencies involved in this case (medical profession, police, prosecution and court) to pass information (…) on to the prison authorities and the inadequate nature of the screening process."[131] Besides the deterrence of different forms of emergency situations and ill-treatment that could potentially result in the death of detainees, due process and a fair trial are of particular importance in the context of the death penalty. The HRCee has ruled that failing to secure fair trial standards when sentencing someone to death is a violation of the right to life, even if the death penalty is ultimately not applied.[132] Apart from living up to fair trial standards, there also has to

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[126] *McCann and Others v. the United Kingdom* (n 45) para 205.
[127] *Neira-Alegría et al. v. Peru* (Merits) Judgment of January 19, 1995, I/A Court HR Series C No. 20, para 60-1.
[128] ICCPR (n 9) art 9-11; ECHR (n 9) art 5 and 6; ACHR (n 9) art 7 and 8; ACHPR (n 9) art 6 and 7; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99 (Sect. 3), ECHR 2002-II, para 56; *Pacheco Teruel et al. v. Honduras* (Merits, Reparations and Costs) Judgment of April 27, 2012, I/A Court HR Series C No. 241, para 67: Enumerates "the main standards on prison conditions and the obligation of prevention that the State must guarantee to persons deprived of liberty" from the court's case law; *Juan Humberto Sánchez v. Honduras* (n 44) para 84: prompt judicial control of detention; *Morales Tornel v. Spain*, Comm. 1473/2006, No. CCPR/C/95/D/1473/2006 (HRC Mar. 20, 2009): medical attention; *Gelman v. Uruguay* (Merits and Reparations) Judgment of February 24, I/A Court HR 2011 Series C No. 221, para 77: The IACtHR rules that running clandestine centres of detention is by definition a violation of the obligation to guarantee the Convention rights as it runs counter to several of the Convention's provisions, including the right to life.
[129] *Juvenile Reeducation Institute"v. Paraguay*, (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 2, 2004, I/A Court HR Series C No. 112, Commission's Claims under A and D.
[130] *"Children's Rehabilitation Institute" v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 2, 2004, I/A Court HR Series C No. 112, para 178; *Pacheco Teruel et al. v. Honduras* (n 128) para 68.
[131] *Paul and Audrey Edwards v. the United Kingdom* (n 128) para 62 and 64.
[132] *Kurbanova v. Tajikistan*, Comm. 1096/2002, No. CCPR/C/79/D/1096/2002, A/59/40, Vol. II (2004), Annex IX at 354 (HRC Nov. 06, 2003) para 7.7; *Akhadov v. Kyrgyzstan*, Comm. 1503/2006, No. CCPR/C/101/D/1503/2006, A/66/40, Vol. II, Part 1 (2011), Annex VI at 156 (HRC, Mar. 25, 2011) para

be room to take personal and particular circumstances of the crime and individual sentenced to death into account.[133]

Apart from detainees, states also have to introduce special guarantees to protect other vulnerable groups against violations of their right to life, such as women, children and people with disabilities and ensure equal protection of their right to life in practice.[134] The HRCee proclaimed in its General Comment 6 on the right to life that states should "take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[135] In the *Cotton Field v. Mexico* case, dealing with the disappearance and murder of three girls in a region notorious for such crimes, the IACtHR notes that Mexico failed to comply with its general obligation of prevention with regard to the protection of women in this region.[136] The IACtHR also addressed the vulnerable situation of children in the penal system and the state's obligation to "prevent situations that might lead, by action or omission, to negatively affect" their rights, including their right to life.[137]

A.3 Genocide

Similar to torture and arbitrary deaths, shaping a legislative and administrative framework capable of deterring genocide requires that states make acts as described in Articles 2 and 3 of the Genocide Convention punishable by law.[138] This entails

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7.5 and Individual opinion of Committee member Mr. Rafael Rivas Posada: Even if the sentence is not carried out, the imposition of the death penalty following an unfair trial is considered a violation of the right to life; ICCPR (n 9) art 6(4): The ICCPR requires that the possibility exists to request a commutation of sentence; *Chisanga v. Zambia*, Comm. 1132/2002, No. CCPR/C/85/D/1132/2002, A/61/40, Vol. II (2006), Annex V at 200 (HRC Oct. 18, 2005) para 7.5; *Kennedy v. Trinidad and Tobago*, Comm. 845/1998, No. CCPR/C/74/D/845/1998, A/57/40, Vol. II (2002), Annex IX at 161 (HRC Mar. 26, 2002) para 7.4; *Thompson v. Saint Vincent and the Grenadines*, Comm. 806/1998, No. CCPR/C/70/D/806/1998, A/56/40, Vol. II (2001), Annex X at 93 (HRC Oct. 18, 2000) para 8.2: A commutation of sentence process does not have to live up to the same standards as the initial judicial process, nor can it "repair" an unfair trial.

[133] *Rolando v. Philippines*, Comm. 1110/2002, No. CCPR/C/82/D/1110/2002, A/60/40, Vol. II (2005), Annex V at 161 (HRC Nov. 03, 2004) para 5.2.

[134] CRC (n 10) art 6; CRPD (n 10) art 10; *Bulacio v. Argentina* (Merits, Reparations and Costs) Judgment of September 18, 2003, I/A Court HR Series C No 100, para 138: This case supports this reasoning in the context of protecting minors, stating that the obligation to guarantee the right to life becomes an obligation to "prevent situations that might lead, by action or omission, to negatively affect it."

[135] HRC, General Comment 6 (n 34) para 5.

[136] *González et al. ("Cotton Field") v. Mexico* (Preliminary Objection, Merits, Reparations and Costs) Judgment of November 16, 2009, I/A Court HR Series C No. 205, para 273 and 282.

[137] *Bulacio v. Argentina* (n 134); *The "Street Children" (Villagrán-Morales et al.) v. Guatemala* (n 109).

[138] Tams, Christian, Berster, Lars and Schiffbauer, Bjorn, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck, co-published by Hart and Nomos, 2013) 233 para 54: This obligation has customary law status.

ensuring that the legal basis exists to track, investigate and punish offences by state officials and non-state actors. The Genocide Convention's Article 5 prescribes that state parties should "undertake to enact (…) the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III."[139] Article 2 enumerates the acts, such as killing and forcibly removing people, that are considered to constitute genocide when committed with the intent to destroy a protected group under the Convention. Article 3 lists which crimes should be made punishable under domestic (criminal) law, among which is the act of genocide, but also conspiracy, incitement, attempt to commit genocide and complicity in genocide.[140] Read in connection with Article 7 of the Genocide Convention, which requires that genocide shall not be considered a political crime for the purposes of extradition, states have to ensure that genocide is not included under a political crime exception in its legislative system.[141]

When Article 5 is read in the broader context of the treaty, especially Article 1, it becomes clear that the necessary legislation goes beyond criminalization and could include "any kind of legislation that addresses all the factors and phases in the process to genocide."[142] There is very little indication, both in the treaty and in the case law or literature on this subject, what other legislative or administrative measures may be required. There is no specific monitoring body to review states' legislative and administrative frameworks and give recommendations, nor has an international tribunal ever dealt with the issue.[143] Drawing on the indicators of genocide, as

[139] Genocide Convention (n 56) art 5.

[140] Office on Genocide Prevention and the Responsibility to Protect, 'Preventing Incitement: Policy Options for Action' (November 2013) available at: <http://www.un.org/en/preventgenocide/adviser/pdf/Prevention%20of%20incitement.Policy%20options.Nov2013.pdf> 12: "States should identify and repeal any national legislation that discriminates against any community based on its identity. States should adopt comprehensive anti-discrimination legislation that includes preventive and punitive action to effectively combat incitement to violence that could lead to atrocity crimes, such as discriminatory legislation"; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 138) 221 para 13-4: This can be done in criminal law, but this is not a hard requirement. As long as the law is passed by the state's legislature and is not a specific individual measure.

[141] Genocide Convention (n 56) art 5 jo 7; Saul, Ben, 'The Implementation of the Genocide Convention at the National Level' in Gaeta, Paola (ed), *The UN Genocide Convention – A Commentary* (OUP, 2009) 58, 70.

[142] Genocide Convention (n 56) art 5: Refers "in particular" but not exclusively to enacting effective penalties; Ruvebana, *Prevention of Genocide under International Law* (n 61) 117: Argues that the "necessary legislation" in Article 5 of the Genocide Convention should not be understood in the sense of being "absolutely essential [or] indispensable" but rather "useful, suitable, proper or conducive to the end sought" in light of the object and purpose of the Genocide Convention.

[143] The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities did occasionally discuss the legislation of certain states until it was wound up in 2006, but not on this specific aspect of the scope of art 5. It recommended that a body be created to examine reports by States on their actions under art 5; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 138) 222 para 17: In this commentary, the

expressed in the Framework of Analysis for Atrocity Crimes, it is submitted that the necessary legislation required by Article 5 of the Genocide Convention should be interpreted to include: (i) Guarantees for protected groups under the Genocide Convention; (ii) Strategies to be able to deal with emergency situations in relation to genocide.[144] With regard to guarantees for protected groups, the international and domestic human rights law framework that in most states is already in place can mitigate many risks related to the treatment of protected groups or intergroup tensions.[145] For example, Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires state parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races."[146] Nevertheless, additional guarantees in relation to protected groups may sometimes be necessary for the long-term prevention of genocide, which requires states to make legislative and administrative arrangements for the monitoring and countering of practices or policies of exclusion or identity based tensions.[147] For example, states may introduce hate-speech laws or ban racist organizations.[148] With regard to measures to deal with emergency situations, it is submitted that states should take legislative and administrative measures to develop strategies that detail how to act when the state becomes aware of signs of an intent to destroy a protected group.[149]

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authors argue that "non-criminal law elements of the Genocide Convention aimed principally at the prevention of genocide" are required under art 5, but the threshold to fulfil the necessity requirement is lower than for making art 3 acts punishable.

[144] Genocide Convention (n 56) art 2: Protected groups refer to the members of a national, ethnical, racial of religious group; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 9 and 18-9: The risk factors specific to genocide are: (risk factor 9) Intergroup tensions or patterns of discrimination against protected groups; and (risk factor 10) Signs of an intent to destroy in whole or in part a protected group.

[145] Office of the United Nations High Commissioner for Human Rights, 'Prevention of Genocide' (9 March 2009) UN Doc A/HRC/10/25, 59; Ruvebana, *Prevention of Genocide under International Law* (n 61) 133-6.

[146] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 2 and 4: Article 4 requires state parties to make the dissemination of ideas based on racial superiority and incitement to racial discrimination punishable by law; See also: ICCPR (n 9) art 20.

[147] OGPRtoP, 'Preventing Incitement: Policy Options for Action' (n 140) 9 and risk factor 9.1 and 9.6: "States should ensure that minority rights are respected and that diversity is not only tolerated but understood as a positive value and as contributing to the richness of societies"; There is an analogy with guarantees for the protection of vulnerable groups for the prevention of torture and arbitrary deaths in the previous two sections.

[148] Saul, 'The Implementation of the Genocide Convention at the National Level' (n 141) 76-7.

[149] OHCHR, 'Prevention of Genocide' (n 145) 59: "State parties are asked to demonstrate and explain the preventive strategies that they have in place and the institutions that they have established to protect against risks and overcome discrimination and exclusion"; OGPRtoP, 'Preventing Incitement: Policy Options for Action' (n 140) 1: "States should […] prepare contingency plans for the prevention of incitement […]. […] Contingency planning aims to prepare governments, civil society and populations to minimise the impact of incitement and respond adequately to any crisis resulting from acts of incitement to violence that could lead to atrocity crimes"; Saul, 'The Implementation of the Genocide Convention at the National Level' (n 141) 77; Note the analogy with the right to life and measures to

Long-term obligations to prevent genocide related to the diligent implementation of the legal framework could be read into the more general obligation to prevent genocide contained in Article 1, read together with Article 5.[150] Unlike for example Article 2 CAT or Article 7 ICERD, there are no specific provisions in the Genocide Convention requiring states to take measures related to training, education or sensitization.[151] However, the OSAPG and other UN human rights bodies have recognized the relevance of such long-term measures for the prevention of genocide. For example, the OSAPG issued policy options to prevent incitement, which include community outreach, encouraging tolerance in political parties, fostering media pluralism, training officials in the law enforcement and judiciary and instituting "an education system that develops attitudes and behaviors necessary to counter hatred and prejudice."[152] The OSAPG and the SG have recommended long-term measures to prevent genocide in its reports based on country missions, such as "raising awareness about the risk of genocide and human rights education."[153] The OHCHR in a report on the prevention of genocide has also paid attention to the important role of systematic prevention and awareness raising.[154] Finally, the HRC has encouraged governments in

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deal with emergency situations in prisons: *"Children's Rehabilitation Institute" v. Paraguay* (n 130) para 178; *Pacheco Teruel et al. v. Honduras* (n 128) para 68.

[150] Genocide Convention (n 56) art 1; *Genocide* case (n 59) para 431: The obligation to prevent genocide was interpreted by the ICJ to arise only when a state "learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed." The ICJ's temporal limitation does not preclude that long-term measures could in the future be interpreted to inhere in the obligation to prevent genocide; Saul, 'The Implementation of the Genocide Convention at the National Level' (n 141) 78: "[A] range of other legislative measures might be regarded as contributing to realizing the obligation to prevent genocide under the Convention. National strategies for educating communities about genocide and disseminating the Convention might be envisaged, as is explicit under the 1949 Geneva Convention in respect of international humanitarian law. Likewise, measures for building inter-ethnic or communal harmony might benefit from legislative enactment"; Ruvebana, *Prevention of Genocide under International Law* (n 61) 121-3.

[151] CAT (n 8) art 2; ICERD (n 146) art 7: "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups (…)."

[152] OGPRtoP, 'Preventing Incitement: Policy Options for Action' (n 140) 2, 3, 4, 6 and 14.

[153] Letter dated 18 March 2009 from the Secretary-General addressed to the President of the Security Council (19 March 2009) UN DOC S/2009/151, available at: <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2009/151> 58j: "Tolerance, raising awareness of the risk of genocide and human rights education among all ethnic groups should be encouraged"; Office of the Special Adviser on the Prevention of Genocide, 'Report of the Special Adviser to the Secretary-General on the Prevention of Genocide on his Mission to Guinea' (7 to 22 March 2010) available at: <http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG%20Mission%20Report%20-%20Guinea%20-%20March%202010.pdf> 54: Recommends that the transitional government, UN and international community "support the existing inter-religious groups, women's groups, councils of elders, youth and civil society to promote dialogue, cohesion and unity, especially among ethnic and religious groups."

[154] OHCHR, 'Prevention of Genocide' (n 145) 59-60.

a resolution on the prevention of genocide adopted on the occasion of the 60th anniversary of the Genocide Convention, to "promote human rights education activities and disseminate knowledge of the principles of the Convention, paying particular attention to the principles of prevention."[155] These documents are not legally binding and it cannot be stated with certainty that states are currently legally required to take such measures for the long-term prevention of genocide.

B. Short-Term Prevention

Short-term obligations to prevent arise when a violation has become foreseeable or ought to be foreseeable and are targeted at preventing a specific violation.[156] Causes and risk factors for violations vary among the three prohibitions. Death threats or dangerous activities can indicate a risk that people's life is in danger. Incommunicado detention or disappearances are risk factors for both torture and arbitrary death. In the context of genocide, some well-known indicators are incitement to violence, an increase in life-integrity violations and organized preparation for genocide.[157] Approaches that could be useful to mitigate concrete risks differ tremendously, depending on the circumstances. They may include intervention by law enforcement officials, detaining individuals who pose a threat, or countering incitement to violence in the media with messages of de-radicalization. Under international human rights law, when a state becomes aware or ought to have been aware of an immediate and concrete risk, it is required to act on it in an effort to prevent the violation from occurring. The types of measures required are usually formulated in an open-ended way in terms of their content, but can involve physical protection and operational measures.

The crosscutting obligation in this temporal phase can be described as taking (operational or protective) measures to prevent a violation. This means that states have to take positive action capable of averting a specific violation. The obligation of states to take short-term measures to prevent violations of the three prohibitions first and foremost applies in regard to a state's own officials (so-called direct obligations).[158] This direct obligation is given further content and meaning by the long-term legislative and administrative framework. The obligation to take measures to prevent a violation is in effect a short-term application of the diligent implementation of the long-term framework, in situations where there is a concrete risk of a violation at the hands of a state official. For example, the obligations to provide for access to a lawyer, judicial oversight or medical assistance in situations of detention are part of the long-term phase, but the obligation to guarantee these safeguards in relation to a specific individual are sometimes triggered by a concrete

[155] Human Rights Council, 'Prevention of Genocide' (25 March 2008) UN Doc A/HRC/7/L26, 15.
[156] See Chapter 1.3.2 Temporal Phases.
[157] Bellamy and McLoughlin, 'Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation' (n 75) 15-20.
[158] CAT, General Comment 2 (n 6) para 17; HRC, General Comment 20 (n 22) para 2.

risk. States are also required to take (protective) measures to prevent offences related to the three prohibitions by non-state actors (referred to as indirect obligations, indirect horizontal effect or drittwirkung).[159] State officials cannot just stand by if they knew or ought to have known about a concrete and immediate risk posed by non-state actors. Besides the crosscutting obligation to take measures, there are specific obligations related to *non-refoulement*, which prohibits states from sending individuals to a third state where they would run the risk of torture or death.

B.1 Torture

The short-term obligation to take measures to prevent torture by state officials is given further content in particular by the responsibility of higher ranking officials for the acts of subordinates. The CAT Committee has explained that officials "cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures."[160] This implies an obligation on the part of state officials to prevent acts of torture by their subordinates if there is a risk of such a violation.[161] The trigger of knowledge is objective, because it is not required that the superior actually knew, but also covers situations in which he/she should have known. The ECtHR has described the obligation as a "duty to impose their will on subordinates" and if they are unsuccessful they "cannot shelter behind their inability to ensure that it is respected."[162] Superior officials should therefore keep subordinates on close watch, especially in situations where torture may occur such as custody or potentially violent law enforcement operations. If they know or should know that a violation may occur, they should take measures to prevent the occurrence by imposing their will on subordinates. At the same time, it does not exempt the primary individual wrongdoer from criminal liability. Even officials who committed acts of

[159] These non-state actors can be private individuals or officials of a third state acting on its territory; CAT, General Comment 2 (n 6) para 18; HRC, General Comment 20 (n 22) para 1; *Dzemajl et al. v. Yugoslavia*, Comm. 161/2000, UN Doc CAT/C/29/D/161/2000, A/58/44 (2003) Annex VI at 85 (CAT Committee Nov. 21, 2002); *Osmani v. Serbia*, Comm. 261/2005, UN Doc CAT/C/42/D/261/2005, A/64/44 (2009) Annex XIII at 273 (CAT Committee May 08, 2009); *Z. and Others v. the United Kingdom* [GC], no. 29392/95, ECHR 2001-V; *A. v. the United Kingdom* (n 104); *Mahmut Kaya v. Turkey* (n 25) para 100; *Pueblo Bello Massacre v. Colombia* (n 36) para 123.

[160] CAT, General Comment 2 (n 6) para 26.

[161] It is unclear whether this stricter form of domestic (criminal) liability of higher ranking officials translates into a stricter form of state responsibility; *Salem v. Tunisia*, Comm. 269/2005, UN Doc CAT/C/39/D/269/2005, A/63/44 (2008) Annex XI at 211 (CAT Committee Nov. 07, 2007): The CAT Committee has not been eager to apply strict liability under art 11 for a failure to carry out supervisory powers to prevent, if it could also find a violation under art 2.

[162] *Ireland v. United-Kingdom* (n 88) para 239: "[A]uthorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected."

torture under the orders of a superior, cannot use this order as an excuse to escape criminal liability.[163]

The obligation to prevent torture and protect individuals extends to acts committed by non-state actors. Therefore, states also have a short-term obligation to take protective measures to prevent acts of torture by non-state actors. In General Comment 20, the HRCee clarified that states should protect everyone against torture "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[164] Under the ACHR and ECHR, states must take measures to prevent acts of torture, also if non-state actors pose a threat.[165] The CAT Committee has stated that the obligation to intervene in acts of torture by non-state actors arises when state officials "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors."[166] On the surface, the phrase "are being committed" would seem to exclude the short-term phase based on knowledge of a risk of a violation. It remains unclear whether the CAT Committee intentionally limited the obligation's temporal scope to continuing acts of torture, or whether the statement also includes situations where non-state actors pose a threat of torture, which would be more similar to how the obligation to prevent torture has been interpretated by other courts and supervisory bodies. So far, the CAT Committee has only acknowledged the risk of torture as a trigger for the obligation to prevent torture in cases involving extradition.[167] The case law of the ECtHR contains the most extensive reasoning on the obligation to prevent acts of torture by non-state actors and several cases will be discussed to gain better insight into the content and scope of the obligation.

The ECtHR set out the existence of short-term obligations to prevent acts of torture or ill-treatment by non-state actors clearly in the *Mahmut Kaya v. Turkey* case, in which it proclaimed that states must "take reasonable steps to avoid a risk of ill-treatment [by non-state actors] about which they knew or ought to have known."[168] The content of this obligation is illustrated by the *Opuz v. Turkey* case, based on a situation in which a man periodically abused his wife and mother in law over a number of

[163] CAT (n 8) art 2(3); IACPPT (n 8) art 4; HRC, General Comment 20 (n 22) para 3.
[164] HRC, General Comment 20 (n 22) para 2.
[165] *Velásquez Rodríguez v. Honduras* (n 23) para 173-5; *Godínez-Cruz v. Honduras* (n 77) para 173-5 and 183; *Đorđević v. Croatia*, no. 41526/10, ECHR 2012, para 138-9.
[166] CAT (n 8) art 1: The definition of torture in the CAT is limited to acts "by or at the instigation of or with the consent or acquiescence of a public official"; CAT, General Comment 2 (n 6) para 18: This definition was interpreted widely by the CAT Committee as including cases in which state officials "know or have reasonable grounds to believe that acts of torture […] are being committed by non-State officials or private actors."
[167] *X. v. Kazakhstan,* Comm. 554/2013, UN Doc CAT/C/55/D/554/2013 (CAT Committee October 9, 2015), para 12.7-13.
[168] *Mahmut Kaya v. Turkey* (n 25) para 115; See also: *Ilaşcu v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para 318; *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, ECHR 2012, para 206.

years.[169] The ECtHR concludes that Turkey "cannot be said [to have] displayed the required diligence to prevent."[170] While explaining that it cannot choose from the range of possible preventive measures what the state should have done, the Court held Turkey responsible for its "failure to take protective measures in the form of effective deterrence."[171] Therefore, states that are aware of a risk of torture posed by a non-state actor should take reasonable measures that amount to effective deterrence. This implies that Turkey should have investigated the matter and on that basis decide what effective measures of deterrence to take. In the *Đorđević v. Croatia* case, the ECtHR clarified that such reasonable measures, besides responding to specific incidents, may also require "relevant action of a general nature to combat the underlying problem."[172] In this particular case, a boy with mental and physical disabilities was systematically harassed by primary school pupils in his neighbourhood, resulting in different forms of bodily injuries and mental stress.[173] The Court concluded that the authorities had made no serious attempt to understand the true nature of the situation, leading to a lack of "adequate and comprehensive measures" and on that account had "not taken all reasonable measures […] notwithstanding the fact that the continuing risk of such abuse was real and foreseeable."[174]

The state's obligation to prevent acts of torture by non-state actors also includes third state officials acting on its territory, as illustrated by the 2012 *El Masri v. "the former Yugoslav Republic of Macedonia"* case.[175] It is one of the infamous Central Intelligence Agency (CIA) rendition cases that came before the ECtHR, based on claims that European states allowed torture and detention practices by the CIA on their territory. Mr. El Masri, a German national, travelled to Macedonia. Upon arrival he was illegally detained by Macedonian state officials without a charge and subsequently handed over to CIA agents at Skopje airport, who tortured him in the presence of Macedonian officials.[176] He was finally removed from Macedonian territory by the CIA agents and held for another couple of months of illegal detention

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[169] *Opuz v. Turkey* (n 45) para 162 and 170.
[170] *Opuz v. Turkey* (n 45) para 169-70.
[171] *Opuz v. Turkey* (n 45) para 176.
[172] *Đorđević v. Croatia* (n 165) para 138-9 and 148: In this case, the ECtHR confirmed the existence of an indirect short-term obligation to prevent torture by non-state actors. Unlike the other ECtHR cases discussed in this section, it applied the *Osman* formula for the short-term prevention of arbitrary death in the context of the prohibition of torture. The *Osman* formula will be discussed in Section 2.2 B.2 Arbitrary Death. The refinement of the indirect short-term obligation to prevent torture along the lines of the *Osman* formula entails that the obligation must not "impose an impossible or disproporionate burden on authorities" but only arises when "the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."
[173] *Đorđević v. Croatia* (n 165) para 7-60.
[174] *Đorđević v. Croatia* (n 165) para 148-9.
[175] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168); See also: *Mohammed Alzery v. Sweden*, Comm. 1416/2005, No. CCPR/C/88/D/1416/2005 (HRC Nov. 10, 2006) para 11.6.
[176] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 18, 21-2.

on a CIA basis in Afghanistan, during which he was also tortured.[177] The ECtHR held Macedonia responsible for a violation of the prohibition of torture on account of Mr. El Masri's treatment while in the custody of Macedonian officials, for the torture inflicted on him at the airport by CIA agents in the presence of Macedonian officials and for his transfer into the custody of the CIA agents, thereby exposing him to the real risk of further acts of torture.[178]

The obligation to take measures to prevent is in line with the widely accepted position that states can be held responsible in relation to acts of torture by non-state actors on its territory based on the acquiescence of state officials.[179] The ECtHR equated responsibility for acts of torture by private persons within its territory, with responsibility for acts of torture by third state officials within its territory.[180] It thereby follows its own reasoning in earlier cases and the reasoning of the HRCee in the 2006 case of *Alzery v. Sweden*, whereby Mr. Alzery was handed over to state officials from the United States (US) and Egypt and subsequently ill-treated at a Swedish airport. The HRCee decided that "a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party."[181] The *El Masri* and *Alzery* cases confirm that states have a positive obligation to take measures to prevent torture by a third state officials on their territory, for example by monitoring their activities and protesting against and negotiating in the event of suspected offences.[182] States must

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[177] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 24-30.

[178] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 223.

[179] See for example: CAT (n 8) art 1; CAT, General Comment 2 (n 6) para 18; Fabbrini, Federico, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism' (2014) 14(1) HRLR 85, 93.

[180] Nollkaemper, André, 'The ECTHR Finds Macedonia Responsible in Connection With Torture by the CIA, but on What Basis?' (24 December 2012) EJIL Talk, available at: <http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>: "The justification of the construction then lies in the combination of the (positive) obligations of states party under the Convention, and the fact that the conduct in question took place on its territory with its acquiescence or connivance, which in turn was incompatible with the positive obligations."

[181] *Mohammed Alzery v. Sweden* (n 175) para 4.12-3 and 11.6: Mr. Alzery argues that given the "global situation […] the risk of ill treatment was thus already wholly clear and realized on Swedish territory." He further argues that "the treatment he suffered at Bromma airport, as described in paragraph 3.11, supra, was imputable to Sweden by the latter's failure to prevent it though within its power." The HRCee concludes that "the acts complained of, which occurred in the course of performance of official functions in the presence of the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, in addition to the State on whose behalf the officials were engaged"; Byrne, William, 'Proving the Extraordinary: Issues of Evidence and Attribution in Cases of Extraordinary Rendition' SHARES Research Paper 41 (2014), ACIL 2014-41, available at: <http://www.sharesproject.nl/wp-content/uploads/2014/04/SHARES-RP-41-final.pdf> 38: "[T]he broader notion of acquiescence suggests it was grounded in a positive obligation of prevention and a failure of due diligence – conceived in terms of the spatial application of the ICCPR."

[182] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 206 and 211; *Mahmut Kaya v. Turkey* (n 25) para 115; Hakimi, Monica, 'The Council of Europe Addresses CIA Rendition and Detention Program' (2007) 101(2) AJIL 442, 449; European Commission for Democracy Through Law (Venice Commission), 'On the International Legal Obligations of Council Of Europe Member States in

also not transfer someone into the care of third state officials on its territory when there is a real risk of torture as part of the prohibition of *refoulement*, which will be more elaborately discussed below.[183]

Interestingly, the ECtHR seems to directly impute Mr. El Masri's treatment at the airport to Macedonia.[184] The ECtHR reasons in relation to the torture inflicted by CIA agents at Skopje airport that:

> "The respondent State must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring."[185]

When a state fails to take measures to prevent offences by non-state actors, it will normally only be held responsible for its own acts or omissions based on its acquiescence and not for the acts by non-state actors.[186] In the 2014 cases of *Al Nashiri v. Poland* and *Husayn v. Poland*, concerning CIA detention facilities on Polish territory, the ECtHR built on its reasoning in relation to facilitation in the *El Masri* case. It held Poland responsible for its acquiescence and connivance, because "Poland, for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring."[187] The Court thereby determined that Poland violated its positive obligation under Article 1 taken together with Article 3 ECHR "to ensure that individuals within its jurisdiction [are] not subjected to torture or inhuman or degrading treatment or punishment."[188] The ECtHR's reasoning in relation to the matter of facilitation is somewhat puzzling. When a state is obligated to prevent certain offences within its territory under international human rights law, it is normally also prohibited from committing such acts itself or facilitating such acts by third states. Yet, these obligations not to commit a violation, not to facilitate a violation by another state and to prevent offences by

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Respect of Secret Detention Facilities and Inter-State Transport of Prisoners' (17 March 2006) Opinion no. 363 / 2005, Doc no CDL-AD(2006)009, para 123, 130 and 132: Claims that in relation to alleged secret detention facilities "[t]he host State is […] entitled and even obliged to prevent, and react to such abuse of its territory. It could exercise its powers in respect of registration and control of aliens, and demand identification and movement orders of those present on the military base in question. […] In addition, appropriate diplomatic channels can be used in order to protest against such practice."

[183] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 212-23: Macedonia was also held responsible "for having transferred the applicant into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Article 3 of the Convention."

[184] *El Masri* v. *"the former Yugoslav Republic of Macedonia"* (n 168) para 223 and 240.

[185] *El Masri* v. *"the former Yugoslav Republic of Macedonia"* (n 168) para 211.

[186] Note that the HRCee applies a similar reasoning as the ECtHR in the El Masri case in *Mohammed Alzery v. Sweden* (n 175) para 11.6: "It follows that the acts complained of, which occurred in the course of performance of official functions in the presence of the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, in addition to the State on whose behalf the officials were engaged."

[187] *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014, para 512; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014, para 517.

[188] *Al Nashiri v. Poland* (n 187) para 517;

non-state actors have a different conceptual basis and different requirements apply to be able to hold states responsible for violating them.[189]

The term "facilitate" and the language the ECtHR uses to consider whether the treatment by CIA agents was "imputable" to Macedonia and Poland respectively, suggests that the Court moved beyond examining the failure of an obligation to prevent acts of torture by non-state actors and points in the direction of aid and assistance.[190] The Court read into the obligation to ensure the right to be free from torture that states should not facilitate acts of torture by a third state on their territory, for example by declining third state officials the use of their territory or airspace.[191] Although the customary rule prohibiting aid and assistance in an internationally wrongful act of another state, laid down in Article 16 of the Articles on State Responsibility is mentioned in the judgments under "relevant international legal documents", the ECtHR did not explicitly apply it in any of these cases.[192] The resulting reasoning is at times confusing. For example, the ECtHR chose to employ the trigger of knowledge for the obligation to take measures to prevent a risk of torture of which it "knew or ought to have known" and not the higher trigger of knowledge required to find a state responsible for aid and assistance, which would mean that the state would have to have both knowledge of the circumstances of the wrongful act and intent to facilitate that act.[193] Furthermore, it held the states responsible for the resulting acts of torture by third state officials, not only for its own acts of facilitation as would be the case under the general law of responsibility or for its omission to take measures to prevent as required by the ECHR.[194] The ECtHR has

[189] Articles on State Responsibility (n 6) art 2, 14(2) and 16.
[190] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 206; *Al Nashiri v. Poland* (n 187) para 510; *Husayn (Abu Zubaydah) v. Poland* (n 187) para 503: The term "impute" is sometimes also used as synonymous for the term attribute that has the specific connotation in the law of state responsibility of the attribution of conduct to a state. The court also uses the term "complicity" in its judgments without referring directly to Article 16 of the Articles on State Responsibility.
[191] Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program' (n 182) 448-9.
[192] *El Masri* v. "the former Yugoslav Republic of Macedonia" (n 168) para 97; *Al Nashiri v. Poland* (n 187) para 207 and 447-450: The third party intervener is the only one to directly link complicity under Article 16 of the Articles on State Responsibility with the state's positive obligations under the ECHR; *Husayn (Abu Zubaydah) v. Poland* (n 187) para 201; *Genocide* case (n 59) para 422-4: In the *Genocide* case, the ICJ moves more explicitly from complicity to prevention. After concluding that complicity in genocide on behalf of Serbia could not be proven, the court moved on to consider a potential failure of its obligation to prevent genocide.
[193] Articles on State Responsibility (n 6) Commentary to art 16 para 3 – 5: The Commentary to Article 16 of the Articles on State Responsibility explains that the state must not only be aware of the circumstances of the wrongful act, but also give aid and assistance "with a view to facilitating the commission of that act"; Gibney, Mark, Tomasevski, Katarina and Vedsted-Hansen, Jens, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harv Hum Rts J 267, 293-4: Commenting on the threshold of complicity, the authors state that a large gap exists in which states can go unpunished for the facilitation of human rights violations, even with the knowledge that they are being committed. Perhaps for this reason, the ECtHR chose to circumvent it, using instead the threshold for the positive obligation to prevent when the state "knew or ought to have known."
[194] *El Masri* v. "the former Yugoslav Republic of Macedonia" (n 168) para 239: Even more striking in this regard is that the court also held Macedonia responsible for the illegal detention of Mr. El Masri by the CIA in Afghanistan after his removal from Macedonian territory, because it was aware of the risk thereof; Nollkaemper, 'The ECTHR Finds Macedonia Responsible in Connection With Torture by the

so far failed to offer a coherent justification for its approach to facilitation or how it relates to the obligation to prevent.[195]

The obligation to prevent acts of torture by non-state actors applies even in circumstances where a state has lost authority over a part of its territory. In such situations, the state still has positive obligations to prevent torture in regard to people residing in that area, as illustrated by the 2004 ECtHR *Ilaşcu v. Moldova and Russia* case.[196] The case concerned the imprisonment and ill-treatment of several individuals in the Moldavian Republic of Transdniestria (MRT), which is part of Moldovan territory. The MRT proclaimed independence in 1991, but is not recognized by the international community as a sovereign state. Russia exercises a level of control in the MRT through its support in creating and maintaining the separatist regime. The applicants addressed their claim both to Moldova and Russia and the Court concluded that both states had jurisdiction and were responsible for their respective failures to prevent the ill-treatment inflicted by MRT officials.[197] Russia's violation will be discussed in Chapter 3, because it exercised extraterritorial jurisdiction. In regard to Moldova, the territorial state, the ECtHR considered:

> "[T]he applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but (…) its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention."[198]

This means that when a state loses authority over part of its territory, it does not lose jurisdiction.[199] It "must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention."[200] The scope of

CIA, but on What Basis?' (n 180) for a different opinion see Assier Garrido's response: Argues that responsibility for acts of torture by third state officials is based on an extention of the logic of the prohibition of *refoulement*; Jackson, Miles, *Complicity in International Law* (OUP, 2015) 194: Classifies the *El Masri* case as one of complicity and states that: "[…] Macedonia's complicity in the conduct of another state—the US—was sufficient to attribute the foreign state's conduct to it."

[195] Incorportating non-facilitation in the primary norm to ensure human rights and holding states responsible for facilitation based on less demanding standards than under the Articles on State Responsibility may indicate an interesting development, that could potentially have far-reaching (preventive) effects. This is especially the case if the reasoning is extended to foreseeable gross human rights violations outside the state's territory. See for an example of state practice that supports a less strict approach to facilitation: Wintour, Patrick, 'Spain Reviews Plan to Let Russian Warships refuel en Route to Syria' The Guardian, available at: <https://www.theguardian.com/world/2016/oct/26/spain-reviews-plan-to-let-russian-warships-refuel-en-route-to-syria>.

[196] *Ilaşcu and Others v. Moldova and Russia* (n 168).

[197] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 331, 441, 448, 453.

[198] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 335.

[199] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 333 and 335.

[200] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 333-4: The court added that determining to what extent a minimum effort was possible to live up to its positive obligations is "especially necessary

a state's positive obligations is related to "the material opportunities available to the State Party to change the outcome of events."[201] The Court further clarified that:

> "Moldova's positive obligations relate both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants' rights, including attempts to secure their release."[202]

Because of the factual situation underlying the *Ilaşcu* case, the ECtHR considered the question whether Moldova had discharged its positive obligations in the context of its relationship with Russia.[203] The Moldovan government never recognized the independence of the MRT and continued to complain about the aggression it suffered. Militarily, there was little it could do to regain control as it was "confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation."[204] However, Moldova did take other steps to re-establish its control over the region, for example by starting criminal proceedings against MRT officials for "usurping titles" and signing an agreement with Russia for the withdrawal of Russian troops.[205] As regards measures to continue to ensure human rights, Moldova had sent doctors to examine the applicants in the MRT's prisons and negotiated for their release, pleading their cases before MRT officials, but also other states and International Organizations (IOs).[206] After Mr. Ilaşcu was released in 2001, however, Moldova had not taken any measures to end the infringements of the other applicants' rights, other than orally raising the issue in its dealings with MRT.[207] It no longer raised the issue in its bilateral relations with Russia.[208] On those grounds, the Court concluded that Moldova had failed to live up to its positive obligations.[209] The ECtHR confirmed its reasoning in the 2011 *Ivanţoc a.o. v. Moldova and Russia* judgment, which was predicated on similar circumstances to the *Ilaşcu* case.[210]

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in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention."

[201] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 333; Heijer, Maarten den, 'Issues of Shared Responsibility before the European Court of Human Rights' SHARES Research Paper 06 (2012), ACIL 2012-04, available at: <http://www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-european-court-of-human-rights/> 5.

[202] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 339.

[203] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 337.

[204] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 341.

[205] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 342-5.

[206] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 346-7.

[207] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 348.

[208] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 349-50.

[209] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 351-2, 449, 454, 464: The ill-treatment and unlawful detention of the three other applicants besides Mr. Ilaşcu was imputed to Moldova for the period after 2001, when it failed to discharge its positive obligations towards them.

[210] *Ivanţoc a.o. v. Moldova and Russia*, no. 23687/05, 15 November 2011, para 105-8: This case also concerned wrongful detention and ill-treatment by the MRT. The court had already determined that Moldova had taken sufficient steps to regain control in the *Ilaşcu* case and therefore only had to determine whether Moldova had done everything in its power to continue to guarantee the applicants'

Finally, states have specific short-term obligations to prevent torture related to the prohibition of *refoulement*, which prescribes that states cannot extradite or expel individuals if they run the risk of torture in the receiving state.[211] The degree of knowledge that triggers the obligation of *non-refoulement* is the same under the CAT and the ICCPR: there must be "substantial grounds for believing that there is a real risk" of torture or ill-treatment upon return of the individual concerned.[212] The phrase "real risk" means that the individual must be personally at risk; it is not enough to show that torture is regularly practiced in the receiving state. The likelihood of a violation does however not have to be "highly probable."[213] The ECtHR similarly requires a "real risk", meaning that the mere possibility that an individual will be tortured or ill-treated is not enough.[214] The CAT and ICCPR require a rigorous review of the risk that the situation presents, with an effective possibility to suspend the enforcement measures leading to expulsion.[215] There is some disparity among the treaties regarding whether *non-refoulement* also covers situations where the risk of

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rights. The Moldovan government had drawn lessons from the 2004 *Ilaşcu* judgment and had since then consistently raised individual cases of ill-treatment and unlawful detention in its dealings with both the MRT and Russia and sought support for their release internationally. It thereby discharged its positive obligations and the court found no violation.

[211] CAT (n 8) art 3; Weissbrodt, David and Hortreiter, Isabel, 'The Principle of Non-Refoulement: Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties'(1999) 5 Buff Hum Rts L Rev 1: The term non-refoulement is used here in the context of the prohibition of torture and does not refer to the definition of non-refoulement under refugee law; *Tebourski v. France*, Comm. 300/2006, UN Doc CAT/C/38/D/300/2006, A/62/44 (2007) Annex VII at 317 (CAT Committee May 01, 2007) para 8.2-3; ICCPR (n 9) art 7 jo 13; ECHR (n 9) art 6 jo 7 and Protocol 7; ACHR (n 9) art 5 jo 22(5); ACHPR (n 9) art 4 jo 5 jo 12; The prohibition of *refoulement* is sometimes qualified as an extraterritorial aspect of the prohibition of torture, because the state does not violate the prohibition through its own acts of torture, but by extraditing an individual and thereby exposing him or her to the grave risk of being tortured in the receiving state. However, the obligation of *non-refoulement* is owed towards a person on the state's territory.

[212] *Pillai v. Canada*, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 473 (HRC, Mar. 25, 2011) para 11.4 and individual opinion of Committee Members Keller, Motoc, Neuman, O'Flaherty and Rodley: The degree of knowledge for non-refoulement to come into play was originally higher under the ICCPR (it had to be the *foreseeable and necessary consequence* that the feared harm *would take place*), but it was relaxed and brought in line with the degree of knowledge used by the CAT Committee (having substantial grounds to believe that there is a real risk) in the *Pillai* case.

[213] *M. N. v. Switzerland*, Comm. 259/2004, UN Doc CAT/C/37/D/259/2004, A/62/44 (2007) Annex VII at 198 (CAT Committee Nov. 17, 2006) para 6.7; Committee Against Torture, 'General Comment 1: Refoulement and Communications (Implementation of Article 3 in the Context of Article 22)' (21 November 1997) UN Doc A/53/44, annex IX, para 6.

[214] *Salah Sheekh v. the Netherlands*, no. 1948/04, ECHR 2007-I, para 148: The risk assessment involves assessing whether there are features which make the ill-treatment or torture foreseeable in that particular case. The Court clarifies that such features do not necessarily have to show that someone is personally at risk. In this case, the unsafe situation in Somalia and the fact that the clan to which the defendant belonged was at risk was considered enough to find the existence of a real risk.

[215] *A. v. the Netherlands*, no. 4900/06, 20 July 2010, para 157.

torture originates from non-state actors residing within the territory of the receiving state. Because of the stricter definition of torture in the CAT in comparison with other treaties, the CAT Committee considers it to fall outside the scope of protection of the prohibition of torture if the receiving state does not acquiesce in the conduct.[216] According to the ECtHR, however, a threat formed by non-state actors in the receiving state may form a ground for *non-refoulement* if the receiving state cannot obviate the risk.[217] Two types of measures may be required in case the trigger of knowledge is reached: either the state does not expel the individual or it attains assurances from the receiving state that the individual will not be ill-treated or tortured. The effectiveness and trustworthiness of such assurances is often an issue.[218] The ECtHR has explained that the assurances must "in their practical application" be sufficient to prevent the risk of torture from materializing.[219] The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated in relation to the CAT that, in circumstances where torture is systematic practiced by the receiving state, "the principle of *non-refoulement* must be strictly observed and diplomatic assurances should not be resorted to."[220]

B.2 Arbitrary Death

The short-term obligation to take measures to prevent arbitrary deprivation of life by state officials is given further content in particular by the framework on the use of force and firearms. State officials must at all times respect the principles of subsidiarity and proportionality when it comes to potentially lethal use of force.[221] For example, whenever possible they should give caution when they intend to use their firearm.[222] Besides the obligation to take measures to prevent arbitrary deprivation of life by state officials, there is a category of short-term obligations to prevent arbitrary deaths that applies both to acts of state officials and non-state actors. These obligations relate to disasters or dangerous activities that should be controlled by the

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[216] *S. V. et al. v. Canada*, Comm. 49/1996, UN Doc CAT/C/26/D/49/1996, A/56/44 (2001) Annex VII at 102 (CAT Committee May 15, 2001) para 9.5: The reasoning underlying this decision is related to the definition of torture as contained in art 1 of the CAT as having to be "with the acquiescence of a public official."

[217] *H.L.R. v. France*, judgment of 29 April 1997, Reports 1997-III, p. 758, para 40; *Salah Sheekh v. the Netherlands* (n 214) para 154; *J.K. and Others v. Sweden* [GC], no. 59166/12, 23 August 2016, para 80 and 120-1.

[218] See for example: Izumo, Alice, 'Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence' (2010) 42 Colum Hum Rts L Rev 233.

[219] *Alan v. Switzerland*, Comm. 21/1995, UN Doc CAT/C/16/D/21/1995, A/51/44 (1996) Annex V at 68 (CAT Committee May 08, 1996) para 11.5; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012 (extracts) para 187: It is not enough that the receiving state is also under an international obligation to prevent torture and ill-treatment.

[220] Special Rapporteur Theo van Boven, 'Report Submitted Pursuant to General Assembly Resolution 58/164' (1 September 2004) UN Doc A/59/324, para 37.

[221] Code of Conduct for Law Enforcement Officials (n 114); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81).

[222] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81) art 10.

state. In the *Oneryildiz v. Turkey* case, which involved a landslide of a rubbish tip that killed people living in slum areas nearby, the ECtHR decided that because the state knew or ought to have known of the real and immediate risk to a number of persons living nearby, it had an obligation to take operational measures to protect the endangered individuals.[223] It indicated that the "timely installation of a gas-extraction system […] could have been an effective measure" because it could have prevented the explosion that caused the landslide without requiring an excessive diversion of recourses.[224] The ECtHR also emphasized the public's right to information, implying that states have an obligation to inform the public when it has information that people may be in physical danger.[225] States should therefore not only regulate dangerous activities in the long-term phase, but if they know or ought to know of an immediate risk to the right to life, they should also take operational measures and inform endangered individuals.

States also have an obligation to take protective measures to prevent the realization of threats to the right to life by non-state actors. The ECtHR, IACtHR and AComHPR have all confirmed the existence of this obligation.[226] Compared to the prevention of torture, the obligation to take short-term measures to avert threats to the right to life by non-state actors has been addressed more frequently and is set out in more unequivocal terms in the courts' and supervisory bodies' case law. This is probably related to the lack of focus on obligations to prevent in treaty texts, combined with the instant and irreparable nature of an arbitrary death. The ECtHR's and IACtHR's case law will be discussed to attain insight into the content and scope of the obligation and the roles of knowledge and capacity.[227] The ECtHR for the first time clearly advanced that states are required under certain circumstances to take short-term measures to prevent the realization of threats to the right to life posed by non-state actors in the *Osman v. UK* case. In this case, Ahmet Osman faced threats to his physical safety by his former schoolteacher. A shooting incident followed in which Ahmet was wounded and his father was killed. The Court proclaimed that once "authorities knew or ought to have known […] of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party" they are

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[223] *Öneryıldız v. Turkey* (n 113) para 101.
[224] *Öneryıldız v. Turkey* (n 113) para 107.
[225] *Öneryıldız v. Turkey* (n 113) para 90 and 108.
[226] The HRCee has not dealt with a case with the specific factual scenario that would warrant short-term operational measures, but it would likely follow the reasoning of these other courts and supervisory bodies.
[227] The AComHPR also decided, in two separate cases against Zimbabwe, that states have a short-term obligation to take measures to prevent violations of the right to life. These cases refer to the case law of the ECtHR and IACtHR and do not add much to their reasoning: *Zimbabwe Human Rights NGO Forum v. Zimbabwe* 2006 (n 46) para 156-7: In the 2006 case, the Commission proclaimed that, if a state can foresee and take measures to prevent a violation of the right to life, it has a due-diligence obligation to do so; *Zimbabwe Human Rights NGO Forum v. Zimbabwe* 2013 (n 114) para 139: In the 2013 case, based on violations against different people at different times, the Commission reiterated that state parties have "an obligation to prevent the wrongful deaths of its citizens."

obligated to "take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[228] The trigger of knowledge is objective, because it includes situations in which the authorities "ought to have known" of a real and immediate risk. No violation was found in the *Osman* case, among other things because the teacher's threats had been cryptic and a psychiatrist had concluded that he did not show any signs of mental illness or propensity to violence.[229] At no point in time could the police reasonably be expected to know that the life of Mr. Osman and his son were in immediate danger. The *Osman* formula has become the ECtHR's main standard and was elaborated to fit other scenario's involving a risk to the right to life by non-state actors in later case law.[230] For example, when there is a pattern of attacks against a certain group of people, this can constitute a real and immediate risk to the right to life of an identified individual or individuals that belong to that group, meaning the state has to protect them.[231] In the *Mastromatteo v. Italy* judgment, the Court extended the *Osman* reasoning of an immediate risk to "the life of an identified individual or individuals" to include general risks posed by certain dangerous individuals to society at large.[232] Mr. Mastromatteo was killed by convicted criminals who were on prison leave. The Court concluded that the state could not have known that the criminals posed an immediate threat to life, but if there had been an indication to that effect, the ECtHR implied that the state would have had to decline their request for leave or take additional measures to ensure that they would not represent a danger to society.[233]

The measures states are obligated to take once the authorities know or ought to have known of a real and immediate threat to the right to life by non-state actors, are described in very open fashion by the ECtHR as "all that could be reasonably expected" or "measures within the scope of their powers which might be expected to avoid the risk."[234] In any case, the obligation "must be interpreted in a way which

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[228] *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para 116.
[229] *Osman v. the United Kingdom* (n 228) para 118.
[230] Ebert, Franz Christian and Romina I. Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems - From the Osman Test to a Coherent Doctrine on Risk Prevention?' (2015) 15(4) HRLR 1, 2-9: The authors show how the Osman test has been used for different types of scenarios and argues that its use in contexts where there was state involvement in the creation of a risk of arbitrary death has led to conceptual confusion and practical problems.
[231] Kılıç v. Turkey, no. 22492/93, ECHR 2000-III, para 66: This case concerned a journalist who worked for a newspaper, where multiple other journalists had faced attacks. Turkey argued that the journalist was no more at risk than other journalists in this region. The court disagreed and stated that he faced a real and immediate risk based on the pattern of attacks against journalists working for this newspaper.
[232] *Osman v. the United Kingdom* (n 228) para 116; *Mastromatteo v. Italy* [GC], no. 37703/97, ECHR 2002-VIII, para 69.
[233] *Mastromatteo v. Italy* (n 232) para 76.
[234] *Osman v. the United Kingdom* (n 228) para 116; Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems - From the Osman Test to a Coherent Doctrine on Risk Prevention?' (n 230) 5.

does not impose an impossible or disproportionate burden on the authorities […] bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources."[235] The scope of the obligation is therefore limited by a state's capacity to ensure the right to life in the particular circumstances. Two examples from the ECtHR's case law involving domestic violence illustrate what type of measures may be required. In the *Branko Tomašić v. Croatia* case, a man who had been arrested on account of threats to kill his ex-wife and child was released after a relatively short time in detention, without a psychiatric evaluation or order for further psychiatric treatment.[236] After his release, he killed his ex-wife and child in line with his earlier threats. The Court found that the state did not adequately protect the woman and child by simply releasing him without reassessing the risk that he would hurt them, searching his house for weapons or imposing further treatment on him.[237] In the *Opuz v. Turkey* case, discussed in Section B1 above, a man had physically abused and threatened his wife and mother in law over a number of years.[238] The women pressed charges several times, but withdrew them once the man was on provisional release, probably under pressure. Eventually, the mother in law was killed, after having notified the authorities that she believed her life was in immediate danger. The state argued that it could not investigate and prosecute the case without official charges, because it would be a violation of the right to private and family life. The Court disagreed and proclaimed that balancing the right to private life and right to life may still mean that states are sometimes required to investigate and prosecute *ex officio*, which can then inform what further measures to protect may be necessary in the particular circumstances.[239] In conclusion, states must investigate and carefully assess the danger posed by non-state actors who have uttered (death) threats, sometimes even *ex officio*, followed by adequate protective measures.

The IACtHR has incorporated the *Osman* formula in its case law in adjusted form. In the *Pueblo Bello Massacre v. Colombia* case it determined that "States' obligation to adopt measures of prevention and of protection of individuals in their relations with each other are conditioned by their awareness of a situation of real and immediate danger to a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger."[240] On first blush, the *Pueblo Bello*-formula and the ECtHR *Osman*-formula seem to differ in two respects. First, unlike the ECtHR, the IACtHR did not expressly objectivize the trigger of knowledge by not incorporating an "ought to have known" phrase. However, the trigger seems to be interpreted in much the same manner and in the *Pueblo Bello Massacre* case itself

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[235] *Osman v. the United Kingdom* (n 228) para 116.
[236] *Branko Tomašić and Others v. Croatia*, no. 46598/06, 15 January 2009, para 58.
[237] *Branko Tomašić and Others v. Croatia* (n 236) para 53 and 61.
[238] *Opuz v. Turkey* (n 45).
[239] *Opuz v. Turkey* (n 45) para 145 and 153.
[240] *Pueblo Bello Massacre v. Colombia* (n 36) para 123.

was considered to be met based on objective terms.[241] Second, the IACtHR adds that states "cannot be responsible for all the human rights violations committed between individuals within its jurisdiction" and there have to be "reasonable possibilities of preventing or avoiding the risk."[242] Based on the phrase used in the judgment, this could be interpreted as an additional condition, apart from the trigger of knowledge, for the obligation to arise. However, there is no indication in later case law that it was intended in such a way. The phrase can also be understood as a restriction related to the scope of the obligation, based on a state's capacity to act in the particular circumstances.[243] As noted above, the ECtHR also added a restriction to the scope, stating that the obligation must be interpreted so as to not place an impossible or disproportionate burden on the authorities. Such restrictions to the scope of the obligation may under certain circumstances mean that there is nothing the state can reasonably be expected to do. With regard to the types of measures required of states under the Inter-American system, the IACtHR has also adopted vague descriptions like: "sufficient and effective measures to avoid the consequences of the danger" and that "positive measures [are] to be determined based on the specific needs of protection."[244] An example from the IACtHR case law illustrating what form such measures may take is the *Cotton Field v. Mexico* case, already discussed in Section B1 above on long-term prevention. The Court explains that, since the authorities were aware of the dangerous situation for women in the region "an obligation of strict due diligence arises in regard to reports of missing women" and the police should have undertaken rigorous and "exhaustive search activities."[245]

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[241] *Pueblo Bello Massacre v. Colombia* (n 36) para 135 and 138: The court admits that "(i)t is true that, in this case, it has not been proved that the State authorities had specific prior knowledge of the day and time of the attack on the population of Pueblo Bello and the way it would be carried out" however that "the mobilization of a considerable number of people in this zone (…) reveals that the State had not adopted reasonable measures to control the available routes in the area"; See also: *González et al. ("Cotton Field") v. Mexico* (n 136) para 250, 282-3: The fact that there was a pattern of violations against women in a certain region meant that Mexico had an obligation of strict due diligence in relation to reports of missing women.

[242] *Pueblo Bello Massacre v. Colombia* (n 36) para 123.

[243] Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems - From the Osman Test to a Coherent Doctrine on Risk Prevention?' (n 230): This article outlines how the IACtHR incorporated the Osman test in its own case law and combines it with its own pre-existing due diligence test; Ethan, Kate, 'Supremer Court: How an Unfavorable Ruling in the Inter-American Commission on Human Rights Should Impact United States Domestic Violence Jurisprudence, A' (2010) 28 Wis Int'l LJ 430, 440: Based on the *Pueblo Bello*-formula, an applicant in a US supreme court case argued that the US "knew or ought to have known of a situation presenting a real and immediate risk to the safety of an identified individual from the criminal acts of a third party" and "failed to take reasonable steps within the scope of its powers, which might have had a reasonable possibility of preventing or avoiding the risk."

[244] *Pueblo Bello Massacre v. Colombia* (n 36) para 125; *González et al. ("Cotton Field") v. Mexico* (n 136) para 243.

[245] *González et al. ("Cotton Field") v. Mexico* (n 136) para 283.

Finally, similar to the context of torture, the prohibition of *refoulement* where there is a real risk that the individual will be arbitrarily deprived of his or her life in the receiving state implies a short-term obligation of states not to expel/extradite individuals. The trigger of knowledge and type of measures are the same as in the context of the prohibition of torture and will not be repeated here.[246] However, it is worth noting that the prohibition of *refoulement* has a special dimension when it comes to the death penalty. In view of the progressive abolition of the death penalty, the HRCee has ruled that a state that has abolished the death penalty cannot expel/extradite an individual to a state where he or she runs the real risk of receiving a sentence of capital punishment.[247] For example, in the *Fong v. Australia* case, China put out an arrest warrant requesting the extradition of Mrs. Fong on account of charges of corruption.[248] Mrs. Fong's husband had previously been convicted and sentenced to death for involvement in the same set of circumstances. The HRCee considered that it would be a violation of Australia's obligations under the ICCPR, having abolished the death penalty itself, to deport Mrs. Fong back to China where there was a real risk that the death penalty would be imposed on her.[249] Even though the death penalty is not per definition considered to be an arbitrary deprivation of life, this interpretation makes sense in light of the abolitionist trend since these treaties first came into force.[250] Under the ECHR, states are also prohibited from extraditing individuals who run a risk of receiving capital punishment in the receiving state.[251] In

[246] *Pillai v. Canada* (n 212) para 11.4: Substantial grounds for believing that there is a real risk; *Salah Sheekh v. the Netherlands* (n 214) para 148: Real and personal risk; The measures required can go one of two ways: either it does not expel the individual or it attains assurances from the receiving state that the individual will not be arbitrarily deprived of his or her life.

[247] *Roger Judge v. Canada*, Comm. 829/1998, UN Doc CCPR/C/78/D/829/1998 (HRC Oct. 20, 2003) para 10.3: In this case the HRCee, referring to the living instrument doctrine, chose to deviate from its previous case law on the matter in favor of a stricter interpretation of the principle of *non-refoulement* in cases where the individual runs the risk of capital punishment in the receiving state.

[248] *Fong v. Australia*, Comm. 1442/2005, No. CCPR/C/97/D/1442/2005 (HRC Oct. 23, 2009).

[249] *Fong v. Australia* (n 249) para 9.6-7.

[250] Schabas, William A., 'International Law and Abolition of the Death Penalty' (1998) 55 Wash & Lee L Rev 798; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

[251] *Soering v. the United Kingdom*, 7 July 1989, ECHR Series A no. 161, para 111 and 126: The ECtHR found that it would constitute a breach of the prohibition of torture and inhumane and degrading treatment to extradite Soering to a state where he would likely receive the death penalty because of the emotional stress of being on death row, the subsidiarity principle and his personal circumstances; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010, para 120: The ECtHR has since held that capital punishment has become unacceptable under all circumstances, effectively amending Article 2 of the ECHR; Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) ETS 114; Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS 187.

general, states can extradite individuals if they attain assurances that the person concerned will not receive the death penalty.[252]

B.3 Genocide

The ICJ explicitly stated in the *Genocide* case that states have an obligation to take measures to prevent genocide once they learn or should have learned of the "serious risk" that genocide will be committed.[253] The trigger of knowledge is objective, meaning that also states who "should have known" of the serious risk that genocide will occur are under an obligation to act, including negligent states who did not diligently consider all relevant information.[254] There is no clear separation in terms of the obligation to prevent genocide by state officials or non-state actors. Government institutions that are not involved must make every effort to suppress acts of genocide within state territory, albeit by public or private actors. Once states learn of a serious risk that genocide will be committed, they are obligated under Article 1 of the Genocide Convention to "employ all means reasonably available to them, so as to prevent genocide so far as possible."[255] Other formulations used are: "means likely to have a deterrent effect", "all means which [are] within [a state's] power and which might [contribute] to preventing the genocide" and "all means reasonably at [a state's] disposal."[256] The Court refers to the concept of due-diligence and the importance of an assessment of the necessary measures *in concreto*.[257] It further qualifies the obligation of due-diligence by stating:

> "[I]t is irrelevant whether the State [...] claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce."[258]

The short-term obligation to prevent genocide is wide in scope and poses a heavy burden, for a state is expected to deploy all available means, even if it cannot by itself avert the commission of genocide.[259] This does not mean the scope of the obligation is unlimited. States must "employ all means reasonably available to them" or

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[252] *Soering v. the United Kingdom* (n 251) para 122.
[253] *Genocide* case (n 59) para 431.
[254] De Pooter, Helene, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (2009) 17 Afr Yearb Int Law 287, 295; As mentioned in the introduction to this section, indicators of a risk of genocide can be incitement, mobilization and an increase in life-integrity crimes.
[255] *Genocide* case (n 59) 430-1.
[256] *Genocide* case (n 59) 430-1.
[257] *Genocide* case (n 59) 430.
[258] *Genocide* case (n 59) 430.
[259] Pooter, The Obligation to Prevent Genocide: A Large Shell Yet to Be Filled (n 254) 311.

"reasonably at [a state's] disposal."[260] Therefore, there is a limit of reasonableness in relation to what a state can be required to do.

The Genocide Convention and *Genocide* judgment hardly elaborate on the content of the obligation to prevent and types of measures that may be required.[261] Some suggestions can be made based on the diligent implementation of the long-term legislative framework, which can have a short-term preventive effect in situations where there is a risk of genocide. States can take measures to protect threatened groups or resort to strategies or contingency plans for situations of emergency in relation to genocide.[262] For example, states can counter hate speech by "positive messages of inclusivity."[263] The obligations to investigate, prosecute and punish contained in Article 6 of the Genocide Convention and incorporated in domestic law can also be important for short-term prevention. According to Article 6 of the Convention, states must prosecute and punish individuals who commit any of the acts prohibited in Article 3 on their territory, which includes incitement.[264] Such acts can already occur before the actual process of genocide as described in Article 2 has started. Prosecuting and punishing individuals who incite their followers to commit genocide before the stage of violence has been reached can help de-radicalize the situation.[265] The scope of Article 6 will be more elaborately discussed in the context of preventing recurrence in Section D3 below. Article 8 of the Genocide Convention stipulates that contracting parties "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."[266] Although the right is not conditioned on the existence of a particular threat, the provision is unlikely to be invoked to seek long-term prevention efforts. Article 8 describes the measure as a discretionary call for action.

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[260] *Genocide* case (n 59) 430-1.

[261] Genocide Convention (n 56) art 1 and 8: Aside from Article 1, only Article 8 refers to prevention in the context of a possibility to call on the UN to take action to prevent and suppress genocide; *Genocide* case (n 59) para 430: In the *Genocide* case, the ICJ hardly elaborated on the type of measures that could be required of states to prevent genocide. Furthermore, it did not concern the territorial context, because the case was brought against neighboring state Serbia for its role in the genocide in Bosnia; Ben-Naftali, Orna, 'The Obligation to Prevent and to Punish Genocide' in Paola, Gaeta (ed), *The UN Genocide Convention – A Commentary* (OUP, 2009) 27, 33: "At the time the Genocide Convention was concluded, the 'obligation to prevent' in Article I was a morally pregnant but a normatively empty concept."

[262] OHCHR, 'Prevention of Genocide' (n 145) 59; OGPRtoP, 'Preventing Incitement: Policy Options for Action' (n 140) 1: "States should […] prepare contingency plans for the prevention of incitement […]. […] Contingency planning aims to prepare governments, civil society and populations to minimise the impact of incitement and respond adequately to any crisis resulting from acts of incitement to violence that could lead to atrocity crimes."

[263] OGPRtoP, 'Preventing Incitement: Policy Options for Action' (n 140) 5.

[264] Genocide Convention (n 56) art 1 jo 3.

[265] Ruvebana, *Prevention of Genocide under International Law* (n 61) 166.

[266] Genocide Convention (n 56) art 8.

The obligation to employ all means reasonably available to prevent genocide under Article 1 is by no means limited to the diligent implementation of the long-term legislative and administrative framework. Additional, more forceful, action may be required. A state may have to resort to the use of force to prevent genocide within its territory, provided it is proportional and in line with applicable standards of human rights law and humanitarian law when relevant.[267] The state can also request international assistance beyond making an appeal to the UN based on Article 8 of the Convention.[268] When the threat of genocide takes the form of an act of aggression emanating from another state, the territorial state may resort to its right to self-defense and take measures (of force) against the other state.[269]

C. Preventing Continuation

Obligations to prevent the continuation of a violation arise after the injurious event has started until it ends.[270] This means the situation has escalated beyond risks and a human rights violation is taking place. A prerequisite for this phase to exist is that the violation is of a continuing character, meaning the wrongful act "has been commenced but has not been completed at the relevant time."[271] The wrongful act either covers a longer period of time or consists of a pattern of instant but inter-connected violations. Obligations in this phase are targeted at halting the on-going violation and mitigating the effects as far as possible. Approaches that could be instrumental to halting continuing violations differ according to the particular circumstances, but like short-term measures may include intervention by law enforcement officials or arresting and detaining dangerous individuals. This is a phase separate from the short-term phase, because when a state becomes aware or ought to be aware of a continuing violation, it is required to cease or intervene in the violation to bring it to a halt. At the same time, measures states have to take in this phase are similar to the short-term phase, together referred to as the acute phases of prevention. Obligations to prevent continuation are often formulated in an open-ended manner in terms of content and can involve many types of operational or protective measures.

There are two crosscutting categories of obligations to prevent the continuation of a violation of all three prohibitions. First, if government institutions are involved in the

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[267] Pooter, The Obligation to Prevent Genocide: A Large Shell Yet to Be Filled (n 254) 311; Ruvebana, *Prevention of Genocide under International Law* (n 61) 167.
[268] Pooter, The Obligation to Prevent Genocide: A Large Shell Yet to Be Filled (n 254) 311; Ruvebana, *Prevention of Genocide under International Law* (n 61) 166 159-61.
[269] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 51; Ruvebana, *Prevention of Genocide under International Law* (n 61) 168 and 174.
[270] See Chapter 1.3.2 Temporal Phases.
[271] Articles on State Responsibility (n 6) Commentary to art 14, para 5 and 14: "The breach of an obligation of prevention may well be a continuing wrongful act […]."

violation, the state has an obligation to cease the wrongful act, which is inherent to the primary obligation.[272] The obligation to cease a wrongful act is also a customary obligation of state responsibility, as codified in Article 30 of the Articles on State Responsibility.[273] Second, states also have an obligation to intervene in continuing offences by non-state actors, if they are aware or ought to be aware of their occurrence. This second obligation can be seen as an extension of the short-term obligation to take measures to prevent based on an immediate risk posed by non-state actors. An important procedural obligation attached to both crosscutting categories in this phase, is the obligation to investigate suspected and alleged continuing violations/offences, to attain with more certainty what is happening and what measures are required in the particular circumstances.

C.1 Torture

A violation of the prohibition of torture continues for as long as acts of torture take place.[274] If a continuing violation of the prohibition of torture can be attributed to a state organ, the state has an obligation to cease the wrongful act.[275] When a person is detained and tortured over a longer period of time, the existing legal and administrative safeguards – such as the right to complaint, medical assistance, chain of command and rules on superior liability – should inspire other officials to intervene in and halt the violation.[276] Beyond individual continuing cases of torture, there have been situations in which an administrative practice of torture exists in (certain) state institutions. The definition of an administrative practice is that there is a repetition of wrongful acts combined with official tolerance.[277] The ECtHR stated that it would be "inconceivable that the higher authorities of a state should be, or should be entitled to be, unaware of the existence of such a practice."[278] Measures subsequently taken by higher authorities to end the violation "must be on a scale which is sufficient to put an

[272] Articles on State Responsibility (n 6) Commentary to art 30 para 5: "The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule"; Zemanek, Karl, 'New Trends in the Enforcement of Erga Omnes Obligations' in Frowein, Jochen A., Wolfrum, Rudiger (eds), *Max Planck Yearbook of United Nations Law, Volume 4, 2000* (Kluwer, 2000) 1, 27: "[T]he obligation to perform the obligation under the primary norm is inherent in the latter."

[273] Articles on State Responsibility (n 6) Article 30(1); *Trail Smelter Arbitration (United States v Canada)* 3 RIAA 1905-1982 (16 April 1938 and 11 March 1941) 1965.

[274] Articles on State Responsibility (n 6) art 14(1) Commentary to Article 14 para 6: The consequences of acts of torture may also extend in time, but are not part of the continuing violation if the acts of torture have ceased.

[275] Articles on State Responsibility (n 6) art 30(1); *Trail Smelter Arbitration* case (n 273).

[276] CAT, General Comment 2 (n 6) para 26; *Ireland v. the United-Kingdom* (n 88) para 239.

[277] *Ireland v. the United-Kingdom* (n 88) para 159; Articles on State Responsibility (n 6) art 14(3): An administrative practice, although concerning different instances of torture, is a continuing violation of the obligation to prevent torture because there is official tolerance in a legislative and administrative system that ought to be capable of deterring torture.

[278] *Ireland v. the United-Kingdom* (n 88) para 159.

end to the repetition of acts or to interrupt the pattern or system."[279] The underlying rationale in the context of both a single continuing violation and an administrative practice of torture, is that higher officials are expected to know and control the manner in which their subordinates carry out their tasks.

States also have an obligation to intervene in continuing acts of torture by non-state actors, if they are aware or should have been aware of their occurrence.[280] This obligation is an extension of the short-term obligation to take measures to prevent acts of torture by non-state actors. Even though the definition of torture in the CAT is limited to pain or suffering inflicted by "or with the consent or acquiescence of a public official", the CAT Committee has interpreted this widely as including situations where state officials "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."[281] The Committee's rationale is that states should not acquiesce or stand by if they are aware or should have been aware of the fact that torture or ill-treatment by non-state actors is taking place, because "the State's indifference or inaction provides a form of encouragement and/or de facto permission."[282] Examples of this rationale can be found in the *Osmani v. Serbia* and *Dzemajl v. Yugoslavia* decisions of the CAT Committee.[283] The *Osmani* case concerned a person of Roma ethnic origin who was ill-treated in the presence of state officials. The *Dzemajl* case concerned racially motivated violence within a community, expressed by the burning and destruction of houses while people were still inside.[284] The CAT Committee held Serbia and Yugoslavia respectively responsible on account of the fact that state officials "had been present at the scene of the events" and yet refrained from taking any appropriate steps to protect the victims.[285] Although officials were actually present at the scene of the crime in both the above cases, the trigger of knowledge is

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[279] *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, no. 9940-9944/82, EComHR judgment on admissibility (6 December 1983) para 30.

[280] So far, only the CAT Committee and ECtHR have expressly acknowledged this obligation to intervene in a continuing violation by a third party, which does not mean it does not exist under other human rights instruments containing the prohibition of torture. See for example: *Mbongo Akwanga v. Cameroon* (n 97): Torture and ill-treatment of a detainee by fellow prisoners. Although technically part of art 10, protecting detainees from ill-treatment is normally considered part of the prevention of torture. The claim is phrased in terms of the state's failure to prevent the claimant from being attacked by his fellow prisoners.

[281] CAT (n 8) art 1: "[…] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"; CAT, General Comment 2 (n 6) para 18.

[282] CAT, General Comment 2 (n 6) para 18.

[283] *Osmani v. Serbia* (n 159) para 10.5.

[284] *Dzemajl et al. v. Yugoslavia* (n 159) para 9.2.

[285] *Dzemajl et al. v. Yugoslavia* (n 159) para 9.2; *Osmani v. Serbia* (n 159).

objective and does not imply that state officials necessarily already need to be present.[286] The ECtHR has also explicitly recognized an obligation to intervene in acts of torture by non-state actors. In the case of *Z. and others v. the United Kingdom*, concerning child-abuse by a step-father over a lengthy period of time, the ECtHR stated that measures under Article 3 "include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge" also if it is "administered by private individuals."[287] The *El Masri v. Macedonia* and other CIA rendition cases that have come before the ECtHR provide examples of the state obligation to intervene in acts of torture on its territory by a third state.[288] Under both the ECtHR's and CAT Committee's triggers of knowledge, it is enough to prove that the state ought to have known that a violation was taking place.

As mentioned in the introduction to this section, an important procedural measure attached to both the obligation to cease and to intervene, is the obligation to investigate the situation, when continuing forms of torture or ill-treatment are suspected or alleged.[289] In this phase, the duty to investigate is a prerequisite to attain with more certainty whether a violation is indeed occurring and as a basis to decide what further measures would be appropriate to halt the violation. The content of the obligation to cease violations by state officials is informed by the investigation, long-term safeguards and the chain of command. The content of the obligation to intervene in acts of torture by non-state actors is usually phrased in terms of taking reasonable/appropriate steps or using means reasonably available/at the state's disposal.[290] The standard of reasonableness implies that the scope of the obligation is limited. What measures are required is context dependent and often not further specified. In the child-abuse case of *Z. and others* it could have entailed any number of measures, investigating and warning the care-givers of the children to ultimately taking the children into the state's care. The CAT Committee has described it as an exercise of due-diligence to "intervene to stop, sanction and provide remedies to victims of torture."[291]

[286] CAT, General Comment 2 (n 6) para 18.
[287] *Z. and Others v. United Kingdom* (n 159) 73.
[288] *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 206 and 211.
[289] *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, para 38; Assenov and Others v. Bulgaria, 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para 102: "[W]here an individual raises an arguable claim that he has been seriously ill-treated" art 1 and 3 read together require that there should be an effective official investigation.
[290] *Mahmut Kaya v. Turkey* (n 25) para 115; *Z. and Others v. United Kingdom* (n 159); *Velásquez Rodríguez v. Honduras* (n 23) para 174.
[291] CAT, General Comment 2 (n 6) para 18.

C.2 Arbitrary Death

Arbitrary deaths are in individual cases of an instantaneous character and cannot be construed as a continuing violation.[292] Consequently, the right to life does not usually give rise to state obligations to prevent the continuation or aggravation of an arbitrary death. As noted in Section B.2, this partially explains why such importance is attached to the short-term obligation to prevent arbitrary death in case law. On the other hand a pattern or practice of inter-connected killings, for example because there is official tolerance, can sometimes be construed as a continuing violation.[293] The pattern or practice does "not constitute a violation […] different from the [main] violation in each individual case", but they can be viewed together because of their similarities in terms of the responsible actor(s), time and place.[294] If state officials are committing a pattern or practice of killings, the state has the obligation to cease the wrongful acts, which is inherent to the primary obligation to ensure the right to life. Like in the short-term phase, the content of the obligation is intertwined with the diligent implementation of the long-term framework. An example would be the obligation to order law enforcement officials to cease a pattern of disproportionate use of force resulting in arbitrary deprivation of life. In analogy with situations in which there is an administrative practice of torture, the trigger of knowledge to intervene in a pattern or practice of killings by state officials is very low, because a state should be aware when something along those lines is happening. The measures it takes to end the violations must be (on a scale) sufficient to halt the pattern or practice.[295]

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[292] *Isaak v. Turkey*, no. 44587/98, 24 June 2008: In the *Isaak v. Turkey* case, for example, police officers stood by or participated in beating to death an unarmed protester. The police officers were both obliged to refrain from participating or standing by based on the real risk that Mr. Isaak might actually be killed (short-term prevention) and based on the obligation not to commit or acquiesce in continuing forms of beating constituting ill-treatment or torture (preventing continuation). Construing individual killings as a continuing violation would lead to an artificial construction, covering a short period in which ill-treatment or threats are so intense that it will almost certainly result in death. Rather than taking this artificial and from an evidentiary perspective unrealistic construction any further, it can safely be concluded that individual killings are not continuing violations; Pauwelyn, Joost, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' (1996) 66(1) BYIL 415, 418: "Only the extension in time of the violation (not of the material act as such) is determinate: even though it might take hours, for example, to murder someone, the crime of murder, by its very nature, remains an 'instantaneous' crime."

[293] The term "killings" is used because it concerns deaths directly caused by people, as opposed to more circumstantial violations of the right to life; Articles on State Responsibility (n 6) Commentary to Article 15 para 4 and 5: This should be distinguished from a breach consisting of a composite act, which entails that separate acts are only wrongful in aggregate. Individual arbitrary killings are each wrongful acts. A pattern of killings may result in crimes against humanity. Crimes against humanity are excluded from the scope of this research except for a short discussion in Chapter 4.

[294] Pauwelyn, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' (n 292) 427-8; *Ireland v. the United-Kingdom* (n 88).

[295] *Ireland v. United-Kingdom* (n 88) para 159.

If non-state actors are behind a pattern or practice of killings, the state has an obligation to intervene.[296] This obligation has been confirmed by the IACtHR and AComHPR.[297] The obligation to intervene is an extension of the short-term obligation to take measures to prevent based on an immediate risk to the right to life of an identified individual or individuals by non-state actors. A state's actions are conditioned by the requirement that the state knows or should have known about the killings. Since it is an extension of the short-term obligation to prevent the realization of threats to the right to life by non-state actors, the scope of the obligation is limited by a standard of reasonableness similar to the *Osman* formula. This means that the obligation should not impose an impossible or disproportionate burden on the authorities.[298] The obligation can be more demanding where the state has a special role of protector or obligation of strict due-diligence towards the victims, for example when it has declared a certain area a security zone as in the *Pueblo Bello Massacre v. Colombia* case.[299] In the *Commission nationale des droits de l'Homme et des libertés v. Chad case*, the AComHPR held Chad responsible for failing to provide security and stability to protect civilians against massive human rights violations and failing to intervene to prevent the killing of specific individuals.[300] In some situations, a large-scale loss of life at the hands of non-state actors may imply that the state has lost (part of) its authority over an area within its territory, which means it may not be aware of everything going on within that area or may not reasonably be able to intervene. In such situations, as discussed in Section B.1, states still have positive obligations to continue to ensure the rights of people in such an area by taking measures to regain control and using all legal, diplomatic and practical means available.[301]

C.3 Genocide

Genocide is a process that takes time to unfold and once the acts described in Article 2 of the Genocide Convention have started they usually continue for at least a certain period of time, constituting a continuing violation. In the Commentary to the Articles on State Responsibility, the ILC noted: "Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of

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[296] *Pueblo Bello Massacre v. Colombia* (n 36) para 139-40; *Zimbabwe Human Rights NGO Forum v. Zimbabwe* 2006 (n 46) para 77; *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, AComHPR, Communication No. 74/92 (11 October 1995) para 22.

[297] It is unimaginable that other tribunals and supervisory bodies would not rule similarly if confronted with these circumstances.

[298] *Osman v. the United Kingdom* (n 228) para 116.

[299] *Pueblo Bello Massacre v. Colombia* (n 36) para 139.

[300] *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* (n 296) para 22.

[301] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 333-9: The ECtHR stated that determining to what extent a state could live up to its positive obligations in such situations is "especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention." Article 2 contains the right to life.

the acts was committed […].”[302] If state officials commit acts of genocide, the state has the direct obligation to cease the wrongful act as inherent to the primary obligation to prevent genocide.[303] State institutions or officials that are not involved should employ all means reasonably available to bring the violation to a halt.[304] For example, the prosecution and punishment of wrongdoers may effectively intervene in the process of genocide, as the wrongdoers will personally no longer be able to carry out violations and a message is sent to other officials that there is no tolerance of such acts and they will not go unpunished. The state will likely have to employ force to stop officials from further carrying out any acts of killings and other types of harm with the intent to commit genocide. A prerequisite for a state to be able to carry out these obligations, however, is that its main institutions are not itself partially or fully involved in the process of genocide and that its enforcement and judicial bodies are still functioning.[305]

If a state learns or should have learned of non-state actors committing acts of genocide within its territory, the state must likewise and in extension of its short-term obligation, employ all means available so as to prevent further acts of genocide as far as possible. This can mean anything from following up on strategies and contingency plans, to the forceful intervention in the process of genocide by law enforcement officials. At this stage, the use of force by the state against non-state actors carrying out acts of genocide is likely even more called for than in the short-term phase of prevention. Individual wrongdoers should be prosecuted and punished, preventing them from personally continuing their wrongful acts and at the same time underlining the public condemnation of these acts.[306] States can also choose to refer the situation to the ICC.[307] Requesting international or UN assistance, as discussed in Section B.3, remain important measures in this phase.[308] When genocide takes the form of an act of aggression emanating from another state, the state can act in self-defense, which may include proportional measures of force against the other state.[309]

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[302] Articles on State Responsibility (n 6) Commentary to Article 15 para 3.

[303] Genocide Convention (n 56) art 1; *Genocide* case (n 59) para 166 and 382: The obligation not to commit genocide is inherent to the obligation to prevent genocide; Articles on State Responsibility (n 6) art 30(1); *Trail Smelter Arbitration* case (n 273).

[304] *Genocide* case (n 59) para 430.

[305] Ruvebana, *Prevention of Genocide under International Law* (n 61) 147: “History has proved that genocide has been possible where states have organized and perpetrated it. […] However, it has not been concluded that genocide is only possible where the whole state apparatus is involve.”

[306] Genocide Convention (n 56) art 6.

[307] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 13 and 14.

[308] Pooter, The Obligation to Prevent Genocide: A Large Shell Yet to Be Filled (n 254) 311; Ruvebana, *Prevention of Genocide under International Law* (n 61) 159-61.

[309] UN Charter (n 269) art 51; Ruvebana, *Prevention of Genocide under International Law* (n 61) 168 and 174.

D. Preventing Recurrence

Obligations to prevent recurrence arise after the violation has ended and are aimed at taking remedial measures and ensuring the violation does not recur.[310] Past occurrences of violations can increase the risk of future violations. If violations are not properly addressed, wrongdoers can continue to commit offences, respect for the rule of law weakens and tensions in society may remain. Therefore, past violations that were not properly addressed should be understood as indicators for a risk of recurrence.[311] Approaches that could be instrumental in preventing recurrence range from peace-building, negotiation and reconciliation processes to holding wrongdoers legally responsible. Human rights law is focused mostly on the latter, the effectiveness of which is sometimes questioned in the context of large-scale conflicts, for example in the "peace versus justice" debate.[312] Obligations to prevent recurrence lie in the area of investigation and prosecution, and sometimes also taking measures to ensure future abidance with the primary obligation.

The first category of crosscutting obligations to prevent the recurrence of torture, arbitrary deaths and genocide is related to the investigation of the violation and the prosecution and punishment of wrongdoers, regardless of whether they are state officials or non-state actors.[313] These obligations arise when the state is alerted to a violation or has other reasons to suspect that a violation occurred.[314] The obligation to investigate exists also in the phase of preventing continuation, but with a different and more limited objective of halting the violation. In this section we shall focus on the role it plays in ensuring prosecution and punishment and bringing to light the truth. The prosecution and punishment of wrongdoers also has a truth-finding function and has a specific and general preventive effect. The specific preventive effect is related to the fact that the particular wrongdoer is prevented from committing more offences.[315] The general preventive effect is related to the message of public condemnation of certain crimes and demonstrating to other potential wrongdoers that

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[310] See Chapter 1.3.2 Temporal Phases.

[311] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) risk factor 2: "Past or current serious violations of international human rights and humanitarian law […] that have not been prevented, punished or adequately addressed and, as a result, create a risk of further violations."

[312] Goldstone, Richard J., 'Peace Versus Justice' (2005) 6 NevLJ 421: Supporters on the "peace" side of the debate have pointed out that an excessive focus on investigation, fact-finding and legal responsibility can sometimes lengthen conflicts and processes of reconciliation and rebuilding; Parlevliet, Michelle, 'Embracing Concurring Realities: Revisiting the Relationship between Human Rights and Conflict Resolution' (PhD Thesis, University of Amsterdam, 2015).

[313] The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.

[314] *Blanco Abad v. Spain*, Comm. 59/1996, UN Doc CAT/C/20/D/59/1996 (CAT Committee May 14, 1998) para 8.2 and 8.6; *Mohammed Alzery v. Sweden* (n 175) para 11.7.

[315] *Blanco Abad v Spain* (n 314) para 8.2.

these acts will not go unpunished.[316] This general preventive effect supports the proper functioning of the long-term legislative and administrative system and public trust therein. Finally, offering forms of reparation to victims or surviving relatives can offer a basis for healing, reconciliation and rebuilding. Reparation is however not generally seen as an obligation to prevent.

A specific category of obligations addressed in case law in the context of torture and arbitrary deaths is related to reinsuring adherence to the primary norm and removing structural obstacles to its realization, thereby preventing recurrence of similar violations.[317] When structural obstacles exist that lie in the way of fully ensuring a right, states may have to take measures to address them that go beyond remedying the particular violation at hand.[318] There is a strong link with the long-term phase, because if such measures have to be taken in response to a particular violation, it often implies failures in introducing and implementing the required legislative and administrative system at an earlier stage. As such, measures to remove structural obstacles taken in reaction to a particular violation feed back into the long-term phase. Courts and supervisory bodies have stressed the existence of the obligation to reinsure adherence to the primary norm and sometimes indicate measures that a state would have to take to that effect.[319] States may also sometimes be required to offer assurances of non-repetition.[320]

[316] *Blake v. Guatemala* (n 87) para 61 and 64: "[I]mpunity fosters chronic recidivism"; *Bulacio v. Argentina* (n 134); *Giuliani and Gaggio v. Italy*, no. 23458/02, 25 August 2009, para 306; *Opuz v. Turkey* (n 45) para 153.

[317] The obligation of *non-refoulement* also applies if an individual runs the risk of torture or death because there is a (risk of) genocide in the receiving state, but it has not been separately addressed in that context.

[318] Human Rights Committee, 'General Comment 31 - Nature and the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev1/Add13, para 8 and 17: "[I]t has been a frequent practice of the Committee (…) to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question"; *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V: Example of judicial practice instructing a state to address a structural problem to prevent future violations; Articles on State Responsibility (n 6) art 30 and Commentary to art 30 para 6; OHCHR, 'The Role of Prevention in the Promotion and Protection of Human Rights' (n 57) para 10.

[319] CAT, General Comment 2 (n 6) para 4; HRC, General Comment 31 (n 318) para 17: "In general, the purposes of the Covenant would be defeated without an obligation integral to Article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices"; *McCallum v. South Africa*, Comm. 1818/2008, No. CCPR/C/100/D/1818/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 568 (HRC, Oct. 25, 2010).

[320] Articles on State Responsibility (n 6) art 30.

D.1 Torture

The obligation to investigate, prosecute and punish acts of torture and ill-treatment has been enshrined in the text of the CAT and IACPPT and other instruments and is widely recognized in the case law of both supervisory bodies and courts.[321] A formal complaint is not necessary for a state to be obligated to investigate.[322] In fact, if a state requires a formal complaint to start an investigation, this in itself may violate that state's obligations.[323] For the obligation to investigate to arise, it is enough that either the victim alleged torture or ill-treatment or that reasonable grounds exist to believe that it occurred.[324] That means that states may have an obligation to investigate *ex officio* based on a low degree of knowledge, meaning there does not have to be any form of certainty that torture occurred. With regard to the content and scope of the obligation, the investigation must be impartial, serious and effective and must be capable of leading to the identification and punishment of the individual(s) responsible.[325] If the investigation gives reasons to believe that torture was committed, the state has an obligation to prosecute identified suspects. The ICJ elaborated on the content and scope of the obligation to prosecute torture in the *Belgium v. Senegal* case, explaining that a state must submit the case to the competent authorities. Those authorities may still decide there is insufficient evidence to prosecute a particular suspect.[326] The CAT Committee clarified in its General Comment 2 that prosecution has to be prompt and in line with the internationally required definitions of torture and ill-treatment, noting that "it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present."[327] The Committee also made clear that amnesties may not be

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[321] CAT (n 8) art 12 and 13; IACPPT (n 8) art 3 and 8; ICCPR (n 9) art 2(1) and (3) jo 7; HRC, General Comment 20 (n 22) para 14; *Guridi v. Spain*, Comm. 212/2002, UN Doc CAT/C/34/D/212/2002, A/60/44 (2005) Annex VIII at 147 (CAT Committee May 17, 2005) para 6.6; *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI, para 98; *Velásquez Rodríguez v. Honduras* (n 23) para 166; *Amnesty International and Others v. Sudan* (n 26) para 56.

[322] *Parot v. Spain*, Comm. 6/1990, UN Doc A/50/44 at 62 (1995) (CAT Committee May 2, 1995) para 10.4.

[323] *Opuz v. Turkey* (n 45) para 168, 171 and 195: In this domestic violence case, the ECtHR declares that Turkey should have undertaken action to investigate and protect without requiring a complaint by the victim. The necessity of this is made especially clear in this case, because complaints that were made were likely retracted under pressure of the abuser.

[324] CAT (n 8) art 12; IACPPT (n 8) art 8; *Blanco Abad v. Spain* (n 314) para 8.2 and 8.6; *Alzery v. Sweden* (n 175) para 11.7.

[325] *Blanco Abad v. Spain* (n 314) para 8.2 and 8.8: Promptness is considered important to ensure that the act stops and because the traces of torture might fade. Effectiveness is taken to mean that the investigation must be serious, capable of finding the perpetrators, impartial and carried out by competent officials; *Al-Adsani v. the United Kingdom* (n 289) para 38: "Article 13 in conjunction with Article 3 impose an obligation on States to carry out a *thorough and effective investigation* of incidents of torture"; *Velásquez Rodríguez v. Honduras* (n 23) para 177: The duty to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."

[326] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep 422, para 94.

[327] CAT, General Comment 2 (n 6) para 10.

afforded to perpetrators of torture, because this would violate the principle of non-derogability, meaning that torture cannot be justified or left unpunished whatever the circumstances.[328]

In case there are structural obstacles to ensuring the right to be free from torture, states must take measures to address those and prevent recurrence of similar violations. Especially the IACtHR is known for its elaborate and inventive rulings pertaining to reparation and measures of satisfaction aimed at preventing recurrence of similar violations. An example in the context of a violation of the prohibition of torture is the *Gutiérrez-Soler v. Colombia* judgment, in which the Court ordered, among other things, that the state should start a police training course, disseminate and implement the standards of the Istanbul Protocol, a training program for physicians, prosecutors and judges and strengthening "existing controls with respect to persons arrested in Colombia."[329] These are all essentially long-term measures related to the legal and administrative framework and diligent implementation thereof, which the state still has to take in reaction to a particular violation to be able to prevent similar violations in the future. Finally, although it is not generally seen as an obligation to prevent, it may be noted that a right to remedy and suitable compensation for victims of torture has been expressly recognized in both the CAT and IACPPT.[330]

D.2 Arbitrary Death

States have an obligation to investigate suspicious deaths and prosecute and punish wrongdoers. This obligation is inherent to the obligation to ensure the right to life and has been applied in the context of the arbitrary deprivation of life by the different courts and supervisory bodies.[331] The ECtHR has ruled that even in difficult circumstances the state is not relieved of the obligation to investigate and punish, for instance when an insurrectional movement is creating instability in a certain region as in the *Yaşa v. Turkey* case, because it would only exacerbate the "climate of impunity" and "create a vicious cycle."[332] With regard to the trigger of knowledge, the authorities are bound to investigate in good faith all allegations of violations, but the obligation also arises without any allegation if the authorities are otherwise informed about a death that took place "in circumstances that might involve a

[328] CAT, General Comment 2 (n 6) para 5 last sentence.
[329] *Gutiérrez-Soler v. Colombia* (Merits, Reparations and Costs) Judgment of September 12, I/A Court HR 2005 Series C No. 132, para 107-11.
[330] CAT (n 8) art 14; IACPPT (n 8) art 9.
[331] ICCPR (n 9) art 2 jo 6; ECHR (n 9) art 1 jo 2; ACHR (n 9) art 1 jo 4; ACHPR (n 9) art 1 jo 4 and 26; *Pestano v. Philippines*, Comm. 1619/2007, No. CCPR/C/98/D/1619/2007, A/65/40, Vol. II (2010), Annex V at 309 (HRC, Mar. 23, 2010) para 7.6; *Yaşa v. Turkey*, 2 September 1998, Reports of Judgments and Decisions 1998-VI, para 100 and 104; *Velásquez Rodríguez v. Honduras* (n 23) para 176-7; *Zimbabwe Human Rights NGO Forum v. Zimbabwe* 2006 (n 46) para 74.
[332] *Yaşa v. Turkey*, 2 September 1998, Reports of Judgments and Decisions 1998-VI, para 104

violation of the right to life."[333] Therefore, similar to the context of torture, an investigation *ex officio* may be called for. Also similar are the standards that the investigation must live up to, meaning it has to be serious, and impartial, among other things.[334] With regard to the obligation to prosecute and punish wrongdoers, states have to submit cases involving suspicious deaths to the competent authorities for consideration.[335] The ECtHR has explained that "national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished", but this does not mean that there is "an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence."[336] Therefore states have an obligation to undertake steps towards the prosecution of suspected wrongdoers, but the prosecutorial authorities and courts have some leniency in assessing the cases. The prosecution and punishment must, however, reflect the seriousness of the offence.[337]

Finally, similar to the context of torture states may have an obligation to address and remove structural obstacles to ensuring the right to life. In the *Turdukan Zhumbaeva v. Kyrgyzstan* case, based on a death in police custody that was not properly investigated, the HRCee notes that Kyrgyzstan is "under an obligation to prevent similar violations in the future."[338] In the context of this case, that implies that the state has to show more diligence while investigating future cases of deaths that occur in custody, for example by introducing stricter guidelines or offering officials who have to investigate such cases specific training. In the *Moiwana Community v. Suriname,* involving the killing of at least 39 defenseless members of the Moiwana community by Surinam state officials, the IACtHR ordered a wide range of measures of reparations. Among these were guarantees of safety for community members who decided to return, a development fund and finally "to memorialize the events […] as well as to prevent the recurrence of such dreadful actions in the future – the State

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[333] *Pestano v. Philippines* (n 331) para 7.4-5: In this case there was "a strong presumption of direct participation of the State party in the violation of [the] right to life", which is why the HRCee uses the term violation instead of the more general term offence; *Yaşa v. Turkey* (n 332) para 100.

[334] *Velásquez Rodríguez v. Honduras* (n 23) para 177: The duty to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective"; *Amnesty International and Others v. Sudan*, AComHPR, Communication No. 48/90, 50/91, 52/91, 89/93 (15 November 1999) para 51: Stating that the officials investigating the case must be completely independent and that the findings must be made public.

[335] HRC, Draft General Comment 36 (n 112): The new General Comment 36 on the right to life will address the obligation to investigate and prosecute.

[336] *Öneryıldız v. Turkey* (n 113) para 96.

[337] *Öneryıldız v. Turkey* (n 113) para 116-7: The ECtHR found a violation of the procedural aspect of the right to life because "the sole purpose of the criminal proceedings in issue was to establish whether the authorities could be held liable for "negligence in the performance of their duties" under Article 230 of the Criminal Code, which provision does not in any way relate to life-endangering acts or to the protection of the right to life within the meaning of Article 2."

[338] *Zhumbaeva v. Kyrgyzstan*, Comm. 1756/2008, No. CCPR/C/102/D/1756/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 418 (HRC, Jul. 19, 2011) para 10.

shall build a monument and place it in a suitable public location."[339] Although the preventive effect of measures of remembrance in practice is unclear, the public acknowledgment and condemnation of violations at least offers a basis for reconciliation and restoring trust in the rule of law.[340]

D.3 Genocide

States are explicitly obligated to investigate, prosecute and punish acts of genocide under the Genocide Convention.[341] A state is required to punish any perpetrators of Article 3 crimes that took place on its territory, whether they are (former) state officials or non-state actors.[342] This contributes to peace-building and restoring order and trust in the rule of law, which the OSAPG has pointed out as a key factor in building resilience against future atrocity crimes.[343] As soon as a state suspects or is made aware that an individual has committed genocide-related crimes on its territory, it must launch a serious and impartial investigation into the matter and if the situation so warrants, prosecute the individual by submitting the case to the competent authorities. The suspect has to be tried by a competent national or international tribunal.[344] A prominent example of national proceedings against a suspect of genocide is the trial against former Guatemalan president Rios Montt.[345] The former president was convicted for genocide in first instance, which represents the first successful national conviction of a former head of state for the crime of genocide. The conviction was however soon annulled in muddled political circumstances for procedural reasons and it is unclear whether there will be a retrial.[346] An example of a competent international tribunal is the International Criminal Court (ICC). So, provided that the state in question is party to the Rome Statute, it may also refer suspects of genocide to the ICC.[347] This can relieve some of the political tension at

[339] *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Judgment of June 15, 2005, I/A Court HR Series C No. 124, para 212-8.
[340] Osiel, Mark J., 'Ever Again: Legal Remembrance of Administrative Massacre' (1995) 144(2) U Pa L Rev 463, 475-6: Discusses how major legal events can turn into collective memories, that can be either "divisive or solidifying."
[341] Genocide Convention (n 56) art 1 jo 6.
[342] Genocide Convention (n 56) art 6.
[343] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 3.
[344] Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 138) 240 para 14-5.
[345] *Sala Tercera de la Corte de Apelaciones del Ramo Penal, Narcoactividad y Delitos contra el Ambiente* (10 May 2013) Judgment against Effrain Rios Montt.
[346] Menchu, Sofia, 'Genocide Trial for Guatemala Ex-dictator Rios Montt Suspended' (11 January 2016) Reuters, available at: <http://www.reuters.com/article/us-guatemala-trial-idUSKCN0UP21F20160111>.
[347] Rome Statute (n 307) art 13-15: Apart from state parties, the Security Council can also refer a situation to the ICC or the ICC Prosecutor can start an investigation *propriu motu*; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 138) 240 para 14-5.

national level unavoidably surrounding cases against suspects of genocide and ensures the impartiality and independence of the trial.[348]

States also have an obligation to reinsure adherence to the prohibition of genocide, but there are few examples in case law that can provide information on the type of measures that states may have to take to prevent future cases of genocide. Reparation and assurances of non-repetition could, in theory, contribute to peace-building, rebuilding society and restoring order and trust in the rule of law.[349] The measures of satisfaction ordered by human rights supervisory bodies and courts in the context of torture and arbitrary killings could serve as an example in this regard.[350] Truth and reconciliation initiatives could ease remaining tensions in society.[351] Further, practices of commemoration and remembrance are considered very important in the context of genocide and could potentially help prevent recurrence.[352] It can be imagined, therefore, that a court could require the establishment of a truth and reconciliation commission or remembrance in the form of a museum or statue as a form of satisfaction.

2.3 Conclusion

This chapter has categorized and discussed various obligations to prevent torture, arbitrary death and genocide in all four temporal phases. Importantly, it was demonstrated that many of these obligations fit within certain categories that are similar for all three prohibitions, referred to as crosscutting obligations. States have: (i) Long-term obligations to introduce a proper legislative and administrative framework capable of deterring violations; (ii) Short-term obligations to take measures to prevent violations; (iii) Obligations to halt continuing violations by

[348] Rome Statute (n 307) art 12(2)b: The ICC may also have jurisdiction if the state of nationality of the suspect is a party tot he ICC; art 17(1)a: The case will not be admissible if it “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”

[349] Articles on State Responsibility (n 6) art 30.

[350] HRC, General Comment 31 (n 318) para 8: The HRC interprets art 2 as encompassing a general legal obligation to prevent the recurrence of violations; *Broniowski v Poland* (n 318): Example of judicial practice instructing a state to address a structural problem to prevent future violations; *Gutiérrez-Soler v. Colombia* (n 329) para 107-11; *Carpio-Nicolle et al. v. Guatemala* (Merits, Reparations and Costs) Judgment of November 22, 2004, I/A Court HR Series C No. 117, para 135.

[351] Rimé, Bernard and others, 'The Impact of Gacaca Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process After a Genocide' (2011) 41(6) Eur J Soc Psychol 695: This psychological study finds that participation in truth and reconciliation processes can decrease shame among victims and increase homogeneity.

[352] See among others: Williams, Paul, 'Witnessing Genocide: Vigilance and Remembrance at Tuol Sleng and Choeung Ek' (2004) 18(2) Holocaust Genocide Stud 234; King, Elisabeth, 'Memory Controversies in Post-genocide Rwanda: Implications for Peacebuilding' (2010) 5(3) Genocide Stud and Prevention 293; Hennebel, Ludovic and Hockmann, Thomas, *Genocide Denials and the Law* (OUP 2011): There is no international obligation that prescribes states to criminalize genocide denial. Nevertheless, there are states that have criminalized holocaust denial. Denial of genocide could also constitute hate-speech or incitement.

ceasing or intervening; and (iv) Obligations to prevent recurrence by investigating, prosecuting and punishing wrongdoers. Because these crosscutting obligations show substantial similarity in the context of the prohibitions of torture, arbitrary death and genocide and across the different instruments and interpretations thereof, they can be assumed to be representative of the types of obligations that exist in the context of other gross human rights violations. The crosscutting categories of obligations will be referred to as the set of territorial obligations to prevent gross human rights violations under international human rights law. Additionally, there are several more specific obligations attached to some of the prohibitions.[353]

The chapter also illustrated how these crosscutting obligations are elaborated in the context of different prohibitions. Various distinct requirements are attached to the crosscutting obligations in the context of the different prohibitions. For example, for the long-term prevention of arbitrary death, states are required to regulate dangerous activities and introduce a framework regulating the use of force and firearms by state officials.[354] For the long-term prevention of torture, states must adopt strict rules and regulations in regard to situations of detention.[355] The emphasis on certain obligations and distribution of obligations in time also varies. For example, there is a strong emphasis on the short-term prevention of arbitrary deaths, because of its instant and irreparable nature.[356] The obligations to investigate, prosecute and punish wrongdoers arise sooner in the context of genocide, because it is a more large-scale violation and punishing individual wrongdoers can have a preventive effect at an early stage.[357] These variations in the way the crosscutting obligations are elaborated in the context of the different prohibitions confirm the importance of the specific type of injury for the way obligations to prevent are modeled.[358]

Whether a state has knowledge of a risk of a violation, continuing or past violation plays a distinct role in the different temporal phases. In the long-term phase, knowledge does not have a triggering role, because obligations in this phase are

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[353] Obligations related to the prohibition of *refoulement* (see Section 2.2 B.1 Torture and B.2 Arbitrary Death) and taking measures to prevent similar violations in the future (see Section 2.2 D.1 Torture and D.2 Arbitrary Death). Similar obligations may exist in the context of genocide, but they have so far not been expressly formulated. In any case, the prohibition of *refoulement* also implies that people cannot be sent to a state where there is a (serious risk of) genocide.

[354] HRC, General Comment 6 (n 34) para 3; *Makaratzis v. Greece* (n 114) para 31; *Nachova and others v. Bulgaria* (n 117) para 99-102; *Juan Humberto Sánchez v. Honduras* (n 44) para 112; Code of Conduct for Law Enforcement Officials (n 114); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81); *Öneryıldız v. Turkey* (n 113) para 89-90.

[355] CAT (n 8) art 10-13 and 15; IACPPT (n 8) art 7; HRC, General Comment 20 (n 22) para 8; *Ali Bashasha v. Libya* (n 90) para 7.4; *Juan Humberto Sánchez v. Honduras* (n 44) para 83-4; Standard Minimum Rules for the Treatment of Prisoners (n 100); Istanbul Protocol (n 100).

[356] See Section 2.2 B.2 Arbitrary Death.

[357] See Section 2.2 B.3 Genocide.

[358] See Chapter 1.2 The Problem: The Content and Scope of Obligations to Prevent and 1.4 Structure.

targeted at general deterrence and not a particular violation.[359] In the short-term phase, knowledge plays a triggering role for the indirect obligation to take measures to prevent offences related to the three prohibitions by non-state actors.[360] The triggers of knowledge in the context of the three prohibitions are broadly similar: the state is required to act if it knew or ought to have known about an real and immediate risk. The trigger is objective, meaning that actual knowledge does not have to be proven. This implies that states should diligently investigate and assess any information of a real and immediate risk of a violation.[361] In the phase of preventing continuation, knowledge plays a triggering role for the indirect obligation to intervene in ongoing acts of torture or genocide or a pattern or practice of killings by non-state actors.[362] It is an objective trigger, similar to the trigger of knowledge in the short-term phase: the state is required to intervene if it knows or should have known about continuing offences by non-state actors related to the three prohibitions. With regard to the direct obligations to prevent and cease violations committed by state officials, the standard of the trigger of knowledge is lower and therefore easier to attain, because a state is expected to know and control the manner in which its officials act.[363] Finally, in the phase of preventing recurrence, there is a low trigger of knowledge that a violation has occurred for the obligation to investigate to arise.[364] It is enough that someone alleges that a violation/offence occurred or that a state otherwise has reasons to believe that it occurred. The investigation provides further information that can, in turn, trigger the obligation to prosecute.

In general terms, the capacity of states to ensure human rights is presumed in territorial context. Even if a state loses authority over parts of its territory, it does not lose jurisdiction and remains obligated to try and regain control and has positive obligations to ensure respect for the human rights of people in that area.[365] Aside from these territory-related considerations on capacity, capacity plays a noteworthy role in the context of the short-term obligation to take measures to prevent and the obligation to intervene in continuing offences by non-state actors as a limit to the scope of obligations.[366] These obligations are limited by diverse standards of reasonableness relating to a state's capacity to act in the particular circumstances. An example is the *Osman* formula that describes that the short-term obligation to prevent arbitrary deaths must not be interpreted so as to place an impossible or disproportionate burden on authorities.[367] These indirect and acute obligations in particular are limited by capacity because, of all the obligations to prevent, they are the most indeterminate in

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[359] See Section 2.2 A Long-Term Prevention.
[360] See Section 2.2 B Short-Term Prevention.
[361] See Section 2.2 B.2 Arbitrary Death.
[362] See Section 2.2 C Preventing Recurrence.
[363] See Section 2.2 B.1 Torture, B.2 Arbitrary Death, C.1 Torture and C.2 Arbitrary Death.
[364] See Section 2.2 D Preventing Recurrence.
[365] *Ilaşcu and Others v. Moldova and Russia* (n 168) para 339.
[366] See Section 2.2 B Short-Term Prevention and C Preventing Continuation.
[367] See Section 2.2 B.2 Arbitrary Death; *Osman v. the United Kingdom* (n 228) para 116.

terms of their content and scope. It is impossible to foresee all the different ways in which non-state actors may commit offences and the types of measures a state might have to take to prevent or stop them. Therefore, these obligations are formulated so they can apply in a multitude of different circumstances. That explains the importance of adding a limitation to the scope of the obligation in the form of a reasonability standard relating to the state's capacity. Other than this specific category of obligations, there are a range of obligations that have a built-in reasonability standard, such as the obligation to start an "effective" investigation and "prompt" judicial intervention.[368] These types of phrases allow for an assessment of what is reasonable to expect in light of the state's capacity in the particular circumstances.

Finally, the complexity of obligations to prevent gross human rights violations is such that they cannot easily be categorized on the basis of existing terminological distinctions between types of obligations.[369] The set of territorial obligations to prevent gross human rights violations under international human rights law contains both obligations of result – such as introducing a proper legislative and administrative system – and obligations of conduct – such as taking short-term measures to prevent violations. In relation to the distinction between positive and negative obligations, it is remarkable that most obligations to prevent gross human rights violations require at least some form of positive state action. For example, the obligation to cease a continuing violation by state officials, which is a negative obligation, may still require a higher-ranking official to take action to intervene in the wrongful conduct of a subordinate. The distinction between direct and indirect obligations is sometimes relevant. This can be seen most clearly in the short-term and preventing continuation phases, where the content and scope of obligations to prevent offences differs for state officials as opposed to non-state actors.

The next chapter will review the content and scope of obligations to prevent gross human rights violations identified in this chapter when translated to extraterritorial settings based on jurisdiction.

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[368] Prompt judicial intervention, see: ICCPR (n 9) art 9(3); ECHR (n 9) art 5(3): ACHR (n 9) art 7(5); CAT (n 8) art 13; Effective investigation, see: *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, para 38: "Article 13 in conjunction with Article 3 impose an obligation on States to carry out a *thorough and effective investigation* of incidents of torture"; *Velásquez Rodríguez v. Honduras* (n 23) para 177: The duty to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."

[369] See Chapter 1.2: The Problem: The Content of Obligations to Prevent.

3. EXTRATERRITORIAL OBLIGATIONS TO PREVENT BASED ON JURISDICTION

Most human rights treaties contain a jurisdiction clause, limiting the treaty's applicability to people or territory within the state parties' jurisdiction.[1] Jurisdiction is not only limited to state territory. When states exercise certain forms of control over territory or people abroad that amount to jurisdiction, they have obligations to ensure these people's rights.[2] However, it is currently unclear what concretely states are obligated to do to prevent gross human rights violations when they exercise extraterritorial jurisdiction. This chapter deals chiefly with situations where states exercise such jurisdictional control through state officials acting outside state territory.[3] Paradigmatic examples are military intervention, occupation and arrest and detention by state officials abroad. These situations include elements of force, while they are at the same time not subject to regular structures of governmental and judicial oversight and can therefore be fertile breeding ground for gross human rights violations.[4] Therefore, it is important to elucidate when and what states are obligated to do to prevent gross human rights violations when they exercise extraterritorial jurisdiction.

To offer more clarity in relation to the content and scope of extraterritorial obligations to prevent gross human rights violations, their application has to be translated to extraterritorial settings. This first of all requires knowing when a state exercises extraterritorial jurisdiction and thus accrues extraterritorial obligations under human rights treaties to which it is a party. An often-overlooked but crucial next step is determining the content and scope of corresponding extraterritorial human rights obligations and the role capacity plays in that regard. When states exercise extraterritorial jurisdiction, there are frequently specific extraterritorial factors that affect their capacity to ensure human rights. For example, there are limits to what a state is lawfully allowed to do abroad or state officials may encounter an unstable security situation. This chapter sets out to contribute to a better understanding of how these capacity-related challenges influence the content and scope of extraterritorial human rights obligations.

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[1] See Section 3.1 Extraterritorial Jurisdiction.

[2] See Section 3.1 Extraterritorial jurisdiction: In very basic terms, extraterritorial jurisdiction means that a state exercises forms of control over individuals abroad that warrant it to ensure the human rights of these individuals.

[3] It is important to note that obligations related to acts by state officials within a state's own territory that have extraterritorial effect are left outside the scope of this chapter. This type of obligations falls within the purview of either: (i) Chapter 2, for example if an obligation springs from the fact that an individual is present on a state's territory such as *non-refoulement*; or (ii) Chapter 4, for example if an obligation springs from a form of prescriptive jurisdiction going beyond state jurisdiction under human rights treaties such as universal criminal jurisdiction over perpetrators of torture.

[4] See for example: *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII: Russia helped create and maintain a separatist regime that committed torture in its detention centers; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011: United Kingdom soldiers shot people without following up with a sufficiently independent investigation.

The first part of this chapter analyses the concept of jurisdiction as contained in human rights treaties relevant to this research. Case law and other authoritative interpretations of extraterritorial jurisdiction are outlined (Section 3.1.1) and the function of jurisdiction is analyzed (Section 3.1.2). The second part of this chapter develops a theoretical framework, which can help translate territorial human rights obligations to extraterritorial settings. The role of capacity within extraterritorial jurisdiction as opposed to state territory is explored (Section 3.2.1) and factors are introduced that can be used to support a realistic assessment of the content and scope of extraterritorial obligations (Section 3.2.2). The third part of the chapter (Section 3.3) uses these factors to translate the set of territorial obligations to prevent gross human rights violations as defined in Chapter 2, to extraterritorial obligations based on jurisdiction. Finally, the conclusion presents an overview of extraterritorial obligations to prevent based on jurisdiction (Section 3.4).

3.1 Extraterritorial Jurisdiction

Most human rights treaties contain jurisdictional limitations to their applicability. Two examples of jurisdiction clauses are Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR):

> "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 […]."[5]

And Article 1 of the European Convention for Human Rights (ECHR):

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[6]

Other treaties contain similar provisions, albeit in slightly different wording.[7] Human rights treaties contain jurisdictional limitations, because states cannot reasonably be required to ensure all human rights to people everywhere.[8]

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[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 24 March 1976) 999 UNTS 171 (ICCPR) art 2(1).

[6] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) art 1.

[7] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 3; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 2(1); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 1; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case): The Genocide Convention does not contain a jurisdiction clause, but has been applied extraterritorially.

Courts and supervisory bodies confronted with interpreting jurisdictional limitations have conceded that jurisdiction does not end at a state's borders, but may also exist when states have control over territory or people abroad.[9] The International Court of Justice (ICJ) confirmed that state jurisdiction under human rights treaties can extend extraterritorially in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[10] The Court stated that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory" and found that the ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention on the Rights of the Child (CRC) all apply to Israel's acts in the occupied Palestinian territories.[11] To support its decision, the ICJ referred to the object and purpose of the ICCPR and to statements by United Nations (UN) human rights treaty bodies in reporting procedures with Israel, concluding in line with these statements that the Palestinian territory is under Israel's effective control.[12] The concept of jurisdiction is crucial for the legal demarcation of human rights treaty's extraterritorial application. Yet, case law on the topic of jurisdiction is confusing and the criteria for the forms of control that amount to extraterritorial jurisdiction are still under debate.

3.1.1 Instruments

All the instruments that contain obligations to prevent gross human rights violations discussed in Chapter 2 can in principle also apply extraterritorially. This section outlines how courts and supervisory bodies have interpreted jurisdiction in relation to the extraterritorial applicability of the relevant treaties.[13]

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[8] Wenzel, Nicola, 'Human Rights, Treaties, Extraterritorial Application and Effects' (May 2008) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819?rskey=Cf3gOD&result=4&prd=EPIL> para 5.

[9] *Sergio Euben Lopez Burgos v. Uruguay*, Comm. R.12/52, UN Doc Supp. No. 40 (A/36/40) at 176 (1981) (HRC June 6, 1979): The ICCPR was found to apply to a case of arrest and detention abroad; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310: The ECHR was found to apply to the occupied area of Northern Cyprus; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 107-112: Several human rights treaties to which Israel is a party were found to apply to the occupied Palestinian territories.

[10] *Construction of a Wall Advisory Opinion* (n 9) para 108-9.

[11] *Construction of a Wall Advisory Opinion* (n 9) para 109.

[12] *Construction of a Wall Advisory Opinion* (n 9) para 109-10 and 112; Human Rights Committee, 'General Comment 24: 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' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 7: According to the HRCee, the object and purpose of the ICCPR is "to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."

[13] The extraterritorial applicability of three instruments protecting vulnerable groups will not be separately discussed. Although they can contain relevant specifications, the obligations discussed in

A. ECHR, ACHR and ACHPR

The case law of the European Court of Human Rights (ECtHR) on the subject of extraterritorial jurisdiction is the most elaborate of all courts and supervisory bodies. Article 1 of the ECHR declares that state parties shall secure the rights in the Convention "to everyone within their jurisdiction."[14] In the 1995 *Loizidou v. Turkey* case, which concerned Turkey's occupation of Northern Cyprus, the Court for the first time recognized that there are situations in which states exercise jurisdiction in the sense of Article 1 outside state territory.[15] The Court stated:

> "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[16]

Based on a teleological interpretation, the ECtHR concluded that people in occupied territories could not be left without protection of the Convention if the occupying power has effective control over the territory. The occupying power, in this case Turkey, is bound by the ECHR and must ensure the rights contained therein to the people in Northern Cyprus.

Six years after *Loizidou*, the Court delivered its infamous judgment in the 2001 case of *Banković and Others v. Belgium and Others*, concerning a bombing by North Atlantic Treaty Organization (NATO) forces during the Kosovo crisis.[17] In this case, the ECtHR extensively analyzed the concept of jurisdiction under Article 1 of the ECHR to determine whether states also have extraterritorial jurisdiction based on

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this study relating to torture, arbitrary death and genocide in the instruments protecting vulnerable groups do not differ greatly from those contained in other instruments that are of more direct relevance; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1588 UNTS 3 (CRC) art 2: The CRC contains a jurisdiction clause similar to the ICCPR and ECHR and is assumed to apply extraterritorially in largely the same manner; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, *entered into force 3* May 2008) 2515 UNTS 3 (CRPD); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW): The CRPD and CEDAW do not contain a jurisdiction clause, similar to the International Convention on Economic, Social and Cultural Rights (ICESCR). See Chapter 4.3.1.

[14] ECHR (n 6) art 1.

[15] *Loizidou v. Turkey* (n 9) para 62; The reasoning in the *Loizidou* judgment was confirmed in: *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV, para 77; The European Commission had already acknowledged this in earlier cases, such as: *Hess v. the United Kingdom*, no. 6231/73, EComHR judgment on admissibility, (28 May 1975) 73.

[16] *Loizidou v. Turkey* (n 9) para 62.

[17] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

more incidental acts abroad, such as the bombing in question. It started off by declaring that it considered state jurisdiction to be essentially territorial and that extraterritorial application of the Convention would only take place in exceptional circumstances.[18] The Court based this reasoning on the "ordinary meaning of [the] relevant term [jurisdiction] from the standpoint of public international law."[19] The ECtHR further submitted that the ECHR functions primarily within the *espace juridique* of the European contracting parties, because it was not drafted to apply throughout the world.[20] Finally, it claimed that the rights secured in the Convention cannot be "divided and tailored in accordance with the particular circumstances of the extra-territorial act", thereby adopting an all or nothing approach to extraterritorial applicability of the Convention.[21] Based on these considerations, the Court finally decided that Belgium and the other states that took part in the bombings did not exercise jurisdiction and consequently the ECHR did not apply to their actions in Kosovo.

The *Banković* judgment has attracted a great deal of criticism and all of the points mentioned above have been revisited in later case law.[22] First of all, the ECtHR has been criticized for causing confusion by conflating jurisdiction under general public international law with jurisdiction under human rights treaties in its reasoning leading to the conclusion that both types of jurisdiction are primarily territorial.[23] Jurisdiction under public international law refers to a state's "lawful power to act" and is usually broken down into three components: prescriptive, enforcement and adjudicative jurisdiction.[24] Jurisdiction under public international law describes when states have a

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[18] *Banković v. Belgium* (n 17) para 61 and 71.
[19] *Banković v. Belgium* (n 17) para 59.
[20] *Banković v. Belgium* (n 17) para 80.
[21] *Banković v. Belgium* (n 17) para 75; Lawson, Rick 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 83, 103 onwards.
[22] Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 85; Milanović, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 183 onwards.
[23] *Banković v. Belgium* (n 17) para 59-61; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 27: "[N]either the Commission nor the Court in its pre-*Banković* case law based their interpretation of Article 1 ECHR on the general international law doctrine of jurisdiction. (…) The purpose of the doctrine of jurisdiction in international law is precisely to establish whether a claim by a state to regulate some conduct is *lawful or unlawful*. Conversely, 'effective overall control of an area' is a question of *fact*, of actual physical power that a state has over a territory and its people"; Wilde, Ralph, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40(2) IsLR 503, 513: "[T]he European Court of Human Rights seemed to suggest that the meaning of "jurisdiction" in the ECHR reflects the meaning of that term in public international law generally. However, insofar as the Court intended to make this suggestion, it does not fit with how the Court and other authoritative bodies have approached the issue in other cases, which is to define extraterritorial jurisdiction as simply a factual test, regardless of whether such a situation is lawful."
[24] *Banković v. Belgium* (n 17) 59-60; Oxman, Bernard H., 'Jurisdiction of States' (November 2007) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-

lawful basis to carry out prescriptive, enforcement or adjudicative jurisdiction abroad, while jurisdiction under human rights treaties demarcates when a treaty applies.[25] The two forms of jurisdiction may collide, but are entirely different concepts designed for different purposes.[26] Acting abroad lawfully does not automatically mean that a state exercises the level of control required for jurisdiction under human rights treaties. Nor does acting abroad unlawfully mean that human rights treaties do not apply.[27] Second, the *espace juridique* argument has retained hardly any meaning and has in practice never been used to exclude applicability of the ECHR in non-member states.[28] Finally, the Court has accepted the existence of jurisdiction based on more incidental *Banković*-type actions abroad in later case law and introduced a second criterion besides effective control over territory.[29] In the 2004 *Issa v. Turkey* case, which concerned a number of deaths caused by Turkish soldiers in the course of a military operation in Northern Iraq, the ECtHR declared that "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in

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9780199231690-e1436> para 1 and 3; Kamminga, Menno T., 'Extraterritoriality' (November 2012) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=Srx94t&result=2&prd=EPIL> para 1.

[25] Kamminga, 'Extraterritoriality' (n 24) para 7: The legal basis of jurisdiction is grounded in domestic laws, but curtailed by international law, most notably by the principles of state-sovereignty and non-intervention.

[26] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 262: Describes the confusion between the notion of state jurisdiction in human rights treaties and jurisdiction under general international law as the "*Banković* fallacy"; Another example of confusion: *Nuhanović v. The Netherlands* (6 September 2013) Supreme Court of the Netherlands, 12/03324, para 3.17.3: The Supreme court mentions the agreement between the UN and Bosnia Herzegovina as the basis for the Netherlands to carry out jurisdiction under art 1 of the ECtHR in Bosnia. This confuses enforcement jurisdiction and jurisdiction in the sense of art 1 ECtHR as a threshold of control.

[27] *Loizidou v. Turkey* (n 9) para 62: This would make it all too easy for a state to circumvent its human rights obligations, by acting outside of the limits of its prescriptive, enforcement or adjudicative jurisdiction.

[28] Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 114; *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, para 68: The ECtHR found that the Convention was applicable to Turkey's actions in Iraq; *Al-Skeini and others v. the United Kingdom* (n 4) para 142: Addressing the *espace juridique* argument, the court states that: "the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction"; Duttwiler, Michael, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (2012) 30(2) Neth Q Hum Rts 137.

[29] *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV, para 91; *Pad and others v. Turkey (Decision)* no. 60167/00, 28 June 2007, para 53-5: This case is based on a factual scenario similar to *Banković* – namely shooting from an aircraft on foreign territory – the victims killed were considered to fall under the authority and control of Turkey and therefore within its jurisdiction. A difference with the Bankovic case is that Turkey disputed that it had carried out an extraterritorial operation and that the men had crossed the Turkish border and were within Turkish jurisdiction on that account; *Al-Skeini v. the United Kingdom* (n 4); *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) Chapter 4 Section 2 and 3.

the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State."[30]

In the 2011 case of *Al-Skeini v. the United Kingdom*, the ECtHR made a renewed attempt to clarify and systematize the meaning of extraterritorial jurisdiction under Article 1 of the ECHR. The case related to the conduct of United Kingdom (UK) officials during the occupation and armed conflict in Iraq. Based on its past cases, the Court now clearly distinguished between two forms of extraterritorial jurisdictional control: over territory and over individuals.[31] To exercise extraterritorial jurisdiction over a territory, a state must carry out *effective control* over an area abroad, which can be the consequence of lawful or unlawful military action.[32] In the *Al-Skeini* case, the Court asserted that effective control over a territory can simply be determined as a matter of fact, "primarily [by having] reference to the strength of the State's military presence in the area."[33] The Court also outlined indicators for indirect forms of effective control exercised through a local subordinate administration, such as "the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region."[34] If a state exercises extraterritorial jurisdiction over a territory, all individuals in that territory are considered to be under its jurisdiction and the state is required to secure all the Convention's rights in that area.[35] Alternatively, a state may exercise extraterritorial jurisdiction based on *authority or control* over individuals abroad. Several examples are mentioned in the *Al-Skeini* case of the types of situations in which states were found to have extraterritorial jurisdiction over individuals: (i) When its diplomatic or consular agents carry out authority or control over a person; (ii) When it carries out all or some of the public powers based on the consent, invitation or acquiescence of the local government; or (iii) When it exercises physical power and control over people through the use of force.[36] If a state carries out authority and control over an individual, it is required to ensure that individual's rights as relevant to the specific situation.[37] With the latter statement, the Court clearly concedes that the Convention rights can be divided and tailored in accordance with the particular circumstances.

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[30] *Issa v. Turkey* (n 28) para 70-1: The ECtHR decided it was unnecessary to "determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area (…) since even overall control of the area may engage the responsibility of the Contracting Party."

[31] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) Chapter 4 Section 2 and 3; *Al-Skeini v. the United Kingdom* (n 4); See also: *Al-Jedda v. the United Kingdom* (n 29).

[32] *Al-Skeini v. the United Kingdom* (n 4) para 138.

[33] *Al-Skeini v. the United Kingdom* (n 4) para 139.

[34] *Al-Skeini v. the United Kingdom* (n 4) para 139.

[35] *Al-Skeini v. the United Kingdom* (n 4) para 138.

[36] *Al-Skeini v. the United Kingdom* (n 4) para 134-6.

[37] *Al-Skeini v. the United Kingdom* (n 4) para 137.

The application of these principles to the factual scenarios in the *Al-Skeini v. the United Kingdom* case and Court's 2014 judgment in the *Jaloud v. the Netherlands* case show that the two forms of jurisdiction – over territory and individuals – are not neatly separable.[38] These cases also illustrate that the general international law context can be important to establish jurisdiction, such as whether a state is an occupying power or has assumed certain responsibilities under an international mandate.[39] Both cases found their origin in the military invasion in Iraq and subsequent occupation by the United States (US), UK and several smaller coalition parties acting under the caretaker administration of the Coalition of Provisional Authorities (CPA).[40] The *Al-Skeini* case involved multiple killings of Iraqi civilians in the course of security operations in Northern Iraq by UK soldiers.[41] Although the Court does not expressly address whether the UK had effective control over the territory concerned, implicitly agreeing with the domestic courts that this was not the case, it considers the fact that the UK assumed authority and responsibility for security in the region as an important factor in its conclusion that the UK exercised jurisdiction over individuals killed in the course of security operations.[42] The *Jaloud v. the Netherlands* case concerned the shooting of Mr. Jaloud while he was driving towards a checkpoint in South-Eastern Iraq, that was manned by members of the Iraqi Civil Defense Force and six Dutch soldiers.[43] The Netherlands was not one of the occupying powers in Iraq and the Dutch soldiers were under the operational control of the UK, but the Court held that this was not per se determinative for the question whether the Netherlands exercised jurisdiction.[44] The Netherlands was acting under a SC mandate and had assumed responsibility for the security in South-Eastern Iraq and "retained full command over its contingent there."[45] Therefore, the Court found that the Netherlands asserted authority and control over individuals passing through the

[38] Raible, Lea, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (2016) (2) EHRLR 161, 164-5: Shows that the ECtHR has difficulty separating the territorial and individual model of jurisdiction in the *Jaloud* and *Pisari* cases. Raible suggests that either the court is confirming criticism that the territorial model collapses into the individual model when applied to ever-smaller areas, or that the two models were never separate to begin with and jurisdiction always essentially "denotes control over persons and [...] control over territory merely functions as a shorthand in this context."

[39] *Al-Skeini v. the United Kingdom* (n 4); *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014; See also: *Pisari v. Moldova and Russia*, no. 42139/12, 21 April 2015.

[40] *Al-Skeini v. the United Kingdom* (n 4) para 9-19; *Jaloud v. the Netherlands* (n 39) para 10-6.

[41] *Al-Skeini v. the United Kingdom* (n 4) para 33-71.

[42] *Al-Skeini v. the United Kingdom* (n 4) para 112, 135 and 143-50: Note that one of the three examples of authority and control over individuals mentioned by the ECtHR under the heading of general principles is "when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government." The *Al-Skeini* case itself, however, concerned belligerent occupation without consent from the Government of Iraq.

[43] *Jaloud v. the Netherlands* (n 39) para 10-6.

[44] *Jaloud v. the Netherlands* (n 39) para 140-3.

[45] *Jaloud v. the Netherlands* (n 39) para 144-9.

checkpoint.[46] Again, the Court did not clarify whether the Netherlands exercised jurisdiction over territory or individuals.[47] In both cases, the ECtHR accepted a mixed form of jurisdiction in which states exercise occasional forms of jurisdiction over individuals in the context of responsibilities assumed in a territory.

Article 1 of the American Convention on Human Rights (ACHR) declares that state parties must "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" contained in the Convention, which is very similar to the phrase in the ECHR.[48] Also similar to the ECtHR, the main criteria used by the Inter-American Commission on Human Rights (IAComHR) to establish extraterritorial jurisdiction under the Inter-American Declaration and Convention are those of effective control and authority and control.[49] However, there are some differences in their application. In the 1996 *Coard v. the United States* case, the IAComHR stressed the fact that the Convention's rights are inherent to everyone by virtue of their humanity and reaffirmed the criterion of authority and control.[50] The emphasis on humanity and inherent rights has sometimes allowed for a very loose interpretation of authority and control. One of the most remarkable cases to demonstrate this is the 1999 *Brothers to the Rescue v. Cuba* case.[51] The factual scenario that gave rise to the complaint took place entirely in international airspace: a Cuban military aircraft forced down two civilian aircrafts with air-to-air missiles. Despite the fact that there was no further relationship between the victims in the civilian aircrafts and Cuba, the AComHR considered them to be within Cuban jurisdiction for the purpose of the ACHR based on the factual control through force

[46] *Jaloud v. the Netherlands* (n 39) para 152-3.

[47] Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 163: The public powers criterion is discussed "under the heading of the personal model, even though it is not entirely obvious that the exercise of public powers should not also be relevant in the context of the spatial one." She later adds: "It seems the idea was to add a specification to the personal model that would preserve its role as a delimiting criterion of extraterritoriality."

[48] ACHR (n 7) art 1; ECHR (n 6) art 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[49] *Victor Saldano v. Argentina* (Admissibility) Decision of March 11, 1999, IAComHR Rep No 38/99, para 19; *Hatian Centre for Human Rights v. the United States ('US Interdiction of Haitians on the High Seas')* (Merits) Decision of March 13, 1997, IAComHR Rep No 51/96, para 167; *Coard and Others v. the United States* (Merits) Decision of September 29, 1999, IAComHR Rep No 109/99, para 37; The application of the authority and control criterion has sometimes led to different outcomes in similar situations. Compare the *Banković* bombing to the air-to-air missiles in: *Armando Alejandre Jr and Others v. Cuba ('Brothers to the Rescue')* (Merits) Decision of September 29, 1999, IAComHR Rep No 86/99, para 23-25; Cerna, Christina M., 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 141, 145, 152, 155; Cassel, Douglas, 'Extraterritorial Application of Inter-American Human Rights Instruments' in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 175: So far, the Inter-American Court (IACtHR) has not yet decided on any cases requiring it to consider the extraterritorial applicability of the Convention.

[50] *Coard and Others v. the United States* (n 49) para 37.

[51] *Brothers to the Rescue v. Cuba* (n 49) para 586.

exercised by the Cuban military aircraft. In terms of the obligations states have once a state exercises extraterritorial jurisdiction, the IAComHR has not offered any clarity. It has stated that no person under a state's authority and control, regardless of their precise location, is "devoid of legal protection for his or her fundamental and non-derogable human rights", offering nu further guidance in terms of corresponding obligations.[52]

The African Convention on Human and Peoples' Rights (ACHPR) does not contain a jurisdiction clause. Commentators have argued that the absence of a jurisdiction clause means that the Charter leaves room for extraterritorial applicability.[53] This has indeed been confirmed by the interpretative practice of the African Commission on Human and Peoples' Rights (AComHPR). In the 2003 *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda* case, based on an inter-state complaint by the DRC about the forceful occupation and human rights violations committed on its territory, the AComHPR decided that the occupying states had committed grave violations of the rights of people in the DRC under the Charter while they had effective control over the relevant provinces.[54] In 2015 the AComHPR adopted General Comment 3 on the Right to Life, in which it highlighted the extraterritorial dimension of the right.[55] It proclaims that states shall respect and under certain circumstances protect the right to life of people outside their territory and that "[t]he nature of these obligations depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights), or exercises effective control over the territory on which the victim's rights are affected."[56] Although the criteria are similar to the ones used to establish jurisdiction under the ECHR and ACHR, the ACHPR's scope of applicability and obligations may well be wider than that of other

[52] *Decision on Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba* (Precautionary Measures) Decision of March 12, 2002, IAComHR 41 ILM 532 (2002); ACHR (n 7) 27(2): Lists all the rights that cannot be suspended, even in times of emergency.

[53] Bulto, Takele Soboka, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' (2011) 27(2) S Afr J Hum Rights 249, 257-8.

[54] *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda*, AComHPR, Communication No. 227/1999 ((19 May 2003), para 91 and final holdings; Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' (n 53) 260-1.

[55] African Commission on Human and Peoples' Rights, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)', Adopted during the 57th ordinary session 4-18 November 2015 in Banjul, Gambia, available at: <http://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=171>.

[56] AComHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (n 55) para 14: It is worth noting that, in this phrase, the "extent" of jurisdiction and content and scope of corresponding extraterritorial obligations are linked. Section 3.2 will instead argue in favor of separate criteria for the threshold function of jurisdiction and content and scope of obligations.

treaties.[57] There are two expressions in the sentence in General Comment 3 that indicate as much. First of all, the AComHPR refers to situations in which a state exercises jurisdiction "or otherwise exercises effective authority, power or control" over individuals, implying that there are other forms of authority, power or control than jurisdiction that can trigger obligations.[58] It may be a textual anomaly that should not be given too much importance, but is noteworthy nonetheless. Second, there is a reference to authority, power and control over the perpetrator, which is not sufficient to establish jurisdiction under the other general human rights treaties that normally require control over the individual whose rights are affected.[59] In any case, the AComHPR acknowledges that the Charter may apply to the extraterritorial conduct of states both based on authority, power or control over individuals and effective control over territory.

B. ICCPR

Article 2(1) of the ICCPR declares that state parties must "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[60] This phrase is slightly different than the ones in the ECHR and ACHR, which only refer to people subject to the state's jurisdiction and do not mention territory at all. Solely based on the text of the provision, the ICCPR could be interpreted to apply to people who are both within the state party's territory *and* within its jurisdiction, limiting its application strictly to territory.[61] The ICJ and the supervisory body of the ICCPR, the Human Rights Committee (HRCee), have not interpreted it that strictly.[62] The HRCee acknowledged that obligations under the ICCPR can also apply extraterritorially as early as the 1981 case of *López Burgos v.*

[57] Probert, Thomas, 'The New African Commission General Comment on the Right to Life is an Important Step Forward' (17 December 2015) Just Security Blog, available at: <https://www.justsecurity.org/28403/african-commission-general-comment/>; Ogendi, Paul, 'The right to life in Africa: General Comment No. 3 on the African Charter on Human and Peoples' Rights' (10 February 2016) AfricLaw Blog, available at: <https://africlaw.com/2016/02/10/the-right-to-life-in-africa-general-comment-no-3-on-the-african-charter-on-human-and-peoples-rights/>.

[58] AComHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (n 55) para 14.

[59] The phrase "general human rights treaties" in the context of this study refers to treaties that contain a set of different human rights and do not focus on one right / prohibition or vulnerable group; See Chapter 4.1, 4.2 and 4.4: In fact, influence over (potential) perpetrators is an important basis for obligations beyond territory and jurisdiction discussed in Chapter 4.

[60] ICCPR (n 5) art 2(1).

[61] McGoldrick, Dominic, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 41, 55.

[62] *Construction of a Wall Advisory Opinion* (n 9) para 111; Human Rights Committee, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 10; King, Hugh, 'The Extraterritorial Human Rights Obligations of States' (2009) 9(4) HRLR 521, 523.

Uruguay.[63] It thereby silenced claims that the phrase "within its territory and subject to its jurisdiction" in Article 2 should be read conjunctively.[64] The case concerned the abduction of Mr. López Burgos by Uruguayan state agents acting across the border in Buenos Aires, Argentina. Mr. Burgos had fled to Buenos Aires to escape from harassment by Uruguayan authorities related to his involvement in a Uruguayan trade union. After his abduction, he was held in incommunicado detention and tortured. In an oft-cited dictum the HRCee stated that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[65] This reasoning seems to do away almost entirely with the limiting function of jurisdiction on the applicability of the treaty. However, the Committee added that obligations under the ICCPR may be applicable extraterritorially only when the relationship between the state and the individual so warrants.[66]

What requirements the relationship between a state and individual must meet to warrant extraterritorial applicability of the ICCPR is not very clear.[67] In its General Comment 31, the HRCee stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[68] The power or effective control criterion seems similar to the criteria used to establish jurisdiction in the ECtHR and IAComHR case law. However, the HRCee employed the effective control notion to describe when a state has extraterritorial jurisdiction over individuals, while the ECtHR and IAComHR use it to describe extraterritorial jurisdiction over territory. The power criterion is often conflated with control and could be interpreted similarly to the ECtHR's and IAComHR's authority and control

[63] *Lopez Burgos v. Uruguay* (n 9).
[64] ICCPR (n 5) art 2(1); McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' (n 61) 55 and 66: Discusses the *travaux préparatoires* of the ICCPR, which also suggest that the phrase "within its territory and subject to its jurisdiction" should be read disjunctively; Despite the relevant interpretations by the HRCee and ICJ and broad support for the disjunctive reading of Article 2(1) ICCPR, the United States and Israel have for a long time continued to claim that the ICCPR only applies territorially: Concluding Observations HRCee on the United States of America (23 April 2014) UN Doc CCPR/C/USA/CO/4, para 4; Concluding Observations HRCee on Israel (21 November 2014) UN Doc CCPR/C/ISR/CO/4, para 5.
[65] *Lopez Burgos v. Uruguay* (n 9) para 12.3.
[66] *Lopez Burgos v. Uruguay* (n 9) para 12.2: "The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."
[67] King, 'The Extraterritorial Human Rights Obligations of States' (n 62) 524-6 and 529: "In the absence of HRC elaboration, several possible relationships suggest themselves." Continues to describe a legal relationship, factual relationship or relationship based on nationality.
[68] HRC, General Comment 31 (n 62) para 10.

criterion.[69] Overall, the criteria for extraterritorial applicability of the ICCPR are a bit muddled and not as refined as in the case law of the ECtHR, which may be explained by the sheer volume of cases involving the issue of extraterritoriality dealt with by the ECtHR as opposed to the HRCee.[70] The HRCee has also not offered a principled view on what corresponding obligations states have when they exercise extraterritorial jurisdiction. In the concluding observations of reporting procedures, the HRCee has recommended that states should train their officials properly for extraterritorial operations, ensure independent modes of oversight for drone-strikes, provide victims of human rights abuses with access to remedy and prosecute state officials responsible for human rights abuses abroad.[71]

C. CAT and IACPPT

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) limits the applicability of the general obligation to prevent torture and ill-treatment in Articles 2 and 16, which both refer to "any territory under its jurisdiction."[72] Purely based on the text of the provisions, "any territory under its jurisdiction" could be taken to mean that states can only exercise extraterritorial jurisdiction over territory, which would exclude jurisdiction over individuals on a more incidental basis, which has been accepted as a form of jurisdiction by the ECtHR, IAComHR, AComHPR and HRCee. In General Comment 2, however, the CAT Committee stated that "the concept of "any territory under its jurisdiction," linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party."[73] The interpretation therefore includes control over individuals similar to the authority and control criterion used by the ECtHR and ACtHR.[74] The Special Rapporteur on Torture, in a 2015 report on the extraterritorial applicability of the prohibition of

[69] Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 165: Discusses the criterion of power and explains the difference between power and control as the difference between potential versus exercise. She notes that the two are often conflated by the ECtHR, which can also be said about other courts and supervisory bodies.

[70] See Section 3.1.1 A ECHR, ACHR and ACHPR; In comparison, the *Lopez Burgos v. Uruguay* (n 9) case is so far the only individual complaint that has come before the HRCee involving the issue of extraterritoriality.

[71] Concluding Observations HRCee on the United States of America 2014 (n 64) para 5, 9 and 21; Concluding Observations HRCee on Belgium' (12 August 2004) UN Doc CCPR/CO/81/BEL, para 6, 9 and 10.

[72] CAT (n 7) art 2 and 16.

[73] Committee Against Torture, 'General Comment 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2, para 7: With de jure control, the CAT Committee refers to laws that can have extraterritorial effect; Even the United States of America has now accepted this position: Statement by NSC Spokesperson Bernadette Meehan on the U.S. Presentation to the Committee Against Torture, November 12 2014, available at: <https://www.whitehouse.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a>.

[74] *Al-Skeini v. the United Kingdom* (n 4) para 134-6.

torture, confirmed that the CAT is applicable in situations where a state has control over a territory abroad as well as control over individuals on a more incidental basis.[75] The CAT Committee has not dealt with individual cases through the individual complaints procedure that concerned claims related to extraterritorial acts of torture.[76] In the reporting procedures, the CAT Committee has confirmed the treaty's extraterritorial applicability. For example, it has continually held that the CAT is applicable to Israel's actions in the occupied Palestinian territories and that Israel has reporting and other obligations in this regard.[77]

The CAT contains several other references to its scope of applicability in other provisions. Articles 11 and 12, which deal with obligations related to custody arrangements and the obligation to investigate respectively, also refer to "any territory under [the state party's] jurisdiction."[78] The multiple explicit references to jurisdiction raise the question whether and how provisions that lack an explicit jurisdictional limitation apply extraterritorially.[79] For example, the scope of applicability of Article 14 of the CAT is under discussion, which contains a right to remedy for victims of torture without any geographic or jurisdictional limitation.[80] The CAT Committee and Special Rapporteur on Torture have widely interpreted Article 14 to mean that states must provide victims of torture a procedure to obtain reparations, regardless of the location where torture was committed, which may involve bringing a civil case for

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[75] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (7 August 2015) UN Doc A/70/ 303, para 29-30: "[T]he Convention's drafting history reveals a preoccupation with balancing the practicability of implementing its provisions rather than an intent […] to dilute the strength of its applicability."

[76] Rather, most cases brought before the CAT Committee deal with (pending) deportations or extraditions where there is an alleged risk of torture upon return. In the CAT Committee's case law, territory is mostly mentioned as a confirmation of a state's obligations to respect, protect and fulfill their obligations under the treaty in relation to the people present within their territory; *Tebourski v. France*, Comm. 300/2006, UN Doc CAT/C/38/D/300/2006, A/62/44 (2007) Annex VII at 317 (CAT Committee May 01, 2007) para 8.2: Article 3 provides absolute protection of anyone on the state's territory, regardless of his/her character or the threat he/she poses to society.

[77] Concluding Observations CAT Committee on Israel (17 October 2002) UN Doc A/57/44 (SUPP) para 47-53, VI. Opinion of the United Nations Legal Counsel concerning the applicability of the Convention in the Occupied Palestinian Territory: In his reply of 19 September 2001 the Legal Counsel stated that, "the Convention is binding upon Israel, as the occupying Power in respect of the Occupied Palestinian Territory." He added that, "the Committee against Torture appears already to have proceeded upon this supposition"; Concluding Observations CAT Committee on Israel (15 May 2009) UN Doc CAT/C/ISR/CO/4.

[78] CAT (n 7) art 11.

[79] Nowak, Manfred, 'Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective' in Gibney, Mark and Skogly, Sigrun (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pensylvania Press, 2012) 11, 15.

[80] CAT (n 7) art 14; Concluding Observations CAT Committee on Canada (7 July 2005) UN Doc CAT/C/CR/34/CAN, paras 4(g), 5(f); Hall, Christopher Keith, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18(5) EJIL 921.

reparations against a foreign state and its officials.[81] However, national courts have not generally accepted this position and the ECtHR and commentators have interpreted the provision as being permissive of, rather than requiring, universal civil jurisdiction.[82] Furthermore, Article 5 contains an obligation to punish acts of torture by asserting criminal adjudicative jurisdiction over alleged perpetrators based on the nationality of the victim or perpetrator (principles of passive or active nationality), or the perpetrator's presence within its jurisdiction, regardless of nationality or where the crime was committed (universal jurisdiction).[83] The principles of active nationality and universal jurisdiction are essentially a form of influence over the perpetrators of torture instead of control over the victims. Therefore, the full scope of this obligation to punish torture extends beyond situations of extraterritorial jurisdiction and will be discussed in Chapter 4, but its relevance for situations of extraterritorial jurisdiction will be highlighted in the third part of this chapter.

The Inter-American Convention to Prevent and Punish Torture (IACPPT) contains a jurisdictional limitation in Article 6, which prescribes that states should "take effective measures to prevent and punish torture within their jurisdiction."[84] Neither the IAComHR nor the IACtHR, which ascribed itself the competence to judge claims based on the IACPPT in the *Street Children* case, have passed a judgment in which it elaborates on the extraterritorial applicability of the treaty.[85] It would seem desirable from the viewpoint of legal certainty that Article 6 of the IACPPT is interpreted along the same lines as the IAComHR has interpreted Article 1 of the ACHR.[86] This means

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[81] Concluding Observations CAT Committee on Canada 2005 (n 80) 4(g) and 5(f); Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 55 onwards; Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (n 80) 922.

[82] See for example: *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* (14 June 2006) House of Lords [2006] UKHL 26, para 34-5, 102-5: The claimants started a civil law suit for reparations for acts of torture against the state of Saudi Arabia and several Saudi state officials in the United Kingdom. The House of Lords finally upheld the immunity of the state and state officials from prosecution in a civil case in the United Kingdom, thereby denying the claim for reparations of the applicants; *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014: The ECtHR did not consider this to be a violation of the right to access to court in Article 6(1) ECHR; Nowak, Manfred, Elizabeth McArthur and Kerstin Buchinger, *The United Nations Convention Against Torture: A Commentary* (OUP, 2008) 492 onwards; Parlett, Kate, 'Universal Civil Jurisdiction for Torture' (2007) 4 EHRLR 385, 403.

[83] CAT (n 7) art 5; Bantekas, Ilias, 'Criminal Jurisdiction of States under International Law' (March 2011) MPEPIL <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1021?rskey=v8P17C&result=1&prd=EPIL>: Note that universal jurisdiction is a form of criminal jurisdiction, which is different from jurisdiction as discussed in this chapter used to limit the applicability of human rights treaties.

[84] Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67 (IACPPT) art 6.

[85] *The "Street Children" (Villagrán-Morales et al.) v. Guatemala* (Merits) Judgment of November 19, 1999, I/A Court HR Series C No. 63, para 247.

[86] ACHR (n 7) art 1: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction (…)."

that the main criterion would be whether state officials carry out authority and control over individuals abroad.[87] Like the CAT, the IACPPT contains an obligation in Article 12 to assert criminal jurisdiction to punish perpetrators of torture based on the principles of active nationality and universal jurisdiction.[88]

D. Genocide Convention

The Genocide Convention does not contain a jurisdiction clause, which the ICJ has interpreted to mean that its provisions may in principle apply extraterritorially.[89] In its 1996 judgment on preliminary objections in the *Genocide* case, the ICJ found that "the obligation each State [...] has to prevent and to punish the crime of genocide is not territorially limited by the Convention."[90] The absence of a territorial or jurisdictional limitation does not mean that the obligation applies without any sort of limitation.[91] To strike an appropriate balance, the ICJ chose to formulate a unique standard to determine when a state is obligated to prevent genocide extraterritorially.[92] In paragraph 430 of its 2007 judgment on the merits of the *Genocide* case, the Court ruled that Serbia had an obligation to prevent genocide in Bosnia based on its "capacity to influence effectively" the (potential) perpetrators and knew or should have known of the "serious risk" that genocide would be committed.[93] The Court attempted to clarify the concept of a capacity to influence effectively by offering three factors to help determine when a state has such a capacity. These factors are: (i) Geographical distance; (ii) The strength of political and other links; and (iii) The legal position *vis a vis* the situation and persons facing the danger.[94]

The use of the term "effectively" and the three factors to assess when a state has a capacity to influence, suggest that the obligation to prevent genocide in specific cases

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[87] *Victor Saldano v. Argentina* (n 49) para 19; *Hatian Centre for Human Rights v. the United States* (n 49) para 167; *Coard and Others v. the United States* (n 49) para 37; The application of the criterion of authority and control has sometimes led to different outcomes in similar situations. Compare the *Banković* bombing to the air-to-air missiles in: *Brothers to the Rescue v. Cuba* (n 49) para 23-25.
[88] IACPPT (n 84) art 12.
[89] *Genocide* case (n 7) para 183-4: In the Genocide case, the ICJ addressed the extraterritorial applicability of Articles 1, 3 and 6. Its conclusion was that Articles 1 and 3 "are not on their face limited by territory", while Article 6 contains an express territorial limitation. Other provisions in the Genocide Convention which have been ascribed preventive effect, such as Articles 5 and 8, are also not on their face limited by territory. Therefore, it will be assumed that they apply when a state has extraterritorial jurisdiction.
[90] *Genocide case* (n 7) para 31.
[91] *Genocide* case (n 7) 154; See Chapter 4.1.2 Genocide Convention: Argues that the capacity to influence effectively has a threshold function similar to jurisdiction.
[92] *Genocide* case (n 7) para 183-2: "The substantive obligations arising from Articles I and III (...) apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below)."
[93] *Genocide* case (n 7) para 430-1.
[94] *Genocide* case (n 7) para 430.

is still limited in its application, just not by territory or jurisdiction.[95] The ICJ thereby introduced a layer of obligations that goes well beyond the concept of jurisdiction as used in the context of other human rights instruments. It held Serbia responsible because it "did nothing to prevent the Srebrenica massacres", while it did not have effective control over the area where the massacres took place nor authority and control over the victims, but a capacity to influence effectively the perpetrators of the genocide.[96] Not all judges agreed with this standard. In a separate opinion to the *Genocide* case, Judge Tomka expressed the opinion that the Court should have used jurisdiction to limit the applicability of the Convention, despite the absence of a jurisdiction clause.[97] The full repercussions of the capacity to influence effectively will be discussed in the next chapter.[98] For now, it is sufficient to conclude that the criteria for jurisdiction – effective control over territory or authority or control over individuals whose rights are affected – are more narrow than what is required for states to have a capacity to influence effectively the (potential) perpetrators of genocide. Based on the factors introduced by the ICJ to assess whether a state has a capacity to influence effectively, it is likely that any state that exercises extraterritorial jurisdiction in an area in which there is a (real risk of) genocide has such a capacity based on its geographical proximity, political and other links and legal position.[99] Therefore, when a state exercises extraterritorial jurisdiction, it is certainly bound by the obligation to prevent genocide.

In contrast to the other provisions in the Genocide Convention, the obligation to prosecute and punish in Article 6 contains an express territorial limitation.[100] The provision reads:

> "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[101]

In the *Genocide* case, the ICJ explained that Article 6 does not obligate states to prosecute and punish alleged perpetrators of genocide on any other ground than that

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[95] See Chapter 4.1.2 Genocide Convention and 4.2 B.1 Genocide: It is argued in these sections, that the capacity to infleunce effectively is not only the threshold and basis for extraterritorial obligations, but also helps determine the scope of obligations.

[96] *Genocide* case (n 7) para 438.

[97] *Separate Opinion of Judge Tomka to the Genocide* case (n 7) para 67.

[98] See Chapter 4.1.2 Genocide Convention.

[99] *Genocide* case (n 7) para 430; Tams, Christian, Berster, Lars and Schiffbauer, Bjorn, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck, co-published by Hart and Nomos, 2013) 52 para 46 (ii): Explains the geographical distance factors as "presence in the area where acts of genocide threaten to take place, or close thereby."

[100] Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 6.

[101] Genocide Convention (n 100) art 6.

the acts took place on their territory.[102] At the same time, states are permitted to assume criminal prosecution on other grounds, such as the nationality of the accused or universal jurisdiction.[103] States do have an obligation to cooperate with international penal tribunals of which they have accepted jurisdiction.[104] How the express territorial limitation affects the scope of obligations to prevent genocide in situations of extraterritorial jurisdiction will be discussed in the third part of this chapter.

3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations

Based on the above overview, it can be concluded that jurisdiction in human rights treaties first and foremost introduces a limit to a treaty's or provision's applicability. For extraterritorial settings, this means that jurisdiction functions as a preliminary step to ascertain whether a treaty applies and thus whether a state party has obligations under that treaty. It is a threshold for extraterritorial applicability. If the threshold is reached, the state exercises extraterritorial jurisdiction and there is a basis for extraterritorial obligations. To reach the threshold of jurisdiction, a state needs to have certain forms of control over territory or people abroad. What level of control leads to extraterritorial applicability differs somewhat per treaty or even per provision, but can roughly be divided into effective control over territory and authority or control over individuals. The former has been labeled the spatial model of jurisdiction and the latter the personal model of jurisdiction.[105] These two models are not truly separable, as was demonstrated in Section 3.1.1 A with the *Al-Skeini v. the United Kingdom* and *Jaloud v. the Netherlands* examples. This section offers a further analysis of the case law discussed above and outlines the work of scholars and experts on the threshold function of jurisdiction.

The spatial model of jurisdiction requires that states exercise effective control over territory, either through the presence of its own military forces or through a local subordinate administration.[106] The spatial model can best be understood as a

[102] *Genocide* case (n 7) para 184 and 442; *Separate Opinion of Judge Tomka to the Genocide* case (n 7) para 65.
[103] *Genocide* case (n 7) para 442.
[104] Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 99) 255 para 56.
[105] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 127 onwards and 173 onwards; Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 165.
[106] *Al-Skeini v. the United Kingdom* (n 4) para 139: It is primarily determined by "the strength of the State's military presence in the area", but "[o]ther indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region"; *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda* (n 54) para 91 and final holdings.

shorthand for personal jurisdiction.[107] Ultimately, extraterritorial jurisdiction is personal in nature, meaning that in the end it always comes down to control over individuals.[108] Extraterritorial jurisdiction over territory in effect introduces a presumption that all individuals in that territory are within the controlling state's jurisdiction.[109] The types of situations in which states have been found to carry out spatial jurisdiction often involve a pervasive and systematic presence abroad.[110] However, a state does not have to be formally recognized as an occupying power to exercise spatial jurisdiction, nor does an occupying power per definition exercise spatial jurisdiction over the occupied territory. Jurisdiction derives from control, not from a state's title under international law.[111] In the *Jaloud v. the Netherlands* case, the ECtHR pointed out that "the status of "occupying power" within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative" but it can sometimes be a relevant consideration for establishing jurisdiction.[112] If a state does not exercise spatial jurisdiction, it may still exercise extraterritorial jurisdiction based on more incidental exercises of control abroad.[113] The personal model of jurisdiction establishes the jurisdictional link between a state and individual based on forms of authority and control exercised over the individual. Authority and control

[107] Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 165: "[J]urisdiction always denotes control over persons and […] control over territory merely functions as a shorthand in this context"; Concurring opinion of Judge Bonello in the *Al-Skeini v. the United Kingdom* (n 4) para 24-8: Argues that military occupation should give rise to a presumption of jurisdiction, which can be rebutted by the state.
[108] Besson, Samantha, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25(4) LJIL 857, 874-5: "[J]urisdiction over territory is […] an indirect and general form of jurisdiction over people."
[109] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 876-7: Speaks of the "presumption of jurisdiction" and "facilitated evidence mechanisms" at least in the case of lawful occupation.
[110] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 876-8 and her chart of the ECtHR's assessment of jurisdiction in terms of evidence on 871.
[111] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) International Peace Conference, The Hague, Official Records (Hague Regulations) art 42; *Al-Skeini v. the United Kingdom* (n 4) para 112, 123-4, 135, 138 and 143-50: Lord Justice Brooke stated in the Court of Appeal: "In my judgment it is quite impossible to hold that the UK … was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time." The ECtHR later implicitly confirmed this view by employing the personal model of jurisdiction, even though the UK was formally an occupying power.
[112] *Jaloud v. the Netherlands* (n 39) para 142: In *Al-Skeini* and *Al-Jedda* the status as occupying power was considered relevant, but the ECtHR also lists a series of cases in which it was not considered, such as *Ilaşcu*.
[113] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 171: Describes how the spatial model "collapses" into the personal model as it is applied to smaller and smaller spaces; Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 165 and 167: Describes the spatial and personal models as complementary. The article also shows how in the *Jaloud* and *Pisari* cases the ECtHR itself does not make the distinction in establishing jurisdiction.

over individuals has consistently been found to exist in situations of arrest and detention abroad.[114] However, the case law has been less consistent with regard to deaths by bombings and shootings.[115]

One of the most pressing and controversial issues still surrounding the threshold function of jurisdiction under human rights treaties is the unclarity in regard to what exactly constitutes authority and control over individuals.[116] After all, this is the minimum amount of control that a state has to exercise abroad to reach the threshold of jurisdiction and accrue extraterritorial human rights obligations. The question is when exactly a state exercises jurisdiction in cases where there is looser contact between state officials and individuals outside their territory. The question arises with bombings and shootings, but for example also when a ship flying the state's flag is aware and in proximity of a ship in distress on the high seas.[117] There are different schools of thought on the meaning of personal jurisdiction as a threshold, one factual and the other normative. Several authors have argued that it should be enough for a jurisdictional link that an individual is affected by the extraterritorial acts or omissions of a state. Lawson, for example, has proposed a "direct and immediate link-test", suggesting that the crux of delimitation lies with the chain of causality.[118] He regards the decisive factor to be whether the state has control over individuals which leads to an "obvious causal connection" between its acts and a human rights violation.[119] Alternatively, Judge Bonello in his concurring opinion to the *Al-Skeini* case put forward a "functional test", after critiquing the approach of the ECtHR for not going far enough in "erect[ing] intellectual constructs of more universal application."[120] According to Bonello, there are by and large five ways in which states can observe human rights: (i) By not violating a right; (ii) By having systems in place which prevent breaches; (iii) By investigating complaints of breaches; (iv) By prosecuting and punishing state agents who commit breaches; and (v) By

[114] Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (n 28) 143-7: Contains an overview of all EComHR and ECtHR cases involving elements of detention.

[115] Compare: *Banković v. Belgium* (n 17); *Brothers to the Rescue v. Cuba* (n 49); *Al-Skeini v. the United Kingdom* (n 4).

[116] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 173: Argues that any limit to the exercise of authority and control over individuals, for example to cases in which a state has physical custody, would be arbitrary.

[117] Trevisanut, Seline, 'Search and Rescue Operations at Sea: Who is in Charge? Who is Responsible?' (28 May 2013) SHARES blog, available at: <http://www.sharesproject.nl/search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible/>; See Chapter 5.4.1 Challenges: The example of refugees and migrants drowning on the high seas is used as an example to illustrate the underdeveloped state of extraterritorial obligations to prevent gross human rights violations under international human rights law.

[118] Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 104.

[119] Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 104.

[120] Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 7.

compensating the victims of breaches.[121] He argues that when a state has authority and control on any of these levels of observance, it has jurisdiction.[122] Lawson and Bonello's proposed jurisdiction-tests approach the threshold function of jurisdiction in a factual manner, basically claiming that whenever state officials affect an individual's rights, they exercise authority and control over that individual.[123]

Another school of thought has argued that jurisdiction must act as a normative threshold that distinguishes it from situations in which states merely affect people's rights, because jurisdiction would otherwise become obsolete as a threshold.[124] Milanović has described that jurisdiction "would serve no useful purpose as a threshold for the application of a human rights treaty [if it were equated with a state affecting an individual's rights], since the treaty would apply whenever the state could actually infringe it."[125] At the same time, he criticizes the personal model of jurisdiction, contending that there are effectively no non-arbitrary limits to its application.[126] To solve this problem, he proposes that there should be no threshold for negative obligations, "because states can always control the actions of their organs or agents" and refrain from violating the rights of people abroad.[127] Jurisdiction should exist as a threshold for positive obligations, to secure and ensure human rights in territories over which a state has spatial jurisdiction.[128] Thought-provoking as it may be, his approach is not likely to gain much influence in practice, because existing case law interprets jurisdictional thresholds as applying equally to all obligations in a

[121] Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 10.
[122] Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 31-2.
[123] In practice, this seems to make a difference especially for cases of bombings or shootings, where authority and control over the victim(s) can be harder to prove. See: Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 28: "Jurisdiction flows not only from the exercise of democratic governance, not only from ruthless tyranny, not only from colonial usurpation. It also hangs from the mouth of a firearm."
[124] Den Heijer, Maarten, *Europe and Extraterritorial Asylum* (Hart Publishing, 2012) 41; Duttwiler, Michael, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (n 28) 155.
[125] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 173.
[126] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 207-9; Milanović, Marko, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) EJIL 121, 129: Commenting on para 136-7 of the *Al-Skeini* case describing the personal model: "[T]he question that immediately arises is whether there should be any reason, or indeed whether there is any non-arbitrary way, to limit this personal conception of jurisdiction, for example to physical custody. Is it not true that having the power to *kill* a person, whether through a drone or from a rifle, is very much an exercise of 'physical power' over that individual? Does that not flatly contradict the *Bankovic* holding that a 'mere' power to kill cannot equal jurisdiction?"
[127] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 119 and 209 onwards: He does make an exception for one category of positive obligations, namely procedural obligations, which are necessary to make the state's negative obligations effective. A good example of such a procedural obligation is the obligation to investigate human rights violations.
[128] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 210.

treaty, both positive and negative.[129] In a more discourse-conform effort to explain jurisdiction as a normative threshold, Besson submits that a certain predefined relationship must exist between the individual and duty-bearing state through an assertion of legitimate authority by the state official.[130] Whether or not the exercise of power is ultimately lawful does not matter, thereby including ultra vires acts.[131] By asserting legitimate authority, meaning that the assertion stems from a "lawfully organized institutional and constitutional framework", the state official suggests the existence of a certain link between itself and the individual over whom it exercises control.[132] According to Besson, this link can be described as "inclusion in a political community", which she believes to be the proper basis of protection under human rights law more generally.[133] As support for this position, she refers to the "public powers" formula first used by the ECtHR in the *Banković* case and argues that it was later employed in the *Al-Skeini* case "as an additional condition to qualify state jurisdiction based on personal authority and control."[134] Besson has not been the only scholar to describe authority and control as a normative and pre-defined relationship.[135]

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[129] Stewart, Alastair, 'Back to the Drawing Board: Al-Skeini v. UK and the Extraterritorial Application of the European Convention on Human Rights' (2011) 4 UCL Hum Rts Rev 110, 119; Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 879; Have, Nienke van der, 'Extraterritorial Application of Human Rights Treaties and Shared Responsibility – A Comment on Marko Milanović' SHARES lecture' (12 September 2012) SHARES blog, available at: <http://www.sharesproject.nl/extraterritorial-application-of-human-rights-treaties-and-shared-responsibility-a-comment-on-marko-milanovic-shares-lecture/>.

[130] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 865, 873

[131] See Section 3.1.1 A Long-Term Prevention.

[132] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 865.

[133] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 865-6 and 878: She argues that the discrepancies in the ECtHR's case law have been over-exaggerated and misconfigured and can be explained by the underlying normative basis of democracy.

[134] *Banković v. Belgium* (n 17) para para 71; *Al-Skeini v. the United Kingdom* (n 4) para 135 and 149; Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 873; Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (n 126) 130: Commenting on the *Al-Skeini* case: "[T]he Court applied a *personal* model of jurisdiction to the *killing* of all six applicants, but it did so only *exceptionally*, because the UK exercised *public powers* in Iraq. But, *a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not have applied."

[135] Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (n 28) 155 onwards: Proposes that authority should be understood as a state's "authority to set the rules" and control as "the enforcement of a state's directives and orders." Together, they create a jurisdictional relationship; Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 168: Argues that jurisdiction should be understood as "the potential for harm or control and a capacity to choose and apply rules to the affected areas of human activity in relation to the potential victims."

At the core of the controversy surrounding the threshold function of jurisdiction is the question: does a state always assert authority or control over an individual when an act or omission attributable to it affects that individual's rights?[136] Attribution creates the link between the act of an individual and the state for the purpose of state responsibility, as the state is a fictional entity that cannot act on its own.[137] An act is attributable to the state if the individual who committed the wrong was acting on the state's behalf as a (*de facto*) state organ and in more exceptional cases also when a private actor acts under the direction and control of the state.[138] In the *Banković* case, the ECtHR stated that equating jurisdiction with attribution would render jurisdiction superfluous.[139] In *Jaloud*, the ECtHR reiterated "that the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law."[140] Jurisdiction in human rights treaties describes the link between the duty-bearing state and the rights-holder(s), whereas attribution describes the link between the state and the (wrongful) conduct of its officials. Jurisdiction under human rights treaties and attribution are chronologically ordered, because without jurisdiction the state has no obligations under a treaty, while the question of attribution can only arise when those obligations exist and have moreover been violated.[141] The factual approaches claim that a state always exercises jurisdiction if an act attributable to it affects an individual's rights; the normative approaches claim that a relationship between the duty-bearing state and individual must amount to something more. The discussion on the precise meaning of authority and control is by no means over. Until it becomes more clear through case law and the work of scholars and experts what jurisdiction means as a threshold for the

[136] Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' (n 49) 147 third exception; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 173: In other words: does a state exercise extraterritorial jurisdiction every time that a state official or other person acting on the state's behalf has "the ability to substantively violate an individual's rights"?

[137] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (November 2001) UN GAOR Suppl No 10 (A/56/10) chpIVE1 (Articles on State Responsibility) art 2: State responsibility, in the sense of accountability, is based on two requirements: breach of an international obligation and attribution.

[138] Articles on State Responsibility (n 137) see generally commentary to art 2 and art 4-11: Describe the rules pertaining to attribution of conduct to a state*; Genocide* case (n 7) para 385-95.

[139] *Banković v. Belgium* (n 17) para 75; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 199 onwards and 207.

[140] *Jaloud v. the Netherlands* (n 39) para 154.

[141] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 867-8: The question of jurisdiction under human rights treaties comes first, as this determines whether the state has any obligations under a certain treaty, and only then does it make sense to review the requirements for state responsibility if these obligations appear breached

application of human rights, the types of scenarios in which states exercise extraterritorial jurisdiction can only be approximated based on relevant precedents.[142]

3.2 Corresponding Obligations

Apart from the controversies surrounding the threshold function of jurisdiction, there is another important issue that has remained relatively underexplored: once the threshold of jurisdiction is reached, what is the content and scope of corresponding extraterritorial obligations? States operate in a different context extraterritorially than within state territory, which means they may lack certain powers or institutional infrastructure or encounter practical difficulties abroad that make it impossible to ensure human rights in the same way as within state territory. It has been proposed by some that such capacity-related factors can or should be linked to jurisdiction as a threshold, like Milanović' proposed distinction between the extraterritorial applicability of positive and negative obligations.[143] However, extraterritorial jurisdiction is a strongly evolving concept and may be found to include new types of situations, rights or obligations in the future.[144] It would hamper the interdependent and indivisible nature of all human rights and their corresponding obligations to allow random distinctions between types of obligations that are somehow connected to a state's capacity to dictate the terms of their extraterritorial applicability.[145]

Instead, it offers more flexibility and conceptual clarity to treat the threshold function of jurisdiction and determining the content and scope of corresponding obligations as two different steps. The threshold is reached by exercising certain forms of control

[142] *Issa v. Turkey* (n 28): International mandate and military operations; *Al-Skeini v. the United Kingdom* (n 4): International mandate, military operations and detention; *Al-Jedda v. the United Kingdom* (n 29): Detention; *Jaloud v. the Netherlands* (n 39): Checkpoint; *Lopez Burgos v. Uruguay* (n 9): Arrest and Detention; See Introduction: This chapter deals chiefly with situations where states exercise such jurisdictional control through state officials acting outside state territory.
[143] *Banković v. Belgium* (n 17) para 46: The gradual approach proposed by the applicants in the *Banković* case is an example, making not only the scope of obligations, but also their applicability dependent on the state's capacity to ensure human rights in the given circumstances; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 119 and 209 onwards: Milanović' approach draws far-reaching conclusions for jurisdiction as a threshold based on the differences between negative and positive obligations.
[144] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 210: Milanović' model, for example, is to a large extent based on the idea that negative and positive obligations are separable and easily recognizable, while in reality this is often not the case. He argues that obligations to prevent violations by third parties are positive and should only apply when a state has effective overall control over a territory. At the same time, Milanović' model is based on the benchmark of realistic compliance. Following this logic, it is unclear why lesser forms of control than effective overall control could not mean that states have certain positive extraterritorial obligations to prevent or protect; Parts of this criticism have been set out in: Have, Nienke van der, 'Extraterritorial Application of Human Rights Treaties and Shared Responsibility – A Comment on Marko Milanović' SHARES lecture' (n 129).
[145] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878.

over territory or individuals abroad.[146] Once a state exercises such forms of control, all rights and obligations in principle apply.[147] This does not mean that all rights will need to be ensured in the same way in extraterritorial circumstances. Besson has described the difference between having "the same abstract rights but different concrete duties" in extraterritorial contexts, meaning that the "content of the specific rights and their corresponding duties may differ from those that apply domestically."[148] The corresponding obligations have to be specified with regard to "the concrete threats to the protected interest" while taking into account a state's capacity to ensure human rights in the specific circumstances.[149] Distinguishing between the threshold of jurisdiction and content and scope of extraterritorial obligations is preferable in several regards: (i) It builds on existing case law, which describes extraterritorial jurisdiction as a product of control and a threshold that applies equally to all obligations contained in a treaty or provision; (ii) It does not diminish a treaty's formal applicability and as such aims to diminish gaps in human rights protection; and (iii) It allows for separate criteria to be employed to determine the content and scope of corresponding obligations, which more fully take the specificities of the extraterritorial context into consideration.

To be able to translate the territorial set of obligations to prevent to extraterritorial contexts, the parameters for the threshold and for determining the content and scope of extraterritorial obligations have to be determined. Based on the overview and analysis in Section 3.1, it can be concluded that there is a basis for extraterritorial obligations to prevent gross human rights violations under all relevant human rights treaties as soon as the threshold of spatial or personal jurisdiction is met. The precise meaning of this threshold is still contested, but even less clear are the consequences once the threshold of jurisdiction is reached. Courts, supervisory bodies and scholars alike have so far given little guidance in regard to the process of assessing what states can realistically be required to do in specific extraterritorial settings. This section will focus on the differences in a state's capacity to ensure human rights within state

[146] *Loizidou v. Turkey* (n 9) para 62: "The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control […]"; *Al-Skeini v. the United Kingdom* (n 4) para 137-9: The level of control can be an indicator for the capacity to ensure human rights, but it is not the only indicator.

[147] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 859 and 878-9: "Jurisdiction is an all-or-nothing matter and not a matter of degree"; Stewart, 'Back to the Drawing Board: Al-Skeini v. UK and the Extraterritorial Application of the European Convention on Human Rights' (n 129) 119.

[148] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878.

[149] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878; *Al-Skeini v. the United Kingdom* (n 4) para 137: This fits with the ECtHR's statement that under the personal model of jurisdiction, a state only has to ensure the individual's rights as relevant to the specific situation. The corresponding obligations are therefore divided and tailored in the process of determining their content and scope.

territory as opposed to extraterritorial jurisdiction and formulate factors that can be used to support a realistic assessment of the content and scope of extraterritorial obligations. The reasoning and examples are based largely on the case law of the ECtHR, which is most refined on the issue of extraterritorial human rights obligations.

3.2.1 The Role of Capacity

Human rights treaties were predominantly devised to apply in the territorial context, to regulate the relationship between a state and people on its territory.[150] As a consequence, most human rights obligations were formulated with the territorial institutional infrastructure in mind – normally consisting of a legislative, executive and judiciary branch – and the control that infrastructure is presumed to exercise throughout the entire territory.[151] Generally speaking, the state is therefore presumed to have the capacity to ensure the rights contained in these treaties within its territory.[152] Nevertheless, there are limits to the scope of certain (categories of) obligations. In the set of territorial obligations to prevent gross human rights violations, different standards of reasonableness were found to limit the scope of: i) Obligations in the phases of short-term prevention and preventing continuation that are formulated in an open-ended manner, so as to be able to apply in a multitude of situations;[153] and ii) Obligations with a built-in reasonableness check, for example by incorporating words like "prompt" or "effective."[154] Some obligations, for example the obligation to investigate violations, are considered central for the overall

[150] Vandenhole, Wouter and Genugten, Willem van, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?' in Vandenhole, Wouter, *Challenging Territoriality in Human Rights Law – Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015) 1.

[151] *Al-Skeini v. the United Kingdom* (n 4) para 131; *Ilaşcu and Others v. Moldova and Russia* (n 4) para 333: "[J]urisdiction is presumed to be exercised normally throughout the State's territory."

[152] See Chapter 2.3 Conclusion; Den Heijer, Maarten, 'Issues of Shared Responsibility before the European Court of Human Rights' SHARES Research Paper 06 (2012), ACIL 2012-04, available at: <http://www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-european-court-of-human-rights/> 4: Observes that the special position of the territorial state is a result of "the territorial bias in the system of human rights protection"; An express exception is made in the ICESCR for economic, social and cultural rights, which may be achieved progressively: International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR): art 2(1).

[153] See Chapter 2.3 Conclusion; *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para 116: An example is the *Osman* formula that describes that the short-term obligation to prevent arbitrary deaths must not be interpreted so as to place an impossible or disproportionate burden on authorities.

[154] For example prompt judicial intervention, see: ICCPR (n 5) art 9(3); ECHR (n 6) art 5(3): ACHR (n 7) art 7(5); CAT (n 7) art 13; Or effective investigation, see: *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, para 38: "Article 13 in conjunction with Article 3 impose an obligation on States to carry out a *thorough and effective investigation* of incidents of torture"; *Velásquez Rodríguez v. Honduras* (Merits) Judgment of July 29, 1988, I/A Court HR (Ser C) No. 4 (1988) para 177: The duty to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."

effectiveness of a right and basic requirements attached to such obligations always have to be ensured.[155] As a benchmark for the scope of obligations, the ECtHR has consistently used the principle that rights must, as far as possible, be interpreted in a manner that ensures that they are practical and effective.[156]

When a state exercises extraterritorial jurisdiction, the state's capacity to ensure human rights is also to a certain extent presumed.[157] It follows from the forms of control that lead to establishing jurisdiction that the state has some capacity to ensure the rights of the people it controls. At the same time, absence of institutional infrastructure, limited powers, legal barriers and practical difficulties such as conflict situations may affect a state's capacity to ensure human rights.[158] States often defend themselves against claimed violations of extraterritorial human rights obligations by referring to the difficult circumstances prevailing in extraterritorial settings.[159] It must not be forgotten that practical obstacles to the protection of human rights may also exist within a state's own territory. The ECtHR has ruled that even in difficult circumstances the state is not relieved of all human rights obligations when faced with situations of large-scale disorder or a loss of authority within its territory.[160] Difficult circumstances therefore cannot simply excuse states of all their obligations. However, extraterritorial jurisdiction does differ from territorial jurisdiction in terms of the type of factors that may influence the state's capacity to ensure human rights.[161] There seems to be agreement on the fact that states cannot simply be required to ensure

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[155] *Al-Skeini v. the United Kingdom* (n 4) para 162 and 169; *Yaşa v. Turkey*, 2 September 1998, Reports of Judgments and Decisions 1998-VI, para 104: The ECtHR ruled that even in difficult circumstances the state is not relieved of the obligation to investigate and punish, for instance when an insurrectional movement is creating instability in a certain region as in the *Yaşa v. Turkey* case, because it would only exacerbate the "climate of impunity" and "create a vicious cycle."

[156] *Al-Skeini v. the United Kingdom* (n 4) para 162; Mowbray, Alastair R., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004) 221: Discusses several cases in which this principle affected the ECtHR' interpretation of obligations.

[157] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878: "[Jurisdiction] comes close to other normative concepts that are also threshold concepts, such as sovereignty or legitimacy."

[158] *Al-Skeini v. the United Kingdom* (n 4) para 161 and 168: "The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war."

[159] See for example *Ilaşcu v. Moldova and Russia* (n 4) para 300-5 and 353-8.

[160] Examples can be found in the case law concerning Southern Turkey and Transdniestria: *Yaşa v. Turkey* (n 155); *Ilaşcu v. Moldova and Russia* (n 4) para 339: Even in the extreme case where a state has lost authority over part of its territory because a separatist regime has seized power, such as in the case of Moldova and the Transdniestria region, the state may still have positive obligations to take "measures needed to re-establish its control" and a due-diligence obligation to do all it can to ensure the rights of the people residing in that area.

[161] Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 106: "[A] state's powers will normally be much more limited during operations abroad."

human rights abroad in the same manner as if they were acting within their own territory, but that a realistic assessment has to be made.[162]

In the case law of the ECtHR, the content and scope of extraterritorial obligations are determined based on the capacity of states to ensure human rights in specific extraterritorial settings.[163] The most general indication to this effect is the distinction the ECtHR made in the *Al-Skeini v. the United Kingdom* in terms of the overall scope of a state's extraterritorial obligations. It forwarded that if a state carries out effective control over territory, it is required to ensure all the Convention's rights in that territory.[164] Alternatively, if a state has authority or control over an individual, it is only required to ensure that individual's rights as relevant to the specific situation.[165] This can be read as an acknowledgement of the fact that the state's capacity to ensure rights in situations of personal jurisdiction is generally more limited than when it exercises spatial jurisdiction. For one, states often exercise more limited public powers and have a more limited institutional infrastructure in situations of personal than territorial jurisdiction. Second, when a state exercises personal jurisdiction it has less control over the surroundings than when it exercises territorial jurisdiction, which can for example hamper its capacity to prevent violations by non-state actors. It does not mean that certain rights or obligations could never arise when a state carries out personal jurisdiction, just that in the specific situation only the relevant rights have to be ensured.[166] As explained in Section 3.1.2, the difference between the spatial and

[162] *Al-Skeini v. the United Kingdom* (n 4) para 168: Extraterritorial obligations under the Convention "must be applied realistically, to take account of specific problems"; Hakimi, Monica, 'State Bystander Responsibility' (2010) 21(2) EJIL 341, 374-6: Argues in favor of differentiating bystander states' responsibility to protect based on what can be reasonably expected and their capacity to restrain the abuser.

[163] *Banković v. Belgium* (n 17) para 46: The applicants in the *Banković v. Belgium* case, brought before the ECtHR in 1999, already forwarded that the "positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised." The ECtHR rejected the gradual approach in the *Banković* case, proclaiming that the rights in the Convention could not be divided and tailored; Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 103: This approach was termed the gradual approach. It is based on the idea that the extraterritorial scope of obligations depends on the capacity of the state to ensure the rights in a treaty; *Osman v. the United Kingdom* (n 153) para 116: It finds support in the *Osman*-formula, which prescribes that states should not carry an "impossible or disproportionate burden" to ensure human rights; Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 10 and 31-2: In his concurring opinion to the *Al-Skeini* case, Judge Bonello submits that the state may have obligations, whether positive or negative, at any of his previously described levels of observance as long as the state is "in a position to ensure" certain rights. He explains that a state acting extraterritorially may not be in a position to ensure the right to education or free and fair elections. His approach alludes to the capacity of a state to ensure human rights in extraterritorial settings, but the position to ensure criterion is not further elaborated.

[164] *Al-Skeini v. the United Kingdom* (n 4) para 138.

[165] *Al-Skeini v. the United Kingdom* (n 4) para 137.

[166] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878: Describes the difference between having "the same abstract rights but different concrete duties" because they "have to be

personal model should not be overstated, for the territorial model is merely a shorthand for personal jurisdiction and the two models cannot be seen as truly separate. Other indications that the ECtHR adjusts the content and scope of extraterritorial obligations to a state's capacity can be found in several cases, in which the Court took the specific extraterritorial circumstances into account when deciding whether a state had violated its obligations. In the *Al-Skeini v. the United Kingdom* case, for example, the Court "takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war."[167]

3.2.2 Factors Towards Realistic Application

Because the same rights and obligations apply when a state exercises extraterritorial jurisdiction, the same standards of reasonableness – defined in Chapter 2 and Section 3.2.1 as capacity-related limits to certain categories of obligations in territorial context – also apply in extraterritorial contexts.[168] These standards of reasonableness insert a degree of flexibility to take account of the concrete circumstances, which may lead to different outcomes in territorial as opposed to extraterritorial contexts.[169] For example, the ECtHR's *Osman* formula sets a standard of reasonableness for the open-ended short-term obligation to prevent arbitrary deaths, conveying that it must not be interpreted so as to place an impossible or disproportionate burden on authorities.[170] When a state has full territorial control and the backing of its normal institutional infrastructure, it will be obligated to take more far-reaching measures to prevent

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specified in context, by reference to the conrete threat to the protected interest" which leads to the conclusion that "the specific content of the specific rights and their corresponding duties may differ from those that apply domestically"; Wilde, Ralph, 'Compliance with Human Rights Norms Extraterritorially: 'Human Rights Imperialism'?' in Boisson de Chazournes, Laurence and Kohen, Marcelo (eds), *International Law and the Quest for its Implementation - Liber Amicorum Vera Gowlland-Debbas* (BRILL, 2010) 319, 337: "The same obligations may apply, and in their totality, but they may mean something rather diff erent in terms of what the state can and cannot do in any given situation."

[167] *Al-Skeini v. the United Kingdom* (n 4) para 168; See also: *Jaloud v. the Netherlands* (n 39) para 226: "The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population – witness the first shooting incident on 21 April 2004 (see paragraph 10 above) – clearly included armed hostile elements."

[168] See Chapter 2.3 Conclusion and Section 3.2.1 The Role of Capacity: The categories of obligations referred to are: i) Obligations in the phases of short-term prevention and preventing continuation that are formulated in an open-ended manner, so as to be able to apply in a multitude of situations; and ii) Obligations with a built-in reasonableness check by incorporating words like "prompt" or "effective."

[169] *Al-Skeini v. the United Kingdom* (n 4) para 161 onwards: The court conceded that when carrying out an effective investigation "in the aftermath of the invasion, during a period when crime and violence were endemic [...] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed."

[170] *Osman v. the United Kingdom* (n 153) para 116.

arbitrary deaths than when a state exercises extraterritorial jurisdiction over individuals in an area surrounded by conflict.[171] The obligation requiring "prompt" judicial intervention after an arrest, which contains a built-in standard of reasonableness, has also led to different outcomes in territorial as opposed to extraterritorial contexts.[172] When suspects are arrested on the high seas, bringing them promptly before a judge has been interpreted to span a much longer period of time than when suspects are arrested within state territory, because there is no judicial infrastructure close by.[173] Importantly, other obligations that are not subject to standards of reasonableness cannot normally be limited based on a state's capacity.

Yet, extraterritorial contexts pose challenges that may require adjustments to the content and scope of obligations, which cannot be made solely based on standards of reasonableness also applied in territorial contexts. The ECtHR has stated that extraterritorial obligations under the Convention "must be applied realistically, to take account of specific problems."[174] As explained above, there is very little guidance in existing case law that can further instruct such realistic application.[175] Therefore, factors will be introduced here that allow for a realistic assessment of the content and scope of extraterritorial obligations to prevent gross human rights violations in the third part of this chapter. These factors are legal, practical and power-related. The factors may affect the content and scope of obligations once the threshold of jurisdiction has been reached, but are submitted not to have a bearing on the formal applicability of obligations. There may be situations in which certain obligations attached to a right/prohibition do not arise due to a legal barrier or situations in which the scope of an obligation is reduced to zero because of practical difficulties, but this does not mean that the rights and corresponding obligations do not apply in the abstract. In general, these factors do not excuse states of extraterritorial obligations, but help specify corresponding obligations once the threshold of jurisdiction is reached by determining their content and scope while taking the state's capacity to ensure human rights in extraterritorial settings into account.

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[171] *Mothers of Srebrenica against the State* (16 July 2014) The Hague District Court, C/09/295247 / HA ZA 07-2973, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>: The Dutch troops exercised jurisdiction over a small compound and were allowed to use force only for particular reasons.

[172] ICCPR (n 5) art 9(3); ECHR (n 6) art 5(3); ACHR (n 7) art 7(5).

[173] *Rigopoulos v. Spain* (dec.), no. 37388/97, ECHR 1999-II, section B; *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010, para 130.

[174] *Al-Skeini v. the United Kingdom* (n 4) para 168.

[175] *Al-Skeini v. the United Kingdom* (n 4) para 137-8: Save for a distinction made by the ECtHR in the *Al-Skeini* case, stating that all rights must be ensured if a state carries out spatial jurisdiction and only the rights relevant to the situation if a state carries out personal jurisdiction.

i) Legal factors: There are limits to what a state is lawfully allowed to do abroad.[176] As outlined in Section 3.1.1 A, the concept of jurisdiction under public international law determines when states have a lawful basis to exercise prescriptive, enforcement and adjudicative jurisdiction abroad.[177] It was explained that when states exercise extraterritorial enforcement jurisdiction unlawfully, human rights law can still apply.[178] At the same time, human rights law generally cannot be assumed to require unlawful extraterritorial conduct beyond what a state is already undertaking.[179] Therefore, rules relating to the lawful extraterritorial exercise of prescriptive and adjudicative jurisdiction – meaning the state's "authority to lay down legal norms [and] decide competing claims" – must be taken into account when determining the content and scope of extraterritorial obligations to prevent gross human rights violations in the first and last temporal phase.[180] In this context, the influence of the law of occupation will be taken into consideration, as an express exception to the exclusion of humanitarian law from this study, because it marks a unique situation in which states have a form of prescriptive and adjudicative jurisdiction abroad.[181] Finally, the influence of a mandate, which can allow or restrict

[176] Kamminga, 'Extraterritoriality' (n 24); Oxman, 'Jurisdiction of States' (n 24); Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31 and 53: General rules of interpretation in good faith and the primacy of *jus cogens*; Matz-Lück, Nele, 'Conflicts Between Treaties' (December 2010) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1485?rskey=5OhssH&result=5&prd=EPIL> para 3: "International law knows neither a general hierarchy between its different sources nor, in principle, between different international treaties"; Herdegen, Matthias, 'Interpretation in International Law' (March 2013) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723> (f) Regard for Other International Rules para 22 onwards: On integrative interpretation: "The study group of the ILC on 'Fragmentation of International Law' considers harmonizing interpretation of treaties in terms of Art. 31 (3) (c) VCLT as an approach crucial to ensuring the coherence of international law"; Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (n 23) 502, 512 onwards and 525: "[T]he norms triggering the applicability of the law of occupation and the main treaties on civil and policitical rights are governed by contested notions of territorial control."

[177] *Banković v. Belgium* (n 17) 59-60; Oxman, 'Jurisdiction of States' (n 24) para 1 and 3; Kamminga, Extraterritoriality' (n 24) para 1.

[178] *Loizidou v. Turkey* (n 9) para 62; See Section 3.1.1 A ECHR, ACHR and ACHPR; Kamminga, 'Extraterritoriality' (n 24) para 22 onwards.

[179] King, 'The Extraterritorial Human Rights Obligations of States' (n 62) 551: Argues that "the limited extent of lawful authority necessarily impacts on the extent of obligations and duties owed"; There may be exceptions, which will be discussed below.

[180] Kamminga, 'Extraterritoriality' (n 24) para 1.

[181] See Chapter 1.3.1 Delineation: "While the potential influence of armed conflict on the capacity to ensure human rights and scope of obligations will be duly explored, the study does not engage the question of the relationship or interaction between human rights law and humanitarian law. […] An exception is made for the consideration of the influence of the law of occupation on the content and scope of extraterritorial obligations in Chapter 3, because it marks a unique situation in which a state may have a form of prescriptive jurisdiction abroad"; Hague Regulations (n 111).

certain forms of extraterritorial conduct, on the content and scope of human rights obligations will also be discussed.

ii) Practical factors: There may be security-, language-, cultural or other practical factors that make it more difficult for states to live up to their human rights obligations in extraterritorial contexts. As mentioned in Section 3.2.1, practical difficulties cannot fully preclude human rights obligations, but the ECtHR does take them into account once jurisdiction has been established to assess what a state could realistically be expected to do in the particular circumstances.[182] If the obligation in question is not absolute, but leaves room for interpretation or can be limited by a standard of reasonableness, practical factors in extraterritorial settings can be additional reasons to adjust the content and scope of obligations.

iii) Power-related factors: A state's powers are usually more limited when exercising extraterritorial jurisdiction, than within state territory.[183] This means that, depending on the state's extraterritorial powers and institutional infrastructure, it may be equipped to ensure all human rights or only rights relevant to the particular situation.[184] For example, a state that has a mandate to provide safety in a particular region cannot realistically be expected to simultaneously organize free and fair elections.[185] Another example is that a limited institutional infrastructure can influence the time it takes to carry out certain obligations, such as a prompt investigation if the investigative personnel is not yet present in the area concerned. This does not diminish the fact that there always remain

[182] *Ilaşcu v. Moldova and Russia* (n 4) para 339; *Al-Skeini v. the United Kingdom* (n 4) para 168: "The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war."; *Jaloud v. the Netherlands* (n 39) para 226: "The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population […] clearly included armed hostile elements."

[183] Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 106: "[A] state's powers will normally be much more limited during operations abroad"; *Al-Skeini and Others v. the United Kingdom* (n 4) para 135: This has to be distinguished from the "public powers" criterion used in the *Al-Skeini* case to establish whether the threshold of jurisdiction had been reached.

[184] See for example: *Jaloud v. the Netherlands* (n 39) para 149; Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 32: Judge Bonello argues that this means that some rights fall within its jurisdiction, while other do not. In contrast, I submit that it does not influence the formal applicability of all rights and obligations based on jurisdiction, but rather the specification of corresponding obligations in the particular context.

[185] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878; *Al-Skeini v. the United Kingdom* (n 4) para 137: This fits with the ECtHR's statement that under the personal model of jurisdiction, a state only has to ensure the individual's rights as relevant to the specific situation.

certain minimum requirements for the powers a state exercises abroad, like the independence of investigators or the judiciary.[186]

3.3 Extraterritorial Obligations to Prevent Torture, Arbitrary Death and Genocide Based on Jurisdiction

This section studies how the crosscutting obligations in the four temporal phases to prevent torture, arbitrary death and genocide (hereinafter: gross human rights violations or the three prohibitions) distinguished in Chapter 2, translate to extraterritorial obligations based on jurisdiction.[187] The set of territorial obligations to prevent gross human rights violations is used as the basis for analysis, because all the same human rights obligations in principle apply when a state exercises extraterritorial jurisdiction and the point of departure for assessing the content and scope of obligations in extraterritorial settings is the same as for territorial settings.[188] The discussion will focus on the content and scope of corresponding obligations once the threshold of jurisdiction is met.[189] The legal, practical and power-related factors discussed in Section 3.2.2 will be used to help determine the content and scope of extraterritorial obligations. Existing case law containing relevant interpretations of the extraterritorial content and scope of obligations based on jurisdiction will be used to illustrate and support the analysis. The analysis in this section does not aim to be exhaustive, because no set of factors or typology of extraterritorial situations would allow for a full display of the ways that the content and scope of the relevant human rights obligations may differ in extraterritorial contexts. Nevertheless, this hypothetical exercise will present a basic idea of what states are required to do to prevent gross human rights violations when they exercise extraterritorial jurisdiction. That way, insight is gained into what is expected of states when they exercise

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[186] *Rigopoulos v. Spain* (n 173): "[T]he Court considers that it was […] materially impossible to bring the applicant physically before the investigating judge any sooner"; *Al-Skeini v. the United Kingdom* (n 4) para 161: "[T]he fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command."

[187] Unlike Chapter 2, this chapter does not deal with obligations to prevent torture, arbitrary death and genocide in separate sections. They are dealt with together based on the timeline. The crosscutting obligations are assumed to be representative of the types of obligations that exist in the context of other gross human rights violations. See: Chapter 2.3 Conclusion.

[188] Note for example how the ECtHR often sets out the "general principles" in extraterritorial jurisdiction cases based on case law that is mostly rooted in territorial contexts, before applying it to the specific circumstances: *Al-Skeini v. the United Kingdom* (n 4) para 162 onwards; *Pisari v. Moldova and Russia* (n 39) 46 onwards.

[189] See Section 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: The threshold of jurisdiction is met as soon as state officials exercise effective control over a territory or authority and control over individuals abroad; See Section 3.1.1 Instruments: The specific obligations will be analyzed in connection with the relevant treaties/ provisions and the intricacies of their extraterritorial applicability.

extraterritorial jurisdiction in terms of preparation, preventing violations, reacting to ongoing violations and preventing recurrence.[190]

A. Long-Term Prevention

The phase of long-term prevention starts as soon as a state is bound by the relevant obligations under a treaty or customary international law and does not require knowledge of a concrete risk of a particular violation.[191] Long-term obligations seek to have a general deterrent effect and continue to be relevant in other phases. The main crosscutting long-term obligation identified in Chapter 2 is the obligation to introduce a proper legislative and administrative framework that is in line with requirements under human rights law and capable of deterring violations. States also have obligations related to the diligent implementation of this legislative and administrative framework and obligations to put in place special guarantees to protect vulnerable groups.[192] The obligation to introduce and implement a legislative and administrative framework immediately touches upon an important legal factor inherent to extraterritorial contexts. When a state exercises extraterritorial jurisdiction, it is not automatically competent to prescribe rules in respect of the people or territory it controls. Although there are exceptions, like prescribing rules for nationals or in situations of occupation, a state's prescriptive jurisdiction is traditionally limited to its own territory.[193] There are two perspectives from which to review the content and scope of the obligation to introduce a proper legislative and administrative system when a state exercises extraterritorial jurisdiction, starting from either: (i) The domestic legal framework of the state that exercises extraterritorial jurisdiction (hereinafter: foreign state); or (ii) The domestic legal framework applicable in the territory where the state exercises extraterritorial jurisdiction (hereinafter: host state).

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[190] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 859; Lawson, Rick and den Heijer, Maarten, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in Langford, Malcolm, Vandenhole, Wouter and Scheinin, Martin (eds), *Global Justice, State Duties - The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP, 2012) 153, 191: That way human rights law can function as a code of conduct for extraterritorial undertakings.

[191] See Chapter 1.3.2 Temporal Phases.

[192] See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory A. Long-Term Prevention and Chapter 2.3 Conclusion.

[193] See Section 3.1.1 Instruments A. ECHR, ACHR and ACHPR: There is a distinction between jurisdiction under public international law, which is usually broken down into prescriptive, enforcement and adjudicative jurisdiction, and jurisdiction under human rights treaties, which is a threshold for human rights treaties to apply abroad; Kamminga, 'Extraterritoriality' (n 24) para 3: "The traditional view is that the exercise of extraterritorial jurisdiction is permissible in exceptional circumstances only. States enjoy full sovereign powers within their territories and any exercise of jurisdiction on another State's territory obviously risks infringing that State's sovereignty."

A.1 Foreign State's Legal and Administrative Framework

The domestic legal framework of the foreign state has to include safeguards to prevent gross human rights violations, both within its territory and abroad when it exercises extraterritorial jurisdiction. For the latter, the state in effect has to extend the applicability of certain domestic laws to the territory over which it has effective control or people over whom it has authority and control, while respecting the limits to its prescriptive jurisdiction posed by international law.[194] Legal, practical and power-related factors in extraterritorial settings do not affect the content and scope of the obligations in relation to the foreign state's legal framework. Safeguards to prevent gross human rights violations in the exercise of extraterritorial jurisdiction can be introduced into the foreign state's legal framework by the legislative organs of the foreign state. States must first of all ensure that state officials can be punished by law for human rights violations they commit abroad, which is inherent to the state's obligation not to commit violations.[195] For armed forces, status of force agreements usually specify that the members of the armed forces are subject to the prescriptive, enforcement and adjudicative jurisdiction of the sending state.[196] For other state officials, states can exercise prescriptive and adjudicative jurisdiction over them based on their nationality.[197]

The foreign state also has to introduce other safeguards into its legislative system to regulate the activities of its officials abroad and deter violations. For example, states have to ensure that there are procedural guarantees to prevent torture and arbitrary deaths when it detains individuals abroad.[198] The Special Rapporteur on Torture has

[194] *SS 'Lotus' France v. Turkey* (7 September 1927) PCIJ Series A no 10, para 19; Oxman 'Jurisdiction of States' (n 24) para 7-8 and 46 onwards; Kamminga, 'Extraterritoriality' (n 24) para 7, 9-10: "Exercise of extraterritorial prescriptive and adjudicative jurisdictions are permitted only if there is sufficient connection between the State exercising it and the extraterritorial event."

[195] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 14-19, 28; *Al-Skeini v. the United Kingdom* (n 4) para 163-169; *Genocide* case (n 7) para 166 and 382; Concluding Observations HRCee on the United States of America 2014 (n 64) para 5: "The State party should ensure that all cases of unlawful killing, torture or other illtreatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies."

[196] Oxman, 'Jurisdiction of States' (n 24) para 18 and 33; Kamminga, 'Extraterritoriality' (n 24) para 20.

[197] Oxman, 'Jurisdiction of States' (n 24) para 18-20.

[198] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 33 and 37: "The obligation to take preventive measures under articles 2 (1) and 16 (1) [of the CAT] clearly encompasses action taken by States in their own jurisdictions to prevent torture or other ill-treatment extraterritorially." Relevant safeguards "include, but are not limited to, the right to legal assistance, access to independent medical assistance, notification of detention and communication with the outside world and the right of individuals deprived of their liberty in any situation to challenge the arbitrariness or lawfulness of their detention and receive remedies without delay. Such obligations apply whenever States detain persons extraterritorially […]; For an overview of the rights of detainees, which are seen as being of particular importance for the prevention of torture and arbitrary death, see: ICCPR (n 5) art 9-11; ECHR (n 6) art

stated that the obligation to systematically review interrogation rules for custody and treatment of people in detention and the obligation to monitor facilities under the CAT should be applied extraterritorially whenever the factual situation involves "arrest, detention, imprisonment or interrogation of persons abroad."[199] The content and scope of most of the basic guarantees for situations of detention, such as "maintaining an official register of detainees, the right of detainees to be informed of their rights […] and to contact relatives", are not usually altered in extraterritorial situations.[200] Yet, the implementation of procedural guarantees with a built-in standard of reasonableness, such as "the right promptly to receive independent legal assistance […] and the availability […] of judicial and other remedies that will allow [detainees] to have their complaints promptly and impartially examined" may sometimes be influenced by practical or power-related factors.[201] For example in the *Rigopoulos v. Spain* and *Medvedyev v. France* cases, both concerning the arrest of drug smugglers on the high seas, the ECtHR determined that the amount of time still considered prompt judicial intervention could be stretched up to thirteen days if it was "materially impossible to bring the applicant physically before the investigating judge any sooner" and handing them over to authorities elsewhere was "unrealistic."[202]

States are also required to introduce a framework regulating the use of force and firearms when state officials exercise extraterritorial jurisdiction, especially because

5 and 6; ACHR (n 7) art 7 and 8; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 6 and 7; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99 (Sect. 3), ECHR 2002-II, para 56; *Pacheco Teruel et al. v. Honduras* (Merits, Reparations and Costs) Judgment of April 27, 2012, I/A Court HR Series C No. 241, para 67: Enumerates "the main standards on prison conditions and the obligation of prevention that the State must guarantee to persons deprived of liberty" from the court's case law; *Juan Humberto Sánchez v. Honduras* (Preliminary Objection, Merits, Reparations and Costs) Judgment of June 7, 2003, I/A Court HR Series C No. 99, para 84: Prompt judicial control of detention; *Morales Tornel v. Spain*, Comm. 1473/2006, No. CCPR/C/95/D/1473/2006 (HRC Mar. 20, 2009): Medical attention; *Juvenile Reeducation Institute'v. Paraguay*, (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 2, 2004, I/A Court HR Series C No. 112, Commission's Claims under A and D: Measures to deal with emergency situations.

[199] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 34 and 36; The obligation to introduce protocols to deal with emergency situations also includes facilities abroad. See among others: *"Children's Rehabilitation Institute" v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 2, 2004, I/A Court HR Series C No. 112, para 178; *Pacheco Teruel et al. v. Honduras* (n 198) para 68.

[200] CAT, General Comment 2 (n 73) para 13; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 37: "[P]ractical difficulties' encountered by States in securing the effective enjoyment of relevant rights in some extraterritorial scenarios can never displace their positive duties to guarantee and ensure these rights at all times."

[201] CAT, General Comment 2 (n 73) para 13; See also: HRC, General Comment 20 (n 22) para 11.

[202] *Rigopoulos v. Spain* (n 173); *Medvedyev and Others v. France* (n 173) para 130; One may wonder whether physical presence of a judge is really necessary and whether technological advances may not make it possible to bring detainees under judicial supervision sooner. A simple skype call may do. Sometimes safeguards can be effectuated by making such arrangements with/ through the local authorities that similar basic guarantees can be offered extraterritorially.

situations of military intervention, occupation, arrest and detention all contain elements of force.[203] A framework regulating the use of force and firearms has to be established in the rules of engagement or elsewhere, so as to ensure that state officials are offered sufficient guidance in extraterritorial contexts to be able to determine when particular types of force are warranted.[204] For example, the British and Dutch troops in Iraq were issued a card with instructions that set out the rules of engagement, stipulating that firearms were to be used only as a last resort in self-defense or for the protection of human life.[205] The diligent implementation of the framework regulating the use of force by state agents also requires training law enforcement personnel to assess whether it is necessary to use firearms.[206] The HRCee has for example recommended Belgium that it should train its officials that act abroad "appropriately" in line with the safeguards established by the ICCPR.[207] States must provide specific training for state officials who undertake operations abroad, to account for cultural and practical challenges and psychological stress that

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[203] *Makaratzis v. Greece* [GC] no. 50385/99, ECHR 2004-XI, para 31 and 58-9; *Mahmut Kaya v. Turkey*, no 22535/93 (Sect. 1) ECHR 2000-III, para 85; *Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of January 31, 2006, I/A Court HR Series C No 140, para 62; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan,* AComHPR, Communication No. 279/03-296/05 (27 May 2009) para 147; Economic and Social Council Resolution 1989/65, 'Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (24 May 1989) UN Doc E/1989/89, at 1; *Juan Humberto Sánchez v. Honduras* (n 198) para 112; Human Rights Committee, 'General Comment 6: The Right to Life (Article 6)' (30 April 1982) UN Doc CCPR/C/GC/6, para 3; UN General Assembly Resolution 34/169 'Code of Conduct for Law Enforcement Officials' (17 December 1979) UN Doc A/RES/34/169, art 3; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (27 August – 7 September 1990) adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, first provision; Secretary-General Kofi Annan, 'Extrajudicial, Summary or Arbitrary Executions' (5 September 2006) UN Doc A/61/311, para 33 onwards.

[204] Findlay, Trevor, *The Use of Force in UN Peace Operations* (SIPRI, 2002) 14: "[T]he ROE for peace operations aim to embody two important principles of peacekeeping – restraint and legitimacy."

[205] *Al-Skeini v. the United Kingdom* (n 4) para 24: "The use of force by British troops during operations is covered by the appropriate rules of engagement. The rules of engagement governing the use of lethal force by British troops in Iraq during the relevant period were the subject of guidance contained in a card issued to every soldier, known as "Card Alpha"; *Jaloud v. the Netherlands* (n 39) para 55: "Netherlands military personnel were issued with an *aide-mémoire* drawn up by the Netherlands Chief of Defence Staff (*Chef Defensiestaf*). This was a reference document containing a summary of the Rules of Engagement. They were also issued with Instructions on the Use of Force (*Geweldsinstructie*), likewise drawn up by the Chief of Defence Staff."

[206] *Mahmut Kaya v. Turkey* (n 203) para 97; Martins, Mark S., 'Rules of Engagement for Land Forces: A Matter of Training, not Lawyering' (1994) 143 Mil L Rev 1; *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, para 202 onwards: The thought behind this obligation is that states must not place their officials in a situation in which they are likely to arbitrarily deprive someone of his or her life.

[207] Concluding Observations HRCee on Belgium (12 August 2004) UN Doc CCPR/CO/81/BEL para 6: "The State party should respect the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad, as for example in the case of peacekeeping missions or NATO military missions, and should train the members of such missions appropriately."

may arise in extraterritorial settings.[208] A state can be held responsible for a failure to provide appropriate training even if its state official acts under the command of another state or International Organization (IO), because the obligation's "practical implementation is not contingent upon the State party's control or authority over a particular individual or area."[209] It is a necessary preparatory measure for the exercise of extraterritorial jurisdiction, but can be implemented within the state's own territory.

In analogy with territorial contexts, it is submitted that extraterritorial operations that could potentially result in the deprivation of life have to be carefully planned and controlled, so as to allow state officials to live up to human rights obligations in the course of the operation.[210] This should include introducing strategies detailing how to handle emergency situations abroad, for example when there is a risk of genocide.[211] So far, not much attention has been given to this particular planning aspect of extraterritorial operations in practice, case law or literature.[212] In the ECtHR *Pisari v. Moldova and Russia* case, which involved the killing of an individual at a checkpoint situated in a Transdniestrian security zone, the Court noted "the lack of appropriate equipment at the checkpoint for immobilizing vehicles without recourse to lethal force."[213] This was used to back the Court's finding that Russia violated the right to life. It supports the argument that states are expected to plan and equip extraterritorial operations to allow them to function in a manner consistent with requirements under international human rights law.[214] States do not always have a determinative say in

[208] CAT (n 7) art 10; IACPPT (n 84) art 7; Martins, 'Rules of Engagement for Land Forces: A Matter of Training, not Lawyering' (n 206); Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 34: States that the obligations in Article 10 of the CAT to train state officials "do not contain a spatial reference, given that their practical implementation is not contingent upon the State party's control or authority over a particular individual or area."

[209] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 34: This means that the obligation to provide training is not per se dependent on the actual exercise of extraterritorial jurisdiction, but it belongs to the necessary preparation for situations where a state does exercise extraterritorial jurisdiction.

[210] See Chapter 2.2 A.2 Arbitrary Death; *McCann and Others v. the United Kingdom* (n 206): In territorial contexts policing operations that could potentially result in the deprivation of life have to be diligently planned and controlled. Otherwise a state in effect sets the scene for gross human rights violations to occur.

[211] See Chapter 2.2 A.3 Genocide; *Mothers of Srebrenica against the State* case (n 171) para 4.264: One of the first measures relevant to such situations is to provide information to actors that could help prevent genocide.

[212] Katayanagi, Mari, *Human Rights Functions of United Nations Peacekeeping Operations* (Martinus Nijhoff Publishers, 2002) 259: After analysing the mandates and functioning of several UN peacekeeping operations states that: "There is a lack of attention to human rights issues at the phase of mission planning, and this needs to be addressed seriously."

[213] *Pisari v. Moldova and Russia* (n 39) para 13 and 57-8.

[214] Twelve Srebrenica Veterans Suing Dutch Government (30 June 2016) NL Times, available at: <http://www.nltimes.nl/2016/06/30/twelve-srebrenica-veterans-suing-dutch-government/>; A potentially relevant domestic case was brought before a Dutch Court by Dutchbat veterans in June 2016, who claim that they were sent on an impossible mission in Srebrenica. Although the applicable legal framework is different – laws applicable between the state as an employer and soldiers employed

regard to the terms of a mandate, for example in the context of multilateral peacekeeping operations. It can be argued that a state should not agree to take part in multilateral extraterritorial operations if the mandate, judged reasonably in light of the information available at the time, may obstruct its officials from living up to the state's human rights obligations.[215] Furthermore, if a change in circumstances during an extraterritorial operation causes the mandate to become an obstruction for the participating state's officials to live up to the state's human rights obligations, it can be argued that the participating state should endeavor to adjust the mandate to accommodate to the changed circumstances at the international level.[216]

On a final note, state parties to the CAT and IACPPT are also required to assume criminal jurisdiction to punish acts of torture on a range of other grounds than that the crime took place on its territory, including universal jurisdiction when an offender is present within its jurisdiction.[217] This means that states have to introduce laws that ground the competence to assume criminal jurisdiction over suspects of torture present in any territory under its jurisdiction, including extraterritorial jurisdiction, or

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in the army v. laws applicable between the state and people over whom it exercises extraterritorial jurisdiction – the outcome of the case may shed some light on the requirements attached to planning extraterritorial operations and the role of mandates in that regard. The Dutchbat troops were ill-prepared and operated under a restrictive mandate, which they allege resulted in their inability to live up to the state's human rights obligations. See for further reference: UN Security Council Resolution 819 (16 April 1993) UN Doc S/RES/819: Demanded that all concerned treat Srebrenica as a safe area; UN Security Council Resolution 836 (4 June 1993) UN Doc S/RES/836: Extended the mandate of UNPROFOR to enable it to deter attacks against the safe areas and monitor the ceasefire; Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (n 212) 230: Argues that deploying civilian human rights officers to conflict zones where there is no ceasefire in place, as in the case of UNPROFOR is "might not be considered appropriate for security reasons."

[215] See Section 3.3 B Short-Term Prevention: Argues in favor of an enabling instead of restricting role of mandates on a state's human rights obligations; Larsen, Kjetil M., *The Human Rights Treaty Obligations of Peacekeepers* (CUP, 2012) 392; Orford, Anne, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP, 2003) 199-201.

[216] *Ilaşcu v. Moldova and Russia* (n 4) para 337, 349 and 393: The ECtHR's reasoned that a state's positive obligations under the ECHR may require certain actions at the international level in relation to other involved states. This can be seen as support for the argument that a state that exercises extraterritorial jurisdiction must at least endeavor to change a mandate that obstructs it from living up to its human rights obligations at the international level; If a mandate is extended, it should be done in a manner that allows state officials to act in accordance with requirements under international human rights law. See for example: Akashi, Yasushi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate' (1995) 19 Fordham Int'l LJ 312, 314-5: Argues that SC Res 836, extending UNPROFOR's mandate to enable it to deter attacks, brought the Force in an unfomfortable position "between peacekeeping and peace-enforcement." The decision was moreover taken "without sufficient consideration of the existing mandates or capabilities of UNPROFOR." The SC therewith "entrusted UNPROFOR with a mandate that it knew, or ought to have known, was not only unrealistic, but impossible to implement."

[217] See Section 3.1.1 C CAT and IACPPT; CAT (n 7) art 5; IACPPT (n 84) art 6 and 12-14: Under the IACPPT, states are even required to cooperate to prevent lacunas in prosecution through extradition arrangements; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46.

extradite them to another state where they will be prosecuted.[218] This far-reaching set of obligations related to the prosecution and punishment of torture makes a difference especially for the prosecution and punishment of non-state actors over whom the state exercises extraterritorial jurisdiction. The rules imply that it has to be made legally possible to prosecute non-state actors within a state's extraterritorial jurisdiction who are suspected of torture based on the foreign state's legal framework, unless it ensures an alternative route of prosecution.[219] There are no equivalent treaty-provisions requiring states to prosecute non-state actors of alleged offences related to the right to life or prohibition of genocide which take place extraterritorially.[220]

A.2 Host State's Legal and Administrative Framework

Whether a foreign state can alter the legal framework of the host state is a more contentious question. Can a foreign state adjust applicable laws or even introduce new laws to ensure that they are in line with requirements under international human rights law? There is only one situation in which this is considered permissible: if the state is an occupying power.[221] A state cannot introduce new laws abroad if it only carries out personal or spatial jurisdiction, but cannot also be defined as an occupying power.[222] Article 43 of the Hague Regulations requires an occupying state to "take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[223] This provision has been recognized as customary international law and prohibits foreign

[218] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 44-8: "[T]he rule of *aut dedere aut judicare* is clearly mandatory."
[219] See Section 3.3 D Preventing Recurrence.
[220] Genocide Convention (n 100) art 6: Article 6 of the Genocide Convention, which contains the obligation to prosecute and punish acts of genocide, has an express territorial limitation; *Genocide* case (n 7) para 184 and 442: The ICJ has explained that Article 6 does not obligate states to prosecute and punish alleged perpetrators of genocide on any other ground than that the acts took place on its territory.
[221] See Section 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: Exercizing spatial jurisdiction and being an occupying power do not always necessarily go hand in hand; *Jaloud v. the Netherlands* (n 39) para 142: To establish jurisdiction "the status of "occupying power" within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative"; Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (n 23) 502, 512 onwards and 525: "[T]he norms triggering the applicability of the law of occupation and the main treaties on civil and policitical rights are governed by contested notions of territorial control."
[222] Hague Regulations (n 111) art 43; Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (n 23) 510-12: The trigger for the law of occupation is still contentious, but requires some level of authority over the territory. Wilde discusses four issues in establishing spatial jurisdiction, such as whether it requires states to exercise civil authority or overall control, and states that "[t]his in part determines the degree of overlap in the circumstances where human rights law and the law of occupation apply"; See Chapter 1.3.1 Delineation.
[223] Hague Regulations (n 111) art 43; Dennis, Michael J., 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99(1) The AJIL 119; Lawson and den Heijer, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' (n 190) 168.

states from changing host states' legislation "unless absolutely prevented." [224] However, exceptions to the general prohibition to legislate have been carved out in state practice and law, illustrated by Article 64 of the Fourth Geneva Convention, which provides a *lex specialis* and less restrictive formulation of when occupying powers are "absolutely prevented" from respecting existing laws.[225] Consequently, it has been argued that occupying powers are required to "abolish legislation and institutions which contravene international human rights standards" and may adjust or introduce new laws to ensure human rights.[226]

Occupying powers that exercise spatial or personal forms of extraterritorial jurisdiction have a responsibility to ensure public order and safety in the occupied territory, as informed by its human rights obligations.[227] Sometimes, this means states will have to suspend or adjust laws applicable in the host state or introduce new laws entirely.[228] If an occupying power does change or introduce laws, it must be in the

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[224] *Construction of a Wall Advisory Opinion* (n 9) para 89 and 124; Sassòli, Marco, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) EJIL 661, 662; Wilde, 'Compliance with Human Rights Norms Extraterritorially: 'Human Rights Imperialism'?' (n 166): There is a risk of imposing culturally inappropriate and democratically illegitimate standards on populations abroad through human rights law.

[225] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 64; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 669-70.

[226] Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 676-7; The Coalition Provisional Authority (CPA) established after the invasion of Iraq even established a Ministry of Human Rights: Coalition Provisional Authority Order Number 60, Establishment of the Ministry of Human Rights (22 February 2004) available at: <http://www.iraqcoalition.org/regulations/20040220_CPAORD60.pdf> last accessed on 5 January 2016, Section 2(1): "The MOHR shall work to establish […] conditions conducive to the protection of human rights […] and the prevention of human rights violations in Iraq."

[227] Hague Regulations (n 111) art 43; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 663: "The two issues – maintenance of public order and safety, and legislative action by an occupying power – are closely interrelated. Human rights and the rule of law […] demand that the maintenance of public order be based on law"; Benvenisti, Eyal, 'Belligerent Occupation' (May 2009) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359?rskey=QwSS5O&result=7&prd=EPIL>.

[228] Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 676-7; Schwenk, Edmund H., 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54(2) Yale Law J 393, 406-7: An example is the abolishment of all Nazi laws by the Allies after the second World War which "express racial, religious, or political discrimination"; *Xenides - Arestis v. Turkey*, no. 46347/99, 22 December 2005, holding 5: "[T]he respondent State must introduce a remedy, which secures the effective protection of the rights laid down in Articles 8 of the Convention and 1 of Protocol No. 1 in relation to the present applicant as well as in respect of all similar applications pending before the Court"; Office of the United Nations High Commissioner for Human Rights, Report on the Question of Human Rights in Cyprus – Note by the Secretary General (7 January 2011) UN Doc A/HRC/16/21, para 20-1: In response to the *Xenides - Arestis v. Turkey* case, the Turkish authority in Northern Cyprus set up an Immovable Property Commission (IPC) under Law No. 67/2005 for the compensation, exchange and restitution of immovable properties; If the host state's

interest of the people and the laws must as far as possible be in line with "local standards and the local cultural, legal and economic traditions."[229] For example, the caretaker administration established by the US, UK and other states after the invasion in Iraq decided to abolish capital punishment and prohibit torture, "[r]ecognizing that the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards."[230] Occupying powers will have to ensure that there is a legal basis and institutional infrastructure to prosecute and punish offences related to the three prohibitions by both state officials and non-state actors. This obligation is inherent both to the relevant rights and prohibitions under human rights law and the obligation to maintain or restore public order and safety under the law of occupation.[231] Public order and safety cannot be maintained if there is no system in place that is capable of tracking and punishing gross human rights violations. Under the law of occupation, states may even be required to set up tribunals "to replace the regular courts if the local administration of justice is completely disorganized" or re-organize the existing court-system.[232]

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legislation allows confessions extracted through methods of torture to be admitted in a court of law, this law cannot be left intact: CAT (n 7) art 15; IACPPT (n 84) art 10; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 27: This obligation is also inherent to the prohibition of torture in other instruments and is customary international law.

[229] Hague Regulations (n 111) art 43; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 673 and 677; *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Rep 16, p. 56, para 125: The ICJ has noted that, although official acts including acts of legislation by an occupying power may be illegal and invalid "this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."

[230] *Al-Skeini v. the United Kingdom* (n 4) para 12 and 145: "Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of 16 April 2003 shall continue to apply in Iraq"; Coalition Provisional Authority Order Number 7, Penal Code (10 June 2003) available at: <http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf> last accessed on 5 January 2016, Section 3 Penalties: Abolishes capital punishment and torture. See also: Section 4 Nondiscrimination in the exercise of public functions; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 680-2: The authority to legislate in this case was arguably based on a SC authorization.

[231] Hague Regulations (n 111) art 43; Fourth Geneva Convention (n 225) art 64: Mentions "the necessity for ensuring the effective administration of justice" as a relevant consideration; See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory A. Long-Term Prevention; Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations ' (n 111) 406: "It is an established general principle that the local civil and criminal law should be respected by the occupant. However, necessity created […] by the occupied country's interest in the restoration of public order and civil life […] may justify a great number of changes; If a basis does not exist under the host state's legal framework, the foreign state can choose to make use of permissive bases of criminal jurisdiction and prosecute offenders under its own legal framework – see previous section – or alter the host-state's legal framework.

[232] Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 405; See for example: Coalition Provisional Authority Order Number 35, Re-establishment of the

Other legislative and administrative changes related to the maintenance of public order and safety may also be called for. For example, states may be required to regulate dangerous activities and possibly life-harming practices, such as disappearances, medical malpractice or epidemic outbreaks.[233] States also have to introduce safeguards to protect vulnerable groups. For example, in the reporting procedures with Israel, the CAT Committee expressed its concern in relation to the treatment of Palestinian juvenile detainees by Israel. In Israel, juveniles are treated as minors when under the age of 18, whereas in Palestine they are treated as minors only under the age of 16 and are prosecuted by military courts. The CAT Committee advised Israel to amend the relevant military order to "ensure that the definition of minor is set at the age of 18, in line with international standards."[234] Furthermore, the CAT Committee expressed its concern at reports about interrogation of juveniles in the absence of a lawyer or family member and their detainment in Israel, far away from their families. It advised Israel to establish a youth court as a matter of priority and to ensure basic safeguards like access to lawyer and visits from family members.[235] The example of the CAT reporting procedure illustrates that occupying powers that exercise extraterritorial jurisdiction are expected to introduce safeguards to protect vulnerable groups in line with requirements under human rights treaties to which they are a party.[236]

Council of Judges (18 September 2003) available at: <http://www.iraqcoalition.org/regulations/20030921_CPAORD35.pdf> last accessed on 5 January 2016; Coalition Provisional Authority Order Number 48, Delegation of Authoritty Regarding an Iraqi Special Tribunal (10 December 2003) available at: <http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf> last accessed on 5 January 2016: Sets up a special tribunal "to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws."

[233] HRC, General Comment 6 (n 203) para 5; *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004 – XII, para 89-90.

[234] Hague Regulations (n 111) art 43; Concluding Observations CAT Committee on Israel 2002 (n 77); Concluding Observations CAT Committee on Israel 2009 (n 77) para 27.

[235] Concluding Observations CAT Committee on Israel 2009 (n 77) para 27-8.

[236] Beyond the general human rights treaties and their interpretations, there are several instruments that can inform the proper interpretation of the obligation to introduce special guarantees to protect vulnerable groups in extraterritorial context. An example is the Convention for the Protection of All Persons from Enforced Disappearances, which lays a strong emphasis on the need for prevention and international cooperation: International Convention for the Protection of All Persons From Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) preamble and art 6(3), 12(4), 22, 23 and 25; Another example is the Geneva Convention relative to the Treatment of Prisoners of War, which contains rules regarding the food ration, hygiene and medical attention for prisoners of war: Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) art 26, 29 and 30.

B. Short-Term Prevention

The phase of short-term prevention starts when a violation becomes foreseeable.[237] The measures are targeted at preventing a specific violation and can involve physical protection and operational measures.[238] The main crosscutting short-term obligation identified in Chapter 2 is the obligation to take (operational or protective) measures to prevent, meaning that states should take positive action capable of averting a specific violation.[239] The obligation first and foremost applies in regard to a state's own officials, which is given further content and meaning by the long-term legislative and administrative framework. States are also required to take (protective) measures to prevent offences related to the three prohibitions by non-state actors. Finally, states have obligations related to *non-refoulement*, which means they cannot send individuals to a third state where they would run the risk of torture or arbitrary death. States are in principle prohibited from exercising enforcement jurisdiction – meaning the authority to ensure compliance with its laws – outside their territory.[240] Extraterritorial enforcement activities involving acts of force are only lawful when the foreign state has the consent of the host state, in self-defense or when mandated by the UN Security Council (SC).[241] Regardless of the lawfulness of a state's extraterritorial enforcement actions, human rights treaties apply to these actions as soon as the threshold of jurisdiction is reached.[242] Otherwise, it would be too easy for states to evade their human rights obligations. Quite a different question is however whether human rights law can impose obligations that would require states to engage into internationally unlawful acts.

A legal factor that may have to be taken into account in that respect, is the mandate based on which an extraterritorial operation is undertaken.[243] The discourse in theory and practice seems to be leaning towards an understanding of the role of mandates as enabling instead of restricting state officials to live up to the state's human rights

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[237] See Chapter 1.3.2 Temporal Phases; The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.

[238] See for a more detailed description Section 1.3.3 Method: Timeline.

[239] See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory B. Short-Term Prevention.

[240] Kamminga, 'Extraterritoriality' (n 24) para 1 and 22-3.

[241] Kamminga, 'Extraterritoriality' (n 24) para 22-3; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 42 and 51.

[242] See Section 3.1.1 A ECHR, ACHR and ACHPR: Acting abroad lawfully does not automatically mean that a state exercises the level of control required for jurisdiction under human rights treaties. Nor does acting abroad unlawfully mean that human rights treaties do not apply. The fact that human rights law may apply to unlawful extraterritorial conduct implies that human rights obligations may require a state to take further unlawful actions in the context of the unlawful conduct it was already undertaking for the purposes of ensuring human rights.

[243] See Section 3.1.1 A: The role a mandate can play in establishing jurisdiction was considered.

obligations.[244] This means that a mandate should be formulated or interpreted as far as possible in a way that allows state officials to live up to extraterritorial human rights obligations. A mandate that is too restrictive in this regard points in the direction of a failure of the long-term obligation to carefully plan the operation.[245] In Section 3.3 A it was argued that states should plan extraterritorial operations to allow them to function in a manner consistent with requirements under international human rights law.[246] If circumstances during a mission change, it can be argued that states should endeavor to adjust the mandate accordingly. However, when gross human rights violations are imminent, it may be too late to change the terms of a mandate. Because of a restrictive mandate, state officials acting extraterritorially may experience difficulty in living up to the state's short-term human rights obligations while acting within their mandate, for example because they are not allowed to use force to protect civilians.[247]

The question whether and how an existing mandate affects the content and scope of a state's human rights obligations in the more acute phases of prevention has so far remained obscure.[248] A mandate demarcates the conduct that state officials are allowed to undertake in the course of an extraterritorial operation. On the one hand, to assert that human rights obligations can require states to engage in internationally unlawful conduct by acting outside the terms of a mandate would be progressive.[249]

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[244] Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (n 215) 392; A practical form of support for the enabling instead of restricting role of mandates speaks from the UN Rights up Front Initiative to prioritize human rights in all operational decisions: Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka (November 2012) available at: <http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf>; Rights up Front Summary (May 2014) available at: <http://www.un.org/News/dh/pdf/english/2016/Human-Rights-up-Front.pdf>: The Rights Up Front initiative was taken by the SG in reaction to a 2012 Internal Review Panel's findings on UN action in Sri Lanka, where it failed to respond to humanitarian needs during a surge of violence in the civil war in 2008-9, mostly because of mandate restrictions and a lack of inter-department and –agency coordination.

[245] See Chapter 2.2 A. 2 Arbitrary Death and Section 3.3 Extraterritorial Obligations to Prevent Torture, Arbitrary Death and Genocide Based on Jurisdiction A. Long-Term Prevention; *McCann and Others v. the United Kingdom* (n 206).

[246] See Section 3.3 A Foreign State's Legal and Administrative Framework.

[247] Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (n 212) 235; *Mothers of Srebrenica against the State* case (n 171).

[248] Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (n 215) 392: Outlines three different arguments to describe the relationship between a peacekeeping mandate and human rights obligations: i) The mandate provides a separate obligation to "protect civilians under relevant imminent threats", but if a more extensive obligation to protect follows from another basis like human rights law, the mandate does not impact the interpretation of those obligations; or ii) Mandates "represent an exhaustive description of the obligation to protect civilians, tot the exclusion of more extensive obligations"; or iii) Mandates "have nothing to do with [human rights] obligations […] they simply provide an authorization to use the necessary force to protect individuals under threat." She prefers the third interpretation, but remarkt that "the issue has not been authoritatively decided."

[249] See Section 3.2.2 Factors Towards Realistic Application; King, 'The Extraterritorial Human Rights Obligations of States' (n 62) 551: Argues that "the limited extent of lawful authority necessarily impacts on the extent of obligations and duties owed"; See: VCLT (n 176) art 31 and 53: General rules

States are generally expected to stay within the limits of international law when carrying out their human rights obligations.[250] On the other hand, allowing mandate restrictions to affect the content and scope of human rights obligations would make it easier for states to escape their human rights obligations. There may therefore be exceptions to the rule that human rights obligations cannot require a state to undertake unlawful extraterritorial conduct. For example, when a state is aleady acting extraterritorially without the required mandate under public international law, its human rights obligations may require further unlawful action for the purpose of ensuring human rights in the course of its actions.[251] Courts have so far tended to avoid directly confronting the terms of a mandate and a state's extraterritorial human rights obligations, but have taken practical and power-related factors stemming from a mandate into account when determining the content and scope of obligations.[252] For example, there may be insufficient resources available or there may be restrictions to the use of force that make it more difficult to deal with threats posed in a particular situation.[253] Courts have thereby implicitly acknowledged that a mandate can at least indirectly affect a state's capacity to ensure human rights through its practical effects. Because the influence of a mandate as a legal factor in this temporal phase remains unclear, this section will only take into account practical and power-related factors to determine the content and scope of obligations to prevent gross human rights violations in this temporal phase.

States have a direct obligation to prevent violations by state officials acting abroad, no matter what practical and power-related factors they encounter. It is much easier for states to control the actions of their state officials than of non-state actors. In the long-

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of interpretation in good faith and the primacy of *jus cogens*. Both human rights treaties and a mandate underlying international operations are international agreements. In case of a conflict at the level of implementation, there is no agreed hierarchy determining which should prevail apart from the concept of *jus cogens*; Matz-Lück, Nele, 'Conflicts Between Treaties' (December 2010) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1485?rskey=5OhssH&result=5&prd=EPIL> para 3: "International law knows neither a general hierarchy between its different sources nor, in principle, between different international treaties"; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, para 92-7: As this case shows, even *jus cogens* norms do not always automatically prevail.

[250] *Genocide* case (n 7) para 430: Mentions in the context of the obligation to prevent genocide that "every State may only act within the limits permitted by international law."

[251] See Section 3.1.1 A ECHR, ACHR and ACHPR: Human rights treaties can apply when a state acts abroad unlawfully.

[252] *Mothers of Srebrenica against the State* case (n 171) Avoids directly addressing the mandate. Discussed below; *Pisari v. Moldova and Russia* (n 39); *Al-Skeini v. The United Kingdom* (n 4).

[253] *Mothers of Srebrenica against the State* case (n 171); Twelve Srebrenica Veterans Suing Dutch Government (n 214): A case has been brought against the Netherlands by Dutchbat veterans, claiming that they were sent on an impossible mission; Akashi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate' (n 216) 316: Describes how there was on the one hand a strong commitment to protecting the civilians in the safe areas, but on the other hand "none of the [SC] members […] were willing or able to provide the resources necessary to carry out the mandate." There was moreover unclarity with regard to the "extent of the use of force UNPROFOR was entitled to employ"; Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (n 212) 235.

term, state officials have been trained and instructed on how to deal with different emergency situations abroad.[254] In the short-term, state officials should bring the training into practice when faced with an immediate risk and refrain from human rights violations. If state officials fail in this regard, they are subject to their own state's legislative framework for prosecution and punishment, which further enhances the control over state official's actions.[255] For example, in the context of the prevention of torture, superior state officials are obligated to prevent violations by subordinates.[256] In the context of preventing arbitrary deaths, state officials must respect the principles of subsidiarity and proportionality when they use potentially lethal force.[257] In the IAComHR *Brothers to the rescue v. Cuba* case, Cuba was held responsible for bringing down a civil aircraft with air-to-air missiles and "did nothing to employ methods other than the use of lethal force to conduct the civil aircraft out of the restricted or danger zone."[258] Another example of the importance of the principles of subsidiarity and proportionality in the extraterritorial use of force is the ECtHR *Pisari v. Moldova and Russia* case discussed in Section 3.3 A.[259] The case concerned the killing of an individual passing through a checkpoint by shots fired by Russian state officials and Russia was held responsible, among other things, for its "automatic recourse to lethal force."[260] The only practical factor that can limit the scope of the direct short-term obligation to prevent arbitrary death is the existence of an armed conflict.[261] Under the ECHR, "deaths resulting from the lawful acts of war" is

[254] See Section 3.3 A. Long-Term Prevention.

[255] Oxman, 'Jurisdiction of States' (n 24) para 18 and 33; Kamminga, 'Extraterritoriality' (n 24) para 20.

[256] *Ireland v. the United-Kingdom,* no. 5310/71, 18 January 1978, Series A no. 25, para 239: "[A]uthorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected"; Concluding Observations HRCee on the United States of America 2014 (n 64) para 5: In the context of its recommendation that the United States should investigate, prosecute and punish alleged human rights violations by state officials in the course of international operations, the HRCee als recommends "the full incorporation of the doctrine of "command responsibility" in its criminal law." The doctrine of command responsibility implies the duty to supervise subordinates.

[257] *Solomou and Others v. Turkey*, no. 36832/97, 24 June 2008: TRNC officials shot dead unarmed protester Solomos Solomou, who entered the buffer zone and started climbing a flagpole bearing a Turkish flag. The court concluded that the use of force could not be justified under art 2 for reasons of self-defence and was not absolutely necessary for the aim of quelling the riot.

[258] *Brothers to the Rescue v. Cuba* (n 49) para 40-2 and 45.

[259] *Pisari v. Moldova and Russia* (n 39) para 13.

[260] *Pisari v. Moldova and Russia* (n 39) para 58.

[261] See Chapter 1.3.1 Delineation: The effects of the co-applicability of humanitarian law is a matter outside the scope of this research. It is mentioned here only as a permissible derogation from human rights obligations; Under humanitarian law it is considered permissible to kill members of the armed forces of parties to the conflict (also known as combatants): Fourth Geneva Convention (n 225) common art 2 and 3; Doswald-Beck, Louise and Henckaerts, Jean-Marie, *Customary International Humanitarian Law - Volume I Rules* (CUP, 2005) Rule 1: The Principle of Distinction Between Civilians and Combatants: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians"; Sassòli, Marco and Olson, Laura M., 'The Relationship Between International Humanitarian

mentioned as the only permissible derogation from the right to life in times of emergency.[262]

States that exercise extraterritorial jurisdiction may also be required to take measures to prevent offences related to the three prohibitions by non-state actors (including third state officials), if they are aware, or should have been aware of a real and immediate risk thereof.[263] The obligation to prevent offences by non-state actors is formulated in an open-ended manner so as to be able to apply in a multitude of situations. When applied within state territory this obligation is limited in scope by standards of reasonableness. When applied in extraterritorial settings, these standards of reasonableness are further informed by practical or power-related factors.[264] What measures a state is required to take depends on the concrete threat and on what can be reasonably expected of the state in light of practical and power-related factors in the

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and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts' (2008) 90(871) IRRC 599, 605 onwards.

[262] ECHR (n 6) art 15(2): "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war."

[263] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 35 and 51: "A state may also be responsible for "indirectly attributable extraterritorial wrongfulness" owing to a failure to fulfil its positive human rights obligations"; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 121: Even Milanović, who proposes a stark distinction between the applicability of positive and negative obligations states: "However, killings by third parties can engage the state's positive obligation to do all it reasonably can to prevent such killings, and the obligation to investigate them"; The existence of a short-term obligation to prevent violations of the three prohibitions within state territory as outlined in the case law of the different courts and supervisory bodies: *Velásquez Rodríguez v. Honduras* (n 154) para 173-5; *Opuz v. Turkey*, Appl no. 33401/02 (Sect. 3), ECHR 2009 (9 June 2009) para 159 and 176: The obligation to prevent acts of torture by non-state actors is based on knowledge or acquiescence on the side of the state of the threat that such offences will occur; *Osman v. the United Kingdom* (n 153) para 116: States have a clear indirect obligation to prevent if state authorities knew (or ought to have known) of the existence of a real and immediate risk to someone's life at the hands of a non-state actor; *Pueblo Bello Massacre v. Colombia* (n 203) para 123: "States' obligation to adopt measures of prevention and of protection of individuals in their relations with each other are conditioned by their awareness of a situation of real and immediate danger to a specific individual or group of individuals and to the reasonable possibility of preventing or avoiding that risk"; *Genocide* case (n 7) para 430-1: The obligation to prevent genocide is triggered when a state knows or should have known of the "serious risk" that genocide may be committed.

[264] See Section 3.2.1 The Role of Capacity: States that exercise spatial jurisdiction generally have a greater capacity to take measures to prevent offences by non-state actors than states that exercise personal jurisdiction. States that exercise personal jurisdiction often have less control over the surroundings of the targeted individual and generally have a more limited institutional infrastructure available extraterritorially. Furthermore, a state that exercises extraterritorial jurisdiction may face difficult practical circumstances, such as having to deal with rebel movements, terrorist attacks, armed conflict and other factors making it extremely difficult to protect the local population from offences by non-state actors; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 34, para 179: The ICJ interpreted Article 43 of the Hague Regulations as containing an obligation to protect inhabitants of occupied territories against violations of their human rights by third parties.

particular context.[265] Those measures can range from forms of negotiation to forcefully intervening in violence between non-state actors and physically protecting endangered individuals. An example related to the right to life can be found in the 2008 ECtHR case of *Isaak v. Turkey*.[266] In 1996, Mr. Isaak took part in an unarmed demonstration against the Turkish occupation of Northern-Cyprus in the buffer zone between Northern and Southern Cyprus. Soldiers and policemen of the Turkish Republic of Northern Cyprus (TRNC) were present in the buffer zone and had allowed a counter-rally by Turkish-Cypriots armed with sticks and iron bars to assemble there. The UN buffer zone is an area beyond Turkish territory, even beyond Turkish occupied territory.[267] Mr. Isaak was isolated, surrounded by around fifteen to twenty people and kicked and beaten to death, while eight TRNC police officers stood nearby. Because Mr. Isaak was unarmed and attacked by a group of more than ten people, the ECtHR concluded that the force used against him was not "absolutely necessary", neither in self-defense nor for the purpose of quelling the violence.[268] Because TRNC officials were present at the scene of the crime and several of them allegedly even participated in the beating, the ECtHR concluded that Turkey "manifestly failed to take preventive measures to protect the victim's life."[269] The officials could reasonably have been expected to intervene, because they belonged to an enforcement branch, were armed and standing close by, which means there were no practical or power-related factors obstructing intervention.

Several cases decided by Dutch domestic courts contain interesting examples of assessments of what can be reasonably required of states to prevent gross human rights violations by non-state actors or third state officials in extraterritorial settings.

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[265] *Opuz v. Turkey* (n 263) para 159 and 176: The state has a large amount of discretion in terms of the type of measures it takes to respond to threats of torture or ill-treatment, but these measures must eventually amount to "effective deterrence" and in any case *not* to complete inaction; *Osman v. the United Kingdom* (n 153) para 116: In response to a threat to the right to life of an identified individual or individuals, states are required to "take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"; *Zimbabwe Human Rights NGO Forum v. Zimbabwe,* AComHPR, Communication No. 245/02 (15 May 2006) para 156-7; *Genocide* case (n 7) para 430-1: In reaction to a threat of genocide, states must "employ all means reasonably available to them, so as to prevent genocide so far as possible"; De Pooter, Helene, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (2009) 17 Afr Yearb Int Law 287, 311: The short-term due-diligence obligation to employ all available means to prevent genocide poses a heavy burden, for a state is expected to deploy all available means, even if the state cannot by itself avert the commission of genocide.

[266] *Isaak v. Turkey*, no. 44587/98, 24 June 2008.

[267] *Isaak v. Turkey* (n 266) para 106: Interestingly, the ECtHR never considered whether Mr. Isaak was within Turkey's jurisdiction, but seems to assume that this is the case and Turkey does not argue otherwise. If it had been explored, Turkish forces would probably have been found to have effective control over the Turkish side of the buffer zone.

[268] ECHR (n 6) art 2(2): Under the ECHR, there are several permissible exceptions to the right to life; *Isaak v. Turkey* (n 266) para 115-8.

[269] *Isaak v. Turkey* (n 266) para 119-20: "[T]he Court is of the opinion that Anastasios Isaak was killed by, and/or with the tacit agreement of, agents of the respondent State."

Note that they are not determinative for the content of human rights obligations and not legally binding on other states, but interesting examples of the practice of courts nonetheless.[270] The cases find their roots in the Srebrenica genocide. The Dutch state delivered troops under the name Dutchbat to the UN Protection Force (UNPROFOR) peacekeeping operation in former Yugoslavia. In 1995 Dutchbat III, led by Lieutenant Colonel Karremans, was forced to retreat and hand over the Srebrenica enclave to Colonel General Ratko Mladic' Army of Republika Srpska (VRS). Arrangements were made between Dutchbat and the VRS for the evacuation of inhabitants and refugees in the enclaves, but contrary to the agreement the VRS proceeded to kill more than 8000 Muslim men after they has been handed over. The 2013 *Nuhanović* and *Mustafić* cases from the Dutch Supreme Court are based on claims brought by relatives of several of the men who had been expelled from a compound under Dutchbat's control and were subsequently killed.[271] Hasan Nuhanović, for example, brought a claim on behalf of his brother and father, who were murdered after having been sent off the compound.[272] Hasan himself was part of the local personnel of the compound and arrangements were made to evacuate him with the Dutch troops. His brother Mohamed was not so fortunate and Dutchbat refused to put him on the list of local personnel. He had to leave the compound, followed by his father, and both were killed shortly thereafter.[273] The Court of Appeals, in a reasoning later confirmed by the Supreme Court, concluded that the Dutch troops should not have sent Mohamed off the compound since they had already received reports of the crimes the VRS was committing against Muslim men outside the safe areas.[274] They were aware of the risk that Mohamed would be murdered and by causing him to leave the compound regardless of this knowledge and not taking him to another safe haven, they violated his right to life.[275] As the case did not involve a direct transfer to another state, it is not a clear-cut case of *non-refoulement*, but the reasoning is much the same.

In the 2014 *Mothers of Srebrenica v. the Netherlands* case, the Dutch District Court in The Hague held the Dutch State responsible for its cooperation with the VRS in the deportation of the relatives of ten claimants from the compound over which it had

[270] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art 38 1(b): When state practice becomes general practice, it can be evidence of customary international law.
[271] *Nuhanović v. The Netherlands* (n 26).
[272] *Nuhanović v. The Netherlands* (n 26) para 3.5.3.
[273] *Mustafić v. The Netherlands* (6 September 2013) Supreme Court of the Netherlands, 12/03329: The Mustafić case is broadly similar, with the difference that Mr. Mustafić and his family had sought refuge in the compound and he had no links with the local personnel. This made little difference for the outcome.
[274] *Nuhanović v. The Netherlands* (n 26) para 3.2 point xii.
[275] *Nuhanović v. The Netherlands* (n 26): It was also considered foreseeable, on the basis of what seems a common-sense assessment of the situation, that Hasan and Muhamed's father Ibro would accompany his minor son Muhamed. Therefore the court concluded that the Netherlands also violated Ibro's right to life.

jurisdictional control, after which they were ill-treated and killed.[276] The Court based responsibility on art 2 ECHR (right to life), art 6 ICCPR (right to life) and a standard of care under domestic law Article 6:162(2) Burgerlijk Wetboek as informed by Article 1 of the Genocide Convention (obligation to prevent and punish genocide) and it limited its considerations to the area over which Dutchbat had jurisdiction based on the "effective control" test.[277] It posed the question: "Given what the management knew at that point during the actions of which they are accused could they reasonably have decided and acted in the way in which they did?"[278] After carefully reviewing a large number of statements, the Court ruled that in the afternoon of July 13th 1995, Dutchbat was "aware of a serious risk of genocide of the men separated and carried off."[279] The Court then assessed the alleged wrongful acts. For many of these acts, such as not allowing more refugees into the compound or supporting the evacuation of refugees from the safe area outside of the compound, the Court concluded that the acts were understandable and expecting more from Dutchbat would have been unreasonable under the circumstances.[280] However, regarding the refugees already present in the compound the Court considered that Dutchbat should have let the able-bodied men stay there until they would have been evacuated together with the Dutchbat troops.[281] If they had done so, many of the men may have been alive today. The Court concluded: "Dutchbat's acts are unlawful with respect to the male refugees who left the compound late in the afternoon on July 13th 1995."[282]

The case illustrates that the measures a state is required to take must be reasonable in the given circumstances. The Court painstakingly analyzed and discussed the different alleged wrongful acts in light of the knowledge at the time, the resources available, the pressure the higher officials of Dutchbat were under and the harsh circumstances in which Dutchbat was functioning. According to the Dutch District Court, Dutchbat in the prevailing circumstances was obligated to ensure the physical protection and

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[276] *Mothers of Srebrenica against the State* case (n 171) para 5.1.

[277] *Mothers of Srebrenica against the State* case (n 171) para 4.151-4.161, 4.164 and 4.179: The court did not apply Article 1 of the Genocide Convention directly, because "the obligation to prevent genocide as is evidenced by the text of the Convention and the history of how it came about now holds only between Convention states themselves, [therefore], the Dutch Constitution does not provide for its direct effect." However, it considered the standard of care required by Article 6:162 (2) Burgerlijk Wetboek to be informed by art 1 of the Genocide Convention; In Chapter 4.2 B.1 Genocide it is argued that the District Court should have used the broader "capacity to influence effectively" criterion as a basis for the state's obligation to prevent genocide, which would then have been broader in scope.

[278] *Mothers of Srebrenica against the State* case (n 171) para 4.180.

[279] *Mothers of Srebrenica against the State* case (n 171) para 4.255 and 4.257.

[280] *Mothers of Srebrenica against the State* case (n 171) para 4.288-91: The court noted that the living conditions in the compound were precarious, the importance of maintaining freedom of movement in the compound, the fact that Dutchbat had too little manpower to go out into the crowd of refugees and select men to admit to the compound and finally that admitting more men would have endangered the evacuation of refugees.

[281] *Mothers of Srebrenica against the State* case (n 171) para 4.329 and 4.331.

[282] *Mothers of Srebrenica against the State* case (n 171) para 4.329.

evacuation of endangered individuals over whom they had jurisdiction.[283] The Court discussed the state's human rights obligations without directly considering the mandate, but taking practical and power-related factors stemming from the mandate into account when considering what could have been reasonably expected in the short-term. This does not preclude a potential failure of the long-term obligation to carefully plan extraterritorial operations and formulate the mandate in a way that allows state officials to live up to the state's extraterritorial human rights obligations.[284]

The *Mothers of Srebrenica* judgment can be considered a progressive judgment in many respects. For example, the Court took an important step in the direction of requirements of information sharing. The Dutch District Court considered the alleged failure to report war crimes as follows:

> "It is indisputable that during the transition period Dutchbat could not protect the refugees inside and around the *mini safe area* located outside the compound on its own, i.e. without outside help, due to its limited manpower and due to the superior military strength of the Bosnian Serbs. Furthermore, Dutchbat at most had a clear view of the men selected by the Bosnian Serbs who were being held in various buildings outside the *mini safe area*. In these circumstances Dutchbat had the obligation to report the war crimes it had directly and indirectly witnessed up to that point as well as from that moment onwards to the UN chain of command."[285]

This obligation to report the witnessed crimes caters to the reasoning of the ICJ in the *Genocide* case, that "the combined efforts of several States, each complying with its obligation to prevent, might [achieve] the result – averting the commission of genocide – which the efforts of only one State [are] insufficient to produce."[286] The obligation to provide information about witnessed crimes, to the UN or other important actors, is a crucial stepping-stone for measures to be taken by these other actors.[287] The Dutch District Court also emphasized that Dutchbat, because of its presence there, had unique insight into the situation. Furthermore, it is a measure that

[283] *Mothers of Srebrenica against the State* case (n 171) para 4.329 and 4.331.

[284] See Section 3.3 A.1 Foreign State's Legal Framework; Twelve Srebrenica Veterans Suing Dutch Government (n 214): A case has been brought against the Netherlands by Dutchbat veterans, claiming that they were sent on an impossible mission because they were ill-prepared and operated under limiting rules of engagement that resulted in their inability to protect the civilian population. This may point to a long-term failure on behalf of the state to carefully plan the operation.

[285] *Mothers of Srebrenica against the State* case (n 171) para 4.264.

[286] *Genocide case* (n 7) para 430 [changed to present tense]; Genocide Convention (n 100) art 8: Stipulates that contracting parties "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III, without any territorial limitation."

[287] See Chapter 5.4.1 Challenges: Employs the example of the Srebrenica genocide to illustrate the point that the consequences of the involvement of multiple duty-bearing states for the content and scope of each state's obligations and their implementation are still largely obscure.

can hardly be considered unreasonable, especially in an age of easy online and telecommunication, even when officials are under extreme pressure.[288] At the same time, the Court restricted its consideration only to the wrongful acts that had been alleged, while it could have broadened its consideration to other measures that could have been reasonably expected of the Netherlands.

Finally, states have short-term obligations in extraterritorial settings related to the prohibition of *refoulement*. Whether a transfer takes place from within the state's own territory or outside of it is irrelevant for the absolute obligation not to expose individuals within the state's jurisdiction to the real risk of torture or ill-treatment or arbitrary death in a receiving state.[289] In extraterritorial contexts, *non-refoulement* also applies if the foreign state plans to hand an individual over to the authorities of the host state.[290] The Special Rapporteur for the Prevention of Torture has stated that the prohibition of *refoulement* under the CAT is not geographically limited and that "the individual being transferred need not cross an international border for this obligation to apply."[291] In the *Al-Saadoon and Mufdhi v. the United Kingdom* case, for example, the UK was held responsible for a violation of the prohibition of torture because an individual held by UK state officials acting in the territory of Iraq, was handed over to Iraqi authorities, while there was a risk of the imposition of the death penalty.[292] The ECtHR ventured that no "real attempt was made to negotiate with the Iraqi authorities to prevent it" while "this could have provided an opportunity to seek the consent of the Iraqi Government to an alternative arrangement involving, for example, the applicants being tried by a United Kingdom court, either in Iraq or in the United Kingdom."[293] Arrangements should be made to be able to review in extraterritorial

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[288] *Mothers of Srebrenica against the State* case (n 171) para 4.265: "The District Court finds that the argument put forward by the State, namely that reporting war crimes did not have the highest priority in Dutchbat as it lacked the manpower to maintain order on site does not constitute a justification defence, not even when it is taken into consideration that decisions were made under great pressure in a war situation."

[289] See for the thresholds required among others: *Pillai v. Canada*, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 473 (HRC, Mar. 25, 2011) para 11.4: Substantial grounds for believing that there is a real risk; *Tebourski v. France* (n 76) para 8.2-3; *Salah Sheekh v. the Netherlands*, no. 1948/04, ECHR 2007-I, para 148: Real and personal risk; Member states of the ICCPR and ECHR that have abolished the death penalty are also not allowed to extradite individuals to a state where he or she might receive a sentence of capital punishment, see: *Fong v. Australia*, Comm. 1442/2005, No. CCPR/C/97/D/1442/2005 (HRC Oct. 23, 2009); *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010, para 120.

[290] *Al-Saadoon and Mufdhi v. the United Kingdom* (n 289) para 141-3; *Mothers of Srebrenica against the State* case (n 171): Involving the handover of Muslim men to the troops of General Mladic by Dutch state officials acting as part of a peacekeeping mission in Bosnia, while there was a risk that they would be killed.

[291] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 38: "Whenever States are operating extraterritorially and are in a position to transfer persons, the prohibition against *non-refoulement* applies in full."

[292] *Al-Saadoon and Mufdhi v. the United Kingdom* (n 289) para 141-3.

[293] *Al-Saadoon and Mufdhi v. the United Kingdom* (n 289) para 141.

contexts whether a real risk exists, which is part of the standard precautionary measures attached to transfers of individuals.[294] If a real risk of torture or arbitrary death is found to exist, the state can choose not to transfer the individual and if necessary transfer the individual to another safe location or attain effective assurances from the receiving state.[295]

C. Preventing Continuation

The phase of preventing continuation or aggravation spans the time after the injurious event has started until it ends.[296] Long-term and short-term measures remain relevant depending on the specific circumstances. The main crosscutting obligation to prevent continuation identified in Chapter 2 is the obligation to halt continuing violations, either by ceasing the wrongful act by state officials or by intervening in offences of non-state actors. An important procedural obligation attached to the obligation to halt continuing violations, is the obligation to investigate to ascertain whether gross human rights violations are indeed taking place and what measures may be required.[297] A prerequisite for this phase to exist is that the violation is of a continuing character.[298] Genocide extends over the time from the moment when the definition of genocide is reached, for as long as acts of killing or causing harm continue to occur with genocidal intent.[299] It is therefore always of a continuing character. Torture can

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[294] *A. v. the Netherlands*, no. 4900/06, 20 July 2010, para 157; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 43: Stresses the importance of procedural obligations attached to *non-refoulement*, such as ensuring the right to challenge detention and potential transfer and ensuring there is an independent decision maker with the power to suspend the transfer.

[295] See for example: *Alan v. Switzerland*, Comm. 21/1995, UN Doc CAT/C/16/D/21/1995, A/51/44 (1996) Annex V at 68 (CAT Committee May 08, 1996) para 11.5; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012 (extracts) para 187; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 40: "States cannot resort to diplomatic assurances against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to such treatment."

[296] See Chapter 1.3.2 Temporal Phases; The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.

[297] *Al-Adsani v. the United Kingdom* (n 154) para 38: The ECtHR stated that the obligation to carry out an effective and official investigation applies "in relation to ill-treatment allegedly committed within its jurisdiction"; The obligation to investigate in this phase can be seen as accessory to or the procedural side of the obligation to cease or intervene. As such, it is central to ensuring the effectiveness of the right concerned.

[298] Commentary to the Articles on State Responsibility (n 137) art 14(1) and (2) and Commentary to Article 14 para 5: "In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time."

[299] Genocide Convention (n 100) art 2: Genocidal intent is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"; See Chapter 2.2 C.3 Genocide; Commentary to the Articles on State Responsibility (n 137) Commentary to Article 15 para 3: "Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed […]."

be of a continuing character in individual cases for as long as acts of torture occur against one individual, or form a pattern or practice of inter-connected acts of torture against one or multiple individuals.[300] Arbitrary deaths are, in individual cases, instant in nature and only have a continuing character when they form a pattern or practice of inter-connected killings.[301] Similar to the short-term phase, human rights treaties apply to a state's actions abroad as soon as the threshold of jurisdiction is reached, regardless of the lawfulness of the extraterritorial exercise of enforcement jurisdiction.[302] Yet, practical and power-related factors may influence the content and scope of obligations to prevent continuation.

The direct obligation to cease violations by state officials is inherent to the primary norms prohibiting torture, arbitrary death and genocide and is also a customary rule of international state responsibility, codified in Article 30 of the Articles on State Responsibility.[303] For it to be triggered there must be an attributable breach of an international obligation.[304] These requirements will be met as soon as an individual acting on behalf of the state commits continuing gross human rights violations abroad.[305] An example of a situation in which a state has an obligation to cease a violation would be the obligation to cease continuing acts of torture or a practice of disproportionate use of force by state officials resulting in the arbitrary death of

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[300] See Chapter 2.2 C.1 Torture; Commentary to the Articles on State Responsibility (n 137) Commentary to Article 14 para 6: A violation of the prohibition of torture continues for as long as acts of torture take place. The consequences of acts of torture may also extend in time, but are not part of the continuing violation if the acts of torture have ceased; Pauwelyn, Joost, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' (1996) 66(1) BYIL 415, 418 and 427-8; *Ireland v. the United-Kingdom* (n 256) para 159.

[301] See Chapter 2.2 C.2 Arbitrary Death; The term "killings" is used because it concerns deaths directly caused by people, as opposed to more circumstantial violations of the right to life; Pauwelyn, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' (n 300) 418 and 427-8; *Ireland v. the United-Kingdom* (n 256) para 159.

[302] See Section 3.1.1 A ECHR, ACHR and ACHPR.

[303] Commentary to the Articles on State Responsibility (n 137) Commentary to art 30 para 5: "The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule"; Zemanek, Karl, 'New Trends in the Enforcement of Erga Omnes Obligations' in Frowein, Jochen A., Wolfrum, Rudiger (eds), *Max Planck Yearbook of United Nations Law, Volume 4, 2000* (Kluwer, 2000) 1, 27: "[T]he obligation to perform the obligation under the primary norm is inherent in the latter"; *Trail Smelter Arbitration (United States v Canada)* 3 RIAA 1905-1982 (16 April 1938 and 11 March 1941).

[304] Articles on State Responsibility (n 137) art 2: The breach of an internationally wrongful act and attribution to a state are the two main requirements for state responsibility; Articles on State Responsibility (n 137) art 16: The obligation to cease violations by state officials also covers situations of complicity by aiding and assisting officials of the host state in committing gross human rights violations, for which it is required that the foreign state officials have "knowledge of the circumstances of the internationally wrongful act" and therefore knowingly contribute to these acts; Genocide Convention (n 100) art 3e; *Genocide* case (n 7) para 419-21: Complicity in genocide requires that the aiding state was aware of the specific intent (*dolus specialis*) to commit genocide of the principal wrongdoer.

[305] Articles on State Responsibility (n 137) Chapter II.

people within its extraterritorial jurisdiction.[306] The trigger of knowledge for the obligation to cease is low, as state officials are directly involved and superiors are expected to know and control the manner in which their subordinates carry out their tasks. If acts of torture or arbitrary killings amount to a pattern or practice, the trigger of knowledge is wholly objective, which means the state "should have known" about the continuing violation.[307] The measures taken to end the violation "must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system."[308] Similar to the reasoning in the short-term phase, practical and power-related factors in extraterritorial contexts cannot normally affect the content and scope of the direct obligation to cease an ongoing violation. It is much easier for the state to control the acts of its own officials than of non-state actors, especially in light of the state's long-term obligations to provide training and carefully plan extraterritorial operations and the obligation to prosecute and punish state officials when they commit human rights violations. Moreover, it would be absurd to allow a state that exercises extraterritorial jurisdiction by its own choosing, to refer to practical and power-related factors in the extraterritorial context in an attempt to justify ongoing violations of absolute prohibitions by its own officials.[309]

States also have an obligation to intervene in offences related to the three prohibitions by non-state actors if they know or should have known of these acts. The obligation to intervene is an extension of the short-term obligation to take measures to prevent the materialization of threats posed by non-state actors. The scope of the obligation is limited to what can be reasonably expected of a state, which is informed by practical and power-related factors in extraterritorial contexts. The ECtHR *Ilaşcu v. Moldova and Russia* case concerned among other things Russia's obligations to prevent acts of torture by the separatist regime Moldovan Republic of Transdniestria (MRT) that it helped create and maintain, even though Russia's officials were not directly involved in the acts of torture.[310] The applicants in the case had been detained and severely ill-

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[306] Note that deaths resulting from lawful acts of war are a permissible derogation from human rights obligations: ECHR (n 6) art 15(2); Fourth Geneva Convention (n 225) common art 2 and 3; Doswald-Beck and Henckaerts, *Customary International Humanitarian Law - Volume I Rules* (n 261) Rule 1.

[307] *Ireland v. the United-Kingdom* (n 256) para 159: In such cases, the ECtHR has stated that it is "inconceivable that the higher authorities of a state should be, or at least should be entitled to be, unaware of the existence of such a practice."

[308] *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, no. 9940-9944/82, EComHR judgment on admissibility (6 December 1983) para 30.

[309] See Chapter 2 Sections 2.1.1 Torture: The prohibition of torture is *jus cogens* and therefore absolute; 2.1.2 Arbitrary Death: There are permissible exceptions to the right to life like self-defence. The right to life is therefore not absolute, but the prohibition of arbitrary deaths is; 2.1.3 Genocide: The prohibition of genocide is *jus cogens* and therefore absolute.

[310] *Ilaşcu v. Moldova and Russia* (n 4) para 392: "[T]he "MRT", set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event […] it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation."

treated in the MRT.[311] Both Moldova and Russia were considered to exercise jurisdiction in the area and were held responsible for their respective failures to prevent the ill-treatment inflicted by MRT officials.[312] Only Russia exercised extraterritorial jurisdiction in the Transdniestrian region, because the region is formally within Moldovan territory.[313] Russia was held responsible because it actively helped create and maintain the situation by supporting the MRT and "made no attempt to put an end to the applicants' situation [initially] brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998", which is when the ECHR entered into force for Russia.[314] This was decided even though "agents of the Russian Federation ha[d] not participated directly in the events complained of in the present application", which suggests that the Court considered the MRT a subordinate local administration.[315] The case shows that, despite practical or power-related factors, states cannot remain passive bystanders when gross human rights violations are taking place against people within their extraterritorial jurisdiction.[316] They must do everything that can be reasonably expected to intervene, which may entail forms of negotiation, physical protection, evacuation or providing information to the UN or other relevant actors.[317]

D. Preventing Recurrence

The phase of preventing recurrence starts once the violation has ended.[318] Obligations in this phase are aimed at taking remedial measures and ensuring the violation does not recur. The main crosscutting obligations to prevent recurrence identified in Chapter 2 are the inter-related obligations to investigate, prosecute and punish. These

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[311] The MRT is part of Moldovan territory, but proclaimed independence in 1991. Neither Moldova nor the international community has recognized it as a state.

[312] *Ilaşcu v. Moldova and Russia* (n 4) para 331, 441, 448, 453.

[313] *Ilaşcu v. Moldova and Russia* (n 4) para 339: Moldova failed its positive obligation to take "measures needed to re-establish its control over Transdniestrian territory (…) and measures to ensure respect for the applicants' rights, including attempts to secure their release."

[314] *Ilaşcu v. Moldova and Russia* (n 4) para 393.

[315] *Ilaşcu v. Moldova and Russia* (n 4) para 393 [changed to past tense]. See para 314 and 316: Explains the concept of jurisdiction, which "also extends to acts of the local administration which survives there by virtue of [a foreign state's] military and other support." See para 392: The Court does not explicitly use the term "subordinate local administration", but its reasoning does resemble the principles set out in para 314 and 316. See Dissenting Opinion Of Judge Kovler: Argues against the idea that the MRT is a local subordinate administration of Russia, implicitly revealing that this was the dominant position among the other judges.

[316] *Osmani v. Serbia*, Comm. 261/2005, UN Doc CAT/C/42/D/261/2005, A/64/44 (2009) Annex XIII at 273 (CAT Committee May 08, 2009) para 10.5; *Dzemajl et al. v. Yugoslavia*, Comm. 161/2000, UN Doc CAT/C/29/D/161/2000, A/58/44 (2003) Annex VI at 85 (CAT Committee Nov. 21, 2002) para 9.2; *Isaak v. Turkey* (n 266); *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, ECHR 2012: Especially if state officials are present at the scene of the crime, inaction is an unacceptable form of state acquiescence or consent.

[317] *Mothers of Srebrenica against the State* case (n 171) para 4.264.

[318] See Chapter 1.3.2 Temporal Phases.

obligations are considered to support both specific and general prevention of future violations.[319] States cannot always lawfully exercise adjudicative jurisdiction abroad, meaning the power of courts to settle legal disputes.[320] There are grounds upon which adjudicative criminal jurisdiction can be exercised abroad, based on: (i) The active personality principle, when an offence was committed abroad by a national of the state; (ii) The passive personality principle, when a crime was committed abroad against a national of the state; (iii) The protective principle, when an offence was committed abroad against vital state interests; or (iv) The universality principle, when offences committed abroad concern the international community as a whole, such as war crimes, crimes against humanity, torture and genocide.[321] Adjudicative civil jurisdiction may also extend abroad, albeit more exceptionally than adjudicative criminal jurisdiction, for example to effectuate an individual's right to remedy, or when companies acting abroad have their center of activity in the state in which a case is brought.[322] The scope of the obligation to investigate, prosecute and punish gross human rights violations when a state exercises extraterritorial jurisdiction will be discussed both in relation to: (i) The domestic legal framework of the foreign state; and (ii) The domestic legal framework of the host state.[323]

If an allegation has been made or there is a suspicion that a violation or offence related to one of the three prohibitions was committed in a territory or against individuals over whom the state has extraterritorial jurisdiction, the first step towards ensuring that suspects can be prosecuted and punished, is to undertake a prompt, serious and effective investigation.[324] This obligation has a built-in standard of

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[319] *Blanco Abad v. Spain*, Comm. 59/1996, UN Doc CAT/C/20/D/59/1996 (CAT Committee May 14, 1998) para 8.2; *Blake v. Guatemala* (Reparations and Costs) Judgment of January 22, 1999, I/A Court HR Series C No 48, para 61 and 64; *Bulacio v. Argentina* (Merits, Reparations and Costs) Judgment of September 18, 2003, I/A Court HR Series C No 100; *Giuliani and Gaggio v. Italy*, no. 23458/02, 25 August 2009 para 306; *Opuz v. Turkey* (n 263) para 153; *Juan Humberto Sánchez v. Honduras* (n 198) para 143; See also the *Pueblo Bello Massacre v. Colombia* (n 203) para 149.

[320] Kamminga, 'Extraterritoriality' (n 24) para 1 and 8; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 23: It is sometimes seen as a part of enforcement jurisdiction.

[321] Kamminga, 'Extraterritoriality' (n 24) para 11-4; Oxman 'Jurisdiction of States' (n 24) 34 onwards.

[322] Kamminga, 'Extraterritoriality' (n 24) para 15; Donovan, Donald F. and Roberts, Anthea, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 AJIL 142; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 55-61: The right to remedy for torture has been argued to exists irrespective of where the violation took place and states may accordingly be obligated to allow civil proceedings against another state or private wrongdoer abroad; See for example the *Vereniging Milieusdefensie v. Royal Dutch Shell PLC* (30 January 2013) Rechtbank Den Haag, C/09/330891 / HA ZA 09-0579, para 2.2.

[323] See Section 3.3 A. Long-Term Prevention: This distinction was also used in the long-term phase to discuss the limits of a state's prescriptive jurisdiction and scope of the obligation to introduce a proper legislative framework to deter violations.

[324] Both the CAT and IACPPT contain express provisions to that effect: CAT (n 7) art 12; IACPPT (n 84) art 8 jo 12; In the context of the other threaties the extraterritorial obligation to investigate follows from the jurisdiction clauses (or lack thereof) combined with the obligation to ensure the relevant rights or prevent violations: ICCPR (n 5) art 2 jo 6 and 7; ECHR (n 6) art 1 jo 2 and 3; ACHR (n 7) art 1 jo 4

reasonableness, meaning that what is considered prompt, serious and effective may differ according to the practical circumstances. In terms of power-related factors, it is relevant for the interpretation of the requirement of promptness whether the state's infrastructure abroad (or local subordinate administration) contains an independent investigative branch, or if the state has to deploy investigative personnel to the location where the violation occurred. Practical factors, such an unstable security situation, may make it more difficult to carry out a prompt, serious and effective investigation. At the same time, the obligation to investigate is a stepping-stone for the obligations to prosecute and punish and therefore a central requirement for the overall effectiveness of the relevant right. The state that exercises extraterritorial jurisdiction must meet at least the basic requirements for the investigation to be capable of leading to the identification and punishment of the individual(s) responsible.[325]

In the *Al-Skeini v. the United Kingdom* case, the ECtHR discussed the scope of the extraterritorial obligation to investigate killings in which state officials were allegedly involved.[326] The facts of the case played out against the background of the occupation of Iraq in 2003 to 2004.[327] In 2003 the CPA was created to act as a caretaker administration until an Iraqi government could be established. It had power, *inter alia,* to issue legislation. The administration of the CPA was divided in regional areas and the south was placed under responsibility of the UK.[328] The complainants brought a case against the UK on behalf of two Iraqis who had been killed in the South in an exchange of gunfire with British military forces. One individual had been killed at a funeral, where guns were shot as a tribute to the dead, which triggered a British soldier to shoot at the group of people attending the funeral. The second individual had been shot in the house of his brother-in-law during a search and arrest operation. The Court recognized the practical factor caused by an unstable security situation and breakdown of civilian infrastructure, but stated that the right to life, being one of the

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and 5; ACHPR (n 198) art 4 and 5; Genocide Convention (n 100) art 1; The investigation must be serious and effective and must be capable of leading to the identification and punishment of the individual(s) responsible: *Pestano v. Philippines*, Comm. 1619/2007, No. CCPR/C/98/D/1619/2007, A/65/40, Vol. II (2010), Annex V at 309 (HRC, Mar. 23, 2010) para 7.5; *Yaşa v. Turkey* (n 155) para 100: Authorities are bound to investigate in good faith all *allegations* of violations, but also if they are otherwise informed about a death which took place in suspicious circumstances; *Velásquez Rodríguez v. Honduras* (n 154) para 177: The duty to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective"; *Amnesty International and Others v. Sudan*, AComHPR, Communication No. 48/90, 50/91, 52/91, 89/93 (15 November 1999) para 51: Officials investigating the case must be completely independent and the findings must be made public.

[325] *Al-Skeini v. the United Kingdom* (n 4) para 169-70: At the very least, states must ensure the independence of the investigators and do everything it can to secure witness statements.

[326] *Al-Skeini v. the United Kingdom* (n 4) para 151; The case is of analogous importance for the prohibitions of torture and genocide.

[327] In 2003 a coalition of armed forces under unified command, led by the United States with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, invaded Iraq. Other States later sent personnel to support the reconstruction effort.

[328] *Al-Skeini v. the United Kingdom* (n 4).

most fundamental rights, must be made practical and effective by ensuring an effective investigation in situations where it may have been violated.[329] It remarked that "in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators."[330] The Court concluded that the independence of the investigators was of particular importance.[331] Similarly, identifying eyewitnesses and securing witness testimonies was considered central to an effective investigation.[332] Because the UK had failed to meet these basic requirements, which were reasonable under the circumstances, it had failed its obligation to investigate and therefore violated the right to life.

If the investigation leads to the identification of suspects, the state has to submit the case to the competent authorities, which can be the prosecutorial service of the foreign state, of the host state or reference to a third state or international penal tribunal.[333] State officials in principle have to be prosecuted and punished in accordance with the foreign state's legal framework.[334] The obligation to punish violations by state officials is inherent to the primary obligation not to commit gross human rights violations abroad. The HRCee has for example expressed its concern "at the limited number of investigations, prosecutions and convictions of members of the Armed Forces and other agents of the US Government, including private contractors, for unlawful killings during its international operations" and asserted that the "State party should ensure that all cases of unlawful killing, torture or other illtreatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned."[335] The official can be tried either by the foreign state's domestic courts or by special tribunals set up for the purpose of dealing with members of the forces to which the official belongs.[336] Because the obligation to

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[329] *Al-Skeini v. the United Kingdom* (n 4) para 152, 158 and 162-3: The UK argued that it had met its investigative duty in relation to some of he applicants, taking the security-circumstances and lack of full control in the area into account. The applicants stated that the UK should have made provision for difficulties related to the security situation and lack of control.
[330] *Al-Skeini v. the United Kingdom* (n 4) para 168.
[331] *Al-Skeini v. the United Kingdom* (n 4) para 169.
[332] *Al-Skeini v. the United Kingdom* (n 4) para 170.
[333] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep 422, para 94; Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 405: States may be required to set up tribunals "to replace the regular courts if the local administration of justice is completely disorganized"; See Section 3.3 Long-Term Prevention.
[334] See Section 3.3 A.1 Foreign State's Legal Framework: This includes officials of subordinate local administrations or any other agent acting on the state's behalf; Oxman, 'Jurisdiction of States' (n 24) para 18 and 33; Kamminga, 'Extraterritoriality' (n 24) para 20: For armed forces, status of force agreements specify that the members of the armed forces are subject to the prescriptive, enforcement and adjudicative jurisdiction of the sending state.
[335] Concluding Observations HRCee on the United States of America 2014 (n 64) para 5.
[336] Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 405: States may set up special tribunals "to deal with the members of the military forces of the occupying power."

prosecute and punish can be implemented by the state's own (especially established) prosecutorial and adjudicative institutions, it is not contingent upon the particular extraterritorial circumstances and cannot be limited based on legal, practical or power-related factors.

Matters can get more complicated when it concerns non-state actors suspected of committing offences related to the three prohibition over whom the foreign state exercises extraterritorial jurisdiction. In theory, non-state can be prosecuted either in accordance with the foreign state's own legal framework (i), the host state's legal framework (ii) or alternative routes of prosecution.[337] In practice, foreign states typically cannot choose between these three options. State parties of the CAT and IACPPT are required to prosecute and punish offences on several grounds, including the fact that the offence took place within its jurisdiction, the active and passive personality principles and principle of universal jurisdiction.[338] State parties are also required to cooperate to prosecute and punish perpetrators of torture.[339] The Special Rapporteur on Torture has stated that "the core purpose of the [CAT] was the universalization of a regime of criminal punishment for perpetrators of torture."[340] This demanding regime of punishment means that a foreign state is required to establish adjudicative criminal jurisdiction over non-state actors suspected of committing acts of torture within its extraterritorial jurisdiction.[341] The suspects must then be prosecuted in accordance with the foreign state's legal framework, unless it ensures an alternative route of prosecution.

If a non-state actor is suspected of committing offences related to arbitrary death or genocide within a state's extraterritorial jurisdiction, the foreign state may be unable to establish adjudicative criminal jurisdiction in accordance with its own legal

[337] When a state exercises personal jurisdiction, it has an obligation to investigate, prosecute and punish only in relation to state officials and the individual(s) over whom it has jurisdiction, not in relation to non-state actors who wage an attack on the rights of the individual(s) but are not themselves within its jurisdiction.

[338] See Section 3.1.1 C CAT and IACPPT and Section 3.3 A.1 Foreign State's Legal Framework; CAT (n 7) art 5; IACPPT (n 84) art 6 and 12-14: Under the IACPPT, states are even required to cooperate to prevent lacunas in prosecution through extradition arrangements; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46

[339] CAT (n 7) art 8; IACPPT (n 84) art 11 and 13; Economic and Social Council Resolutions 663C(XXIV) and 2076(LXII), 'Standard Minimum Rules for the Treatment of Prisoners' (31 July 1957 and 13 May 1977) UN ESCOR, Supp. No. 1, at 11, UN Doc E/3048 (1957), amended by UN ESCOR, Supp. No. 1, at 35, UN Doc E/5988 (1977), Chapter III.

[340] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 44.

[341] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46-8: "The [CAT] requires States to criminalize all acts of torture "wherever they occur, and to establish criminal jurisdiction over various extraterritorial acts of torture, including universal jurisdiction when an offender is present in 'any territory under its jurisdiction'."" The phrase 'any territory under its jurisdiction' in the CAT has been interpreted to include forms of authority and control over individuals.

framework.[342] The obligation to prosecute and punish acts of genocide under Article 6 of the Genocide Convention, for example, contains an express limitation to acts committed within the state's own territory.[343] States are permitted to assume universal jurisdiction over acts of genocide, but not all states have introduced legislation to that effect.[344] If there is no basis for the foreign state to establish adjudicative jurisdiction in accordance with its own legal framework, it must find another way to ensure prosecution and punishment of non-state actors suspected of committing offences related to the prohibitions of genocide or arbitrary death within its extraterritorial jurisdiction.[345] For example, the foreign state could transfer the suspect to the authorities of the host state or to a third state with a basis to establish adjudicative criminal jurisdiction. For acts of genocide, this reasoning is supported by Article 7 of the Genocide Convention, which contains a pledge to extradite individuals to other states that want to prosecute.[346] Another alternative route is to transfer the suspect to an international penal tribunal.[347] Before transferring a suspect to another state or international penal tribunal, the foreign state should consider whether the prosecution and punishment would be in line with requirements under international human rights law.[348]

Finally, if the foreign state is also an occupying power, the obligations to investigate, prosecute and punish offences by non-state actors are part of the obligation to "restore, and ensure, as far as possible, public order and safety", as prescribed by Article 43 of the Hague Regulations, which has customary law status.[349] Accordingly,

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[342] Genocide Convention (n 100) art 6: Contains an express territorial limitation; *Genocide* case (n 7) para 184 and 442: States are only obligated to prosecute and punish people charged with genocide or other acts in Article 3 if the acts were committed on their territory. This does not exclude criminal prosecution on other grounds, such as the nationality of the accused or universal jurisdiction; *Separate Opinion of Judge Tomka to the Genocide* case (n 7) para 65; Note that the obligation to investigate, prosecute and punish acts of torture can already come into play in the short-term phase and phase of preventing continuation, because genocide is a more large-scale and composite violation and punishing individual offences can have a preventive effect at an earlier stage. For the sake of clarity, it is only discussed in the last temporal phase in this chapter. See: Chapter 2.2 B.3 and 2.3 Conclusion.

[343] Genocide Convention (n 100) art 6.

[344] Kamminga, 'Extraterritoriality' (n 24) para 14: If the acts qualify as war crimes or crimes against humanity, states are also allowed to assumed universal jurisdiction; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46.

[345] The obligation to prosecute and punish offenders is inherent to the obligation to ensure the right to life and right to be free from genocide. See Chapter D.2 Arbitrary Death and D.3 Genocide.

[346] Genocide Convention (n 100) art 7.

[347] States are in any case obligated to cooperate with international tribunals if they have accepted the tribunal's jurisdiction and the tribunal requests their assistance in the arrest of alleged offenders within the state's jurisdictional control. See: *Genocide* case (n 7) para 443-450: Serbia was held responsible for refusing to fully cooperate with the ICTY in the arrest of General Mladic.

[348] CAT, General Comment 2 (n 73) para 10: Conduct may not be prosecuted as ill-treatment if elements of torture were present; *Öneryıldız v. Turkey* (n 233) para 116-7.

[349] Hague Regulations (n 111) art 43; Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (n 223).

the foreign state has to make a structural effort to investigate, prosecute and punish offences that occur in the territory over which it exercises spatial jurisdiction or by or against people over whom it exercises authority and control. In principle, the prosecution and punishment of non-state actors will happen in accordance with the host state's legal framework, or in accordance with the (adjustments to) laws that the occupying power has introduced to that effect.[350]

3.4 Conclusion

This chapter set out to explore how the territorial set of obligations to prevent gross human rights violations can be translated to extraterritorial obligations based on jurisdiction. The first step was to outline the interpretation of extraterritorial jurisdiction for instruments relevant to this research. Importantly, instruments containing obligations to prevent gross human rights violations all in principle allow for extraterritorial applicability based on jurisdiction.[351] It was concluded that jurisdiction in human rights treaties functions as a threshold and basis for extraterritorial applicability.[352] To reach the threshold, states need to exercise certain forms of control over territory or people abroad. The forms of control that lead to extraterritorial applicability can roughly be divided into: effective control over territory or authority and control over individuals. These forms of jurisdictional control have been termed the spatial and personal models. The spatial model introduces a presumption that everyone within a certain territory over which the state has effective control is within a state's jurisdiction. The personal model requires that there is a relationship of authority and control between a state and individual that warrants the state to ensure that individual's rights, such as arrest and detention, but arguably also bombings and shootings.

Once the threshold has been reached, a second – often disregarded – step is the process of determining the content and scope of corresponding extraterritorial obligations. As human rights treaties were devised for territorial context, the capacity to ensure human rights within state territory is presumed. Only the scope of certain types of obligations, like obligations to prevent formulated in an open-ended manner or obligations that leave room for interpretation, may be limited by standards of reasonableness. When a state exercises extraterritorial jurisdiction, the capacity to ensure human rights is also to a certain extent presumed. Yet, extraterritorial contexts pose challenges that may require other adjustments to the content and scope of obligations than in territorial contexts Therefore, legal, practical and power-related factors were formulated to allow for a realistic assessment of the content and scope of extraterritorial obligations. Importantly, these factors only influence the content and

[350] Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 406; Coalition Provisional Authority Order Number 7, Penal Code (n 230).

[351] See Section 3.1.1 Instruments.

[352] See Section 3.1.2 Jurisdiction as a Threshold.

scope of extraterritorial obligations once the threshold has been reached, not their formal applicability. Once the threshold of extraterritorial jurisdiction has been reached, all rights and obligations in a treaty in principle apply.[353] However, certain obligations may not arise in extraterritorial settings due to legal barriers and the scope of other obligations may be reduced to zero because of practical or power-related factors.

The third and final step was to use these factors to translate the set of territorial obligations to prevent gross human rights violations in the four temporal phases (long-term prevention, short-term prevention, preventing continuation, preventing recurrence), to extraterritorial obligations based on jurisdiction.[354] In the long-term phase, states have an obligation to introduce a proper legislative and administrative system capable of deterring violations.[355] In extraterritorial context, attention must be paid to the limits of a state's prescriptive jurisdiction. The state that exercises extraterritorial jurisdiction is required to make provision in its own domestic legal framework to punish gross human rights violations by its state officials abroad. It also has to introduce safeguards in its domestic legal framework to regulate the activities of state officials abroad, such as procedural safeguards for situations of detention or a framework regulating the use of force and firearms. Furthermore, states must plan and equip extraterritorial operations to allow them to function in a manner consistent with requirements under international human rights law. Finally, occupying powers may also have to adjust the domestic legal framework of the host-state, to abolish laws that are not in line with requirements under international human rights law, ensure a basis to punish non-state actors for offences related to the three prohibitions and other legislation necessary to ensure public order and safety, like regulating dangerous activities and introducing guarantees to protect vulnerable groups.

In the short-term phase, states have to take measures to prevent gross human rights violations when they are aware or should have been aware of an immediate risk.[356] There is a difference in the influence of the factors in relation to the scope of direct *versus* indirect obligation to take measures to prevent. It is much easier for states to oversee and control the actions of its state officials abroad, than of non-state actors. Officials are trained and instructed how to prevent gross human rights violations. If the officials fail in that regard, they will have to be prosecuted and punished based on the foreign state's legal framework. On the other hand, the obligation to prevent offences by non-state actors requires positive state action to avert danger posed by non-state actors, over whom the state does not necessarily have any control. When

[353] See Section 3.2 Corresponding Obligations: That way, a treaty's formal applicability is not diminished and separate criteria can be employed to determine the content and scope of corresponding obligations, which fully take the specificities of an extraterritorial context into account.
[354] See Chapter 1.3.2 Temporal Phases and Section 3.3 Extraterritorial Obligations to Prevent Torture, Arbitrary Death and Genocide.
[355] See Section 3.3 A Long-Term Prevention.
[356] See Section 3.3 B Short-Term Prevention.

applied within state territory this obligation is in any case limited by standards of reasonableness and its scope may be further limited in extraterritorial settings due to practical or power-related factors. What measures a state is required to take depends on what can be reasonably expected of the state in the particular context. Accordingly, the direct obligation cannot be limited, but the indirect obligation to prevent offences by non-state actors may be more easily limited than within state territory. Examples of measures the state may be required to take are negotiation, informing other actors, physical protection and *non-refoulement* if there is a risk of torture or arbitrary death. In the phase of preventing continuation, states have an obligation to halt continuing violations.[357] The state has to cease continuing violations by state officials, which cannot be limited. States must also intervene in offences by non-state. The considerations discussed above in relation to the short-term obligation to prevent offences by non-state actors in terms of reasonability and practical and power-related factors, also apply in relation to the obligation to intervene in continuing violations.

Finally, in the phase of preventing recurrence, states have obligations to investigate, prosecute and punish violations.[358] In extraterritorial context, there are limits to a state's adjudicative jurisdiction that have to be kept in mind. The first step towards ensuring the prosecution and punishment of wrongdoers is to investigate. It is a stepping-stone for the obligations to prosecute and punish and therefore central to the effectiveness of the right concerned. The state must in any case meet the basic requirements of a prompt, serious and effective investigation capable of leading to the identification and punishment of those responsible. What is considered prompt, serious and effective in extraterritorial contexts may differ based on practical or power-related factors. If the infrastructure abroad (or local subordinate administration) contains an investigative branch, the state will be able to act more promptly and effectively. If not, deployment of investigative personnel is required to the location where the offence occurred. If state officials were allegedly involved, they must be prosecuted and punished based on the foreign state's legal framework. States must also ensure the prosecution and punishment of offences by non-state actors within its extraterritorial jurisdiction, either based on its own legal framework, the legal framework of the host state, or alternative routes of prosecution like transfer to a third state with a claim to criminal jurisdiction or international penal tribunal.

The next chapter will review the content and scope of extraterritorial obligations to prevent gross human rights violations beyond jurisdiction and discuss relevant trends for the future development of those obligations.

[357] See Section 3.3 C Preventing Continuation.
[358] See Section 3.3 D Preventing Recurrence.

4. EXTRATERRITORIAL OBLIGATIONS TO PREVENT BEYOND JURISDICTION

Even though jurisdiction has traditionally served as the outermost border of the applicability of human rights treaties, there are exceptional situations in which states can incur human rights obligations while the people whose rights are affected are beyond their jurisdiction (hereinafter: third state obligations). [1] Third state obligations depart from the traditional working sphere of human rights law between a state and people it controls. Rather, they are based on the universalist conception that, in certain situations, states should help to ensure the rights of people regardless of where they are or whether the state has any control over them. An important example is the third state obligation to prevent genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), based on a state's capacity to influence effectively the (potential) perpetrators of genocide. [2] The concept of owing obligations towards people outside a state's jurisdiction is not entirely new, but has received increased attention in this era of modern communication in which state interdependence has become more recognized. When gross human rights violations (threaten to) take place and the territorial state is not able to act effectively against them, or is itself the wrongdoer, third states can be of crucial importance to prevent or halt violations.[3]

Third state obligations to prevent gross human rights violations are generally not as well-established or defined as human rights obligations based on territory or jurisdiction.[4] Furthermore, they have mostly been studied in fragmented fashion.[5] As such, there is very little clarity in regard to the content and scope of these obligations: on what basis do third states incur obligations to prevent, what are the triggers, what types of measures are third states expected to take and what is the influence of capacity on the scope of obligations? To start answering some of these

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[1] The term "third states" is used to describe states that do not exercise territorial or extraterritorial jurisdiction over the people whose human rights are affected. Third states are sometimes also referred to in literature as "bystander states." See for example: Hakimi, Monica, 'State Bystander Responsibility' (2010) 21(2) EJIL 341; Glanville, Luke, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) HRLR 1; The use of the term "third states" in this chapter is to be distinguished from the use of the term for states that are not individually affected, but have a legal interest in compliance with an international obligation in the sense of Article 41 of the Articles on State Responsibility. See: Bird, Annie, 'Third State Responsibility for Human Rights Violations' (2010) 21(4) EJIL 883.

[2] Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 1; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case) para 430.

[3] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (November 2001) UN GAOR Suppl No 10 (A/56/10) chpIVE1 (Articles on State Responsibility) Commentary to Article 41 para 3.

[4] Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 28.

[5] Hakimi, 'State Bystander Responsibility' (n 1) 344: Notes that the practice and research is piecemeal and disjointed.

questions, the first part of this chapter outlines which of the obligations distinguished as part of the set of obligations to prevent gross human rights violations in Chapter 2 can be incurred by third states and on what basis (Section 4.1). In the second part, the triggers, content and scope of these third state obligations to prevent gross human rights violations are discussed based on the timeline (Section 4.2). Finally, there is a shift towards recognizing the important role of third states for ensuring human rights. The third part of the chapter explores how developing third state obligations could contribute to strengthening the set of third state obligations to prevent gross human rights violations (Section 4.3).

4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction

Several of the obligations that are part of the set of obligations to prevent gross human rights violations distinguished in Chapter 2 are not limited in their application by territory or jurisdiction and can also be incurred by third states. More specifically, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Inter-American Convention to Prevent and Punish Torture (IACPPT) and Genocide Convention contain such obligations.[6] This section discusses the bases and limits for the extraterritorial applicability of these obligations beyond jurisdiction, before discussing their content and scope in Section 4.2.

4.1.1 CAT and IACPPT

The Convention against Torture (CAT) and Inter-American Convention to Prevent and Punish Torture (IACPPT) both contain jurisdiction clauses.[7] Most of the obligations in these treaties only apply extraterritorially when the state party exercises

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[6] Special Rapporteur Theo van Boven, 'Civil and Political Rights, Including the Questions of Torture and Detention' (15 December 2004) UN Doc E/CN.4/2005/62, para 37: Besides the third state obligations to prosecute and punish contained in the CAT and IACPPT that will be discussed below, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has argued that the "the obligation to prevent torture […] necessarily includes the enactment of measures to stop the trade in instruments that can easily be used to inflict torture and ill-treatment." This interpretation would mean that third states are obligated to regulate trade of such instruments to prevent torture abroad. He adds a list of recommendations that states can follow, such as monitoring the development of such instruments, strictly regulating their export and consider setting up international regulatory mechanisms in this area; Council Regulation (EC) No 1236/2005, Concerning Trade In Certain Goods Which Could Be Used For Capital Punishment, Torture Or Other Cruel, Inhuman Or Degrading Treatment Or Punishment (27 June 2005) OJ L 200, 30.7.2005, 1-19: A mechanism has been introduced at European level to regulate the trade of goods that could be used for capital punishment or torture. This is an interesting development, albeit only as closely related to the prevention of torture as non-proliferation agreements are to the prevention of arbitrary death. Whether it can be seen as an obligation inherent to the prohibition of torture can be contested.

[7] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 2, 11, 12 and 16; Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67 (IACPPT) art 6.

jurisdiction over territory or individuals abroad.[8] However, the CAT and the IACPPT also explicitly permit, and in some cases require, state parties to assume criminal jurisdiction over individuals suspected of having committed acts of torture on several bases that extend beyond their jurisdiction. State parties to the CAT and IACPPT are permitted, but not required, to assume criminal jurisdiction over cases of torture on the basis of the nationality of the victim (passive personality principle).[9] Furthermore, state parties to both treaties are required to assume criminal jurisdiction based on the nationality of the accused (active personality principle) and when an individual suspected of having committed acts of torture abroad is present "in any territory under the jurisdiction of a State party" (universal criminal jurisdiction).[10] The United Nations (UN) Special Rapporteur on Torture stated in a 2015 report on the extraterritorial application of the prohibition of torture that "the core purpose of the Convention Against Torture was the universalization of a regime of criminal punishment for perpetrators of torture […]."[11] To achieve a worldwide regime of criminal punishment for acts of torture, the role of third states is considered of essential importance. It is generally accepted that states that are not party to the CAT or IACPPT are permitted to assume universal jurisdiction over suspects of torture based on customary international law.[12]

What distinguishes the obligations to assume criminal jurisdiction over suspects of torture based on the active nationality principle or universal jurisdiction from obligations to prosecute and punish based on territorial or extraterritorial jurisdiction, is that the state did not necessarily have any form of control over the victim or circumstances of the offence. The offence can have taken place abroad against an individual over whom the state did not exercise extraterritorial jurisdiction. The active personality principle means that a state must seek to establish criminal jurisdiction over any national suspected of having committed acts of torture, regardless of the

[8] See Chapter 3.1.1 C CAT and IACPPT.
[9] CAT (n 7) art 5(1)c: "When the victim is a national of that State if that State considers it appropriate"; IACPPT (n 7) art 12c: Ibid.
[10] CAT (n 7) art 5(1) a, b and (2): The CAT also adds that a state should assume criminal jurisdiction when acts of torture are committed on board a ship or aircraft registered in the state; IACPPT (n 7) art 12; Nowak, Manfred, McArthur, Elizabeth and Buchinger, Kerstin, *The United Nations Convention Against Torture: A Commentary* (OUP, 2008) 310 and 314 onwards, 345; Committee Against Torture, 'General Comment 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2, para 7: The phrase "in any territory under its jurisdiction" has been interpreted to include forms of personal jurisdiction. See also: Chapter 3.1 C. CAT and IACPPT.
[11] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (7 August 2015) UN Doc A/70/ 303, para 44.
[12] Bantekas, Ilias, 'Criminal Jurisdiction of States under International Law' (March 2011) MPEPIL <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1021?rskey=v8P17C&result=1&prd=EPIL> para 28; Rodley, Nigel S., *The Treatment of Prisoners under International Law* (OUP 2000) 129-30; Kamminga, Menno T., 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2001) 23(4) HRQ 940, 946 and 949.

location of the crime.[13] The obligation to prosecute is based on the link of nationality between the state and the alleged perpetrator. The principle of universal criminal jurisdiction means that a state has to choose to extradite or prosecute suspects of acts of torture who are present in any territory under its jurisdiction, no matter where the alleged crime was committed and regardless of the nationality of the accused or victim. The rationale behind the principle is that certain crimes represent a "threat to the international legal order" for which there should be no safe haven, granting every state an interest in their punishment.[14] In practice, the obligation to establish universal criminal jurisdiction means that state parties to the CAT and IACPPT must choose to extradite suspects of acts of torture within their jurisdiction to another state or international penal tribunal that is willing to prosecute, or prosecute that person before their own domestic courts (*aut dedere aut judicare*).[15] The obligation is based on the presence of the suspect in any territory under its jurisdiction after committing acts of torture elsewhere, meaning that the state has the *de facto* capacity to influence whether the alleged perpetrator is prosecuted or not.

Both the CAT and IACPPT also include explicit and detailed provisions containing obligations to cooperate with other states or international tribunals for the prosecution and punishment of acts of torture.[16] For example, state parties are required to include torture as an extraditable offence in any extradition treaties they enter into.[17] State parties to the CAT are also explicitly required to assist each other in relation to criminal proceedings against alleged offenders, for example by providing evidence.[18] This interconnected set of obligations illustrates the important role of state cooperation and obligations beyond territory and jurisdiction to effectuate a worldwide regime of criminal punishment for acts of torture, as envisioned by the drafters of the treaties.[19] Finally, Article 14 of the CAT contains a right to an effective remedy for victims of torture without any geographic or jurisdictional limitation.[20] The CAT Committee and Special Rapporteur on Torture have interpreted the provision very widely, as meaning that states must provide victims of torture a

[13] Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 310-11.
[14] Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 943.
[15] CAT (n 7) art 5; IACPPT (n 7) art 12; Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 948; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 44-8: "[T]he rule of *aut dedere aut judicare* is clearly mandatory."
[16] CAT (n 7) art 5-9; IACPPT (n 7) art 11-14.
[17] CAT (n 7) art 8; IACPPT (n 7) art 13.
[18] CAT (n 7) art 9.
[19] Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 44 onwards.
[20] CAT (n 7) art 14; Hall, Christopher Keith, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18(5) EJIL 921; See also the discussion of this provision in Chapter 3.1.1 C. CAT and IACPPT.

procedure to obtain reparations, even if the torture was committed outside the state's jurisdiction.[21] This means that a state may be required to exercise universal civil jurisdiction in cases for reparations against a foreign state and its officials, based on the state's practical capacity to grant the victim access to remedy.[22] However, this wide interpretation of Article 14 is contested and courts have been reluctant to admit such cases.[23] Although access to remedy is not as such part of the set of obligations to prevent gross human rights violations distinguished in Chapter 2, its potential applicability beyond territory and jurisdiction is a noteworthy development. It illustrates the broadening use of adjudicative jurisdiction by third states to punish and remedy gross human rights violations.[24]

4.1.2 Genocide Convention

The Genocide Convention does not contain a jurisdiction clause and according to the International Court of Justice (ICJ) this should be read to mean that its provisions can in principle apply extraterritorially.[25] In the *Genocide* case, the ICJ addressed the extraterritorial applicability of Articles 1, 3 and 6.[26] Article 1 contains the general obligation to prevent genocide by employing all means reasonably available and Article 3 contains the definition of genocide. The Court concluded that, while Article 6 contains an express territorial limitation, Articles 1 and 3 "are not on their face limited by territory" and can apply extraterritorially.[27] The ICJ could have chosen jurisdiction as the basis for extraterritorial application of these Articles, thereby limiting the group of states that could potentially incur the obligation to prevent genocide to those that exercise extraterritorial jurisdiction over people whose rights

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[21] Concluding Observations CAT Committee on Canada (7 July 2005) UN Doc CAT/C/CR/34/CAN, 4(g) and 5(f); Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 55 onwards; Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (n 20) 922.

[22] Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 470-2.

[23] Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 492: In the drafting process, the phrase "committed in any territory under its jurisdiction" was removed from the text of the provision without reason. This could be argued to mean that the provision is not territorially limited, or that the limitation was so obvious that it seemed unnecessary to include it. In any case, courts have been reluctant to admit such cases; Parlett, Kate, 'Universal Civil Jurisdiction for Torture' (2007) 4 EHRLR 385, 403; *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014.

[24] See for example Section 4.3.2 Corporations Acting Abroad.

[25] See Chapter 3.1.1 D Genocide Convention.

[26] The extraterritorial applicability of other provisions of the Genocide Convention remains unclear. Other provisions that are relevant in this chapter are Article 5, containing the obligation to enact the necessary legislation for the prosecution and punishment of genocide, and Article 8, containing a right to call upon the competent UN organs to take action. Because Articles 5 and 8 are also not on their face limited by territory, discussion of these provisions will be included below.

[27] *Genocide* case (n 2) para 183-4.

are affected.[28] This was in fact argued by Serbia, which stated: "[T]he Genocide Convention can only apply when the State concerned has territorial jurisdiction or control in the areas in which the breaches of the Convention are alleged to have occurred."[29] In his separate opinion to the *Genocide* case Judge Tomka agreed with Serbia's argument, claiming that states have "an obligation to prevent genocide outside its territory to the extent that it exercises jurisdiction outside its territory, or exercises control over certain persons in their activities abroad."[30] Instead, the Court deliberately chose a broader approach and decided that Serbia had an obligation to prevent the genocide in Bosnia based on its "capacity to influence effectively the action of persons likely to commit, or already committing, genocide."[31] The capacity to influence effectively does not necessarily require that a state exercises authority and control over the individuals whose rights are affected.[32] Therefore, it goes beyond territory and jurisdiction as the traditional bases for obligations under most human rights treaties. Instead, the third state obligation to prevent genocide is based on influence over the (potential) perpetrators of genocide.[33]

The precise meaning of the capacity to influence effectively has remained obscure. Before and during the Bosnian genocide, Serbia had a particularly strong capacity to influence because it had close political, military and financial ties with the Bosnian

[28] Tams, Christian, Berster, Lars and Schiffbauer, Bjorn, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck, co-published by Hart and Nomos, 2013) 47 para 35 onwards: Notes that Article 1 of the Genocide Convention is silent on the issue of geographical applicability.

[29] *Separate Opinion of Judge Tomka in the Genocide* case (n 2) para 64, quoting from Verbatim Record of Public Sitting (CR 2006/16, p. 15).

[30] *Separate Opinion of Judge Tomka in the Genocide* case (n 2) para 67.

[31] *Genocide* case (n 2) 183 and 430-1: The ICJ first reiterated its 1996 judgment on preliminary objections, in which it decided that Articles 1 and 3 of the Genocide Convention "apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question"; Gattini, Andrea, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18(4) EJIL 695, 699-700: "On the one hand [the Court] audaciously decided to disentangle the obligation to prevent in Article I of the Genocide Convention from any territorial link, substituting for the traditional concept of 'jurisdiction' the new and much vaguer one of 'capacity to effectively influence'"; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 48 para 38: "If the duty to prevent only applied within a state's territory, or in areas under its jurisdiction, it would not go much beyond a duty of vigilance 'at home'. […] However, as in practice, genocide […] 'typically … presume[s] state participation', it would not go much beyond a duty not to commit the crime. By contrast, a 'global' construction of a duty to prevent is much better able to give effect to the solemn pledge of state parties […] 'to liberate mankind from [the] odious scourge [of genocide]."

[32] *Separate Opinion of Judge Tomka in the Genocide* case (n 2) para 68: "In this case, it has not been established that the Federal Republic of Yugoslavia exercised jurisdiction in the areas surrounding Srebrenica where atrocious mass killings took place."

[33] Hakimi, 'State Bystander Responsibility' (n 1) 342: Describes the obligation to prevent genocide as an obligation to restrain third parties from committing abuse. Framed as such, the influence over the (potential) perpetrator is of manifest importance.

Serbs.[34] This has led some commentators to suggest that the capacity to influence effectively exists only in situations where third states have very strong influence over the (potential) perpetrators, while other commentators have interpreted it more loosely.[35] Glanville and Gattini have gone as far as to claim that the third state obligation to prevent genocide is incumbent on all states, to a greater or lesser degree.[36] Yet, the fact that the term "effectively" was added to the phrase used by the ICJ, suggests that the capacity to influence effectively does have a limiting or threshold function, meaning that not all states automatically incur an obligation to prevent genocide as soon as they become aware of a serious risk of genocide somewhere in the world. Apart from this indication in the judgment, it seems very optimistic to expect all states to take measures to prevent genocide, while in reality past cases of genocide were often met with inaction by the international community of states. In his 1993 separate opinion to the second provisional measures order in the *Genocide* case proceedings, Judge Lauterpacht noted that "[t]he limited reaction of the parties to the Genocide Convention in relation to [past episodes of genocide] may represent a practice suggesting the permissibility of inactivity."[37] In light of the above, it seems appropriate to understand the capacity to influence effectively as a limit to the potential duty-bearing states and at the same time threshold for the obligation's extraterritorial applicability, albeit less strict than jurisdiction. In contrast to jurisdiction, the capacity to effectively influence is also an important parameter for the content and scope of each state's ensuing obligation once the threshold has been reached.[38]

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[34] *Genocide* case (n 2) paras 388, 394, 434; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 19; Gibney, Mark, 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' (2011) 3(2) GR2P 123, 137: Points out the absurdity of the standards for direction or control and complicity, which are "virtually impossible to reach".

[35] Rosenberg, Sheri P., 'Responsibility to Protect: A Framework for Prevention' (2009) 1(4) GR2P 442, 469: Argues that "the bar remains very high for establishing the sufficient level of influence necessary for the legal duty to prevent to arise"; Hakimi, 'State Bystander Responsibility' (n 1) 364-5: Suggests Serbia only had an obligation to prevent the genocide because it substantially enabled it; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 19: Mentions Rosenberg and Hakimi, but counters their interpretations; Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 31) 705 and 713: "(…) all states had, at least *in abstracto*, a duty to prevent it."

[36] Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18: "The obligation (…) would appear to be borne by every state to a greater or lesser degree"; Gibney, 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' (n 34) 139: "In sum, each State Party has a legal obligation to take all measures within its powers (which will vary from state to state) to prevent genocide – in other lands."

[37] *Separate opinion of Judge ad hoc Lauterpacht, Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) Order of 13 September 1993 [1993] ICJ Rep 325, para 115.

[38] See Section B.1 Genocide: The role of the capacity to effectively influence as a parameter for the content and scope of the obligation is further explained; *Genocide* case (n 2) para 430: The capacity to influence effectively is described as a "parameter"; See Chapter 3.2 Corresponding Obligations: Jurisdiction follows from forms of control over territory or people. The content and scope of

The capacity to influence effectively has not yet been applied in other cases and it is hard to say how (strictly) it should be interpreted.[39] The ICJ stated that the capacity to influence effectively "varies greatly from one State to another" and attempted to clarify the concept of a capacity to influence effectively by putting forward three factors to assess a state's capacity.[40] These factors are: (i) The geographical distance to the scene of the events; (ii) The strength of political and other links with the main actors involved in the events; and (iii) The legal position *vis a vis* the situation and persons facing the danger.[41] The first two factors are substantive, while the third is a legal factor. The first factor is relatively straightforward and stipulates that a state's capacity to influence depends on the "presence in the area where acts of genocide threaten to take place, or close thereby."[42] This factor points to neighboring or regional states, but also states that exercise extraterritorial jurisdiction in (potentially) affected areas. The second factor appears the widest, since a great number of states can have political or other links with the main actors involved in a (potential) case of genocide. The third factor seems to be added mostly to "stress the 'limits' imposed by international law on the actions of the states", meaning for example that states cannot use force in or against another state without that state's consent or Security Council (SC) authorization.[43] It is unclear how the different factors should be weighed.[44] For example, it is uncertain if one of the factors could be determinative or whether the factors should be considered cumulative.[45] Furthermore, given the fact that the ICJ

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corresponding obligations are not only informed by the level of control, but also by other legal, practical and power-related barriers.

[39] Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 51 para 45: "Delineation the general criterion of 'capacity to influence' is the key challenge."

[40] *Genocide* case (n 2) para 430.

[41] *Genocide* case (n 2) para 430; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 52 para 46; See also Chapter 3.1.1 D Genocide Convention.

[42] Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 52 para 46 (ii).

[43] Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 31) 701; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(4) jo 42; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 51 para 45 and 52 para 46: These authors interpret the legal factor both as a limit, and as a power that forms a parameter for the capacity to influence. They note that legal powers can also "recognize rights or duties of particular states: treaties designating particular states as protective powers are one illustration, special powers enjoyed under regimes of occupation another."

[44] Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 31) 699-700.

[45] Ruvebana, Etienne, *Prevention of Genocide Under International Law – An Analysis of the Obligations of States and the UN to Prevent Genocide at the Primary, Secondary and Tertiary Levels* (Intersentia, 2014) 172: Argues that the geographical factor should in any case not be determinative, because it would exclude other states that are further removed. "Yet, the capacity to prevent may be absent even for a state close to the scene of events and may exist between a state concerned and the

states that the capacity to influence effectively depends "among other things" on the three factors, it seems it was not intended to be an exhaustive list and leaves room for other relevant factors.[46] Other potentially relevant factors have been suggested, such as the "regularity of contact" or a state's relative wealth or political (persuasive) power in the international community of states at large.[47] As it stands, the capacity to influence effectively remains an imprecise threshold and vague parameter for the content and scope of the obligation. In any case, the threshold will be more easily met and the corresponding obligation particularly burdensome for states that are present in or close by the area where a genocide threatens to take place, states that have political and other links with the (potential) perpetrators and states that do not have to act outside the limits of international law to employ measures to prevent.

As already discussed in Chapter 3.1.1 D, the obligation to prosecute and punish in Article 6 of the Genocide Convention contains an express territorial limitation.[48] Although provisions on punishment in earlier drafts of the Convention were more widely applicable, the drafting parties ultimately decided against the inclusion of an express obligation to prosecute based on nationality or universal jurisdiction.[49] In the 2007 *Genocide* case, the ICJ interpreted this as meaning that Article 6 does not obligate states to prosecute and punish alleged perpetrators of genocide on any other basis than that the acts took place on their territory.[50] This implies that the scope of applicability of the obligation to prosecute and punish is more limited under the Genocide Convention than under the CAT and IACPPT. Although third states are not required to prosecute wrongdoers who committed acts of genocide abroad under the ICJ's interpretation, the Court confirmed that they are permitted to do so based on customary law.[51] The territorially limited scope of applicability is somewhat mitigated by an obligation to cooperate with international penal tribunals of which states have

actors of genocide in a place very far from the scene of events […] Thus the criterion may be relevant, but it needs to be supplemented by other criteria."

[46] *Genocide* case (n 2) para 430.

[47] Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 52 para 45 (iii); Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18: Mentions that the obligation is presumably particularly burdensome for "a great power that possesses the ability to persuade or compel persons to refrain from committing the crime" and less so for a "less influential and weaker state […]"; Pooter, de, Helene, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (2009) 17 Afr Yearb Int Law 287, 299 and 305: Wonders whether members of the SC have an obligation to use the UN machinery to prevent genocide. "It is surprising that the Court does not go further in its enumeration of the parameters [which she takes to mean that the Court] refuses to draw an exhaustive list of parameters, letting the door open for a free assessment of future situations."

[48] Genocide Convention (n 2) art 6.

[49] Economic and Social Council Resolution 77 (V), 'Genocide' (6 August 1947) UN Doc E/573, art 6-8.

[50] *Genocide* case (n 2) para 184 and 442; *Separate Opinion of Judge Tomka in the Genocide* case (n 2) para 65.

[51] *Genocide* case (n 2) para 442.

accepted the jurisdiction also referred to in Article 6.[52] Examples of such tribunals are the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[53]

It is odd that international treaty obligations for the prosecution and punishment of acts of torture are more demanding under positive international law than obligations for the prosecution and punishment of acts of genocide, which has been described as the "crime of crimes."[54] Article 6 of the Genocide Convention and its interpretation by the ICJ have received much criticism for the limited approach in this regard, especially as many states have now embraced a more accepting attitude towards universal jurisdiction.[55] In light of this changing attitude, Tams, Berster and Schiffbauer have suggested that, because the obligation to punish genocide contained in Article 4 is phrased in absolute terms, an implied legal consequence of Article 4 jo 6 of the Genocide Convention should be that states other than the territorial state must ensure prosecution of suspects within their jurisdiction.[56] In practice, this would mean that when a suspect of acts of genocide is present within a state's jurisdiction, it has a duty to promote prosecution by others. In the specific circumstances where there is no international penal tribunal or other state willing or able to prosecute, meaning that the absolute obligation to punish cannot be otherwise ensured, state parties would have a subsidiary duty to prosecute suspects before their domestic courts.[57] The argument offers a convincing solution for the perceived shortcomings of Article 6 in

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[52] Genocide Convention (n 2) art 6; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 255 para 56.

[53] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 248-9.

[54] Schabas, William A., 'National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'' (2003) 1(1) JICJ 39; Genocide Convention (n 2) preamble: Describes genocide as an "odious scourge" and an international crime that is "contrary to the spirit and aims of the United Nations and condemned by the civilized world."

[55] Schabas, 'National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'' (n 54) 60: Explains that the *travaux préparatoires* of the Genocide Convention show that the drafters sought to explicitly exclude universal jurisdiction for genocide, while it is now accepted at least as a permissive basis for prosecution; Ben-Naftali, Orna, 'The Obligation to Prevent and to Punish Genocide' in Paola, Gaeta (ed), *The UN Genocide Convention – A Commentary* (OUP, 2009) 27, 48: Finds the ICJ's interpretation of Article 6 "puzzling given that the interpretation of the Convention 'must exclude any narrow or overly technical approach to the problems involved', and that the judgment itself otherwise employs a purposive method of interpretation." He claims that "a teleological reading of Article VI in the light of Article I and of other provisions of the Convention as well as in the light of later normative developments in both conventional and customary international law, supports the conclusion that the jurisdictional regime over perpetrators of genocide includes an obligation to exercise universal jurisdiction […]."

[56] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58(2).

[57] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58 (3); Gaeta, Paola, *The UN Genocide Convention – A Commentary* (OUP, 2008) 46-8.

light of the object and purpose of the Genocide Convention, correlation between its different provisions and developments that have taken place since the Convention came into being, such as the adoption of the CAT and IACPPT with more demanding regimes of prosecution and punishment in the mid-80's.[58] Nevertheless, the subsidiary duty to prosecute acts of genocide based on universal jurisdiction is contentious in light of the ICJ's clear pronouncement in the 2007 *Genocide* case that the territorial limitation included in Article 6 should be respected. Therefore, it cannot be considered *lex lata* until it is either accepted as a valid interpretation of the Convention by an authoritative interpretative body or if a (subsidiary) obligation to prosecute genocide based on universal jurisdiction develops into customary law.[59]

4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction

From the above overview it can be inferred that third state obligations to prevent torture and genocide are commonly based on forms of influence that states have over (potential) perpetrators of these acts, either before, during or after they are committed.[60] The triggers, content and scope of the obligations introduced in Section 4.1 will now be discussed based on the timeline.[61] There are not many third state obligations to prevent gross human rights violations, nor are they spread out evenly over all the temporal phases. Third state obligations to prosecute and punish acts of torture that were committed outside the state's jurisdiction are part of the first and last temporal phase (long-term prevention and preventing recurrence). On the other hand, the third state obligation to employ all means reasonably available to prevent genocide outside the state's jurisdiction is part of the acute phases of prevention (short-term prevention and preventing continuation). Obligations to prevent arbitrary deaths beyond territory and jurisdiction do not have any recognized legal basis and are therefore altohether absent from this section.[62] Compared to the territorial and

[58] CAT (n 7); IACPPT (n 7).

[59] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 257 para 59: This position was not confirmed nor contradicted by the ICJ's judgment in the Genocide case, because that judgment was rendered in the context where there was an international penal tribunal available, namely the ICTY, to prosecute suspects. The ICJ affirmed Serbia's obligation to cooperate with the ICTY and not further discussion was needed; Schabas, 'National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'' (n 54) 60.

[60] CAT (n 7) art 5; IACPPT (n 7) art 12: Because of the presence of suspects who committed torture abroad within a state's jurisdiction; or; Genocide Convention (n 2) art 1 and *Genocide* case (n 2) para 430: Because of the geographical distance and close links with (potential) perpetrators of genocide abroad; CAT (n 7) art 14: There are exceptions, such as the claimed obligation to ensure the right to an effective remedy of victims of torture, even if the acts took place abroad.

[61] See Chapter 1.3.2 Temporal Phases and 1.3.4 Determining the Content and Scope of Obligations to Prevent.

[62] A recent development in the ECTHR's case law suggests that third state obligations to prosecute and punish may also develop for other rights, such as the right to life: *Gray v. Germany*, no. 49278/09, 22 May 2014, para 20, 29, 32, 40-1 and 93: The ECtHR took an unexpectedly broad approach towards the applicability of the procedural requirements attached to the right to life. The case concerned a German doctor who committed malpractice resulting in the death of a patient in the United Kingdom (UK), then

jurisdictional layers, the picture that emerges of obligations to prevent gross human rights violations beyond jurisdiction is that of a mere patchwork of rather incidental third state obligations.

A. Long-Term Prevention

The phase of long-term prevention starts as soon as a state is bound by the relevant obligations under a treaty or customary international law and does not require knowledge of a concrete risk.[63] Long-term obligations seek to have a general deterrent effect and continue to be relevant in other phases. The main long-term obligation identified in Chapter 2 is the obligation to introduce a proper legislative framework that is in line with requirements under human rights law and capable of deterring violations. In this layer, long-term third state obligations are focused on: (i) Including bases in the domestic legal framework that allow for the establishment of criminal jurisdiction over acts of torture that took place outside the state's territory and jurisdiction; and (ii) Removing legal obstacles and including a basis in the domestic legal framework for the extradition of suspects and other forms of cooperation with other states and international penal tribunals.

A.1 Torture

The CAT and IACPPT require state parties to enact legislation prohibiting torture and providing for appropriate punishment where required.[64] As explained in Section 4.1.1, state parties to the CAT and IACPPT have obligations to prosecute suspects of torture based on nationality and universal jurisdiction, also if the acts were committed outside its jurisdiction. That means state parties are in the long-term obligated to include the relevant bases – the active nationality principle and universal criminal jurisdiction – in their domestic legal frameworks and taking other measures that will allow it to establish jurisdiction, investigate, prosecute or extradite suspects in line with these principles.[65] State parties must take steps to enact the necessary legislation as soon as

to return to Germany. Both the UK and Germany started proceedings against the doctor, but he was tried in Germany. The victim's children complained about the procedures in Germany, which were ultimately dismissed on the merits. But a remarkable step was taken at the admissibility stage. Or rather, a step was missed that perhaps should have been taken. Neither Germany nor the court considered whether Germany was at all obligated, in light of the jurisdictional limitation in Article 1 of the ECHR, to extradite or prosecute the doctor in the first place, considering the malpractice took place in the UK; Milanović, Marko, 'Gray v. Germany and the Extraterritorial Positive Obligation to Investigate'(28 May 2014) EJIL Talk, available at: <http://www.ejiltalk.org/gray-v-germany-and-the-extraterritorial-positive-obligation-to-investigate/>: The case opens the door to the argument that states are required to extradite or prosecute suspects of crimes other than torture that took place abroad, if the suspect is a national or present on their territory. Still, there is no cause to overgeneralize, as the case was rendered in a context where no argument was brought forward to contest applicability and therefore the broad approach may not be upheld.

[63] See Chapter 1.3.2 Temporal Phases.

[64] CAT (n 7) art 2(1), 4; IACPPT (n 7) art 6.

[65] CAT, General Comment 2 (n 10) para 2 and 9; International Law Commission, 'Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (2014) Yearbook of the ILC, Vol II, Part 2, para 17: "The effective fulfilment of the obligation to extradite or prosecute requires undertaking necessary

they become a party to the treaty, since it is a necessary condition for the realization of their other obligations.[66] A general preventive effect is often ascribed to the adoption of punitive legislation, even though this effect has not been proven.[67] The ICJ stated in the *Belgium v. Senegal* case, brought before the Court after Belgium had unsuccessfully requested the extradition of former president of Chad Hissène Habré, that the worldwide regime of criminal punishment for acts of torture:

> "[H]as in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction."[68]

Besides enacting such legislation, states should ensure that there are institutions capable of investigating and prosecuting crimes committed abroad.[69] State parties must also ensure that torture is an extraditable offence in extradition treaties they enter into *inter se* and state parties of the CAT must ensure they can afford other

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national measures to criminalize the relevant offences, establishing jurisdiction over the offences and the person present in the territory of the State, investigating or undertaking primary inquiry, apprehending the suspect, and submitting the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extrading, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect."

[66] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep 422, para 76-77: "The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. […] Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention"; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 78; Koutroulis, Vaios, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (May 2014) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2129?rskey=PhebjZ&result=1&prd=EPIL> para 18.

[67] Andenaes, Johannes, 'The General Preventive Effects of Punishment' (1966) 114(7) UPaLRev 949, 952-4: Describes the belief in general prevention as mostly an ideological conviction, but does not exclude that it exists. There is just a lack of empirical research that can prove it. Although some progress has been made, generally this still seems to be the case today. The article also proposes a set of nuances to take into account, such as cultural and personal differences; See 2.2 A. Long-Term Prevention: Although the preventive effect of both national and international criminal law remains speculative, making offences punishable by law is reasoned to have a long-term deterrent effect on potential perpetrators and lays the groundwork for a system that is capable of tracking and punishing violations.

[68] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 75.

[69] Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 954.

states (judicial) assistance in connection with criminal proceedings for acts of torture.[70]

A.2 Genocide

Like the CAT and IACPPT, the Genocide Convention requires state parties to "undertake to enact […] the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III."[71] In light of its focus on effective penalties, the scope of the obligation to enact the necessary legislation is linked to Article 6, which contains an express territorial limitation. As discussed in Section 4.1.2, in the interpretation of the ICJ the obligation to prosecute and punish is more limited under the Genocide Convention than under the CAT and IACPPT.[72] Nevertheless, genocide has been widely accepted as a crime for which states are permitted to exercise universal criminal jurisdiction based on customary law.[73] So although states may not be required under the Genocide Convention to prosecute acts of genocide on any other basis than that the acts took place within their

[70] CAT (n 7) art 8 and 9; IACPPT (n 7) art 13: These Articles seek to remove obstacles to extradition, to support the obligations to establish criminal jurisdiction over suspected torturers on different bases and avoid safe havens. Extradition can be subject to certain requirements in domestic law; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 369 and 383: Article 8 "establishes an obligation to treat torture as an extraditable offence in bilateral or multilateral extradition treaties between States parties and an obligation to recognize torture as an extraditable offence in domestic law." Article 9 means that "the State in which the act of torture has been committed (the territorial State) and the State of which the suspected torturer is a citizen (the national State) are under an obligation to provide the forum State with all the evidence needed to proceed with the prosecution."

[71] Genocide Convention (n 2) art 5: The obligation to criminalize acts of genocide in Article 5 can be seen as having a general preventive effect of its own; Andenaes, 'The General Preventive Effects of Punishment' (n 67) 952-4: Such a general preventive effect has never been empirically proven, but is an aspiration and motivation for legislative action; *Genocide* case (n 2) 162 and 430-1: In the Genocide case, the court expressly stated that the obligation to prevent contained in Article 1 is broader in scope than the Articles in the Genocide Convention. However, it also limited the temporal scope of the obligation to the phases of short-term prevention and prevention of continuation, after a state knows or should have known that there is a serious risk that genocide may occur. Therefore, it would go too far to claim that third states are obligated to take long-term measures to prevent genocide abroad under the auspices of Article 1 of the Genocide Convention; United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (2014) available at: <http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf>k 9 and 18-9: Although no long-term obligations exist in the context of the Genocide Convention, long-term measures to prevent genocide may be expected to focus mostly on mitigating preconditions of genocide. This could for example take the form of targeted assistance and development cooperation.

[72] *Genocide* case (n 2) para 184 and 442.

[73] Kamminga, Menno T., 'Extraterritoriality' (November 2012) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=Srx94t&result=2&prd=EPIL> para 14.

territory, they can still choose to introduce legislation that allows them to prosecute suspects based on universal jurisdiction.[74] Many states have in fact enacted such legislation, such as the Netherlands, Germany and Canada.[75] If a (subsidiary) obligation to prosecute suspects based on universal jurisdiction is at some point accepted as *lex lata*, states will then be obligated to enact legislation that includes bases to establish criminal jurisdiction over acts of genocide that took place outside its jurisdiction.[76] State parties to the Genocide Convention do have certain other obligations that need to be translated into domestic law that can apply to suspects that committed acts of genocide outside the state's jurisdiction. For example, state parties are required to remove legal obstacles and ensure that a basis exists in domestic and treaty law for the cooperation with, and extradition of suspects to, international penal tribunals and other states.[77]

B. Short-Term Prevention

The phase of short-term prevention starts when a violation has become foreseeable.[78] The measures relating to this phase are targeted at preventing a specific violation and can involve physical protection and operational measures.[79] The main obligation relating to short-term prevention identified in Chapter 2 is the obligation to take (operational or protective) measures to prevent, meaning that states must take positive action capable of averting a specific violation.[80] The only short-term obligation to prevent gross human rights violations that can be incurred by third states is the obligation to employ all means reasonably available to prevent genocide so far as possible.[81]

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[74] Genocide case (n 2) para 442; See also Chapter 3.3 A Long-Term Prevention: States must introduce legislation that ensures that state officials that commit offences abroad can be punished.
[75] Netherlands International Crimes Act (19 June 2003) Stb 2003, 270, available at: <http://wetten.overheid.nl/BWBR0015252/geldigheidsdatum_03-08-2009> art 2 and 3; Schabas, 'National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'' (n 54) 60: Mentions Canada and Germany as countries that "explicitly authorize universal jurisdiction for genocide."
[76] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 252-4 and 256 para 58(3).
[77] Genocide Convention (n 2) art 6 and 7: "Genocide and the other acts enumerated in Article III shall not be considered political crimes for the purpose of extradition"; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 261 onwards: Extradition can be subject to other requirements in domestic law, for example based on the risk of death penalty or torture or protecting nationals against foreign jurisdiction.
[78] See Chapter 1.3.2 Temporal Phases; The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.
[79] See for a more detailed description Section 1.3.3 Method: Timeline.
[80] See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory B. Short-Term Prevention.
[81] *Genocide* case (n 2) para 430-1; See Section 4.1.2 Genocide Convention.

B.1 Genocide

In the *Genocide* case, the ICJ explicitly stated that the obligation to prevent genocide in Article 1 means that, if states have the capacity to influence effectively and once they learn or should normally have learned of the "serious risk" that genocide will be committed, they must "employ all means reasonably available to them, so as to prevent genocide so far as possible."[82] The trigger of knowledge is objective, so it does not have to be proven that a state actually knew about the risk of genocide.[83] It is enough that it "should normally have learned of" the serious risk.[84] In the specific context of the *Genocide* case, the Court noted that:

> "[A]lthough it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent […], they could hardly have been unaware of the serious risk of it once the VRS [Army of Republika Srpska] forces had decided to occupy the Srebrenica enclave."[85]

The Court supported this statement with reference to several official documents that showed that such awareness existed.[86] State representatives are often reluctant to expressly recognize a risk of genocide in an attempt to evade obligations.[87] Because

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[82] *Genocide* case (n 2) para 430-1.

[83] Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 49 para 40-1: According to the authors, the trigger contains two elements: (i) A credible, plausible or real threat of genocide, meaning there is a background of "military build-up or incitement"; and (ii) Awareness of the risk, which is a matter of evidence.

[84] *Genocide* case (n 2) para 431:

[85] *Genocide* case (n 2) para 436.

[86] *Genocide* case (n 2) para 436-7: Several documents detailing meetings between third state and IO officials with Milosevic, which were also used in the Milosevic trial before the ICTY, prove his awareness of the risk of a massacre when the VRS forces occupied the Srebrenica enclave.

[87] Grünfeld, Fred and Huijboom, Anke, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (BRILL, 2007) 240 citing Kofi Annan: "One of the reasons for our failure in Rwanda was that […] once it started, for too long we could not bring ourselves to recognize it, or call it by its name; Hong, Mai-Linh K., 'A Genocide by Any Other Name: Language, Law, and the Response to Darfur' (2008) 49 Va J Int'l L 235, 265: "[D]etermining whether or not a situation constitutes genocide is a process fraught with biases"; Sarkin, Jeremy and Fowler, Carly, 'The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and the Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia' (2010) 33 Suffolk Transnat'l L Rev 35, 23: "It is important to address the use of the word "genocide" as the word itself is inherently political and comes, as argued above, with moral—if not legal—obligations. As noted, the word "genocide" was first applied to the situation in Rwanda by the RPF on April 13—just six days after the onset of violence. The events were not called "genocide" publicly, however, until fifteen days later, on April 28"; Sometimes situations are still not recognized as genocide *ex post facto*, even though it does fit the legal criteria. Think of the controversy surrounding the Armenian Genocide. Recently, a UNSC resolution was vetoed by Russia that calls the Srebrenica massacre genocide, despite the fact that multiple international and national courts have already identified it as such. See: The New York Times, 'Russia Vetoes UN Resolution Calling Srebrenica 'Crime of Genocide'' (8 July 2015) available at: <http://www.nytimes.com/2015/07/09/world/europe/russia-vetoes-un-resolution-calling-srebrenica-massacre-crime-of-genocide.html?_r=0>; There is a push to move beyond semantics and act to prevent

of the objective trigger of knowledge, it should not matter whether a state itself or the international community labels a situation as (a serious risk of) genocide. All that is legally relevant for the obligation to be triggered is whether states are aware of the serious risk that elements of genocide will come together: the intent to destroy in whole or in part one of the protected groups combined with acts of killing, torture or other acts mentioned in Article 2 of the Genocide Convention.[88]

The content and scope of the corresponding third state obligation can only be described in tentative fashion.[89] There is little guidance in that regard in the Genocide Convention itself or the treaty's *travaux préparatoires.*[90] Ben-Naftali describes that "[a]t the time the Genocide Convention was concluded, the 'obligation to prevent' in Article I was a morally pregnant but a normatively empty concept."[91] The ICJ took important steps to clarify the obligation to prevent in the *Genocide* case, by claiming that it has a separate existence from the obligation to punish genocide and deciding the basis upon which it can be incurred by third states and parameters for its scope. At the same time, the Court made little effort in terms of clarifying what type of measures may be required, describing the obligation to prevent as one of due-diligence to "employ all means reasonably available to them."[92] It later decided that Serbia violated its obligation to prevent genocide, because it did not show "that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed."[93] The Court does not explore what Serbia should have done, giving little guidance to the question what measures third states in general may be

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the risk and continuation of mass atrocities in general: OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71); Jacobs, Dov, 'Moving Beyond the Genocide Debate: Mass Atrocities and the International Community' (Presented at the ISA Annual Convention 2010, New Orleans) available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564901>.

[88] Genocide Convention (n 2) art 2; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) 19, risk factor 10: "Signs of an intent to destroy in whole or in part a protected group" can manifest itself, among others, through official documents, media records or other documents showing an intent/ incitement to target a protected group, widespread discriminatory practice, dehumanization of a protected group, physical elimination or other forms of violence against members of a protected group; Ruvebana, *Prevention of Genocide Under International Law* (n 45) 109: "[T]he knowledge (or awareness) of the risk of genocide should not be confused with the certainty that genocide will occur."

[89] Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 53 para 48: "Outside these special settings [referring to the territorial state and state's that exercise extraterritorial jurisdiction], the specific conduct required of third states where genocide appears likely to occur in a foreign country can only be described tentatively."

[90] Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 33; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 45 para 31 and 33: "Unlike the duty to punish, the duty to prevent genocide is not elaborated in any detail in the subsequent provisions of the Convention. [...] Because this is so, the precise scope of the duty to prevent is difficult to assess."

[91] Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 33.

[92] Genocide case (n 2) para 430.

[93] Genocide case (n 2) para 438.

required to take to prevent genocide.[94] Only a few works in literature have tried to further substantiate what it may mean in practice, describing the obligation as "a large shell yet to be filled."[95]

The content and scope of the obligation to prevent genocide of each individual third state that has a capacity to influence effectively can be approximated based on a few considerations. First of all, the capacity to influence effectively and factors formulated by the ICJ to assess that capacity does not only act as a threshold, but also as a parameter for the content and scope of the third state's obligation.[96] A geographically close state with close political or other ties may be required "to exercise massive diplomatic or economic pressure on a foreign regime seriously threatening to commit acts of genocide."[97] Whereas a state that is further removed and does not have particularly strong ties, may only be required to support international prevention efforts.[98] Furthermore, states must act within the limits of international law, meaning for example that they cannot use force in or against another state without that state's consent or authorization by the SC.[99] Second, the third state obligation to prevent

[94] Genocide case (n 2) para 429: The Court confined itself "to determining the specific scope of the duty to prevent in the Genocide Convention […] to the extent that such a determination is necessary to the decision to be given on the dispute before it."
[95] Pooter, de, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (n 47); Ruvebana, *Prevention of Genocide Under International Law* (n 45).
[96] *Genocide* case (n 2) para 430: "Various parameters operate when assessing whether a State has duly discharged the obligation concerned"; See Section 4.1.2 Genocide Convention; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 53 para 49; Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 40; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18-20: Suggests that for larger and wealthier states, the obligation to prevent will be more demanding than for smaller and less wealthy states.
[97] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 54 para 49; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18-20.
[97] Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20.
[98] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 53 para 49.
[99] Genocide case (n 2) para 430: "The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law"; UN Charter (n 43) art 2(4) jo 42; See Chapter 3.3 A.1 Foreign State's Legal and Administrative Framework and B Short-Term Prevention: Discusses whether and how the particular terms of a mandate affect the content and scope of extraterritorial human rights obligations. The role of a specific mandate is similar in the context of third state obligations: once a mandate exists it should allow state officials to function in a manner consistent with requirements under international human rights law. If a mandate is too restrictive in this regard, this points to a failure of a state's long-term obligations, but it may nevertheless indirectly impact the content and scope of short-term obligations or obligations to prevent continuation. The biggest initial hurdle to third state obligations is often that there is no mandate in the first place. As long as there is no mandate (to use force), this does not obviate a third state's obligation to prevent genocide by taking all other means reasonably available; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 51 para 45.

genocide is limited by a standard of reasonableness, because states are only required to employ measures that are "reasonably available to them."[100] Which means, as Glanville has convincingly argued, that a third state is not expected to take measures to prevent genocide "to an extent that is excessively costly to itself."[101]

What may be required of states in terms of specific measures is mostly an open question that can only be answered in the specific circumstances. If the risk of genocide stems from a group of non-state actors within a state, which the territorial state is willing to suppress, the role of third states will be one of facilitation and support. If on the other hand the territorial state is involved in acts prohibited in the Convention, third states will have to take measures against that state.[102] The ICJ referred to the importance of assessing the necessary measures *in concreto*, meaning they must respond to the concrete threat.[103] Similar to short-term obligations in other layers, the obligation to prevent genocide is formulated in an open-ended manner, meaning that the measures states may have to take are not specified. Yet, in the other layers, it is clearer what measures states may be expected to take to satisfy those open-ended obligations. There are many possible measures that third states can take that might be reasonably available to them and could contribute to preventing a concrete threat of genocide, some of which may depend on a specific state's capacity to influence. A few examples are: neighboring states opening their borders for protected groups under the Genocide Convention, informing or calling upon other actors such as states or UN organs to take action, exercising diplomatic pressure, negotiating with the (potential) perpetrators, suspending treaty benefits or membership of an IO, imposing sanctions or arms embargoes and finally taking coercive measures within the limits of what is allowed under international law.[104]

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[100] *Genocide* case (n 2) para 430; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; See Chapter 2.2 B.3 Genocide and 2.3 Conclusion.

[101] Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20.

[102] *Genocide* case (n 2) para 430 ; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 53 para 48; Milanović, Marko, 'State Responsibility for Genocide: A Follow-Up' (2007) 18(4) EJIL 669, 686.

[103] Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 31) 704: "[I]t is only through temporally determinable elements, e.g. the presence of a real and serious danger of genocide, that the duty to prevent can be concretized"; Genocide case (n 2) 430; To further concretize the short-term obligation to prevent genocide, studies on causes and paths of escalation are very useful; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) 4: Explains that from the ability to identify risk factors "it follows that we can also identify measures that can be taken by States and the international community to prevent these crimes." Because of authoritative studies on paths of escalation leading to genocide, states are now more aware of what to look for to determine whether genocide is unfolding and what action could be required of them.

[104] Genocide Convention (n 2) art 2: Protected groups refer to the members of a national, ethnical, racial of religious group; Pooter, de, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (n 47) 306; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 53-4; Bellamy, Alex J. and McLoughlin, Stephen, 'Preventing Genocide and Mass

Because states must act to prevent genocide within the limits of international law, coercive measures may only amount to the use of force by third states with the consent of the territorial state or when authorized by the SC.[105] Once a SC mandate under Article 42 of the UN Charter exists, it brings with it a new set of obligations for UN member states to negotiate making available the necessary means to undertake the mission.[106]

The fact that the SC has to sanction the use of force is sometimes problematic, given the possibility of political deadlock. Glanville has argued that states that are members of the SC have a "particular obligation to facilitate the prevention of genocide."[107] Given the references to geographical distance and political and other links, it seems unlikely that members of the SC would per definition be considered to pass the

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Atrocities: Causes and Paths of Escalation' Asia Pacific Centre for the Responsibility to Protect (8 June 2009) available at: <https://r2pasiapacific.org/filething/get/1281/Causes%20and%20Paths%20of%20Escalation%20Report%20June%202009.pdf> 17 and and more detailed list of elements on 19-20.

[105] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 51 para 45: "[T]he recognition of a duty to prevent adds very little to debates about the unilateral use of force to stop genocide in so-called 'humanitarian interventions'"; Two other measures indicated in the Genocide Convention could have a short-term preventive effect: calling upon UN organs to take action and prosecuting suspects of genocide. Neither of these are international obligations for third states. See: Genocide Convention (n 2) art 4 jo 6 and 8: Article 6 contains an express territorial limitation and Article 8 allows but does not require states to call upon UN organs; *Genocide* case (n 2) para 184 and 442: States may exercise universal jurisdiction for acts of genocide; Ruvebana, Etienne and Brus, Marcel, 'Before It's Too Late: Preventing Genocide by Holding the Territorial State Responsible for Not Taking Preventive Action' (2015) 62(1) Neth Int'l L Rev 25, 29: Prosecuting suspects of acts of genocide can have a preventive effect. Prosecution by a third state could have a short-term preventive effect, for example when an individual suspected of committing acts prohibited under Article 3 of the Convention travels abroad and the third state takes action to prevent them from returning or committing acts of genocide in the direct future; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58(2) and 53-4; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; Bellamy and McLoughlin, 'Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation' (n 104) 17 and and more detailed list of elements on 19-20.

[106] UN Charter (n 43) art 43(1): "All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security"; *Genocide* case (n 2) 430; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 53-4 para 49; Simma, Bruno and others, *The Charter of the United Nations: A Commentary* (OUP, 2002) 1351 onwards: "This fundamental obligation, however, exists only in accordance with one or more special agreements, and it is therefore transformed into a duty *de negotiando et de contrahendo*. Such negotiations should concern only the 'how', not the 'if', of the provision of forces […]"; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20: Glanville argues that states are legally bound to contribute troops if this is a measure "reasonably available" to them.

[107] Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20 and 21-3; Peters, Anne, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) EJIL 513, 540: "[T]he exercise of the veto may under special circumstances constitute an *abus de droit* by a permanent member."

threshold to incur the obligation to prevent genocide. Rather, the question is whether – in a situation where member states of the SC do incur the obligation to prevent genocide – they are obligated not to obstruct resolutions that could contribute to preventing genocide. De Pooter considers this possibility, but calls it a "progressive" interpretation and explains that "[w]hat is more certain is that in case of obstruction within the [SC] because of a lack of majority or the use of veto, the obligation to prevent supported by the individual members of the Security Council would not be extinguished."[108] Given the perceived need for discretion of state delegates to vote freely in the context of political IO organs and ambiguity in relation to the type of measures third states may be required to take to prevent genocide, it would be premature to claim that the obligation to prevent genocide requires SC member states to vote in a certain way in the context of IO organs.[109] An important initiative that may change the attitude of states, is the call for the permanent members of the SC to withhold from their right to veto in mass atrocity situations.[110] The initiative underlines the fact that SC member states cannot be required to vote in any particular way, because it calls on them to withhold from the permanent members' right to veto on a voluntary basis.

Finally, when a state agrees to contribute to a peacekeeping mission, it must continue to assess what measures may contribute to preventing genocide in the concrete circumstances. This is to some extent illustrated by the *Mothers of Srebrenica v. the Netherlands* case decided by the Dutch District Court in the Hague, based on complaints about the actions of the Dutch troop contingency Dutchbat during its withdrawal out of Srebrenica, which was already discussed in Chapter 3.3 B.[111] The Court concluded that the Netherlands was responsible, among other things, for failing to ensure the physical protection and evacuation of endangered individuals who were within their jurisdiction and failing to report the war crimes it had witnessed to the

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[108] Pooter, de, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (n 47) 299-300.

[109] Ryngaert, Cedric and Buchanan, Holly, 'Member State Responsibility for the Acts of International Organizations' (2011) 7(1) Utrecht L Rev 131: Another way to approach this, is through the responsibility of the IO. States may be held responsible for offering "aid or assistance" to a violation by an IO, although it is questionable whether a vote would be sufficient. First, it would have to be established whether the IO is obligated to prevent genocide.

[110] President of France H.E. Mr. François Hollande, in his address at the General Debate of the 68th Session of the UNGA in 2013, called upon the permanent members of the SC to "collectively renounce their veto powers" in mass atrocity situations, see: <http://www.globalr2p.org/our_work/un_security_council_code_of_conduct>; Accountability Coherence Transparency Group, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (New York, 24 October 2015) available at: <http://www.unelections.org/files/Code%20of%20Conduct_EN.pdf>.

[111] *Mothers of Srebrenica against the State* (16 July 2014) The Hague District Court, C/09/295247 / HA ZA 07-2973, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748> para 5.1: The Dutch State was held responsible for its cooperation with the VRS in the deportation of the relatives of ten claimants from the compound over which it had jurisdictional control, after which most of them were ill-treated and killed

UN.[112] Because the obligation to prevent genocide was not considered to have direct effect, the substance of the obligation was indirectly applied through a general tort provision in Dutch domestic law.[113] As a consequence of this indirect application, the Court did not separately discuss the obligation to prevent genocide, but considered it together with the state's other human rights obligations only in the context of the compound over which the state was judged to have extraterritorial jurisdiction.[114] As such, the Netherlands was not held responsible for measures it arguably should have taken to prevent genocide, based on its capacity to influence effectively. As explained in Section 4.1.2, the obligation to prevent genocide is based on the capacity to influence effectively the (potential) perpetrators of genocide, which extends beyond extraterritorial jurisdiction. Based on its presence with troops on the ground and political and other links with the VRS, the Netherlands arguably had a capacity to influence effectively and therefore an obligation to prevent genocide also beyond jurisdiction. Measures to prevent genocide that were arguably reasonably available that could have contributed to preventing genocide were further negotiation about the terms of the withdrawal, applying more diplomatic pressure, raising alarm among other actors in light of its first-hand information about the acts committed by the VRS and possibly even sending further backup.[115]

A final issue that may influence the content and scope of the third state obligation to prevent genocide but has so far remained unresolved, is the interconnection between different third states acting to prevent. In the *Genocide* case, the ICJ underlined that it is irrelevant to an individual state's obligation to prevent genocide, whether it alone

[112] *Mothers of Srebrenica against the State* case (n 111) para 4.264, 4.329 and 4.331.
[113] *Mothers of Srebrenica against the State* case (n 111) para 4.151-4.164 and 4.179: The court did not apply Article 1 of the Genocide Convention directly, because it was considered to hold between Convention states and not grant rights directly to individuals. However, the court does consider the standard of care required by Article 6:162 (2) Burgerlijk Wetboek to be informed by art 1 of the Genocide Convention.
[114] *Mothers of Srebrenica against the State* case (n 111) para 4.160-1 and 4.179: "The District Court is of the opinion however that through Dutchbat after the fall of Srebrenica the State had effective control as understood in the Al-Skeini judgment over the compound. […] The foregoing leads the District Court to the conclusion that by means of Dutchbat the State was only able to supervise observance of the human rights anchored in the ECHR and ICCPR vis-à-vis those persons who as of the fall of Srebrenica were in the compound."
[115] *Genocide* case (n 2) 430; *Mothers of Srebrenica against the State* case (n 111) para 4.264: The court states that: "It is indisputable that during the transition period Dutchbat could not protect the refugees inside and around the *mini safe area* located outside the compound on its own, i.e. without outside help […]." This does not exclude the option that the Netherlands could have raised alarm at the international level, pushed for further negotiations about its withdrawal or even sent more military backup; A case has been brought against the Netherlands by Dutchbat veterans, claiming that they were sent on an impossible mission because they were ill-prepared and operated under limiting rules of engagement that resulted in their inability to protect the civilian population. This may point to a long-term failure on behalf of the state to carefully plan the operation: Twelve Srebrenica Veterans Suing Dutch Government (30 June 2016) NL Times, available at: <http://www.nltimes.nl/2016/06/30/twelve-srebrenica-veterans-suing-dutch-government/>.

could or could not have succeeded in preventing genocide.[116] From the viewpoint of each third state employing all means reasonably available, this makes sense. However, given the fact that multiple third states may be obligated to prevent in reaction to the same threat of genocide, it is unsatisfactory to see their obligations as completely separate. The Court acknowledges this only to the extent that is absolutely necessary, by stating that "the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result."[117] Yet, for achieving the aim of preventing genocide as far as possible, collective action may be more effective.[118] Furthermore, the involvement of multiple third states acting to prevent genocide can have consequences for each individual state. In the *Mothers of Srebrenica v. the Netherlands* case, for example, complicating factors that remained unacknowledged by the District Court were the fact that Dutchbat operated under a mandate that limited the use of force to self-defense and protection of the safe areas and was promised backup in the form of air support by other states, which never came.[119] In light of such interconnections and the aim of preventing genocide as far as possible, it can be questioned whether the third state obligation to prevent genocide should be interpreted to include an obligation to cooperate, even if this only means that states must make an effort to inform other relevant actors of their plans and

[116] *Genocide* case (n 2) 430.
[117] *Genocide* case (n 2) 430.
[118] Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 42: "In cases where, arguably, only a combined effort may generate an effective 'capacity to influence', the line to be drawn between the capacity—and ensuing responsibility—of a single state and collective action is blurred."
[119] UN Security Council Resolution 819 (16 April 1993) UN Doc S/RES/819: Demanded that all concerned treat Srebrenica as a safe area; UN Security Council Resolution 836 (4 June 1993) UN Doc S/RES/836: Extended the mandate of UNPROFOR to enable it to deter attacks against the safe areas and monitor the ceasefire; See Chapter 3.3 A.1 Foreign State's Legal and Administrative Framework: It was argued that states have an obligation to carefully plan and control extraterritorial operations that could potentially result in deprivation of life, so as to allow state officials to live up to human rights obligations in the course of the operation; Twelve Srebrenica Veterans Suing Dutch Government (n 115): A domestic case was brought before a Dutch Court by Dutchbat veterans in June 2016, who claim that they were sent on an impossible mission in Srebrenica. As argued in Chapter 3.3 A.1 this could point to a failure of the long-term obligation to carefully plan and control the mission; Srebrenica is a disastrous example of inaction on the part of several other states that arguably had a capacity to influence effectively. Even though several states had made promises of air support and intelligence came to the attention of high state officials that Srebrenica would likely be attacked, US and NATO-led airstrikes were quietly paused shortly before the attack took place and the VRS killed over 8000 Muslim men and boys: Memo, Anthony Lake to President Clinton, SUBJ: Policy for Bosnia Use of US Ground Forces to Support NATO Assistance for Redeployment of UNPROFOR within Bosnia (29 May 1995) available at: <http://www.foia.cia.gov/document/523c39e5993294098d51764a> stating on page 1 in the para "Prospects of additional airstrikes" point (3) that "privately we will accept a pause, but make no public statement to that effect" and on page 3 warning that withdrawal from the Eastern enclaves had "the associated potential for a humanitarian nightmare for the civilians in the safe areas currently under the promise of UN protection"; UN Security Council Resolution 713 (25 September 1991) UN Doc S/RES/713; UN Security Council Resolution 819 (n 119) para 4: "Requests the Secretary-General […] to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings; demands that all parties and others concerned cooperate fully and promptly with UNPROFOR towards that end."

coordinate where necessary.[120] Several developing obligations requiring states to cooperate to ensure human rights in different areas will be discussed in Section 4.3, which could influence the development of the obligation to prevent genocide in a similar direction.

C. Preventing Continuation

The phase of preventing continuation or aggravation spans the time after the injurious event has started until it ends.[121] Long-term and short-term measures remain relevant depending on the specific circumstances. The main obligation to prevent continuation identified in Chapter 2 is the obligation to halt continuing violations, either by ceasing the wrongful act by state officials or by intervening in offences of non-state actors. In this layer, the only existing obligation to prevent continuation is the obligation to employ all means reasonably available to prevent genocide so far as possible. Discussion of the trigger, content and scope of the obligation need not be repeated. Measures required in the phase of short-term prevention remain applicable and should be introduced, maintained or intensified as relevant in the concrete circumstances after genocide has started.

D. Preventing Recurrence

The phase of preventing recurrence starts once the violation has ended.[122] Obligations in this phase are aimed at taking remedial measures and ensuring the violation does not recur. The main obligations to prevent recurrence identified in Chapter 2 are the inter-related obligations to investigate, prosecute and punish. In this layer, third state obligations are focused on: (i) Investigating and prosecuting acts of torture that took place outside the state's jurisdiction; and (ii) Cooperating with and extraditing suspects of torture to other states and international penal tribunals.

D.1 Torture

State parties to the IACPPT and CAT have obligations to investigate, prosecute and punish acts of torture that took place outside their territory and jurisdiction based on the principles of active nationality or universal jurisdiction, thereby putting the

[120] Support can be found in the obligation to report war crimes: *Mothers of Srebrenica against the State* case (n 111) para 4.264: "In the opinion of the District Court Dutchbat's failure to report war crimes observed during the transition period constitutes a violation of generally accepted standards in accordance with law of custom, in connection with which special reference is made to 4.175-4.177 for the interpretation of the standard of care [referring to the obligation to prevent genocide]."

[121] See Chapter 1.3.2 Temporal Phases; The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.

[122] See Chapter 1.3.2 Temporal Phases.

legislation introduced in the long-term preventive phase into practice.[123] As such, the obligations to investigate, prosecute and punish acts of torture enforce the worldwide regime of criminal punishment and are thought to have a general preventive effect.[124] They also have a specific preventive effect by ensuring that perpetrators cannot repeat their offences.

The obligation to investigate is an important part of the obligations to prosecute and punish.[125] If a national suspected of committing acts of torture is still outside the state's jurisdiction, this may involve alerting the authorities of the so-called forum state of the individual's presumed presence and suspected offences and requesting them to open an investigation, ensure the presence "by effective custodial or non-custodial measures" of and prosecute or extradite the national.[126] If a suspect is present in any territory under a state party's jurisdiction, the ICJ explained the relevant provisions under the CAT in the *Belgium v. Senegal* case as meaning that steps must be taken to investigate "as soon as the suspect is identified in the territory" and at the latest when a complaint is filed against the suspect.[127] A preliminary enquiry must be carried out to corroborate suspicions regarding a person.[128] States are thereby obligated to seek cooperation with other states that have relevant information, especially if complaints have been filed there against the suspect.[129]

If the preliminary enquiry provides sufficient reason to pursue the case, the state may then choose to extradite the suspect or fully investigate and prosecute the case before its domestic courts (*aut dedere aut judicare*).[130] According to the ICJ's assessment of the CAT in the *Belgium v. Senegal* case, extradition and prosecution do not have

[123] See Section 4.1.1 CAT and IACPPT and 4.2 A Long-Term Prevention; CAT (n 7) art 7 and 8; IACPPT (n 7) art 11-14; Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 948.

[124] See Section 4.2 A.1 Long-Term Prevention; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 75.

[125] CAT (n 7) art 6(2); IACPPT (n 7) art 8 jo 14.

[126] CAT (n 7) art 5(1)b; IACPPT (n 7) art 12b; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 310-11 and 345: "The active nationality principle serves the purpose of maintaining good relations with other States by ensuring that nationals of State A do not go unpunished in the event they escape prosecution by State B in which they committed a crime." The forum state is required to "ensure the presence of such persons by effective custodial or non-custodial measures" and "carry out preliminary inquiries into the facts and notify other States parties of the custody and the findings of their investigations in order to facilitate possible extradition requests."

[127] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 86 and 88; Koutroulis, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (n 66) para 19.

[128] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 83-85: It is not sufficient for this preliminary enquiry to question the suspect to establish his or her identity and inform them of the charges against them.

[129] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 83.

[130] Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 345 onwards.

equal weight.[131] Extradition is not a separate obligation under the Convention, merely a means to relieve itself of the obligation to prosecute.[132] If no other state has requested extradition or is willing to take the case, the custodial state is still required to prosecute the suspect. Vice versa, a custodial state that is unwilling to prosecute is not then under an obligation to extradite the suspect to another state instead.[133] States may, however, be under a separate obligation to extradite a suspect based on extradition agreements or statutes of international penal tribunals.[134] If the state chooses to prosecute the suspect, proceedings must be undertaken "without delay", "within a reasonable time" and states must "take all measures necessary for its implementation as soon as possible […]."[135] That means a state must submit the case to the competent authorities. Those authorities may still decide that the evidence is not sufficient to convince a judge to find the suspect guilty and therefore decide not to further pursue the case, in the same manner as it would in cases involving other serious offences.[136] However, internal law or financial difficulties cannot justify a

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[131] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 95: Note that the ICJ's assessment pertains only to the CAT, but its considerations are likely to be of analogous relevance for the IACPPT.

[132] If a custodial state refuses both to extradite or prosecute, that state will only be in violation of its obligation to prosecute.

[133] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 92 and 95: Despite Belgium's claim that Senegal would be obligated to extradite Habré if it did not prosecute him, the ICJ stated that: "[E]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State"; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 359-60: "Since Article 5 does not establish any order of priority among the various grounds of jurisdiction, there exists no obligation of the forum State to extradite the alleged torturer to a State with a 'better' jurisdiction. But the forum State is under an *obligation to proceed to prosecution*. The choice between prosecution and extradition (*aut dedere aut iudicare*) is, therefore, an uneven choice"; Nollkaemper, André, 'Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in Belgium v Senegal' (2013) 4(3) JIDS 501, 504: Argues that the ICJ's interpretation hampers the aim of the CAT to prevent impunity, by annihilating entitlements of other states instead of ensuring that a suspect is prosecuted by the state that has the "best normative entitlements to prosecute and that may be best equipped to do so."

[134] CAT (n 7) art 8 and 9; IACPPT (n 7) art 13: Extradition can be subject to certain requirements in domestic law.

[135] CAT (n 7) art 7(2): "These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1"; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 114-7.

[136] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 94; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 361: "As one cannot establish any meaningful obligation of a State to the effect that its independent courts shall convict and punish a perpetrator, international law cannot effectively oblige a public prosecutor to indict and prosecute a suspected torturer if the evidence available to the prosecution is not sufficient to proceed with the case."

decision not to prosecute.[137] State parties to the CAT are also explicitly required to assist each other in relation to criminal proceedings against alleged perpetrators, for example by providing evidence.[138]

Although the set of inter-related obligations and (permissive and obligatory) bases for criminal jurisdiction aiming at a worldwide regime of criminal punishment for torture have been implemented by states in practice, this has not always led to the desired result of promptly punishing perpetrators of torture. Over the past decades, domestic courts have regularly sought to establish criminal jurisdiction over suspects of torture. [139] For example, the Spanish examining magistrate Judge Baltasar Garzon sought to try former Chilean President Augusto Pinochet of Chile for among others the crimes of torture committed during his dictatorship.[140] He issued two international warrants for arrest, invoking universal jurisdiction and the passive personality principle, as some of Pinochet's victims had been Spanish.[141] Pursuant to a European Arrest Warrant, Pinochet was arrested in London in 1998, which made headline news as exemplifying state cooperation for the prosecution of perpetrators of gross human rights violations and challenging the impunity of former heads of state.[142] Pinochet was eventually allowed to return to Chile due to concerns about his health, where he was subsequently stripped of his immunity and a series of cases were lodged against him.[143] Pinochet ultimately wasn't convicted, because he died in 2006 while awaiting trial under house arrest.

A more recent example is the indictment of the former president of Chad Hissène Habré in 2005 by a Belgian court for crimes against humanity, torture, war crimes and other human rights violations based on universal jurisdiction.[144] After Senegal refused to extradite Habré to Belgium for various legal reasons, Belgium brought the case before the ICJ, requesting the Court to find that Senegal should either extradite or

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[137] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 112-3.

[138] CAT (n 7) art 9.

[139] Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 289 onwards.

[140] Gattini, Andrea, 'Pinochet Cases' (June 2007) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e859?rskey=MvsOgn&result=1&prd=EPIL>.

[141] Van Alebeek, Rosanne, 'The Pinochet Case: International Human Rights Law on Trial' (2001) 71(1) BYIL 29, 29-30 and 32; *R* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (1999) House of Lords, 2 All ER 97, 101–4.

[142] Gattini, 'Pinochet Cases' (n 140) para 1 and 8.

[143] Gattini, 'Pinochet Cases' (n 140) para 5-7; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 294.

[144] Koutroulis, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (n 66) para 3: In 2000 and 2001, 21 people filed complaints against Habré in Belgium. Some of the complainants had (dual) Belgian nationality.

prosecute Habré based on the CAT and customary international law.[145] According to the ICJ, the object and purpose of the CAT is "to make more effective the struggle against torture (…) throughout the world."[146] It found Senegal to be in violation of its obligations to investigate (Article 6(2) CAT) and prosecute (Article 7(1) CAT) Habré and ordered it to submit the case to the competent authorities for prosecution without delay, if it did not choose to extradite him.[147] A trial against Habré finally started in 2015 before the Extraordinary African Chambers, especially established as a part of the Senegalese court system by the African Union (AU) for this particular case, marking the first trial in the world in which a former head of state is prosecuted for torture and other offences in a third state.[148] The Chambers delivered its judgment on 30 May 2016, finding Habré guilty of among others forced sexual slavery, disappearances, summary executions and torture committed in Chad between 1982 and 1990 and sentenced him to life in prison.[149]

There has been growing attention for the use of universal jurisdiction, also in relation to other crimes than torture.[150] For example, the ILC has used the obligation in the CAT and the ICJ's interpretation of this obligation in the *Belgium v. Senegal* case as

[145] Koutroulis, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (n 66) para 3-7.
[146] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 68.
[147] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 121-2; Koutroulis, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (n 66) para 24.
[148] The New York Times, 'A Milestone for Justice in Africa' (22 July 2015) available at: <http://www.nytimes.com/2015/07/22/opinion/a-milestone-for-justice-in-africa.html?emc=edit_tnt_20150722&nlid=9510037&tntemail0=y&_r=0>; Williams, Sarah, 'The Extraordinary African Chambers in the Senegalese Courts an African Solution to an African Problem?' (2013) 11(5) JICJ 1139.
[149] Secretary General, With Thoughts on Victims, Applauds Senegal, African Union on Judgment in Case Against Former Chad President Hissene Habré (30 May 2016) UN Press Release SG/SM/17806-AFR/3390, available at: <http://www.un.org/press/en/2016/sgsm17806.doc.htm>; African Union Welcomes the Judgment of an Unprecedented Trail of Hissene Habré (1 June 2016) AU Press Release, available at:<http://www.au.int/en/pressreleases/30728/au-welcomes-judgement-unprecedented-trial-hiss%C3%A8ne-habr%C3%A9>.
[150] Kamminga, Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses (n 12) 946-8: For example, for crimes against humanity, war crimes and genocide; Oxman, Bernard H., 'Jurisdiction of States' (November 2007) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1436> para 39: "As the human rights content of international law expanded, universal adjudicative jurisdiction also expanded to embrace universally condemned crimes"; Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, GA Res 3074 (XXVIII) UN Doc A/9030/Add1 (1973): Non-binding document that lays down principles for co-operation between states in the area of collection of evidence and information, detection, arrest and extradition; Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Countried, The Law Library of Congress, Global Legal Research Center (April 2010) available at: <http://www.loc.gov/law/help/crimes-against-humanity/crimes-against-humanity.pdf>: List of countries that have included universal criminal jurisdiction for crimes against humanity in domestic criminal law.

authoritative examples to formulate a Draft Article on the obligation *aut dedere aut judicare* in the context of other crimes that are of international concern, based on customary law.[151] There is, however, a tension between the principle of universal jurisdiction and the principle of state sovereignty and its elements of non-interference in a state's internal affairs and immunity of state officials. This has led to some concern that the principle of universal jurisdiction is open to abuse through its selective use for political reasons.[152] Furthermore, many practical issues attached to the implementation of universal jurisdiction remain unresolved. For example, the interpretation of extradition as an option, rather than an international obligation, means that a state in whose territory the suspect is present can deny requests for extradition from states who are actually more closely connected to the offence. It is still an open question whether, in some cases in which there are competing claims for jurisdiction, priority should be afforded to states on whose territory the crime was committed or states that have a link with the perpetrator or victim.[153]

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[151] Note that an obligation of *aut dedere aut judicare* is not necessarily synonymous with universal jurisdiction. It could also be based on other grounds of jurisdiction, such as the principle of nationality; ILC, 'Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (n 65) para 15 onwards; Special Rapporteur Zdzislaw Galicki, 'Fourth Report on the Obligation to Extradite or Prosecute' (31 May 2011) 63rd session of the ILC, UN Doc A/CN4/648, chp.4(h) para 95: Draft Article 4: International custom as a source of the obligation *aut dedere aut judicare.* Draft Article 4(2) notes: "Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes]." Para 96 of the report states that the list of crimes covered by Draft Article 4(2) is still contested and open to further discussion.

[152] UN General Assembly Sixth Committee, 'The Scope and Application of the Principle of Universal Jurisdiction' (11 November 2015) 70th session, UN Doc A/C.6/70/L.12; UN General Assembly Sixth Committee, Summary Record of the 12th Meeting (5 November 2015) UN GAOR A/C.6/70/SR.12, para 2: The Assembly of the African Union "reiterated its request that warrants of arrest issued on the basis of the abuse of the principle of universal jurisdiction should not be executed in any member State." Para 3: The Movement of Non-Aligned Countries "cautioned against unwarranted expansion of the range of [crimes that fall within the scope of universal jurisdiction]." Para 8: The African Group was of the opinion that "abuse of universal jurisdiction could undermine efforts to combat impunity; it was therefore vital, when applying the principle, to respect other norms of international law, including the sovereign equality of States, territorial jurisdiction and the immunity of State officials under customary international law." Similar opinions and concerns were voiced by the Caribbean Community and other states.

[153] UNGA Sixth Committee, Summary Record of the 12th Meeting (n 152) Para 80: The delegate of the US noted that further analysis of the "practical application" of the principle would be useful, adding that the US "for example, might refrain from exercising universal jurisdiction when the State in which the crime was committed or the State whose citizens were the primary victims of the crime was able and willing to prosecute"; Nollkaemper, 'Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in Belgium v Senegal' (n 133) The latter statement fits with the approach promoted in this article that a suspect is prosecuted by the state that has the "best normative entitlements to prosecute and that may be best equipped to do so."

D.2 Genocide

It has been explained above that states are in principle not obligated to investigate, prosecute and punish on any other basis than that acts of genocide took place on their territory.[154] States do have obligations to cooperate with other states for the extradition of suspects and international penal tribunals of which it has accepted jurisdiction.[155] There is an argument to be made that states should, under particular circumstances, ensure punishment of suspects of acts of genocide that took place outside its territory if a suspect is present within their territory or jurisdiction.[156] In this line of reasoning, a state has a duty to promote prosecution and punishment by other states or an international penal tribunal. If no international tribunals or other states are willing or able to prosecute, states have a subsidiary obligation to prosecute the suspect before its own courts.[157] It was concluded in Section 4.1.2 that the argument is still too contentious to be able to conclude that it is currently an existing obligation under the Genocide Convention, but that may change. Although states are currently not required to prosecute suspects of genocide when the acts took place outside their territory, it is generally accepted that states are allowed to do so based on universal jurisdiction.[158]

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[154] Genocide Convention (n 2) art 6; See Section 4.1.2 Genocide Convention.

[155] Genocide Convention (n 2) art 1, 6 and 7: “Genocide and the other acts enumerated in Article III shall not be considered political crimes for the purpose of extradition”; Genocide case (n 2) para 443; See for example: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 58, 59, 86 and 89; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 261 onwards: Extradition can be subject to certain requirements in domestic law, for example based on the risk of death penalty or torture or protecting nationals against foreign jurisdiction.

[156] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58: This also implies a duty to investigate once a state learns or is made aware of the presence of suspects within its jurisdiction.

[157] Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58(3); Gaeta, *The UN Genocide Convention – A Commentary* (n 57) 46-8.

[158] *Genocide* case (n 2) para 442; Kamminga, 'Extraterritoriality' (n 73) para 14; Schabas, 'National Courts Finally Begin to Prosecute Genocide, The ‘Crime of Crimes'' (n 54) 60: Explains that the *travaux préparatoires* of the Genocide Convention show that the drafters sought to explicitly exclude universal jurisdiction for genocide, while it is now accepted at least as a permissive basis for prosecution; Spijkers, Otto, ‘Universal Jurisdiction in the Case of Jorgic v. Germany’ (18 July 2007) School of Human Rights Research Blog, available at: <http://invisiblecollege.weblog.leidenuniv.nl/2007/07/18/universal-jurisdiction-in-the-case-of-jo/>: An example of an exercise of permissive universal jurisdiction by a third state over a suspect of acts of genocide in another state, is the prosecution and punishment of Nikola Jorgic; *Jorgic v. Germany*, no. 74613/01, ECHR 2007-III, para 68: After his conviction, Nikola Jorgic complained to the ECtHR that Germany had not had criminal jurisdiction over him. The ECtHR disagreed, and stated that “the national courts’ reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing).”

4.3 Shift Towards Third State Obligations

The moral and societal shift towards prevention, described in the introductory chapter, has been accompanied by a shift towards recognizing the important role third states can play in ensuring human rights.[159] The territorial state cannot always effectively prevent gross human rights violations, or may itself be the perpetrator.[160] In such situations, third states can play an important role to (help) prevent violations. Both the shift towards prevention and the shift towards recognizing the important role of third states are clearly illustrated by the attention for the Responsibility to Protect (RtoP) concept, which advances the notion that the international community has responsibilities to assist states in protecting their populations and ultimately take timely and decisive action if any particular state manifestly fails to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing.[161]

There are many other areas in which the important role of third states to ensure human rights has gained attention, such as state assistance and cooperation for the full realization of economic social and cultural (ESC) rights, preventing and remedying human rights abuses by corporations acting abroad and state cooperation to bring serious violations of peremptory norms to an end as part of the Articles on State Responsibility.[162] There is some cautious evidence of developing third state obligations in the above-mentioned areas.[163] These developing obligations supplement

[159] Hakimi, 'State Bystander Responsibility' (n 1); Bird, 'Third State Responsibility for Human Rights Violations' (n 1); Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 28.

[160] For example: i) Developing states cannot ensure all human rights to the people in their territory partly as a result of structures at the international level; ii) Non-state actors sometimes commit human rights abuses that are hard to control, like transnational corporations or rebel movements; iii) A state may itself be the perpetrator of human rights violations against people on its territory.

[161] See Chapter 1.1 Context: Shift Towards Prevention; Secretary-General Ban Ki-Moon, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677, summary, 10, 15 and 22; The RtoP is pre-dated by and builds on the notion of humanitarian intervention.

[162] Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties Obligations (Art 2 par 1 of the Covenant)' (14 December 1990) UN Doc 14/12/90, para 13-4; Concluding Observations HRCee on Germany (November 2012) UN Doc CCPR/C/DEU/CO/6, para 16; Articles on State Responsibility (n 3) art 41(1): Which peremptory norms will be discussed in Section 4.3.3.

[163] Chapter 1.3.1 Delineation: Note that this section diverges from the main focus in this research on human rights law, for the sake of finding ways that third state obligations to prevent gross human rights violations might develop and can be strengthened. There are other areas beyond the four discussed below in which third state obligations may develop that could strengthen the set of obligations to prevent gross human rights violations, such as the obligation not to avoid causing extraterritorial harm and the obligation to exercise universal jurisdiction for war crimes and crimes against humanity. The four areas that have been chosen are the ones most discussed in literature in relation to the prevention of gross human rights violations and are indicative of the theoretical and methodological challenges third state obligations entail. For further reading, see: Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 946-8; De Schutter, Olivier and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States

the patchwork of existing obligations beyond territory and jurisdiction discussed in Sections 4.1 and 4.2 and could eventually strengthen the set of obligations to prevent gross human rights violations. Most of the third state obligations discussed below have not been fully accepted as *lex lata*, but some have the potential to develop into (customary) law, while others may influence the development of international law in other ways. The different sections will consider the basis, triggers, content and scope of these developing obligations – as far as these are clear at this point in time – and how they may strengthen obligations to prevent gross human rights violations beyond jurisdiction.

4.3.1 Economic, Social and Cultural Rights

There is a strong push for the further development and acceptance of third state obligations for states to assist each other and cooperate with each other for the worldwide realization of ESC rights.[164] A long history lies behind the argument that the realization of ESC rights requires more cooperative efforts than civil and political (CP) rights.[165] As the source of obligations of assistance and cooperation, the Committee on Economic, Social and Cultural Rights (CESCR) and scholars mainly refer to Articles 55 and 56 in the UN Charter, Article 28 of the Universal Declaration of Human Right (UDHR) and finally Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[166] Article 56 UN Charter proclaims that:

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in the area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084 (Maastricht Principles and Commentary) Principle 13 and 14.

[164] ESC rights and obligations were not included in the discussion of obligations to prevent in the territorial and jurisdictional layers because instruments containing these rights do not contain obligations that directly aim, either expressly or impliedly, to prevent torture, arbitrary death or genocide. Nevertheless, the discussion on extraterritorial ESC rights is broader than just the third state obligations to assist and cooperate. For example, states may also have obligations based on extraterritorial jurisdiction not to destroy houses, hospitals, schools or crops; Salomon, Margot E., *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, 2007); Sepúlveda, Magdalena, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 Neth Q Hum Rts 271; Maastricht Principles and Commentary (n 163).

[165] See for example: International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2 (1) which obligates states to devote “the maximum of [...] available resources” to the realization of economic and social rights through “assistance and cooperation”; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164); Howland, Todd, 'The Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights' (2007) 35(3/4) Denver J Int Law Policy 389.

[166] UN Charter (n 43) art 55 and 56; UN General Assembly Resolution 217 (A), ‘Universal Declaration of Human Rights’ (10 December 1948) UN Doc A/RES/3/217A (UDHR) art 28: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”; ICESCR (n 165) art 2.

> "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."[167]

The purposes in Article 55 of the UN Charter include, among others, the universal observance of human rights and economic and social progress and development.[168] The ICESCR, like the Genocide Convention, does not contain a jurisdiction clause.[169] Article 2 of the ICESCR reads:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation […] 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 […]."[170]

In view of the references to joint action and international assistance and cooperation in the above provisions, coupled with the lack of a jurisdiction clause in the ICESCR, the CESCR and scholars have argued that states have legally binding obligations to ensure ESC rights beyond state territory and jurisdiction.[171] Yet, the basis, content and scope of these obligations are by no means settled. Many states, fearing potentially significant resource implications, therefore do not accept third state obligations for the realization of ESC rights as *lex lata*, but argue that they are only of a moral character.[172] By further clarifying the basis, content and scope of these obligations, the CESCR and scholars have attempted to push for their further acceptance.[173]

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[167] UN Charter (n 43) art 56.

[168] UN Charter (n 43) art 55.

[169] This may partly illustrate the universalist intention of the drafters, but most importantly it has allowed room for broad teleological interpretation to that effect: Alston, Philip and Quinn, Gerard, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 2, 156, 191: Explain that, based on the *travaux préparatoires* of the ICESCR, the argument that the obligation of cooperation is legally binding cannot be sustained, but that subsequent developments may necessitate a re-interpretation.

[170] ICESCR (n 165) art 2.

[171] CESCR, General Comment 3 (n 162) para 13-4: The CESCR explains that the "available resources" refer both to the resources within a state and those available from the international community. "The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States"; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164).

[172] Sepúlveda, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n 164) 273.

[173] Maastricht Principles and Commentary (n 163); Sepúlveda, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n 164) 300 onwards; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) 999 UNTS 171 (OP-ICESCR) art 14: Article 14 of the OP, which gives the CESCR the right to receive individual (and inter-state, see Article 10) complaints, is focused on the role of the CESCR in the context of international assistance and cooperation. The provision gives the CESCR the right to bring the need for assistance and cooperation to the attention of specialized UN bodies.

In regard to the basis of third state obligations of assistance and cooperation, the CESCR has stated that they are "particularly incumbent upon those States which are in a position to assist others in this regard."[174] The CESCR has so far not specified any criteria to determine when states are in a position to assist.[175] In 2011, a group of experts adopted the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, followed by a Commentary in 2012, which aim to elucidate the extraterritorial application of ESC rights.[176] Although these documents were devised by experts and are not legally binding, they have gained some authority based on the qualifications of the drafting experts.[177] The Preamble notes:

> "Drawn from international law, these principles aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights."[178]

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[174] CESCR, General Comment 3 (n 162) para 14; Repeated in: Committee on Economic Social and Cultural Rights, 'General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)' (11 August 2000) UN Doc E/C12/2000/4, para 45; Committee on Economic Social and Cultural Rights, 'General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)' (20 January 2003) UN Doc E/C12/2002/11 para 38; Committee on Economic Social and Cultural Rights, 'General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting From any Scientific, Literary or Artistic Production of Which He or She is the Author (Article 15, paragraph 1 (c), of the Covenant)' (12 January 2006) UN Doc E/C12/GC/1712, para 37; See also: Committee on Economic Social and Cultural Rights, 'General Comment 18: The Rights to Work (Art 6 of the Covenant)' (6 February 2006) UN Doc E/C12/GC/18, para 29-30.

[175] Sepúlveda, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n 164) 277 onwards: Refers to the CESCR's division between developed and developing states and regards the obligation to cooperate from those perspectives.

[176] Maastricht Principles and Commentary (n 163).

[177] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art 38(1)d; Maastricht Principles and Commentary (n 163) The commentary straight away addressed the geographical dispersion and status of the experts involved in the drafting; The Maastricht Principles have already been referred to in General comments: Committee on Economic Social and Cultural Rights, 'General Comment 23: On the Right to Just and Favourable Conditions of Work' (27 April 2016) UN Doc E/C12/GC/23, para 70: "States parties should also provide guidance to employers and enterprises on how to respect the right extraterritorially"; Committee on Economic Social and Cultural Rights, 'General Comment 22 On the Right To Sexual and Reproductive Health' (2 May 2016) UN Doc E/C12/GC/22, para 60: "States also have an extraterritorial obligation to ensure that transnational corporations, such as pharmaceutical companies operating globally, do not violate the right to sexual and reproductive health of people in other countries, for example through non-consensual testing of contraceptives or medical experiments"; It will be interesting to see what the influence of the Maastricht Principles will be in the CESCR individual complaints cases. So far, only 4 individual complaints have been dealt with by the CESCR, of which two led to inadmissibility decisions and none refer to the Maastricht Principles.

[178] Maastricht Principles and Commentary (n 163) Preamble.

The phrase “drawn from international law” in a way acknowledges that many of the principles include *lege ferenda* elements. This becomes apparent for example when viewing the Principles’ approach to jurisdiction and other bases for extraterritorial applicability.

Principle 9 of the Maastricht Principles sets out to clarify the “scope of jurisdiction.”[179] First of all, since the ICESCR does not contain a jurisdiction clause, it is not readily apparent why the drafters of the Principles chose jurisdiction as a basis for extraterritorial obligations in the area of ESC rights. Second, the way jurisdiction is described in the Maastricht Principles is much wider than the understanding of jurisdiction in CP rights context.[180] Principle 9 sub a refers to “situations over which [a state] exercises authority or effective control, whether or not such control is exercised in accordance with international law”, which describes jurisdiction as it has been interpreted in the context of CP rights.[181] Principle 9 sub c, however, refers to situations where a state, acting separately or jointly, “is in a position to exercise decisive influence or to take measures to realize” ESC rights, which according to the Commentary “refers, in particular, to the role of international assistance and cooperation in the fulfillment of economic, social, and cultural rights.”[182] Being in such a position to exercise decisive influence does not necessarily require forms of control over territory or people and therefore goes well beyond the interpretation of jurisdiction in the context of other human rights treaties. Because the Principles nevertheless categorize Principle 9 sub c as a form of jurisdiction, this would lead to a separate understanding of jurisdiction in ESC as opposed to CP context.

It is submitted that it offers more conceptual clarity to distinguish between jurisdiction as described in Chapter 3 and Principle 9 sub a as a form of control over territory or people and other bases for extraterritorial human rights obligations that go

[179] Maastricht Principles and Commentary (n 163) Principle 9.
[180] Parts of these paragraphs have also been used in a blogpost: Have, Nienke van der, ‘The Maastricht Principles on Extraterritorial Obligations in the Area of ESC Rights – Comments to a Commentary’ (25 February 2013) SHARES blog, available at: <http://www.sharesproject.nl/the-maastricht-principles-on-extraterritorial-obligations-in-the-area-of-esc-rights-comments-to-a-commentary/>: In this blog, I criticized the fact that the Maastricht Principles categorize Principle 9 sub c as a form of jurisdiction, because it is much wider than the understanding of jurisdiction in CP rights context. For reasons of conceptual clarity, this chapter categorizes obligations of assistance and cooperation as obligations beyond territory and jurisdiction.
[181] Maastricht Principles and Commentary (n 163) Principle 9 sub a and b: Note that sub b refers to “situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights” including extraterritorially. This is also somewhat wider than jurisdiction as it has been interpreted in CP rights context. In the Principles it is used as a basis of third state obligations to respect and protect. See also principles 13 and 14; See Chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations.
[182] Maastricht Principles and Commentary (n 163) Principle 9 sub c.

beyond this understanding of jurisdiction.[183] Therefore, Principle 9 sub c and the related obligations of assistance and cooperation are not discussed under the heading of jurisdiction in this study, but as developing third state obligations beyond jurisdiction. It has so far remained unclear when third states are in a position to exercise decisive influence and thereby incur obligations to assist and cooperate. Although Principle 9 sub c resembles the CESCR's concept of states in a position to assist, like the CESCR, the Principles and Commentary fail to specify further criteria to establish when a state is in such a position.[184] The drafting experts of the Principles did, however, recognize that the lack of such criteria hampers the implementation of obligations of assistance and cooperation and advanced an interesting solution to this deficiency. Alongside the substantive obligation for states to cooperate, they chose to introduce a procedural obligation in Principle 30 to devise a system of burden sharing so as to create "criteria and indicators to assist in the allocation of particular obligations of international assistance and cooperation."[185] The Principles thereby recognize the need for such criteria while leaving it up to states to devise them. This construction resembles the obligation "*de negotiando et de contrahendo*" to make available the necessary means for a mission authorized by the SC under Article 42 or the UN Charter.[186] In reality, however, it seems unlikely that states will take up the practice of establishing burden sharing systems for obligations of assistance and cooperation in the context of ESC rights in the near future.

Similar to the basis, the content and scope of the developing obligations to assist and cooperate are far from clear. The CESCR and Maastricht Principles have interpreted Article 2(1) of the ICESCR to mean that states have obligations to support the realization of ESC rights in other states, which has been categorized primarily as an obligation to fulfill.[187] The CESCR has explained in General Comment 3 that the

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[183] Maastricht Principles and Commentary (n 163) Principle 9 sub a; See Chapter 1.3.3 Territory, Jurisdiction and Beyond and 3.1.2 Jurisdiction as a Basis and Threshold for Extraterritorial Obligations.

[184] Maastricht Principles and Commentary (n 163) Commentary to Principle 9c para 9.

[185] Maastricht Principles and Commentary (n 163) Principle 30 and Commentary to Principle 30 para 2: The commentary to the Maastricht Principles refers to the potential use of the principle of common but differentiated responsibility, a principle mainly used in the area of environmental law as a way to distribute obligations serving a common goal on a differentiated basis.

[186] UN Charter (n 43) art 43(1); Simma and others, *The Charter of the United Nations: A Commentary* (n 106) 1351 onwards: Such negotiations should concern only the 'how', not the 'if', of the provision of forces […]."

[187] ICESCR (n 165) art 2(1); Maastricht Principles and Commentary (n 163) Principle 33 and 35: "As part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States." Principle 35 elaborates that states that receive a request for assistance must consider it in good faith and respond in a manner consistent with their obligation to support the realization of ESC rights in other states; Shue, Henry, *Basic Rights* (2nd edn, Princeton UP, 1996) 52: The respect, protect and fulfill distinction is often used in the context of ESC rights; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164) 75-7 and 191: Notes that the ICESCR defines obligations on the basis of

reference in Article 2 ICESCR to "international assistance and cooperation" to "the maximum of [...] available resources" refer both to "resources existing within a State and those available from the international community through international cooperation and assistance."[188] Principle 31 of the Maastricht Principles asserts that individual states must jointly contribute to the extraterritorial fulfillment of ESC rights "commensurate with, *inter alia*, its economic, technical and technological capacities, available resources, and influence in international decision-making processes."[189] The Principles thereby propose that the scope of these third state obligations is limited by every individual states' capacity and resources.[190] Article 23 of the ICESCR further specifies several means for international assistance and cooperation, such as technical assistance, consultation and study.[191] In other General Comments, the CESCR has tried to elucidate the content of the obligations to assist and cooperate in relation to particular rights.[192] For example, in General Comment 18 the CESCR stated that obligations of assistance and cooperation in relation to the right to work mean that due attention must be paid to the right in international agreements and that states should promote the right to work in bilateral and multilateral negotiations.[193]

In this context, mention should also be made of solidarity rights, such as the rights to peace and development.[194] These rights were recognized in UN General Assembly (GA) resolutions several decades ago, but have not been generally accepted as *lex lata*. They were born from the realization that many individual CP and ESC rights cannot be achieved without states cooperatively addressing the underlying structural

international co-operation, requiring pro-active steps; Vandenhole, Wouter, 'A Partnership for Development: International Human Rights Law as an Assessment Instrument' (November 2005) Submission to the UN High-Level Task Force on the Right To Development for its 2nd session, 3, para 4: "[...] States parties to the ICESCR, are to respect, protect and fulfil economic, social and cultural rights not only domestically but also abroad. Though these extraterritorial obligations may still be in need of further conceptualization, their existence should go undisputed."

[188] CESCR, General Comment 3 (n 162) para 13.

[189] Maastricht Principles and Commentary (n 163) Principle 31.

[190] Maastricht Principles and Commentary (n 163) Principle 13-14 and 21-22: Some of the obligations proposed by the Maastricht Principles are specifically focused on prevention, such as Principles 13 and 14 which address the duty to avoid causing harm extraterritorially and the importance of impact assessments and prevention efforts in that regard. The Maastricht Principles also address the negative effects of sanctions or other indirect interference with another state's capacity to ensure human rights within their own territory.

[191] ICESCR (n 165) art 23; CESCR, General Comment 3 (n 162) para 13: Refers to Articles 11, 15, 22 and 23 of the ICESCR as underlining the "essential role of such cooperation in facilitating the full realization of the relevant rights."

[192] CESCR, General Comment 14 (n 174) para 45; CESCR, General Comment 15 (n 174) para 38; CESCR, General Comment 17 (n 174) para 37; CESCR, General Comment 18 (n 174) para 29-30.

[193] CESCR, General Comment 18 (n 174) para 29-30.

[194] UN General Assembly Resolution 39/11 'Declaration on the Right of Peoples to Peace' (12 November 1984) UN Doc A/RES/39/11; UN General Assembly Resolution 41/128, 'Declaration on the Right to Development' (4 December 1986) UN Doc A/41/53; Sachs, Albie, 'Social and Economic Rights: Can They Be Made Justiciable' (2000) 53 SMU L Rev 1381, 1383.

and global causes of inequality. Solidarity rights bestow primary responsibility for their realization on the territorial state. However, they also have a clear collective dimension, calling on states to cooperate for the realization of the right worldwide.[195] A pragmatic approach is to view solidarity rights as having an internal and external dimension.[196] The internal dimension contains obligations that states owe towards people within their jurisdiction, whereas the external dimension contains obligations of states towards people outside their territory and jurisdiction and the obligation of all states to cooperate for the realization of the right.[197] However, there is currently very little guidance with regard to the basis or content and scope of obligations in the external dimension.[198] These aspects of the external dimension of solidarity rights could be further clarified and developed along the same lines as the obligations of assistance and cooperation for the worldwide realization of ESC rights.[199]

Although prevention of the types of injury associated with gross human rights violations is not the only or even principal aim of ESC rights, the developing third state obligations to assist and cooperate signify an advancing interest in addressing root causes of human rights violations within the international human rights law framework at a level surpassing territory and jurisdiction.[200] As such, the development of these obligations forms a strong contribution to the concepts used to further clarify the basis, content and scope of human rights obligations beyond territory and jurisdiction. If these obligations become more accepted, they could also have a practical impact on the long-term prevention of gross human rights violations. Different forms of economic and social instability can be risk factors that lead to gross human rights violations.[201] Obligations of assistance and cooperation for the realization of ESC rights target such economic and social instabilities and are generally focused on creating an enabling environment for the realization of human rights.[202] As such, they may contribute to mitigating risk factors for gross human rights violations.

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[195] Working Group on the Right to Development, Report on its Ninth Session (10 September 2008) UN Doc A/HRC/9/17, para 27: The remarks made by Cuba, Egypt and Pakistan are illustrative of the push and pull between developing states, who emphasize the collective external dimension and western states who emphasize the territorial dimension.

[196] Have, Nienke van der, 'The Right to Development: Can States Be Held Responsible?' in Foeken, Dick and others (eds), *Development and Equity* (BRILL, 2014) 191, 195.

[197] Have, van der, ‘The Right to Development: Can States Be Held Responsible?’ (n 196) 195.

[198] Have, van der, ‘The Right to Development: Can States Be Held Responsible?’ (n 196) 198-202.

[199] Maastricht Principles and Commentary (n 163) Principle 9.

[200] See Chapter 1.1.3 International Human Rights Law: “The type of injury that […] express obligations to prevent seem to focus on, are violations of a person’s life, body or dignity”; ICESCR (n 165) art 2: This interest is expressed in, but also shaped, by the entry point offered by Article 2.

[201] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) risk factors 1.7-11.

[202] Maastricht Principles and Commentary (n 163) Preamble and Principle 28-35; Declaration on the Right to Development (n 194) art 3-6.

4.3.2 Corporations Acting Abroad

There are some rudimentary legal and practical developments suggesting that obligations beyond territory and jurisdiction may develop for states to prevent and remedy human rights abuses by corporations acting abroad. The issue of human rights violations caused by corporations has been on the international agenda for several decades.[203] Corporations are not parties to treaties and are not directly bound by human rights standards, yet they have the potential to cause much harm. In 2008, UN Special Representative John Ruggie presented a report, which described the need for states to "foster a corporate culture respectful of human rights at home and abroad."[204] The report was followed in 2011 by Ruggie's Guiding Principles for Business and Human Rights, based on a protect, respect and remedy framework.[205] The Human Rights Council (HRC) unanimously endorsed the framework.[206] The Guiding Principles strike a careful balance between the state's obligations to protect against and remedy human rights violations by corporations within their jurisdiction and the responsibility of corporations to respect human rights.[207] In terms of obligations beyond territory and jurisdiction, the Commentary to the Guiding Principles notes that:

> "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction."[208]

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[203] Ruggie, John G., 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) AJIL 819.

[204] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5, para 27.

[205] Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (n 204); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31 (Guiding Principles on Business and Human Rights).

[206] Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4: In the same resolution, the HRC established a Working Group on the issue of human rights and transnational corporations and other business enterprises.

[207] Guiding Principles on Business and Human Rights (n 205) Commentary to Foundational Principle I. A 1: It stresses that is does not create new legally binding obligations for states, but is based on existing human rights obligations; Principle 17-21: Warn that adverse human rights impacts can result in criminal charges or civil claims for compensation against business enterprises and encourages businesses to carry out human rights impact assessments. States could choose to include this as a requirement in their regulation of business enterprises domiciled in their territory.

[208] Guiding Principles on Business and Human Rights (n 205) Commentary to Foundational Principle 2.

There are quite a few examples of recommendations to prevent and remedy human rights abuses by corporations acting abroad in the reporting procedures of UN Treaty Bodies.[209] Two concluding observations of the Human Rights Committee (HRCee) will be highlighted. The first example concerns the HRCee's concluding observations in its 2012 reporting procedure with Germany. According to a parallel report by a non-governmental organization (NGO), the Neumann Kaffee Gruppe, which is a German company, carried out forced evictions in Uganda at gunpoint, during which the victims were beaten and their houses were demolished.[210] The HRCee stated:

> "The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad."[211]

A second example can be found in the HRCee's concluding observations in its 2015 reporting procedure with Canada, in relation to concerns about allegations of human rights abuses committed by Canadian mining companies abroad. The language in these concluding observations is stronger and more mandatory in nature:

> "The State party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad."[212]

The HRCee thus recommended to both Germany and Canada that they should regulate against, investigate and remedy human rights abuses of corporation acting abroad, despite the lack of jurisdictional control over the victims.[213] Instead, states are expected to wield the influence they have over the (potential) perpetrators of human

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[209] The Global Initiative for Economic, Social and Cultural Rights, 'Human Rights Law Sources: UN Pronouncements on Extraterritorial Obligations' (Working Paper July 2015) available at: <http://globalinitiative-escr.org/wp-content/uploads/2015/07/150706-Human-Rights-Law-Sources-ETOs.pdf>.

[210] Parallel Report Submitted by the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) to the Country Report Task Force of the Human Rights Committee on the Occasion of the Consideration of List of Issues related to the Sixth Periodic Report of Germany During the Committee's 105th Session (April 2012) available at: <http://www.ccprcentre.org/wp-content/uploads/2012/07/GI_Germany105.pdf>.

[211] Concluding Observations HRCee on Germany (November 2012) UN Doc CCPR/C/DEU/CO/6, para 16.

[212] Concluding Observations HRCee on Canada (13 August 2015) UN Doc CCPR/C/CAN/CO/6, para 6.

[213] See also: Maastricht Principles and Commentary (n 163) Principle 25c.

rights abuses abroad, namely corporations domiciled in their territory or jurisdiction.[214]

In June 2014, the HRCee established an open-ended intergovernmental working group with the mandate to elaborate on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[215] At the open-ended intergovernmental working group's first session during the summer of 2015, a panel was dedicated to obligations of states to guarantee the respect of human rights by transnational corporations and other business enterprises, including corporations operating abroad.[216] There was wide agreement among the panelists that states "should be responsible for indirect facilitation of human rights abuses, or failing to act to curb private actions."[217] Beyond improving domestic regulation of the activities of corporations abroad, suggestions were also made towards creating prevention and disclosure requirements and incorporating human rights in free trade and investment agreements.[218]

Together, the developments described above may spark a development in customary or treaty law towards binding obligations of states to regulate against and remedy human rights abuses by corporations abroad. The development of third state obligations in this area is rudimentary and the content and scope can only be very generally assessed. States would be expected to regulate the activities of corporations domiciled in their territory, by incorporating safeguards against human rights abuses abroad. Among possible remedies is the option to litigate for compensation for business related human rights harm caused abroad, before the domestic courts of the state where a company is domiciled. An example of such litigation practice is the case brought against Shell before a Dutch court based on oil leaks in Nigeria.[219]

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[214] Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (12 July 2011) UN Doc E/C.12/2011/1, para 5: The CESCR has also stated that "states parties should […] take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction"; See also: Maastricht Principles and Commentary (n 163) Commentary to Principle 24.

[215] Human Rights Committee, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (14 July 2014) UN Doc A/HRC/RES/26/9.

[216] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Draft Report (10 July 2015) UN Doc A/HRC… available at:
<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Draftreport.pdf>.

[217] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Draft Report (n 216) para 61.

[218] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Draft Report (n 216) para 64 and 67.

[219] *Vereniging Milieusdefensie v. Royal Dutch Shell PLC* (30 January 2013) Rechtbank Den Haag, C/09/330891 / HA ZA 09-0579, para 2.2; Another example of three separate ongoing cases brought in Canada against a corporation allegedly involved in human rights violations in Guatemala: *Choc v. Hudbay Minerals Incorporated* (14th February 2013) Superior Court of Justice, Canada, Ontario, 2013

The development of obligations to prevent and remedy human rights abuses by corporations acting abroad underlines the important role of third states in counteracting certain forms of human rights abuses by non-state actors that are otherwise hard to address. It also illustrates and supports two broader developments. The first is the growing support for third state obligations to avoid causing harm extraterritorially.[220] The second is the broadening forms of adjudicative jurisdiction used by third states for the purpose of punishing and remedying gross human rights violations abroad.[221] If the obligations to prevent and remedy human rights abuses by corporations abroad become accepted as customary law or are laid down in a treaty, they might sometimes directly help prevent the type of injury associated with gross human rights violations, such as in the case of the Neumann Kaffee Gruppe.[222] Even if abuses by corporations acting abroad generally cause other types of injury than those associated with gross human rights violations, tolerance towards human rights

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ONSC 1414: Permitting the three lawsuits to proceed to trial in Canada; Seibert-Fohr, Anja, 'United States Alien Tort Statute' (October 2015) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e743?rskey=935ZHH&result=1&prd=OPIL>: The Alien Tort Statute or Alien Torts Claim Act (ATCA) enacted in 1789 allows aliens to file civil claims for damages of international law in United States domestic courts; *Kiobel et al v. Royal Dutch Petroleum Company* (17 April 2013) Supreme Court of the United States, 10 US 1491: In this case, brought against Shell for human rights violations allegedly committed in Nigeria, the Supreme Court decided that a "presumption against extraterritoriality" applies to claims under the ATCA and the "mere corporate presence" of the corporation in the United States was not enough to trigger adjudicative jurisdiction. It thereby rejected universal civil jurisdiction and limited the opportunities for civil litigation in the United States for business-related human rights harm abroad. This does not necessarily preclude claims from being accepted if a company is domiciled in the United States; Ward, Halina, 'Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options' (2000) 24 HICLR 451: Discusses the "increasing trend for parent companies of multinational corporate groups to face litigation in developed country courts over environmental, social and human rights impacts in developing countries."

[220] McCorquodale, Robert and Simons, Penelope, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) MLR 598, 617 onwards; See also: Maastricht Principles and Commentary (n 163) Principle 9(b) and Principles 13 and 14.

[221] See for example: *Gray v. Germany* (n 62): Germany prosecuted a German doctor for malpractice that resulted in a death in the UK, even though Germany was arguably not required to do so given the fact that the doctor was not a state official and the crime was committed outside its jurisdiction; Concluding Observations CAT Committee on Canada (7 July 2005) UN Doc CAT/C/CR/34/CAN, 4(g) and 5(f); Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 55 onwards: Article 14 providing a right to remedy for acts of torture has been interpreted widely by the CAT Committee and Special Rapporteur on Torture as meaning that states must provide victims of torture access to remedy, even if the torture was committed outside their territory and jurisdiction.

[222] See Chapter 1.1.3 International Human Rights Law: "The type of injury that […] express obligations to prevent seem to focus on, are violations of a person's life, body or dignity"; Parallel Report Submitted by GI-ESCR to the Country Report Task Force of the Human Rights Committee on the Occasion of the Consideration of List of Issues Related to the Sixth Periodic Report of Germany During the Committee's 105th Session (n 210): The German Kaffee Gruppe allegedly evicted people using grave forms of violence.

abuses and impunity are risk factors that may lead to gross human rights violations.[223] Third state obligations to prevent and remedy human rights abuses could help mitigate these risk factors.

4.3.3 Article 41 of the Articles on State Responsibility

The International Law Commission's (ILC) Articles on State Responsibility contain a special regime dealing with serious breaches of peremptory norms. The regime arose as a compromise, after the proposal to include a set of Articles on crimes of states was removed because of widespread resistance to the notion.[224] It does not necessarily apply to all gross human rights violations, only when it amounts to a serious breach of an obligation arising under a peremptory norm such as the prohibitions of genocide and torture.[225] According to Article 53 of the Vienna Convention on the Law of Treaties (VCLT) a peremptory norm is one that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is

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[223] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) Risk factors 2.3, 2.4 and 2.8.

[224] Special Rapporteur Mr. Gaetano Arangio-Ruiz, 'Seventh Report on State Reponsibility' (9, 24 and 29 May 1995) 47th session of the ILC, UN Doc A/CN.4/469 and Add.1-2, chp.1D1: Objections to article 19 part 1; Special Rapporteur Mr. Gaetano Arangio-Ruiz, 'Eighth Report on State Reponsibility' (14 and 24 May 1996) 48th session of the ILC, UN Doc A/CN.4/476 & Corr.1 and Add.1, chp1: Problems relating to the regime of internationally wrongful acts singled out as crimes in article 19 of part one of the draft articles; Special Rapporteur Mr. James Crawford, 'Third Report on State Responsibility' (15 March, 15 June, 10 and 18 July and 4 August 2000) 52nd session of the ILC, UN Doc A/CN.4/507 and Add. 1–4, chp4C, Additional consequences of "gross breaches" of obligations to the international community as a whole: fn 819: "In the draft articles adopted on first reading, it was noted that "alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime'." Para 412 onwards proposes the set of Draft Articles more or less as they were included in the final document; Dupuy, Pierre-Marie, 'Implications of the Institutionalization of International Crimes of States' in Weiler, Joseph H., Antonio Cassese and Marina Spinedi, *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter, 1989) 170: Outlines arguments against the concept of crimes of states.

[225] Articles on State Responsibility (n 3) Commentary to art 40 para 4 and 5: In its commentary to Article 40 ASR, the ILC confirms that both the prohibition of genocide and the prohibition of torture are considered to be peremptory norms; See also: CAT, General Comment 2 (n 10) para 1; Besides the main examples of peremptory norms, which are few, some room is left to consider certain fundamental human rights as such. Note that many very general claims granting all kinds of human rights *jus cogens* status have made legal scholars somewhat wary of the concept: Frowein, Jochen A., 'Ius Cogens' (March 2013) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1437?rskey=UuqDvP&result=1&prd=EPIL> para 6-8; For the right to life it is unclear whether it qualifies as a peremptory norm. It is certainly a fundamental right from which no derogation is permitted. It is moreover considered to be of fundamental importance as the very first and basic right, without which no other individual rights can exist: Human Rights Committee, 'General Comment 6: The Right to Life (Article 6)' (30 April 1982) UN Doc CCPR/C/GC/6, para 1-3; Other well-recognized peremptory norms such as war crimes and genocide often involve arbitrary killings. Therefore, arguably at least a core part of the right to life is protected by a peremptory norm. If acts of genocide, torture and arbitrary deaths occur on a gross or systematic basis, Article 41(1) applies to them.

permitted and which can be modified only by a subsequent norm of general international law having the same character."[226] A second question is whether the violation in question is a "serious breach."[227] To qualify as a serious breach, Article 40(2) explains that a breach must amount to "a gross or systematic failure by the responsible State to fulfill the obligation."[228] In its commentary to that Article, the ILC clarifies that the word "gross" means that a "certain order of magnitude of violation is necessary" and, alternatively, the word systematic describes "violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule."[229] The ILC adds that genocide is an example of a violation that is by its very nature a serious breach.[230]

Article 41 of the Articles on State Responsibility contains several obligations for third states that result from the existence of a serious breach of a peremptory norm. Starting with the obligations that have already been accepted as *lex lata*, Article 41(2) of the Articles on State Responsibility contains an obligation to refrain from recognizing as lawful or rendering aid and assistance in maintaining a situation created by a serious breach.[231] The obligation of non-recognition is an existing customary obligation of abstention, which has been confirmed by the ICJ.[232] However, its content is somewhat unclear, because for example torture or genocide do not necessarily produce legal consequences that other states can deny.[233] An example would be to not allow state organs to use evidence that may have resulted from the use of torture in another state.[234] The second obligation contained in Article 41(2) of the Articles on

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[226] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155b UNTS 331 (VCLT) art 53.
[227] Articles on State Responsibility (n 3) art 40(2) jo 41.
[228] International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) Report on the Work of its Sixty-Third Session, UN Doc A/66/10, art 40.
[229] Articles on State Responsibility (n 3) Commentary to art 40, para 7 and 8.
[230] Articles on State Responsibility (n 3) Commentary to art 40, para 8.
[231] Articles on State Responsibility (n 3) art 41(2).
[232] *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 126, para 125: The obligation of non-recognition is qualified by the consideration that it should not lead to depriving individuals of any advantages derived from international cooperation, such as refusing to accept the registration of births, deaths and marriages; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 188; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 160; Articles on State Responsibility (n 3) Commentary to art 41 para 6-10: Also refers to several SC resolutions in support of the obligation of non-recognition as a customary rule of international law.
[233] Talmon, Stefan, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance? ' in Tomuschat, Christian and Thouvenin, Jean-Marc (eds), *The Fundamental Rules of the International Legal Order* (BRILL, 2006).
[234] *A (FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004) House of Lords, Conjoined Appeals [2005] UKHL 71: Based on Article 41 of the Articles on

State Responsibility prohibits states to render aid and assistance towards maintaining a situation created by a serious breach of a peremptory norm. This obligation finds support in Security Council resolutions and ICJ case law.[235] The obligation extends beyond the scope of the general prohibition of aid and assistance in the commission of a wrongful act contained in Article 16 of the Articles on State Responsibility, because it also targets the situation after the wrongful act has ended.[236] Therefore, states are also not allowed to render aid and assistance to maintaining a situation created after a serious violation of a peremptory norm.[237]

Article 41(1) contains a developing third state obligation to "cooperate to bring to an end" serious breaches of peremptory norms.[238] This signifies a progressive *lege ferenda* element of the ILC Articles.[239] The Commentary explains that:

> "It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy."[240]

In the report in which Special Rapporteur Crawford proposes the Article more or less in its current form, he states:

State Responsibility, the House of Lords concluded that "there is reason to regard it as a duty of states [...] to reject the fruits of torture inflicted in breach of international law."

[235] Articles on State Responsibility (n 3) Commentary to art 41 para 12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 232) para 160.

[236] Articles on State Responsibility (n 3) Commentary to art 41 para 11.

[237] Articles on State Responsibility (n 3) Commentary to art 41 para 12: Refers to the regime of apartheid.

[238] Articles on State Responsibility (n 3) art 41(1); Special Rapporteur Mr. James Crawford, 'Fourth Report on State Responsibility' (2 and 3 April 2001) 53rd session of the ILC, UN Doc A/CN4/517 and Add.1, chp.3, para 43 onwards: An earlier draft of the Article raised concern among states that it supported the notion of state crimes and punitive responses by the international community. In its current form they reflect a compromise, leaving room for the further development of the law. Para 44: "Other Governments (e.g. Austria, 67 the Netherlands, 68 Slovakia) also support the compromise embodied in chapter III, on the basis that its substantive provisions are reasonable and do not impose onerous burdens on third States." Para 52: "In the Special Rapporteur's view, chapter III is indeed a framework for the progressive development [...]it recognizes that there can be egregious breaches of obligations owed to the community as a whole, breaches which warrant some response by the community and by its members."

[239] Articles on State Responsibility (n 3) Commentary to art 41 para 3; Wyler, Eric and Castellanos-Jankiewicz, Leon, 'Serious Breaches of Peremptory Norms' in Nollkaemper, André and Plakokefalos, Ilias, *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP, 2014), 284, 305: Refers to Article 49 of the UN Charter and the ICJ's Wall opinion as support for the existence of an obligation to cooperate, but conclude that the legal status of Article 41(1) is "rather indeterminate."

[240] Articles on State Responsibility (n 3) Commentary to art 41 para 3.

> "It is obvious that issues of the salience and enforcement of community obligations are undergoing rapid development. Older structures of bilateral State responsibility are plainly inadequate to deal with gross violations of human rights and humanitarian law, let alone situations threatening the survival of States and peoples. The draft articles cannot hope to anticipate future developments, and it is accordingly necessary to reserve to the future such additional consequences […] to the international community as a whole."[241]

Article 41(1) was therefore included as a savings clause for future developments, which explains why it does not offer much clarity in relation to the obligation's content and scope. The trigger for Article 41(1) requires a serious breach of a peremptory norm to already have started. Article 41(1) is therefore more temporally limited than for example the obligation to prevent genocide, which can be triggered by a serious risk.[242] The Commentary to the Articles on State Responsibility claims that "it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State", which in effect eliminates any meaningful trigger of knowledge.[243] When a serious breach of a peremptory norm occurs somewhere, other states are assumed to know. In regard to the basis of the obligation, it is unclear if Article 41(1) is based on any sort of pre-existing influence, like the capacity to influence effectively for the obligation to prevent genocide. In the Commentary to Article 41, the ILC clarifies that states do not have to be individually affected by the serious breach and what is called for is "a joint and coordinated effort by all States to counteract the effects of these breaches."[244] This seems to suggest that there is no threshold of influence and that all states are under a positive obligation to seek international cooperation if a serious breach of a peremptory norm occurs anywhere in the world.

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[241] Special Rapporteur Mr. James Crawford, 'Third Report on State Responsibility' (n 224) para 411; Comments and Observations Received from Governments (19 March, 3 April, 1 May and 28 June 2001) 53rd session of the ILC, UN Doc A/CN.4/515 and Add.1–3, chp3 Serious breaches of essential obligations to the international community: Most states approved the move away from the concept of state crimes. On 70 Spain requests that: "The Commission should enlarge upon and clarify to the extent possible the obligations of all States provided for […].The reference in paragraph 2 (c) to cooperation among States "to bring the breach to an end" is also problematic, as it is unclear whether a separate obligation is involved or whether it is related to the taking of countermeasures under article 54. On 72 China adds: "A question arises regarding the relationship of article 42, paragraph 2, with Security Council resolutions. For example, for an act that threatens international peace and security, would the obligations set out in article 42, paragraph 2, arise automatically, or only after a decision has been made by the Security Council?" The Netherlands adds: "The Netherlands assumes that the emphasis in subparagraph (c) (the obligation for all States "[t]o cooperate as far as possible to bring the breach to and end" is on cooperation, i.e. maximizing the collective response, for example, through the collective security system of the United Nations, and preventing States from going it alone."

[242] Genocide case (n 2) para 431; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 27.

[243] Articles on State Responsibility (n 3) Commentary to Article 41, para 11.

[244] Articles on State Responsibility (n 3) Commentary to art 41 para 3.

What measures may be required and the scope of any particular state's obligation is not specified nor well established.[245] The Commentary to the Articles on State Responsibility clarifies that Article 41(1) puts forward a positive obligation to cooperate, which can either be realized within the framework of an International Organization (IO) or outside.[246] According to the ILC, the choice of means "will depend on the circumstances of the given situation."[247] Examples of means to cooperate to bring to an end a serious breach of a peremptory norm are negotiation, (economic) sanctions and public condemnation. Such measures could gain in force if they are discussed and carried out in cooperation, for example in the context of an IO. For example, in its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* opinion, the ICJ stated that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation."[248] Under article 41, states are required to cooperate to bring the violation to an end through lawful means.[249] This confirms that they cannot use force unless sanctioned by the SC.[250] Article 41 adds force to the arguments that permanent members should refrain from using their veto in case of mass atrocities and that states should endeavor to contribute to peacekeeping missions once SC authorization exists.[251]

Article 41(1) supports the more general claim that third states should act to halt gross human rights violations and can inspire and strengthen the development of other third state obligations in this regard.[252] Interestingly, the Commentary to Article 41 states that, although the positive duty to cooperate is still developing, it may be the "only way of providing an effective remedy" in response to the gravest breaches of international law.[253] This underlines the importance the ILC members attached to further developing this obligation and implores states to make a serious effort to that effect. In that context, the ILC's work on a Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity should be noted, which will likely contain a state obligation to prevent as well as robust forms of state cooperation

[245] Nollkaemper, André, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52(3) Int'l & Comp LQ 615, 626-7: "It need not be detailed here that the implementation of aggravated responsibility is not satisfactorily regulated by international law and that much work needs to be done to bring them under proper legal control."
[246] Articles on State Responsibility (n 3) Commentary to Article 41, para 2; Klein, Pierre, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13(5) EJIL 1241: Focuses on the important role that the UN could and arguably should play in initiating and coordinating forms of cooperation, the inadequacies in the current UN system, as well as proposals for new institutional mechanisms.
[247] Articles on State Responsibility (n 3) Commentary to art 41, para 3.
[248] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 232) para 160.
[249] Articles on State Responsibility (n 3) art 41(1).
[250] UN Charter (n 43) art 2(4) and 42.
[251] Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; UN Charter (n 43) art 43.
[252] See Section 4.2 B.2 Genocide and 4.4.4 The Responsibility to Protect.
[253] Articles on State Responsibility (n 3) art 41(2) and Commentary to Article 41, para 3.

for the punishment of crimes against humanity.[254] The third state obligation to cooperate to bring to an end serious violations of peremptory norms could also be of immense practical relevance in strengthening third state obligations to prevent gross human rights violations. If the obligation contained in Article 41(1) gains acceptance in state practice and *opinio juris*, it could become a rule of customary international law.[255] Article 41(1) of the Articles on State Responsibility would then be a directly relevant legal basis for third state obligations to prevent the continuation of gross human rights violations abroad.[256]

4.3.4 The Responsibility to Protect

The term responsibility to protect (RtoP) is generally used in a non-legal sense and "fix[es] a clear set of rules, procedures, and criteria" relating to the prevention of and intervention in the occurrence of four specified crimes.[257] The RtoP has shifted the discussion on humanitarian intervention from the right of third states and IOs to intervene in atrocity crimes, to their responsibility to prevent, assist and, only as an ultimate measure, intervene. The historic development of the concept of the RtoP has

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[254] International Law Commission, Report on the Work of its 66th Session (5 May–6 June and 7 July–8 August 2014) UN GAOR Supplement No. 10 (A/69/10) chp.14(a) para 1: "At its 3227th meeting, on 18 July 2014, the Commission decided to include the topic "Crimes against humanity" in its programme of work and to appoint Mr. Sean D. Murphy as Special Rapporteur"; Special Rapporteur Sean D. Murphy, 'First Report on Crimes Against Humanity' (17 February 2015) 67th session of the ILC, UN Doc A/CN4/680, chp.5(a) Obligation to prevent crimes against humanity: Draft Article 1 contains a general obligation to prevent, similar to the Genocide Convention, but also specifies that states will take "effective legislative, administrative, judicial or other measures to prevent", similar tot he CAT; Special Rapporteur Sean D. Murphy, 'Second Report on Crimes Against Humanity' (21 January 2016) 68th session of the ILC, UN Doc A/CN4/690, chp. 4 and 5: Draft Article 9 outlines the obligation of *aut dedere aut judicare* based on the presence of the alleged offender in any territory under the state party's jurisdiction. By combining these elements of prevention and universal jurisdiction from the Genocide convention and CAT, the proposed convention could mitigate the lack of an obligation to establish universal jurisdiction over acts of of genocide and help push beyond legalistic discussions on the nature of a crime before taking measures to prevent.

[255] Although state practice is scant, support for an obligation to cooperate based on customary law can be found in, for example: UN Charter (n 43) art 55 and 56; UN General Assembly Resolution 25/2625, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/25/2625, Preamble and Principle 4: The duty of States to co-operate with one another in accordance with the Charter; Gattini, Andrea, 'A Return Ticket to 'Communitarisme', Please' (2002) 13(5) EJIL 1181, 1186: "[O]ne can infer that, if the obligation to cooperate has been recognized as a general rule for the protection of peace and the promotion of human rights, the same must be true when these supreme values are seriously violated. Taking account of the strong political connotation of the Declaration, it is apparent that the ILC codified, rather than developed, the obligation the obligation to cooperate in bringing the violation to an end."

[256] Jorgensen, Nina H. B., '"The Next Darfur" and Accountability for the Failure to Prevent Genocide' (2012) 81 NJIL 407, 411-2.

[257] Winkelmann, Ingo, 'Responsibility to Protect' (2010) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1464?rskey=sDiXW0&result=1&prd=EPIL> para 2.

already been addressed in the introductory chapter in the context of the shift towards prevention.[258] The RtoP will now be discussed in the context of a shift towards recognizing the importance of the role of third states to ensure human rights. In 2005, after intense last-minute debates on the wording and content, the RtoP was accepted in non-binding form in the World Summit Outcome Document (WSOD).[259] Paragraphs 138 and 139 read:

> "138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. […]
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. […] We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[260]

Heads of state and government unanimously adopted the WSOD and the SC reaffirmed the relevant paragraphs on the RtoP in 2006.[261] The WSOD specified the crimes to which the RtoP applies as: genocide, war crimes, crimes against humanity and ethnic cleansing.[262]

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[258] See Chapter 1.1.2 Responsibility to Protect; International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (International Development Research Centre, Ottawa 2001) (ICISS Report); UN General Assembly Resolution 60/1, '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1 (2005 World Summit Outcome) para 138-9.

[259] 2005 World Summit Outcome (n 258) para 138-9; On the drafting history, see: Strauss, Ekkehard, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (2009) 1 GR2P 291, 293-9.

[260] 2005 World Summit Outcome (n 258) para 138-9, emphasis added.

[261] UN Security Council Resolution 1674 (28 April 2006) UN Doc S/RES/1674, para 4; The SC also reaffirmed the RtoP in later resolutions: UN Security Council Resolution 1894 (11 November 2009) UN Doc S/RES/1894; UN Security Council Resolution 2117 (26 September 2013) UN Doc S/RES/2117; UN Security Council Resolution 2150 (16 April 2014) S/RES/2150.

[262] Rome Statute (n 155) art 6, 7 and 8: These categories show great similarity to the crimes contained in the Rome Statute, the founding document of the ICC aimed at holding individuals responsible for international crimes. Despite the fact that the Rome Statute and RtoP developed in the around the same time and are both aimed at offering guidance for grave humanitarian crises, the overlap in the types of crimes between the Rome Statute and RtoP is somewhat odd. Whereas the Rome Statute is aimed at grounding individual criminal responsibility ex-post facto, the RtoP is aimed at preventing and reacting

In a 2009 Secretary General (SG) report on implementation of the RtoP, the SG further elaborated on the paragraphs in the WSOD on the RtoP with a three-pillar structure.[263] The three pillars are: (i) States' responsibility to protect their own population; (ii) The international community's responsibility to assist states in meeting their pillar one responsibilities; and (iii) The international community's responsibility to take timely and decisive action if a state is manifestly failing in regard to its pillar one responsibilities.[264] As pointed out by Bellamy, there is a difference in the "legal quality" of the three RtoP pillars.[265] The first pillar of the RtoP, responsibilities of states towards their own populations, is largely based on existing obligations codified in human rights treaties, which prohibit arbitrary deaths, torture and genocide, and international humanitarian law treaties, which prohibit war crimes.[266] The same is not true for the second and third pillars.[267] The third state obligation to prevent genocide and developing obligations discussed in Section 4.3 offer some weight to the argument that the second and third pillar are partially based on international obligations, but together they are not sufficient to ground these pillars entirely in existing international law.[268] GA resolutions such as the WSOD can spark

to a specified set of crimes by states; Bellamy and McLoughlin, 'Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation' (n 104) 10-4: The content and delineation of the four RtoP crimes has therefore principally been explained with reference to the Rome Statute, but also International Humanitarian Law, the Genocide Convention and a great deal of other sources; Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (n 35) 461: Of the four RtoP crimes, ethnic cleansing is the odd one out, because it does not have an independent legal foundation, meaning that there is no treaty or other source of international law prohibiting this specific act, making its delineation and content more elusive than the other three crimes; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) 1: Depending on the circumstances, ethnic cleansing can be classified in legal terms as a war crime or a crime against humanity.

[263] Secretary-General Ban Ki-Moon, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677; Luck, Edward C., 'The Responsibility to Protect: The First Decade' (2011) 3(4) GR2P 387.

[264] Secretary-General Report, 'Implementing the Responsibility to Protect' (n 263) summary, 10, 15 and 22.

[265] Bellamy, Alex J. and Reike, Ruben, 'The Responsibility to Protect and International Law' (2010) 2 GR2P 267, 274.

[266] The category of crimes against humanity first arose in the field of international criminal law and its scope in relation to obligations of states is still debated. Ethnic cleansing has no distinct pre-existing legal content at all. Therefore, state obligations to prevent genocide and war crimes are better defined in the body of international law as it stands today. The claim that states may not commit the acts comprising the RtoP crimes towards its own population has a strong basis in international law: Genocide Convention (n 2); ICCPR (n 5) art 6 and 7; ECHR (n 6) art 2 and 3; ACHPR (n 198) art 4 and 5; ACHR (n 7) art 4 and 5; CAT (n 7); IACPPT (n 7); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention); Bellamy and Reike, 'The Responsibility to Protect and International Law' (n 265) 275-80.

[267] Glanville, 'The Responsibility to Protect Beyond Borders' (n 1).

[268] All of this is further complicated by the fact that the international community, being the bearer of responsibilities under the second and third pillar, does not only comprise of states, but also IOs and to a certain extent non-state actors; Secretary-General Ban Ki-Moon, 'Responsibility to Protect: Timely and

the development of new rules of customary international law.[269] However, a review of the negotiation process and the subsequent practice of the GA, SC and states show little intention of laying down a new rule of international law and cannot be assumed to evidence *opinio juris*.[270] Although it is unlikely that the RtoP will be fully accepted as customary international law, elements of the second and third pillar may inspire the development of new obligations.[271]

None of the above documents discusses the basis of the second and third pillar responsibilities and whether states should have any form of pre-existing influence to incur responsibility under those pillars. The 2012 SG report on the third pillar refers to the obligation of states to prevent genocide and the capacity to influence effectively the (potential) perpetrators of genocide, but does not clarify the relevance of this concept for the RtoP.[272] The 2014 SG report on the second pillar states that:

> "Those with the proximity, trust, knowledge, capacity or legitimacy to best provide assistance may take the lead in certain situations. This does not absolve other actors,

Decisive Response' (25 July 2012) UN Doc A/66/874–S/2012/578, para 45-7; Secretary-General Ban Ki-Moon, The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect' (28 June 2011) UN Doc A/65/877–S/2011/393; The degree to which these other actors have obligations under international law is still contested: Chapter 1.3.1 Delineation: This study focuses only on state obligations.

[269] ICJ Statute (n 177) art 38(b); Ian Shaw, *International Law* (6th edn, CUP, 2008) 70; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164) 89: There are several factors which can predict if and how fast a resolution may be accepted into custom, such as the use of mandatory language, the voting pattern with which it was adopted and the follow-up mechanisms erected to further its implementation.

[270] Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 259) 293-12; Hehir, Aidan, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect' (2013) 38(1) Int Secur 137: The record of application of the RtoP in practice is patchy. A widely acclaimed success is the role the RtoP played in Kenya in 2007, where pressure by the international community and a mediation process under the leadership of former Secretary-General Kofi Annan helped halt post-election violence. However, the lack of third pillar action in regard to Syria is seen as a failure. Due to the complexity of the conflict in Syria and differing political interests, the SC has remained in a political deadlock; Bellamy, Alex J., 'Libya and the Responsibility to Protect: The Exception and The Norm' (2011) 25(03) Ethics Int Aff 263; Weiss, Thomas G., 'RtoP Alive and Well After Libya' (2011) 25(03) Ethics Int Aff 287: Recently, supporters of the RtoP have eagerly acclaimed the intervention in Libya as a new sign of the norm's progressive acceptance. However, NATOs intervention has also been much criticized for going beyond the mandate of protection to ensure regime change and in the aftermath of the intervention Libya has remained very internally unstable; Orford, Anne, *International Authority and the Responsibility to Protect* (CUP, 2011) 90 onwards: Sees the patchy record of the RtoP's application as proof of the fact that the RtoP is merely a new concept justifying politically motivated action, which would be undertaken regardless of its existence.

[271] Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 259) 317-20 and 323.

[272] Secretary-General Report, 'Responsibility to Protect: Timely and Decisive Response' (n 268) para 40.

> however, of their continuing responsibility to support policies that are directed at atrocity crime prevention and response."[273]

The dominant position seems to be that all three pillars of the RtoP always apply to all states, but that the manner of implementation differs based on the particular risk and the state's capacity.[274] The lack of a threshold and references to capacity suggest that all states have a responsibility to protect at all times, to differing degrees.

In terms of the content and scope, measures that have been forwarded as part of the second and third RtoP pillars are wide-ranging.[275] States are expected, *inter alia*, to encourage and support capacity that will strengthen resilience to atrocity crimes and offer protection assistance to other states.[276] The 2012 SG report on the third pillar outlines the tools available under Chapter VI, VII and VIII of the UN Charter for a timely and decisive response, which include both non-coercive and coercive measures.[277] The initiative calling for permanent members of the SC to refrain from using their veto in votes regarding mass atrocity crimes, mentioned in Sections 4.2 B2 and 4.3.3, was largely inspired by the RtoP.[278] The initiative is now supported by 109 UN member states, including permanent SC members France and the UK.[279] For both second and third pillar action, measures must be concretized in accordance with the

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[273] Secretary-General Ban Ki-Moon, 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (11 July 2014) UN Doc A/68/947–S/2014/449, para 20, 34: The report also refers to regional actors as being particularly well-placed to engage in forms of encouragement.

[274] Bellamy, Alex J., 'The Responsibility to Protect – Five Years On' (2010) 24(2) Ethics Int Aff 143, 158 "First, as agreed by member states, RtoP is universal and enduring—it applies to all states, all the time. […] The question should not be whether it applies, but how it is best exercised."

[275] ICISS Report (n 258) 22-7: Although the understanding of the RtoP has developed and narrowed since the introduction of the ICISS report, the report contains an interesting set of proposals for the types of measures states should take. The report differentiates between root cause and direct prevention and measures addressing political, economic, legal and military dimensions.

[276] Secretary-General Ban Ki-Moon, 'Responsibility to Protect: State Responsibility and Prevention' (9 July 2013) UN Doc A/67/926-S/2013/399, para 7-15: The 2013 SG report on the RtoP that focuses on state responsibility and prevention, clusters different policy options for atrocity prevention, such as economic development, strengthening accountability and the rule of law. The SG report also states that promoting and protecting human rights is key to a state's resilience to conflict. The direct preventive measures in the SG report are much less far-reaching and less focused on international support and intervention than the direct preventive measures suggested in the ICISS report; Secretary-General Report, 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (n 273) Summary: The 2014 SG report on the second pillar outlines the main forms of assistance as: encouragement, capacity building and protection assistance.

[277] Secretary-General Report, 'Responsibility to Protect: Timely and Decisive Response' (n 268) para 25 onwards.

[278] ACT Group, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (n 110).

[279] See: <http://www.globalr2p.org/resources/893>.

particular risks.[280] In 2014, the Office on Genocide Prevention and the Responsibility to Protect (OGPRtoP) introduced its Framework of Analysis for Atrocity Crimes - A Tool for Prevention.[281] The Framework makes different risk factors for RtoP crimes insightful and thereby aims to support states in formulating strategies to prevent, assist and intervene.

Elements of the RtoP's second and third pillar may, in time, spark the development of new customary obligations.[282] Regardless of its legal status, the RtoP can strengthen the prevention of gross human rights violations in practice by supporting the process of systematizing preventive efforts and increasing the focus on human rights in (potential) mass atrocity situations.[283] The SG has clearly stated that the RtoP above all else "provides a political framework based on fundamental principles of international law for preventing and responding to genocide, war crimes, ethnic cleansing and crimes against humanity."[284] Therefore, the RtoP is a useful tool to help streamline efforts for the prevention of mass atrocities and the universal protection of human rights. Furthermore, the RtoP provides a clear moral claim, supported by a great number of states, that third states have a responsibility to prevent, assist and respond to certain mass atrocities.[285] As such, the RtoP can inspire and support the further acceptance and development of other third state obligations to prevent and halt gross human rights violations abroad.

4.4 Conclusion

Only a few of the obligations that comprise the system to prevent gross human rights violations within state territory or jurisdiction can be incurred by states towards

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[280] Secretary-General Report, 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (n 273) 7-11; Secretary-General Report, 'Responsibility to Protect: Timely and Decisive Response' (n 268) para 20 and 35.

[281] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71).

[282] Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 259) 317-20 and 323: Strauss reasons that the SC could build on its practice to consider internal conflicts as a threat to international peace and security. Nevertheless, he argues there is still a long way to go: "Ultimately, this practice, based on a common ethic vision supporting the agreement that such action was required to meet existing legal obligations, might lead to a new norm of international customary law."

[283] Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (n 35) 459 and 463; Bellamy, 'The Responsibility to Protect – Five Years On' (n 274) 158, 161-6: The discussions surrounding the RtoP are all too often focused on a very small aspect of the RtoP: military intervention under the third pillar. Bellamy states that it is unlikely that the RtoP can offer a strong compliance pull to catalyze third pillar action that states would not otherwise be willing to undertake, largely due to the norm's indeterminacy. It is in its function as "a policy agenda in need of implementation" that Bellamy truly sees an added value.

[284] Secretary-General Report, 'Responsibility to Protect: Timely and Decisive Response' (n 268) para 59.

[285] Rosenberg 'Responsibility to Protect: A Framework for Prevention' (n 35) 459 and 463: The RtoP offers a "directive to act in the face of mass atrocities" with a strong focus on prevention and assistance and only as an ultimate measure to take timely and decisive action to respond.

people who are not within their territory or jurisdiction (third state obligations).[286] Third state obligations to prosecute and punish torture were developed under the CAT and IACPPT, with the aim of consolidating a worldwide regime of criminal punishment.[287] These obligations are based on the active personality principle or universal jurisdiction, which are forms of influence over the (potential) perpetrator, but do not require that the state had any form of influence over the victim or circumstances of the crime.[288] The obligations are part of the phases of long-term prevention and preventing recurrence and their content and scope are relatively well defined.[289] A worldwide regime of criminal punishment was not given as much priority in the context of the Genocide Convention, though a (subsidiary) obligation to prosecute and punish genocide based on universal jurisdiction may develop in time.[290] Importantly, the ICJ has interpreted the obligation to prevent genocide as applying beyond territory and jurisdiction, based on a state's capacity to influence effectively the (potential) perpetrators of genocide.[291] The obligation is part of the phases of short-term prevention and preventing continuation and is triggered when third states learn or should have learned of a serious risk of genocide, but its basis, content and scope are still somewhat unclear.

Compared to the set of obligations to prevent gross human rights violations in the territorial and jurisdictional layers, third state obligations to prevent gross human rights violations are better described as a patchwork of incidental obligations to prevent, which developed in rather uncoordinated fashion.[292] Third state obligations to prevent torture and genocide are unevenly spread out over the different temporal phases and third state obligations to prevent arbitrary deaths are wholly absent. At the same time, there is a shift towards recognizing the important role of third states for ensuring human rights, in light of the fact that the territorial state cannot always effectively prevent violations or may itself be the perpetrator.[293] This shift has fostered the development of new obligations that could supplement and strengthen the

[286] The term "third states" is used to describe states that do not exercise territorial or extraterritorial jurisdiction over the people whose human rights are affected.
[287] CAT (n 7) art art 5(1) b and (2); IACPPT (n 7) art 12; See Section 4.2 A.1 and D.1 Torture.
[288] See Section 4.1.1 CAT and IACPPT.
[289] See Section 4.2 A.1 and D.1 Torture: They require third states to include the relevant bases to establish criminal jurisdiction into their domestic legal system and take steps to investigate and prosecute when acts of torture by nationals or people within their jurisdiction are suspected or alleged to have taken place abroad.
[290] Genocide Convention (n 2) art 6: Contains an express territorial limitation; See Section 4.2 A.2 and D.2 Genocide.
[291] See Sections 4.1.2 Genocide Convention and 4.2 B.1 Genocide.
[292] See Section 4.1.2 Genocide Convention: For example, the Genocide convention was adopted before the CAT and IACPPT, at a time in which universal jurisdiction was less accepted. This has resulted in a situation where states are often obligated to exercise universal jurisdiction for acts of torture, but not for acts of genocide.
[293] See Section 4.3 Shift Towards Third State Obligations.

patchwork of existing third state obligations to prevent gross human rights violations. Four relevant areas were discussed:

i) There is a strong push for the acceptance and refinement of third state obligations to assist and cooperate for the realization of ESC rights when states are in a position to assist.[294]

ii) There are rudimentary developments suggesting that third state obligations may develop to regulate against and remedy human rights violations by corporations acting abroad.[295]

iii) Article 41(1) of the Articles on State Responsibility contains a developing obligation requiring third states to cooperate to bring to an end serious violations of peremptory norms.

iv) The RtoP advances a moral responsibility to assist and intervene when a state fails to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing.

Developing obligations in the first two areas are not necessarily aimed at preventing the type of injury typically associated with gross human rights violations.[296] However, these developing obligations support the creation of an internationally enabling environment for the realization of human rights and can help mitigate risk factors that could lead to gross human rights violations. As such, they could contribute to the long-term prevention of gross human rights violations by third states.[297] Developing obligations in the latter two areas are directly aimed at preventing and halting types of injury associated with gross human rights violations. As such, they could contribute to the phases of short-term prevention and preventing the continuation of gross human rights violations by third states.[298] Together with the growing acceptance of universal jurisdiction for crimes like genocide, the four areas illustrate several broader developments. There is growing support for obligations to avoid causing harm abroad.[299] There is a push for the development and acceptance of state obligations to assist and cooperate.[300] Finally, there is a trend towards extending forms of criminal and civil adjudicative jurisdiction to be able to punish and remedy gross human rights

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[294] See Section 4.3.1 Economic and Social Rights.

[295] See Section 4.3.2 Corporations Acting Abroad.

[296] See Chapter 1.1.3 International Human Rights Law: “The type of injury that […] express obligations to prevent seem to focus on, are violations of a person’s life, body or dignity.”

[297] See Sections 4.3.1 and 4.3.2 last para’s: Furthermore, they illustrate and support the acceptance of third state obligations to avoid causing harm extraterritorially and assist and cooperate for the worldwide realization of human rights.

[298] See Sections 4.3.3 and 4.4.4 last para’s: Furthermore, they underline the claim that third states should act in the face of gross human rights violations and inspire and support the development of third state obligations in that regard.

[299] See Sections 4.3.1 Economic Social and Cultural Rights and 4.3.2 Corporations Acting Abroad.

[300] See Sections 4.3.1 Economic Social and Cultural Rights and 4.3.3 Article 41 of the Articles on State Responsibility.

violations that took place abroad.[301] These developments show that there is great potential to strengthen the set of third state obligations to prevent gross human rights violations in all temporal phases. However, the basis, triggers, content and scope of developing obligations are often elusive. Much work will need to be done to clarify these different aspects of the developing obligations by supervisory bodies, courts and academics, so they become easier for states to accept and implement.[302]

In this layer of third state obligations, a state's capacity to ensure human rights is much more closely entwined with both the basis, content and scope of obligations than in the previous two layers. Within state territory or when a state exercises extraterritorial jurisdiction, the capacity to ensure human rights is to some extent presumed. Capacity-related factors can only incidentally limit the scope of obligations.[303] In contrast, the capacity to ensure human rights is not generally presumed to exist in regard to people who are outside a state's territory and jurisdiction. Unlike territorial control or extraterritorial jurisdictional, there is not just one basis upon which states can incur obligations beyond territory and jurisdiction. Third states may incidentally incur (developing) obligations based on different forms of influence, for example influence over (potential) perpetrators or being in a position to assist other states. As such, it is not surprising that the content and scope of third state obligations are strongly connected with capacity in general and the specific forms of influence upon which they are based.[304]

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[301] See Sections 4.1.1 CAT and IACPPT, 4.1.2 Genocide Convention and 4.3.2 Corporations Acting Abroad.

[302] See Chapter 1.3.4 Clarifying the Content of Obligations: It is assumed in this research that clarifying the content of obligations will at the very least add clarity to the debate about them and can at best induce efforts of implementation and enforcement.

[303] See Chapter 2.3 Conclusion and Chapter 3.4 Conclusion.

[304] See Section 4.2 D.1 Torture: When suspects of acts of torture reside within a state's jurisdiction, it has the obligation to extradite or prosecute the suspect in line with the practical control it has over them; See Section 4.2 B.1 Genocide: When a state has a capacity to influence effectively the (potential) perpetrators of genocide, it is expected to employ all means reasonably available to prevent genocide, the scope of which is partly determined by the same factors that also determine whether there is a basis for the obligation at all; See Section 4.3.1 Economic, Social and Cultural Rights: When a state is in a position to assist, it must assist and cooperate with other states for the realization of ESC rights in line with its capacity and resources.

5. CONCLUSION

"Repeating the phrase "never again" is, in itself, a sign of continued failure."[1]

"Never again", the phrase that embodied the international community's commitment to preventing gross human rights violations in the aftermath of the genocides in Rwanda and Srebrenica, appears rather hollow in light of the humanitarian tragedies currently unfolding in Syria, Iraq and South-Sudan. It is perhaps better understood as an ideal worth striving for: continued failures must be met with the continued effort to improve the prevention of gross human rights violations. Over the past decades, there has been much attention for concepts aimed at the prevention of gross human rights violations, like conflict prevention and the responsibility to protect (RtoP).[2] This has caused a normative and societal shift in attention towards prevention. At the same time, the legal obligations of states to prevent gross human rights violations under international human rights law remained cloaked in obscurity.[3] Core questions in relation to the content and scope of obligations to prevent gross human rights violations had remained unanswered. For example, it was unclear what types of obligations states have at different points in time, when they are triggered, what they require in terms of concrete measures and how they apply outside a state's territory.

This study's aim was to systematically assess the content and scope of obligations to prevent gross human rights violations under international human rights law. The study concentrated on particular types of injurious events that are prohibited under international human rights law: torture, arbitrary death and genocide (hereinafter: three prohibitions).[4] To understand obligations to prevent in their interconnection, they were studied based on a timeline with four temporal phases: long-term prevention, short-term prevention, preventing continuation and preventing recurrence.[5] The timeline made it possible to more clearly distinguish what types of obligations states have at different points in time and how they are triggered by knowledge that there is a risk of a violation or a continuing violation. Both territorial and extraterritorial obligations to prevent gross human rights violations were included, by dividing the research into three different spatial layers.[6]

The assessment resulted in an overview of obligations to prevent gross human rights violations under international human rights law. In this concluding chapter, the overview of obligations to prevent in territorial and extraterritorial contexts will be outlined and discussed (Section 5.1). Two overarching themes will then be examined. The first is the influence of a state's capacity on obligations to prevent gross human rights violations in the territorial as

[1] 'Repeating 'Never Again' after Atrocity 'a Sign of Continued Failure', Deputy Secretary-General Says at Event on Rwanda Genocide' (15 January 2014) Press Release DSG/SM/736-AFR/2794, available at: <http://www.un.org/press/en/2014/dsgsm736.doc.htm>.

[2] See Chapter 1.1 Context: Shift Towards Prevention.

[3] See Chapter 1.2 The Problem: The Content and Scope of Obligations to Prevent.

[4] See Chapter 1.3.1 Delineation.

[5] See Chapter 1.3.2 Temporal Phases.

[6] See Chapter 1.3.3 Territory, Jurisdiction and Beyond.

well as the extraterritorial layers (Section 5.2). The second is how existing typologies can be applied in the framework elaborated in this study to gain a proper understanding of obligations to prevent gross human rights violations (Section 5.3). Finally, an appraisal will be made of the overview of obligations to prevent gross human rights violations, describing several of its challenges and discussing where this leaves room for improvement (Section 5.4).

5.1 Overview of Obligations to Prevent Gross Human Rights Violations: Four Temporal Phases and Three Spatial Layers

This study offers an overview and in-depth analysis of obligations to prevent gross human rights violations under international human rights law, which is in itself the most important outcome of the research. The exercise to distinguish and analyze the content and scope of obligations to prevent torture, arbitrary death and genocide based on the timeline was repeated in three different spatial layers: within state territory, extraterritorially based on jurisdiction and extraterritorially beyond jurisdiction.[7] This section will provide a short outline of the most important findings for each spatial layer.

5.1.1 Territory

Human rights treaties were devised to apply primarily within state territory. Therefore, it is unsurprising that human rights law prescribes a refined set of territorial obligations to prevent gross human rights violations that extends over all temporal phases. Significant overlap was found to exist in terms of the types of obligations to prevent violations of all three of the prohibitions. Most obligations to prevent fit within certain crosscutting categories. The crosscutting categories can be described as: (i) Long-term obligations to introduce a proper legislative and administrative framework capable of deterring violations; (ii) Short-term obligations to take measures to prevent violations; (iii) Obligations to halt continuing violations/offences by ceasing or intervening; and (iv) Obligations to prevent recurrence by investigating, prosecuting and punishing wrongdoers. These crosscutting categories can be seen as representative for the types of obligations to prevent gross human rights violations that states have under international human rights law more generally. They are referred to as the set of territorial obligations to prevent gross human rights violations.[8]

Notwithstanding the general division into crosscutting categories, the content of the obligations to prevent varies and is specified towards deterring violations of the specific prohibitions. For example, for the long-term prevention of arbitrary deaths, introducing a proper legislative and administrative system means that states must introduce a framework regulating the use of force and firearms by state officials.[9] For the long-term prevention of

[7] See Chapter 1.3.3 Territory, Jurisdiction and Beyond.

[8] See Chapter 2.3 Conclusion.

[9] See Chapter 2.2 A.2 Arbitrary Death; Human Rights Committee, ‘General Comment 6: The Right to Life (Article 6)’ (30 April 1982) UN Doc CCPR/C/GC/6, para 3; *Makaratzis v. Greece* [GC] no. 50385/99, ECHR 2004-XI, para 31; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII, para

torture, introducing a proper legislative and administrative system entails adopting strict rules and regulations in regard to situations of detention.[10] The emphasis on certain obligations or their distribution in time also varies in the context of the different prohibitions. For example, the obligations to investigate, prosecute and punish wrongdoers can arise before genocide occurs, because it is a more large-scale violation and punishing individual wrongdoers for incitement or other genocide-related offences can already have a preventive effect at an early stage.[11] States can also have more specific obligations to prevent in the context of the different prohibitions that do not necessarily fit the crosscutting categories, such as the obligation of *non refoulement* if people run a real risk of being tortured or arbitrarily deprived of their life in a receiving state.[12] All of these variations underline the importance of the specific type of injury for the way that obligations to prevent are shaped.[13]

99-102; *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004 – XII, para 89-90; *Juan Humberto Sánchez v. Honduras* (Preliminary Objection, Merits, Reparations and Costs) Judgment of June 7, 2003, I/A Court HR Series C No. 99, para 112; UN General Assembly Resolution 34/169 'Code of Conduct for Law Enforcement Officials' (17 December 1979) UN Doc A/RES/34/169; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (27 August – 7 September 1990) adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba.

[10] See Chapter 2.2 A.1 Torture; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 10-13 and 15; Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67 (IACPPT) art 7; Human Rights Committee, 'General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7)' (10 March 1992) UN Doc CCPR/C/GC/20, para 8; *Ali Bashasha v. Libya*, Comm. 1776/2008, No. CCPR/C/100/D/1776/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 504 (HRC, Oct. 20, 2010) para 7.4; *Juan Humberto Sánchez v. Honduras* (n 9) para 83-4; Economic and Social Council Resolutions 663C(XXIV) and 2076(LXII), 'Standard Minimum Rules for the Treatment of Prisoners' (31 July 1957 and 13 May 1977) UN ESCOR, Supp. No. 1, at 11, UN Doc E/3048 (1957), amended by UN ESCOR, Supp. No. 1, at 35, UN Doc E/5988 (1977); Office of the United Nations High Commissioner for Human Rights, 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Professional Training Series' (9 August 1999) UN Doc HR/P/PT/8/Rev.1 (Istanbul Protocol).

[11] Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 1 jo 3; Chapter 2.2 B.3 Genocide: "According to Article 6 of the Convention, states must prosecute and punish individuals who commit any of the acts prohibited in Article 3 on their territory, which includes incitement. Such acts can already occur before the actual process of genocide as described in Article 2 has started."

[12] States have obligations of *non refoulement* in the context of torture and arbitrary death. Although these obligations cover situations of genocide, they have not been expressly formulated as separate obligations in the context of genocide. See Chapter 2.2 B.1 Torture and B.2 Arbitrary Death; CAT (n 10) art 3; IACPPT (n 10) art 13; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 24 March 1976) 999 UNTS 171 (ICCPR) art 6 and 7 jo 13; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) art 2 and 3 jo 6 and 7 and Protocol 7; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 5 jo 22(5); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 4 and 5 jo 12; *Tebourski v. France*, Comm. 300/2006, UN Doc CAT/C/38/D/300/2006, A/62/44 (2007) Annex VII at 317 (CAT Committee May 01, 2007) para 8.2-3; *Pillai v. Canada*, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 473 (HRC, Mar. 25, 2011) para 11.4.

[13] See Chapter 1.2 The Problem: The Content and Scope of Obligations to Prevent and 2.3 Conclusion.

Because of the timeline, it not only became more clear what types of obligations states have at different points in time, but also how they are triggered by knowledge that there is a risk or continuing violation. In the long-term phase, knowledge does not play a role as trigger, because the obligations are aimed at general deterrence and are incurred by states immediately after they are bound by the relevant obligation.[14] In the two acute phases of prevention – short-term prevention and preventing continuation – knowledge plays an important triggering role in relation to indirect obligations to take measures to prevent and intervene in (continuing) offences by non-state actors.[15] The triggers of knowledge are broadly similar in the context of the three prohibitions, only differing somewhat in terms of their formulation.[16] In the short-term phase, the state is required to take measures if it knew or ought to have known of a real and immediate risk. In the phase of preventing continuation, the state is required to intervene if it knows or should have known about a continuing offence. Both triggers are objective, meaning that it does not have to be proven that the state had actual knowledge. This implies that states must diligently investigate and assess information that may indicate a real and immediate risk of a violation or a continuing offence.[17] For the direct obligations to prevent or cease continuing violations by state officials in the acute phases of prevention, the standard of the trigger of knowledge is lower – meaning that it is more easily attained – because a state is expected to know and control the way its state officials act.[18] In the last phase of preventing recurrence, there is a low trigger of knowledge for the obligation to investigate that a violation/offence has occurred.[19] The state must investigate as soon as a violation/offence is alleged or it has reason to believe it occurred. The investigation, in turn, can provide information that triggers the obligation to prosecute.

5.1.2 Extraterritorial Jurisdiction

Extraterritorial human rights obligations based on jurisdiction have developed through a practice of applying human rights treaties to extraterritorial forms of states conduct, such as

[14] See Chapter 2.2 A Long-Term Prevention.

[15] See Chapter 2.2 B Short-Term Prevention and C Preventing Continuation.

[16] *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para 116: States have a short-term due diligence obligation under the ECHR to prevent arbitrary death if "the authorities knew or ought to have known (…) of the existence of a real and immediate risk"; *Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of January 31, 2006, I/A Court HR Series C No 140, para 123: States have a short-term due-diligence obligation under the IACHR to prevent arbitrary death if the authorities have "awareness of a situation of real and immediate danger"; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case) para 431: States have a short-term due-diligence obligation to prevent genocide when the authorities learn or should have learned of the "serious risk" that genocide will be committed; *Pillai v. Canada* (n 12) para 11.4: *Non-refoulement* involves a risk assessment and applies when there are "substantial grounds to believe that there is a real risk" of torture or death upon return.

[17] See Chapter 2.3 Conclusion.

[18] See Section 2.2 B.1 Torture, B.2 Arbitrary Death, C.1 Torture and C.2 Arbitrary Death; *Ireland v. the United-Kingdom*, no. 5310/71, 18 January 1978, series A no 25, para 159: The ECtHR stated that in the context of an administrative practice of torture it would be "inconceivable that the higher authorities of a state should be, or should be entitled to be, unaware of the existence of such a practice."

[19] See Chapter 2.2 D Preventing Recurrence.

situations of occupation, military intervention or arrest and detention. All of the instruments that contain obligations to prevent gross human rights violations included in this research allow for extraterritorial applicability when a state exercises jurisdiction over individuals extraterritorially.[20] Despite an increasing body of case law and scholarly attention, uncertainty has continued to surround the precise meaning of jurisdiction for the extraterritorial applicability of human rights treaties.[21] Based on an overview of existing case law and scholarly work, it was concluded that jurisdiction functions as a threshold and basis for extraterritorial human rights obligations.[22] To reach the threshold, states must exercise effective control over territory (spatial model) or authority and control over individuals (personal model) abroad.[23] Most of the scholarly attention has so far been focused on the precise levels of control for the threshold to be reached.[24]

Once the threshold of jurisdiction is reached, a next step is to determine the content and scope of corresponding extraterritorial obligations.[25] When a state exercises extraterritorial jurisdiction, the same rights and obligations as within state territory apply in principle. However, extraterritorial contexts are in many ways different from a territorial context.[26] Accordingly, there are additional factors that have to be taken into account as influencing the content and scope of extraterritorial obligations.[27] A set of legal, practical and power-related factors was formulated to be able to take the state's capacity to ensure human rights in extraterritorial settings into account. Legal factors tackle the reality that there are limits to what a state is lawfully allowed to do abroad in terms of prescribing rules, enforcing them and adjudicating disputes.[28] Practical factors encompass all kinds of security, language, cultural or

[20] See Chapter 3.1.1 Instruments; Genocide Convention (n 11); *Genocide* case (n 16) 183-4: Only the Genocide Convention does not contain a jurisdiction clause, but this has been interpreted by the ICJ as permitting extraterritorial applicability for most of its provisions.

[21] Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); Milanović, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); Besson, Samantha, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25(4) LJIL 857.

[22] See Chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations.

[23] See Chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: The two models cannot be strictly separated. The spatial model is merely a shorthand for the personal model, by introducing a presumption that everyone within that territory is within the controlling state's jurisdiction; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, para 134-9.

[24] Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 21); Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 21); Raible, Lea, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (2016)(2) EHRLR 161.

[25] See Chapter 3.2 Corresponding Obligations.

[26] See Chapter 3.2.1 The Role of Capacity.

[27] See Chapter 3.2.2 Realistic Application: Although these factors may mean that certain obligations do not arise or their scope is reduced to zero under particular circumstances, they are not linked with the threshold and do not influence the formal applicability of a state's rights and obligations.

[28] Kamminga, Menno T., 'Extraterritoriality' (November 2012) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=Srx94t&result=2&prd=EPIL>; Oxman, Bernard H., 'Jurisdiction of States' (November 2007) MPEPIL, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-

other concerns that make it more difficult for states to live up to their human rights obligations in specific extraterritorial contexts.[29] Finally, power-related factors take into account the fact that a state usually exercises more limited powers and has a more limited institutional infrastructure at its disposal abroad.[30] By using these factors to translate the crosscutting obligations to prevent gross human rights violations identified in Chapter 2 to extraterritorial settings based on jurisdiction, the following overview of obligations emerged: (i) Long-term obligations to prepare for extraterritorial operations through the state's own legislative and administrative framework. Long-term obligations to plan and equip extraterritorial operations in a way that allows them to function in accordance with a state's human rights obligations. Occupying powers may have long-term obligations to adjust the host-state's legislative and administrative system if it is not in line with requirements under international human rights law; (ii) Short-term obligations and obligations to prevent continuation by taking measures to prevent and halt violations/ offences in the course of extraterritorial operations; and (iii) Obligations to prevent recurrence by investigating, prosecuting and punishing violations by state officials and ensuring the prosecution of offences by non-state actors within their extraterritorial jurisdiction.[31]

Legal factors primarily have a bearing on obligations in the phases of long-term prevention and preventing recurrence, while practical and power-related factors primarily have a bearing on obligations in the phases of short-term prevention and preventing continuation.[32] A clear

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e1436>: States' prescriptive, enforcement and adjudicative jurisdiction are in principle limited to their territory, although there are exceptions; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) International Peace Conference, The Hague, Official Records (Hague Regulations) art 42-3: Occupying powers have certain forms of prescriptive and adjudicative jurisdiction in the occupied territory. This was taken into account as an express exception to the exclusion of humanitarian law from the scope of this study; See Chapter 1.3.1 Delineation and 3.2.3 Realistic Application.

[29] See for example: *Al-Skeini v. the United Kingdom* (n 23) para 168: "The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war."; *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014, para 226: "The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population – witness the first shooting incident on 21 April 2004 (see paragraph 10 above) – clearly included armed hostile elements."

[30] Lawson, Rick 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 83, 106: "[A] state's powers will normally be much more limited during operations abroad"; *Rigopoulos v. Spain* (dec.), no. 37388/97, ECHR 1999-II, section B: In a case concerning an arrest on the high seas and the obligation of prompt judicial review "the Court considers that it was […] materially impossible to bring the applicant physically before the investigating judge any sooner."

[31] See Chapter 3.4 Conclusion: The long-term obligation to prepare for extraterritorial operations through the state's own legislative and administrative framework, entails: making provision to punish gross human rights violations by state officials abroad, introducing safeguards against gross human rights violations and training state officials.

[32] Note that the role of a mandate as a legal factor in the phases of short-term prevention and preventing continuation is still unclear. See: 3.3 B Short-Term Prevention; Larsen, Kjetil M., *The Human Rights Treaty Obligations of Peacekeepers* (CUP, 2012) 392.

example of the influence of a legal factor in the long-term phase is that, other than occupying powers, states cannot introduce new laws or adjust the legal framework of a host state.[33] This impacts the long-term obligation to introduce a proper legislative and administrative system capable of deterring gross human rights violations. States therefore mainly have to prepare for extraterritorial operations through their own legislative and administrative frameworks, for example by introducing safeguards against violations in the course of such operations and offering specific training to state officials.[34] They also have to plan and equip operations to allow them to function in accordance with human rights obligations. In the phases of short-term prevention and preventing continuation, practical and power-related factors like an unstable security situation or a lack of resources may influence the time it takes to carry out certain obligations or type of measures a state is required to take. Because states oversee and control the actions of their state officials abroad, direct obligations in these acute phases of prevention hardly differ from territorial obligations; whereas indirect obligations to prevent offences by non-state actors may sometimes be more easily limited in scope abroad than within state territory due to practical and power-related factors.[35] Finally, a legal factor to be taken into account in the phase of preventing recurrence is that states may not always be able to establish adjudicative criminal jurisdiction over non-state actors who commit offences within their extraterritorial jurisdiction.[36] In such cases states must seek alternative routes of prosecution, for example by transferring the suspect to the host-state or a third state that has a basis to establish adjudicative criminal jurisdiction.

5.1.3 Beyond Territory and Jurisdiction

Although the applicability of human rights treaties is normally limited by jurisdiction, there are situations in which states can incur human rights obligations beyond jurisdiction (third state obligations). These obligations are based on the universalist conception that sometimes states have to (help) ensure human rights regardless of their relationship with the people affected. In practical terms, this means that the people whose rights are affected do not have to be within the third state's territorial or extraterritorial jurisdiction. Some of the obligations that are part of the set of obligations to prevent gross human rights violations distinguished in Chapter 2, are in fact not limited by territory or jurisdiction and can also be incurred by third states.[37] Third state obligations exist in the context of the Convention against Torture and

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[33] See Chapter 3.3 A Long-Term Prevention; Kamminga, 'Extraterritoriality' (n 28) para 3.

[34] See Chapter 3.3 A Long-Term Prevention; Concluding Observations HRCee on Belgium (12 August 2004) UN Doc CCPR/CO/81/BEL, para 6: "The State party should respect the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad […] and should train the members of such missions appropriately"; Martins, Mark S., 'Rules of Engagement for Land Forces: A Matter of Training, not Lawyering' (1994) 143 MilLRev 1.

[35] See Chapter 3.3 B. Short-Term Prevention and C. Preventing Continuation; *Mothers of Srebrenica against the State* (16 July 2014) The Hague District Court, C/09/295247 / HA ZA 07-2973, available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>: Contains a careful consideration of the measures that Dutchbat could reasonably have been expected to take in light of the resources available, the harsh circumstances and the pressure higher officials were under.

[36] See Chapter 3.3 D Preventing Recurrence.

[37] See Chapter 4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction.

Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Inter-American Convention to Prevent and Punish Torture (IACPPT) and Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Under these treaties, third states have: (i) Long-term obligations to include bases in their legal framework to exercise criminal jurisdiction over acts of torture that took place outside the state's jurisdiction based on the principles of nationality or universal jurisdiction; (ii) Short-term obligations and obligations to prevent continuation to prevent genocide by employing all means reasonably available based on the capacity to influence effectively; and (iii) Obligations to prevent recurrence to investigate, prosecute and punish acts of torture that took place outside a state's jurisdiction based on the principles of nationality and universal jurisdiction.[38] All of these obligations are based on forms of influence over the (potential) perpetrator(s). Compared to the much more refined set of obligations to prevent gross human rights violations that applies within state territory and when a state exercises extraterritorial jurisdiction, third state obligations to prevent gross human rights violations is more aptly described as a patchwork of incidental obligations.

The patchwork of third state obligations to prevent gross human rights violations is fragmented and the obligations are unevenly spread out over the different temporal phases. Third state obligations to prevent torture focus on long-term prevention and preventing recurrence, before and after violations occur, with the view of achieving a worldwide system of criminal punishment for torture.[39] This means that states have to investigate and extradite or prosecute suspects of torture who committed their acts outside the state's territory and jurisdiction, because the suspect is either a national of the state or present in any territory under the state's jurisdiction.[40] On the other hand, third state obligations to prevent genocide are concentrated in the phases of short-term prevention and preventing continuation.[41] In other words, there is an obligation to prevent genocide beyond territory and jurisdiction in the acute phases of prevention. A third state accrues the obligation to prevent genocide if it learns or should have learned of the serious risk that genocide will occur and has the capacity to effectively influence the (potential) perpetrators.[42] When states have such a capacity to influence effectively is not yet entirely clear, nor is the content and scope of the ensuing obligation to prevent.[43] Oddly, the Genocide Convention takes a more restrictive approach to the prosecution and punishment of wrongdoers based on the principles of nationality or universal jurisdiction for the crime of genocide than the CAT and IACPPT for torture.[44]

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[38] See Chapter 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction.

[39] CAT (n 10) art 2(1), 4; IACPPT (n 10) art 6; Committee Against Torture, 'General Comment 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2, para 2 and 9.

[40] See Chapter 4.2 A Long-Term Prevention and D Preventing Recurrence.

[41] Genocide Convention (n 11) art 1; *Genocide* case (n 16) para 430.

[42] Genocide Convention (n 11) art 1; *Genocide* case (n 16) para 430.

[43] *Genocide* case (n 16) para 430; See Chapter 4.1.2 Genocide Convention: The ICJ introduced three factors to assess a state's capacity to influence effectively: geographical distance, political and other links and legal position. However, it is unclear how these factors are to be weighed and whether there may be other relevant factors to take into account.

[44] Genocide Convention (n 11) art 6: Contains an express territorial limitation to the obligation to punish; *Genocide* case (n 16) para 184 and 442: The ICJ interpreted this as meaning that Article 6 does not obligate

Finally, third state obligations to prevent arbitrary death are wholly absent from all of the phases of prevention.

The patchwork of third state obligations to prevent gross human rights violations under international human rights law shows that there is a big gap between a state's legal obligations and concepts like conflict prevention and the RtoP. While human rights obligations are built on the assumption of a relatively well-functioning governmental structure and primarily focused on regulating the relationship between that government and individuals on its territory or within its jurisdiction; concepts like conflict prevention and the RtoP have been developed to deal with situations where such a relationship of governmental protection fails disastrously, potentially resulting in large-scale crises and mass atrocities. However, international human rights law and conflict prevention and the RtoP have slowly been developing towards each other. There are developments in international law that signify a shift towards recognizing the important role that third states can play, for example if the territorial state cannot effectively prevent gross human rights violations or is itself the perpetrator.[45] There is a push for the development and acceptance of state obligations to assist and cooperate for the worldwide realization of economic, social and cultural (ESC) rights.[46] Furthermore, there are rudimentary indications that third state obligations may develop to prevent human rights abuses by corporations and crimes against humanity abroad.[47] The

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states to prosecute and punish alleged perpetrators of genocide on any other basis than that the acts took place on their territory; See Chapter 4.1.2 Genocide Convention: In part this state of affairs can be explained by the fact that the CAT and IACPPT were adopted later in time, when universal jurisdiction was already more accepted.

[45] See Chapter 4.3 Shift Towards Third State Obligations.

[46] See Chapter 4.3.1 Economic, Social and Cultural Rights and 4.3.3 Article 41 of the Articles on State Responsibility; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 55 and 56: States pledge themselves to take "joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55"; UN General Assembly Resolution 25/2625, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/25/2625; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2 (1): Obligates states to devote "the maximum of [...] available resources" to the realization of economic and social rights through "assistance and cooperation"; De Schutter, Olivier and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084 (Maastricht Principles and Commentary) Principle 9(c), 27 Obligation to cooperate in the context of protection against violations of ESC rights by non-state actors and 28-35 On international assistance and cooperation to fulfil ESC rights.

[47] See Chapter 4.3.1 Economic, Social and Cultural Rights and 4.3.2 Corporations Acting Abroad; Concluding Observations HRCee on Germany (November 2012) UN Doc CCPR/C/DEU/CO/6, para 16: "The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations"; Concluding Observations HRCee on Canada (13 August 2015) UN Doc CCPR/C/CAN/CO/6, para 6: "The State Party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad"; Maastricht Principles and Commentary (n 46) Principle 13 Obligation to Avoid Causing Harm and 14 Impact Assessment and Prevention; Special Rapporteur Sean D. Murphy, 'First Report on Crimes Against Humanity' (17 February 2015) 67th session of the ILC, UN Doc A/CN4/680, chp.5(a) Obligation to prevent crimes against humanity.

Articles on State Responsibility contain a developing obligation for states to cooperate to bring to an end serious violations of peremptory norms abroad.[48] Finally, there is growing support for an obligation to prosecute and punish acts of genocide based on universal jurisdiction.[49] More in general, there is a trend towards extending forms of criminal and civil adjudicative jurisdiction to be able to punish and remedy gross human rights violations that took place abroad.[50] Together, these developments show that there is great potential to strengthen obligations to prevent gross human rights violations in all temporal phases.

5.2 Capacity in Territorial and Extraterritorial Settings

A consistent point of analysis throughout the research has been to consider how a state's capacity to ensure human rights in particular circumstances may influence the content and scope of its obligations to prevent gross human rights violations. Capacity as understood in the context of this study refers to expressions used in treaties, case law or other sources of interpretation that take into account a state's resources, powers or other factors that influence what it is capable of doing to ensure human rights obligations in particular circumstances. Capacity plays a role both in regard to the basis of obligations to prevent gross human rights violations and their content and scope. However, the influence of capacity is different in the

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[48] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (November 2001) UN GAOR Suppl No 10 (A/56/10) chpIVE1 (Articles on State Responsibility) art 41(1): Contains a developing obligation for states to cooperate to bring to an end serious violations of peremptory norms.

[49] See Chapter 4.1.2 Genocide Convention and 4.2 D Preventing Recurrence; Ben-Naftali, Orna, 'The Obligation to Prevent and to Punish Genocide' in Paola, Gaeta (ed), *The UN Genocide Convention – A Commentary* (OUP, 2009) 27, 48: Finds the ICJ's interpretation of Article 6 "puzzling given that the interpretation of the Convention 'must exclude any narrow or overly technical approach to the problems involved', and that the judgment itself otherwise employs a purposive method of interpretation." He claims that "a teleological reading of Article VI in the light of Article I and of other provisions of the Convention as well as in the light of later normative developments in both conventional and customary international law, supports the conclusion that the jurisdictional regime over perpetrators of genocide includes an obligation to exercise universal jurisdiction […]"; Tams, Christian, Berster, Lars and Schiffbauer, Bjorn, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck, co-published by Hart and Nomos, 2013) 256 para 58: Claims that states other than the territorial state must ensure prosecution of suspects within their jurisdictional control, which means state parties would have a subsidiary duty to prosecute suspects before their domestic courts if there is no international penal tribunal or other state willing or able to prosecute, meaning that the absolute obligation to punish cannot be otherwise ensured.

[50] See Chapter 4.1.1 CAT and IACPPT and 4.3.2 Corporations Acting Abroad; CAT (n 10) art 14: Contains a right to effective remedy for victims of torture, without a geographical limitation; Concluding Observations HRCee on Canada 2015 (n 47) 4(g) and 5(f); Article 14 of the CAT has been interpreted to mean that states must provide victims of torture a procedure to obtain reparations, even if the torture was committed outside the state's territorial and other jurisdiction; *Gray v. Germany*, no. 49278/09, 22 May 2014, para 20, 29, 32, 40-1 and 93: The ECtHR took an unexpectedly broad approach towards the applicability of the procedural requirements attached to the right to life; Concluding Observations HRCee on Germany 2012 (n 47) para 16: The state party is "encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad"; Special Rapporteur Sean D. Murphy, 'Second Report on Crimes Against Humanity' (21 January 2016) 68th session of the ILC, UN Doc A/CN4/690, chp. 4 and 5: Draft Article 9 outlines the obligation of *aut dedere aut judicare* based on the presence of the alleged offender in any territory under the state party's jurisdiction.

three spatial layers. While a state's capacity to ensure human rights is presumed by the basis of obligations in the territorial and extraterritorial jurisdiction layers, it is not presumed in the layer beyond territory and jurisdiction. Furthermore, although the same rights and obligations apply in the territorial and extraterritorial jurisdiction layers, additional capacity related factors may influence the content and scope of obligations in the latter.

Within their territory, states are presumed to have the capacity to ensure human rights. Human rights treaties were devised primarily for the territorial context. As such, the obligations laid down in human rights treaties are catered to the territorial context and the requisite institutional infrastructure. Furthermore, the ECtHR has stated that "jurisdiction is presumed to be exercised normally throughout the State's territory."[51] The "territorial bias in the system of human rights protection" means that the territorial state has the primary responsibility to ensure human rights to the people within its territory and must for example rebut the presumption of jurisdiction if it has lost authority over parts of its territory.[52] Even then, it will still have positive obligations to ensure the rights of people in an area of its territory over which it has lost authority.[53] At the same time, states have to balance the application of their attention, powers and resources in response to varying threats to be able to live up to the many human rights obligations that usually apply within state territory. To make this balance manageable, there are limits of reasonableness to certain types of obligations, especially in relation to obligations to prevent offences by non-state actors.[54] It is impossible to foresee all the ways that non-state actors may commit offences related to the three prohibitions and the types of measures states may have to take. Therefore, indirect obligations to prevent in the acute phases of prevention are usually formulated in an open-ended manner and limited based on a standard of reasonableness that will allow consideration of a state's capacity in the particular circumstances.[55] Other than these standards of reasonableness, there are many

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[51] *Al-Skeini v. the United Kingdom* (n 23) para 131; *Ilaşcu v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para 333.

[52] Den Heijer, Maarten, 'Issues of Shared Responsibility before the European Court of Human Rights' SHARES Research Paper 06 (2012), ACIL 2012-04, available at: <http://www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-european-court-of-human-rights/> 4; *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, para 139: "The Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence. The Court must now determine whether there is valid evidence to rebut that presumption"; A direct consequence of the territorial bias for a state's obligations is that, if the territorial state does lose control over people or parts of its territory, it will still have positive obligations to continue to ensure human rights. See: *Ilaşcu and Others v. Moldova and Russia* (n 51) para 333 onwards; *Ivantoc a.o. v Moldova and Russia,* no. 23687/05, 15 November 2011, para 105-8; *Catan and Others v. the Republic of Moldova and Russia* [GC]*,* nos. 43370/04, 8252/05 and 18454/06, ECHR 2012, para 109.

[53] *Ilaşcu v. Moldova and Russia* (n 51) para 331: "[E]ven in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."

[54] See Chapter 2.2 B Short-Term Prevention and C Preventing Continuation and 2.3 Conclusion.

[55] See Chapter 2.3 Conclusion; *Osman v. the United Kingdom* (n 16) para 116: An example is the *Osman* formula that describes that the short-term obligation to prevent arbitrary deaths must not be interpreted so as to place an impossible or disproportionate burden on authorities.

obligations with a built-in reasonableness check, for example with the words "prompt" or "effective" incorporated in the obligation.[56] These phrases offer some leeway to consider what can be reasonably expected of a state in the particular circumstances.

When states exercise extraterritorial jurisdiction, the capacity to ensure human rights is also to a certain extent presumed. The forms of control that lead to the exercise of extraterritorial jurisdiction – effective control over territory or authority and control over individuals – imply that the state has a minimum capacity to ensure the human rights of people it controls.[57] Because the same rights and obligations apply as within state territory, the standards of reasonableness that limit certain obligations territorially also apply extraterritorially. These reasonability checks may lead to different outcomes in extraterritorial context. For example, when suspects are arrested on the high seas, bringing them "promptly" before a judge has been interpreted to span a longer period of time than when suspects are arrested within state territory.[58] But these standards of reasonableness alone cannot ensure the realistic application of human rights obligations in extraterritorial settings. Human rights treaties were not devised to apply in extraterritorial settings and there are many factors that influence the state's capacity to ensure human rights that are different from territorial settings. States may lack certain powers and parts of its institutional infrastructure or encounter legal barriers or practical difficulties abroad that make it impossible to ensure human rights in the same way as within state territory. Therefore, other legal, practical or power-related factors in extraterritorial contexts have to be taken into account when determining the content and scope of extraterritorial obligations.[59] By using such factors when translating territorial obligations to extraterritorial obligations based on jurisdiction, the content and scope of extraterritorial obligations to prevent gross human rights violations is adjusted to a state's capacity to ensure human rights in specific extraterritorial contexts.

Beyond territory and jurisdiction, the capacity to ensure human rights is not presumed. In general, human rights treaties were not intended to apply between third states and people outside their territory and jurisdiction. Yet, some treaties do contain provisions that apply regardless of the relationship with the person whose rights are potentially affected.[60] These obligations are therefore not based on forms of control over territory or individuals, but on other forms of influence. Such forms of influence are in essence a form of capacity to ensure a certain aspect of a right. For example, states may be obligated to prosecute and punish suspects of torture based on universal jurisdiction, who committed their acts outside the state's jurisdiction but are later present in a territory over which the state exercises

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[56] For example prompt judicial intervention, see: ICCPR (n 12) art 9(3); ECHR (n 12) art 5(3): ACHR (n 12) art 7(5); CAT (n 10) art 13; Or effective investigation, see: *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI – (21.11.01) para 38: "Article 13 in conjunction with Article 3 impose an obligation on States to carry out a *thorough and effective investigation* of incidents of torture"; *Velásquez Rodríguez v. Honduras* (Merits) Judgment of July 29, 1988, I/A Court HR (Ser C) No. 4 (1988) para 177: The duty to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."

[57] See Chapter 3.2.1 The Role of Capacity.

[58] *Rigopoulos v. Spain* (n 30); *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010, para 130.

[59] See Chapter 3.2 Corresponding Obligations.

[60] See Chapter 4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction.

jurisdiction.[61] Another example is the obligation to prevent genocide, which is based on the capacity to influence effectively the (potential) perpetrators of genocide.[62] These obligations are based on a legal and practical capacity in relation to the (potential) perpetrators or circumstances of a gross human rights violation. Other third state obligations may develop based on, for example, the capacity to prescribe rules for corporations domiciled in a state's territory that act abroad or being in a position to assist other states in the realization of their ESC rights.[63] Because there is not one single basis – like territory or jurisdiction – that immediately grounds a range of human rights obligations, capacity is closely related to both the basis and content and scope of third state obligations. Similar to the other layers, there are also certain standards of reasonableness that limit third state obligations.[64]

5.3 Applying Existing Typologies Within the New Framework

An important presumption adopted at the start of this study and confirmed throughout, is that obligations to prevent under international law are not homogenous and cannot be easily categorized based on existing typologies of obligations. Obligations to prevent are often described as obligations of best effort or conduct.[65] However, in the context of this research many different types of obligations to prevent were revealed to be part of the set of obligations to prevent gross human rights violations. This includes for example both obligations of result – such as introducing a proper legislative and administrative system – and obligations of conduct – such as taking short-term measures to prevent violations.[66] The framework offered by injury, timeline and spatial layers allowed for a more differentiated overview of obligations to prevent gross human rights violations. Importantly, the type of injury that an obligation aims to prevent from occurring strongly influences the way obligations to prevent are shaped.[67] The timeline proved an invaluable tool to understand obligations to prevent a certain type of injury in their interconnection and reveal when particular obligations are triggered. By using the timeline, several crosscutting categories of obligations to prevent gross human rights were distinguished. Finally, the spatial layers further made insightful how these categories of obligations are applied in territorial and extraterritorial contexts.

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[61] CAT (n 10) art 5 (2); IACPPT (n 10) art 12.

[62] Genocide Convention (n 11) art 1; *Genocide* case (n 16) para 430.

[63] See Chapter 4.3.1 Economic, Social and Cultural Rights and 4.3.2 Corporations Acting Abroad; ICESCR (n 46) art 2; Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties Obligations (Art 2 par 1 of the Covenant)' (14 December 1990) UN Doc 14/12/90, para 14; Concluding Observations HRCee on Germany 2012 (n 47) para 16.

[64] *Genocide* case (n 16) para 430: States with the capacity to influence effectively have to "employ all means reasonably available to them, so as to prevent genocide so far as possible."

[65] Articles on State Responsibility (n 48) Commentary to Article 14 para 14: "Obligations of prevention are usually construed as best efforts obligations […] without warranting that the event will not occur."

[66] See Chapter 2.3 Conclusion.

[67] See Chapter 1.2 The Problem: The Content and Scope of Obligations to Prevent; Special Rapporteur Roberto Ago, 'Seventh Report on State Responsibility' (1978) 30th session of the ILC, UN Doc A/CN4/307 and Add 1-2 and Add2/Corr 1, chp.3(8), para 15: Special Rapporteur Mr. Roberto Ago introduced the idea that obligations to prevent are aimed at preventing an injurious event.

By using this framework, the danger of drawing overgeneralized conclusions about obligations to prevent based on existing typologies is largely avoided. Several useful observations about obligations to prevent gross human rights violations can be made by combining the new framework with existing typologies:

i) Conduct and result: Obligations to prevent gross human rights violations in the phases of long-term prevention and preventing recurrence are usually obligations of result, such as the introduction of legislation or maintaining an official register of detainees.[68] On the contrary, obligations in the phases of short-term prevention and preventing continuation are usually obligations of conduct, such as taking measures reasonably available to prevent violations.[69] However, there are exceptions to keep in mind. An example of an obligation of result in the short-term phase is related to *non-refoulement*. Before expelling an individual the state has to investigate whether it would not be exposing him or her to the grave risk of being tortured or killed in the receiving state, which is a short-term obligation of result.[70] Examples of obligations of conduct in the phase of preventing continuation are the obligations to investigate and prosecute. Although the investigation and prosecution must live up to certain standards, they do not necessarily have to lead to a certain outcome, such as punishment.[71]

ii) Positive and negative: In general, the distinction between positive and negative obligations is quite hard to maintain.[72] Most rights require states to both adopt and refrain from certain conduct and obligations that are phrased negatively may still require a state to take positive measures or *vice versa.* The two types of obligations therefore often overlap. Obligations to prevent gross human rights violations are no different in that regard. Nevertheless, it is remarkable that almost all obligations to prevent require some form of positive action from the state.[73] For example, the obligation to cease a continuing violation by a state official, which can in principle

[68] See Chapter 2.2 A Long-Term Prevention and D Preventing Recurrence; CAT (n 10) art 2; ICCPR (n 12) art 2(2) jo 6 and 7; ECHR (n 12) art 1 jo 2 and 3; ACHR (n 12) art 1 jo 4 and 5; ACHPR (n 12) art 1 jo 4 and 5; CAT, General Comment 2 (n 39) para 13.

[69] See Chapter 2.2 B Short-Term Prevention and C Preventing Continuation; *Opuz v. Turkey*, no. 33401/02, ECHR 2009, para 176: Turkey was held responsible for its "failure to take take *protective measures* in the form of effective deterrence"; *Osman v. the United Kingdom* (n 16) para 116: States must do "all that could be reasonably expected" or take "measures within the scope of their powers which might be expected to avoid the risk"; *Genocide* case (n 16) para 430: States must "employ all means reasonably available to them, so as to prevent genocide so far as possible."

[70] CAT (n 10) art 3; ICCPR (n 12) art 7 jo 13; ECHR (n 12) art 6 jo 7 and Protocol 7; ACHR (n 12) art 5 jo 22(5); ACHPR (n 12) art 4 jo 5 jo 12.

[71] See Chapter 2.2 D Preventing Recurrence.

[72] Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 23) para 10 and 31-2: States may have obligations, whether positive or negative, at any level of observance.

[73] See Chapter 2.3 Conclusion.

be categorized as a negative obligation, may still require a higher-ranking official to take action to intervene in the wrongful conduct of a subordinate.[74]

iii) Direct and indirect: Many obligations to prevent in the long-term phase and phase of preventing recurrence contain aspects aimed at both direct prevention (violations by a state's officials) and indirect prevention (offences by non-state actors).[75] For example, making certain acts punishable by law and investigating, prosecuting and punishing wrongdoers target both violations by state officials and offences by non-state actors. At the same time, a significant portion of long-term obligations focus on direct prevention, such as safeguards for situations of detention or regulating the use of force and firearms and training state officials.[76] In the acute phases of prevention, the distinction between direct and indirect obligations is more visible. In the short-term phase, direct obligations to prevent are given content primarily by long-term safeguards.[77] While the more open-ended obligation to take measures to prevent gross human rights violations is aimed at preventing offences by non-state actors. In the phase of preventing continuation, states have a direct obligation to cease a continuing violation and an indirect obligation to intervene in offences by non-state actors.[78] Notably, the distinction between direct and indirect obligations has a bearing upon the trigger of knowledge. As a state is assumed to oversee the conduct of its state officials, the standard of the trigger of knowledge is lower and therefore easier to attain in the context of direct obligations than indirect obligations.[79] Finally, as mentioned in Section 5.4.2, the distinction between direct and indirect obligations has a specific bearing on extraterritorial obligations to prevent gross human rights violations based on jurisdiction. Because states have a higher level of control over their state officials, practical and power-related factors do not usually affect the content and scope of their direct obligations, whereas they may influence indirect obligations.[80]

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[74] See Chapter 2.2 C.1 Torture; *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, EComHR judgment on admissibility of claims 9940-9944/82 (6 December 1983) para 30: "[A]ny action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system."

[75] See Chapter 2.2 A Long-Term Prevention and D Preventing Recurrence.

[76] See Chapter 2.2 A Long-Term Prevention.

[77] See Chapter 2.2 B Short-Term Prevention; An interesting exception are the rules surrounding superior liability, which also play a role in the phases of short-term prevention and preventing continuation; *Ireland v. the United-Kingdom*, no. 5310/71, 18 January 1978, series A no 25, para 239: "[A]uthorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected."

[78] See Chapter 2.2 C Preventing Continuation.

[79] *Ireland v. the United-Kingdom* (n 77) para 159: The ECtHR stated that in the context of an administrative practice of torture it would be "inconceivable that the higher authorities of a state should be, or should be entitled to be, unaware of the existence of such a practice."

[80] See Chapter 3.3 B Short-Term Prevention and C Preventing Continuation and 3.4 Conclusion.

5.4 Appraisal

The framework of injury, timeline and spatial layers introduced in this research was used to gain insight into the content and scope of obligations to prevent gross human rights violations under international human rights law. What emerged was an overview of territorial and extraterritorial obligations to prevent gross human rights violations that is at certain points unclear, incomplete and possibly ineffective when applied in practice.[81] This section will appraise the overview of obligations by discussing some of the remaining challenges and highlighting where there is room for development.

5.4.1 Challenges

Now that there is a more structured overview of obligations to prevent gross human rights violations under international human rights law, it is clear that certain challenges remain. This is perhaps unsurprising insofar as human rights obligations developed in an *ad hoc* and uncoordinated manner within the state-centric system of international law.[82] Furthermore, there are limits to what the law can do to influence state behavior.[83] Nevertheless, these challenges can explain why obligations to prevent gross human rights violations sometimes enable states to remain inactive when faced with gross human rights violations in practice. Three challenges will be discussed in particular. First of all, extraterritorial obligations are still relatively underdeveloped. The basis, content and scope of extraterritorial obligations based on jurisdiction and beyond jurisdiction are often still unclear and the patchwork of obligations beyond jurisdiction is incomplete. The second challenge is related to the first and the fact that obligations of multiple duty-bearing states may overlap and interact. It is still unclear how the existence of multiple duty-bearing states in any given situation affects the content and scope of obligations and their implementation. Third, it is questionable whether the measures required by obligations to prevent gross human rights violations are actually effective when applied in practice, or whether there may be other more effective approaches.

The basis, content and scope of extraterritorial obligations to prevent gross human rights violations are still relatively underdeveloped. International human rights law was primarily intended to apply between a state and people residing on its territory, with international supervisory bodies and courts as additional guarantors. This structure does not cater well to a reality in which states are increasingly involved in each-others' affairs and there is growing recognition that gross human rights violations outside state territory cannot be overlooked. Chapter 3 showed how treaty obligations have developed towards wider applicability based

[81] See Chapter 2.3 Conclusion, 3.4 Conclusion and 4.4 Conclusion.

[82] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art 38(1) a and b: International human rights law developed on the basis of concessions in the drafting processes of treaties or state practice and *opinio juris* and further interpretations by supervisory bodies and tribunals.

[83] Goodman, Ryan and Jinks, Derek, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) Duke Law J 621: Discerns three mechanisms of social influence and discusses how they influence state behavior: coercion, persuasion and acculturation.

on extraterritorial jurisdiction. However, there is still lack of clarity and disagreement in regard to many aspects of extraterritorial obligations based on jurisdiction, such as what level of control is required for states to exercise extraterritorial jurisdiction.[84] Furthermore, supervisory bodies and courts do not structurally take into account the many different factors that influence the content and scope of human rights obligations in extraterritorial settings. There are also factors whose influence on the content and scope of extraterritorial obligations is still unclear, such as the influence of a mandate as a legal factor in the acute phases of prevention.[85] Chapter 4 showed how third state obligations to prevent gross human rights violations beyond territory and jurisdiction are fragmented and seemingly incomplete.[86] For example, states have obligations to combat impunity for acts of torture based on universal jurisdiction, but not for the "odious scourge" of genocide.[87] These obligations and limits to their applicability have been laid down in treaties, which are the result of complicated dynamics of treaty drafting processes that can cause seemingly illogical differences.[88] Furthermore, there are effectively no third state obligations to prevent torture and arbitrary death in the acute phases of prevention, unless a situation constitutes (a serious threat of) genocide.[89] Even though there can be a broadly perceived need for third states to act in situations of gross human rights violations, this need often does not translate into legal obligations.

The fact that extraterritorial obligations are in many respects underdeveloped can be illustrated by reference to the example of refugees and migrants in distress on the high seas.[90] Thousands of people have died while trying to cross the Mediterranean Sea to reach European shores in recent years.[91] In striking contrast to the desperate need for protection of these people's rights, it is often unclear in legal terms whether states have any human rights

[84] See Chapter 3.1 Extraterritorial Jurisdiction, in particular 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations.
[85] See Chapter 3.3 B Short-Term Prevention: "The question whether and how an existing mandate affects the content and scope of a state's human rights obligations in the more acute phases of prevention has so far remained obscure."
[86] See Chapter 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction.
[87] Genocide Convention (n 11) preamble and art 6: The preamble describes genocide as an "odious scourge" and an international crime that is "contrary to the spirit and aims of the United Nations and condemned by the civilized world." Article 6 on the punishment of genocide nevertheless contains a territorial limitation; Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 49).
[88] See Chapter 4.1.2 Genocide Convention: Describes the "perceived shortcomings of Article 6 in light of the object and purpose of the Genocide Convention, correlation between its different provisions and developments that have taken place since the Convention came into being, such as the adoption of the CAT and IACPPT with more demanding regimes of prosecution and punishment in the mid-80's."
[89] See Chapter 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction.
[90] Fischer-Lescano, Andreas, Löhr, Tillmann and Tohidipur, Timo, 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law' (2009) 21 Int J Refugee Law 256; Giuffré, Mariagiulia, 'Watered-down Rights on the High Seas: Hirsi Jamaa and Others v Italy (2012)' (2012) 61(3) Int'l & Comp LQ 728.
[91] For a regularly updated map of the numbers of refugees crossing the Mediterranean, see: <http://data.unhcr.org/mediterranean/regional.php>; 'Mediterranean Death Toll Has Reached at Least 1000 This Week, Says IOM' (31 May 2016) The Guardian, available at: <https://www.theguardian.com/world/2016/may/31/mediterranean-death-toll-880-last-week-unhcr-migration>: In the first 5 months, more than 2500 people lost their lives while trying to cross the Mediterranean Sea. This marks a sharp increase compared to 2015.

obligations towards refugees and migrants when they are on the high seas.[92] Once a state exercises jurisdiction over refugees and migrants on the high seas, it has extraterritorial obligations towards them to ensure their rights at sea, for example to save them from drowning, offering medical attention and not to sending them back to a state where they run the risk of being tortured or killed and the associated access to legal proceedings.[93] However, the question when jurisdiction arises is controversial.[94] Does it arise when a ship makes a distress call?[95] When a ship in distress is in view and in physical reach? Or does it arise only when a state intercepts the refugees and migrants? These unanswered questions offer leeway for states to remain inactive when it becomes aware of a ship in distress. The obligations a state accrues once it exercises jurisdiction may even act as a disincentive to rescue refugees and migrants on the high seas. Importantly, states do not have a short-term obligation to prevent arbitrary deaths beyond territory and jurisdiction.[96] A few rescue operations have nevertheless been set up based on a perceived moral duty to save refugees and migrants in distress on the high seas.[97] However, obligations to prevent gross human rights violations

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[92] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 98(b): "[T]o proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him." States do have an obligation to help persons in distress under the law of the sea, but only if such action may "reasonably be expected", which implies in any case a certain proximity with a ship flying the state's flag to a boat of migrants and refugees in distress; Fischer-Lescano, Löhr and Tohidipur, 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law' (n 90) 36: "The 'place of safety' for refugees in distress at sea may not be established without taking due account of refugee and human rights provisions."

[93] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012: The court decided that "push back" practices of refugees and migrants on the high seas by the Italian Revenue Police was in violation of the ECHR; Giuffré, 'Watered-down Rights on the High Seas: Hirsi Jamaa and Others v Italy' (n 90) 729: "The Hirsi judgment attains great […] prominence since it is the first case in which the Court unanimously finds a European State in violation of human rights of migrants and refugees intercepted on the high seas and returned to a third country in the absence of any procedural safeguards"; Fischer-Lescano, Löhr and Tohidipur, 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law' (n 90) 264-5 and 271-7: State parties to the CAT, ICCPR and ECHR all have obligations of *non-refoulement* once refugees enter their territorial waters or are intercepted and therefore within the state's extraterritorial jurisdiction on the high seas.

[94] See chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: "One of the most pressing and controversial issues still surrounding the threshold function of jurisdiction under human rights treaties is the unclarity in regard to what exactly constitutes authority and control over individuals. After all, this is the minimum amount of control that a state has to exercise abroad to reach the threshold of jurisdiction and accrue extraterritorial human rights obligations."

[95] Trevisanut, Seline, 'Search and Rescue Operations at Sea: Who is in Charge? Who is Responsible?' (28 May 2013) SHARES blog, available at: <http://www.sharesproject.nl/search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible/>: States that the argument could be made that "the distress call creates a 'relation' between the state, which receives it, and the persons who send it. […] The argument could go further and support the existence of an exclusive *de facto* control that the state, which received the call, exercises on the lives of those people."

[96] See Chapter 4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction and 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction: Third States only have a short-term obligation to prevent genocide abroad.

[97] Carrera, Sergio and Den Hertog, Leonhard, 'Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean' (CEPS Liberty and Security in Europe January 2015) 79, available at: <http://aei.pitt.edu/60717/1/LSE_79.pdf> 3 onwards: Examples are the Italian-led Mare Nostrum operation that ended in 2014 and was followed by Operation Triton conducted by the European Union border security agency Frontex; Stephens, Tim, 'Search and Rescue Operations at Sea: Who is in Charge? Who is Responsible? –

under international human rights law have so far enabled states to leave the fate of refugees and migrants on the high seas mostly up to chance and subject to political will.[98]

The second challenge is related to the fact that obligations to prevent gross human rights violations, which in the context of this study have been separated into three different spatial layers, can in fact overlap and interact.[99] This means that multiple states may have obligations in relation to the same situation of gross human rights violations. So far, there is very little clarity in regard to the allocation of obligations among multiple duty-bearing states. This lack of clarity is sometimes related to the basis of obligations. For example, it is unclear when third states have an obligation to prevent genocide based on the capacity to influence effectively the (potential) perpetrators.[100] The lack of clarity is also sometimes related to the fact that the consequences of the involvement of multiple duty-bearing states are unknown. For example, when multiple third states have an obligation to prevent genocide, it is unclear whether they should coordinate or cooperate.[101] The involvement of multiple duty-bearing states can furthermore influence each state's capacity to ensure human rights and thereby the content and scope of their obligations. The uncertainty that results from overlapping obligations may allow states to remain inactive by pointing to other actors and passing the buck, which could result in preventable cases of gross human rights violations.[102] This is

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Commentary' (28 May 2013) SHARES blog, available at: <http://www.sharesproject.nl/search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible-commentary/>: It is unclear which state(s) exercise(s) jurisdiction in multilateral search and rescue operations; 'Mediterranean Migrant Deaths: EU has 'Moral Duty' to Act' (20 April 2015) BBC News, available at: <http://www.bbc.com/news/world-europe-32377768>.

[98] There are basically two options to include refugees and migrants on the high seas in the system of obligations to prevent gross human rights violations: (i) Lowering the threshold of jurisdiction to include situations where states are aware or should have been aware of a ship in distress and have the capacity to prevent the materialization of the risk that boat-migrants may drown on the basis of its proximity and available resources; and (ii) Creating a specialized set of obligations beyond jurisdiction to deal with the situation of boat-migrants. The second option is more likely than the first, based on existing case law. However, it will require the cooperation of European states to reach an agreement based on solidarity and burden-sharing.

[99] See Chapter 1.3.3 Territory, Jurisdiction and Beyond; 2.2 B Short-Term Prevention: Discusses the *Ilaşcu* case, concerning the Trandsniestrian region over which Moldova had lost authority, but was still considered to have territorial jurisdiction and positive obligations; Chapter 3.1.1 A ECHR, ACHR and ACHPR: Discusses how the general international law context can be important to establish extraterritorial jurisdiction, such as whether a state has assumed certain responsibilities under an international mandate and whether it has command over its state officials acting abroad; Chapter 4.2 B Short-Term Prevention: Explains that multiple third states may be obligated to prevent genocide; Chapter 4.3.1 Economic, Social and Cultural Rights: Discusses Principle 30 of the Maastricht Principles, which introduces an obligation to devise a system of burden-sharing for third state obligations to assist and cooperate in the area of ESC rights; *Ilaşcu and Others v. Moldova and Russia* (n 51); *Genocide* case (n 16) para 430; Maastricht Principles and Commentary (n 46) Principle 30.

[100] See Chapter 4.1.2 Genocide Convention.

[101] See Chapter 4.2 B Short-Term Prevention: Argues that it is unsatisfactory to see the obligations of multiple third states that are obligated to prevent genocide as completely separate, because coordinated action would be more effective in achieving the aim of preventing genocide.

[102] Nollkaemper, André and Jacobs, Dov, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) Mich J Int'l L 359, 392: Referring to the Srebrenica genocide as an example of buck-passing, where the UN and the Netherlands denied responsibility and placed blame on each other; See also: Nollkaemper, André, 'Multilevel Accountability in International Law: A Case Study of the Aftermath of Srebrenica' in Shany, Yuval and Broude, Tomer (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (Hart Publishing, 2008) 345.

demonstrated for example by the recent reports on the failure of the UN Mission in the Republic of South Sudan (UNMISS) to prevent gross human rights violations against the civilian population, among other things due to a risk-averse culture and lack of coordination between the UN and contingents of the different troop-contributing states.[103]

This second challenge can be illustrated by reference to the genocide in Srebrenica. In the buildup to the genocide in Srebrenica, it was unclear which states were obligated to prevent genocide and what this entailed.[104] Even now that it has become clear that at least several states had obligations to prevent in relation to the genocide, the legal and practical consequences of the involvement of multiple duty-bearing states remain unclear.[105] For example, it was revealed through recently declassified documents that high United States (US) officials were aware that Srebrenica would be attacked and that withdrawing the US and North Atlantic Treaty Organization (NATO) led mission could be a precursor to brutal ethnic cleansing.[106] Still, the US Principals Committee, an advisory organ for the US department of foreign affairs, advised to quietly suspend NATO airstrikes against the Serbs. This decision was discussed with France and the United Kingdom (UK), but was not communicated to the Netherlands.[107] It shows that US was aware of the serious risk of genocide and arguably had the capacity to influence effectively in relation to the perpetrators, but chose not to act. As such, the lack of clarity surrounding the basis and content of the obligation to prevent genocide in relation to the matter of coordination allowed the US to intransparantly decide to withdraw airsupport at a crucial moment.[108] It has also remained unclear how this decision influenced the capacity to ensure human rights and content and scope of obligations to prevent of other states. Both Serbia by the International Court of Justice (ICJ) and the Netherlands by a domestic court have been held responsible for their respective failures to prevent in relation to the genocide, but neither of the courts considered the content and scope

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[103] Wintour, Patrick, 'UN Failed to Protect Civilians in South Sudan, Report Finds' (1 November 2016) The Guardian, available at: <https://www.theguardian.com/world/2016/nov/01/un-failed-to-protect-civilians-in-south-sudan-report-finds>: "The report also finds that UNMISS peacekeepers "did not operate under a unified command, resulting in multiple and sometimes conflicting orders to the four troop contingents from China, Ethiopia, Nepal and India, and ultimately underusing the more than 1,800 infantry troops at [headquarters]"."

[104] Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 49) 33: "At the time the Genocide Convention was concluded, the 'obligation to prevent' in Article I was a morally pregnant but a normatively empty concept"; See Chapter 4.1.2 Genocide Convention; Chapter 4.2 B Short-Term Prevention: There is still considerable uncertainty surrounding the question when a state has a capacity to influence effectively.

[105] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (n 102) 392; See Chapter 4.1.2 Genocide Convention; Chapter 4.2 B Short-Term Prevention: It is unclear whether the third state obligation to prevent genocide also requires states to coordinate or cooperate.

[106] Memo, Anthony Lake to President Clinton, SUBJ: Policy for Bosnia Use of US Ground Forces to Support NATO Assistance for Redeployment of UNPROFOR within Bosnia (29 May 1995) available at: <http://www.foia.cia.gov/document/523c39e5993294098d51764a> page 3 warns that withdrawal from the Eastern enclaves had "the associated potential for a humanitarian nightmare for the civilians in the safe areas currently under the promise of UN protection." Page 1 in the para "Prospects of additional airstrikes" point (3): He also writes that "privately we will accept a pause, but make no public statement to that effect.

[107] Memo, Anthony Lake to President Clinton (n 106) page 1 in the para "Prospects of additional airstrikes" point (3): "[P]rivately we will accept a pause, but make no public statement to that effect."

[108] Hartmann, Florence and Vulliamy, Ed, 'How Britain and the US Decided to Abandon Srebrenica to its Fate' (4 July 2015) The Guardian, available at: <https://www.theguardian.com/world/2015/jul/04/how-britain-and-us-abandoned-srebrenica-massacre-1995>.

of their obligations in relation to the acts and omissions of other (potential) duty-bearing states.[109]

Finally, it is questionable whether legal obligations that are considered to have a preventive effect actually do have that effect in practice, or whether they could have been more effective had they been shaped differently. For example, the introduction of laws prescribing punishment for certain behavior is presumed to have a general deterrent effect, but for many rules this has never been empirically proven.[110] In Chapter 2, some of the risk factors of gross human rights violations and measures that could be expected to address those risk factors were discussed and contrasted with states' legal obligations to prevent the three selected prohibitions.[111] It illustrated that such risk factors and measures are only to some degree reflected in state obligations to prevent and there often appears to be a (partial) disconnect. To some extent, this reflects the fact that there is only so much that the law can require and that states can be expected to do to prevent gross human rights violations. However, it is also a result of the way in which human rights obligations were formulated. As mentioned above, human rights obligations have often been developed in an *ad hoc* and uncoordinated manner.[112] This did not usually involve (empirical) research into the effectiveness of certain measures of prevention. As a result, obligations to prevent gross human rights violations do not always correspond well with the indicators that such violations may be committed, meaning the measures required by these obligations may be incomplete or ineffective in practice. In the context of genocide, there are for example no long-term obligations to address inter-group tensions, which is an important long-term indicator that genocide may be committed.[113]

5.4.2 Room for Development

The challenges discussed above demonstrate that there is still ample room for development for obligations to prevent gross human rights violations. Over the past years, there has been more attention for the challenges to human rights obligations with a primarily territorial focus

[109] *Mothers of Srebrenica against the State* case (n 35) para 4.264: The court only considered that "Dutchbat had the obligation to report the war crimes it had directly and indirectly witnessed up to that point as well as from that moment onwards to the UN chain of command"; *Genocide* case (n 16) para 430: The ICJ underlined that it is irrelevant to an individual state's obligation to prevent genocide, whether it alone could or could not have succeeded in preventing genocide. It did acknowledge that "the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result"; Chapter 4.2 B.1 Genocide.

[110] Andenaes, Johannes, 'The General Preventive Effects of Punishment' (1966) 114(7) UPaLRev 949, 952-4: Describes the belief in general prevention as mostly an ideological conviction, but does not exclude that it exists. There is just a lack of empirical research that can prove it. Although some progress has been made, generally this still seems to be the case today.

[111] See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory.

[112] ICJ Statute (n 82) art 38(1) a and b.

[113] United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' United Nations (2014) available at: <http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf> 9 and 18-9.

in an increasingly interconnected world.[114] Extraterritorial human rights obligations are accordingly in a phase of strong development. Courts and supervisory bodies widely agree that most human rights obligations can also apply outside a state's territory. This development has received much attention in scholarship and many of the implications still need to be teased out. Especially the process of determining the content and scope of extraterritorial obligations based on jurisdiction deserves more structural attention by courts, supervisory bodies and scholars. This study has formulated several factors that influence the content and scope of extraterritorial obligations to prevent gross human rights violations, but determining the content and scope of extraterritorial obligations in general needs more thought. More research could for example be done into different types of extraterritorial settings and how the content and scope of human rights obligations is affected in these settings. There is an impetus towards recognizing the importance of third state action to prevent gross human rights violations in certain cases.[115] As explained in Section 5.4.3, the set of obligations to prevent gross human rights violations and concepts like conflict prevention and the RtoP have been moving towards each other. On the one hand, documents on conflict prevention and the RtoP stress the primary importance of the home state and the key role that protecting human rights has for national resilience and ultimately preventing large-scale atrocities.[116] International support or intervention is ever only seen as a secondary means of prevention. On the other hand, legal practice on the prevention of gross human rights violations has slowly developed from regulating the government's relationship with individuals on its territory, to influencing its relationship with people worldwide. There are developments in many areas of international law involving third states, such as widening forms of adjudicative jurisdiction and developing obligations of assistance and state cooperation.[117] Related to this are the effects of the involvement of multiple duty-bearing states and clarifying matters of allocation and cooperation.[118] In time, the increasing interconnectedness of states will unquestionably become more reflected in the overview of obligations to prevent gross human rights violations.

Because of the moral and societal shift in attention towards prevention, there is an increasing wealth of information on risk factors and measures to prevent different types of injury associated with gross human rights violations. A few examples mentioned in the context of this study are the Framework of Analysis for Atrocity Crimes and the Principles on the

[114] Gibney, Mark and Skogly, Sigrun (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvenia Press, Philadelphia 2010); Gondek, Michal, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); Vandenhole, Wouter, *Challenging Territoriality in Human Rights Law – Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015).

[115] See Chapter 4.3 Shift Towards Third State Obligations.

[116] Secretary-General Ban Ki-Moon, 'Responsibility to Protect: State Responsibility and Prevention' (9 July 2013) UN Doc A/67/926-S/2013/399, 12; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 113) 3.

[117] See Section 5.1.3 Beyond Territory and Jurisdiction.

[118] See Chapter 1.3.3 Territory, Jurisdiction and Beyond; Chapter 2.2 B Short-Term Prevention; Chapter 3.1.1 A ECHR, ACHR and ACHPR; Chapter 4.2 B Short-Term Prevention; Chapter 4.3.1 Economic, Social and Cultural Rights; Maastricht Principles and Commentary (n 46) Principle 30.

Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and accompanying manual.[119] Information from these sources can be used to compare measures that are considered effective deterrents based on the risk factors associated with gross human rights violations with measures currently required by obligations to prevent gross human rights violations. Furthermore, the interpretation of existing obligations or formulation of new obligations to prevent can draw on well-developed parts of the set of obligations to prevent gross human rights violations. For example, in the context of the prohibition of torture there are many explicit long-term obligations to prevent.[120] States can be alerted to failures in their compliance with long-term obligations through state reporting procedures or preventive supervisory mechanisms such as the European Committee for the Prevention of Torture (ECPT) or the CAT Subcommittee for the Prevention of Torture.[121] Most other prohibitions lack an explicit set of long-term obligations, which makes the long-term phase harder to supervise. The long-term prevention of torture could serve as an example for obligations to prevent other types of gross human rights violations, of course taking into account the different risk factors and types of measures that would be useful deterrents. A good example is the work of the International Law Commission's Special Rapporteur on a Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, which draws inspiration from the set of obligations to prevent torture in the long-term and preventing recurrence phases and from the obligation to prevent genocide in the short-term phase.[122] Another positive development in this regard is that international courts or

[119] OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 113); Subcommittee on Prevention of Torture, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (30 December 2010) UN Doc CAT/OP/12/6-A/HRC/18/24; ECOSOC, Standard Minimum Rules for the Treatment of Prisoners (n 10); Istanbul Protocol (n 10); Economic and Social Council Resolution 1989/65, 'Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (24 May 1989) UN Doc E/1989/89, at 52; UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12; Code of Conduct for Law Enforcement Officials (n 10); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 10).

[120] See Chapter 2.2 A Long-Term Prevention.

[121] See Chapter 2.1.1 Torture; CAT (n 10) art 19; IACPPT (n 10) art 17; Human Rights Committee, 'General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7)' (10 March 1992) UN Doc CCPR/C/GC/20, para 8: "[S]tate parties should inform the Committee of "legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment."; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS 126 (ECPT); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (CAT Optional Protocol).

[122] Special Rapporteur Sean D. Murphy, 'First Report on Crimes Against Humanity' (n 47) chp.5(a) Obligation to prevent crimes against humanity: Draft Article 1 contains a general obligation to prevent, similar to the Genocide Convention, but also specifies that states will take "effective legislative, administrative, judicial or other measures to prevent", similar to the CAT; Special Rapporteur Sean D. Murphy, 'Second Report on Crimes Against Humanity' (n 50) chp. 4 and 5: Draft Article 9 outlines the obligation of *aut dedere aut judicare* based on the interpretation of that obligation under the CAT.

supervisory bodies sometimes indicate what measures a state would have to take to prevent recurrence of a violation.[123] These measures feed back into the phase of long-term prevention, which can turn the timeline into a cycle of improvement instead of a linear process that is repeated with every violation.

The aim of this study was to clarify the content and scope of both territorial and extraterritorial obligations to prevent gross human rights violations under international human rights law. The resulting overview can help provide clarity to (academic) debates about prevention and can be used as a basis for further efforts in the area of research and implementation. It can serve as a source of information on the status of the law in this area for policy makers, legal professionals and researchers alike. The overview can also act as a basis for critical examination of the role of law in prevention efforts, the future development of (extraterritorial) human rights obligations and the formulation of policies that can complement the law where additional prevention efforts are considered necessary.

[123] Especially the IACtHR is known for its elaborate and inventive rulings in this regard: *Carpio-Nicolle et al. v. Guatemala* (Merits, Reparations and Costs) Judgment of November 22, 2004, I/A Court HR Series C No. 117, para 135: The court ordered that "sufficient human, financial, logistic and scientific resources" needed to be allocated to the units charged with prevention and investigation of extrajudicial killings; *Gutiérrez-Soler v. Colombia* (Merits, Reparations and Costs) Judgment of September 12, I/A Court HR 2005 Series C No. 132, para 107-11: The Court ordered, among other things, that the state start a police training course, disseminate and implement the standards of the Istanbul protocol, a training program for physicians, prosecutors and judges, physical evaluation of state staff in detention centers and strengthening "existing controls with respect to persons arrested in Colombia."

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SUMMARY: THE PREVENTION OF GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Chapter 1: Introduction

Over the past decades there has been a great deal of attention for concepts aiming to prevent gross human rights violations, such as conflict prevention and the responsibility to protect. Despite this shift in attention towards prevention, it has remained unclear what legal obligations states have to prevent gross human rights violations under international human rights law. For example, it is unclear what types of obligations states have at different points in time, when they are triggered, what concrete measures they may require and how they apply outside a state's territory. This study sets out to systematically assess the content and scope of obligations to prevent gross human rights violations. To be able to understand obligations to prevent in their interconnection, the focus is on three specific types of injury prohibited under international human rights law: torture, arbitrary death and genocide. Further distinctions are made between four temporal phases (long-term prevention, short-term prevention, preventing continuation, preventing recurrence) and territorial and extraterritorial obligations. A point of analysis throughout the study is how the capacity of states influences the content and scope of obligations to prevent gross human rights violations in territorial and extraterritorial settings.

Chapter 2: Obligations to Prevent Within State Territory

Obligations under international human rights law are directed primarily at regulating the relationship between a state and people on its territory. It is not surprising, therefore, that states have the most intricate web of obligations to prevent gross human rights violations within their own territory. To provide context and general background information, the three selected prohibitions (torture, arbitrary death and genocide) are first outlined by discussing their legal status, relevant treaty provisions, explicit or implied obligations to prevent and existing international mechanisms focused on prevention. Obligations to prevent the three prohibitions are then separately analyzed on the basis of the timeline (long-term prevention, short-term prevention, preventing continuation, preventing recurrence). It is demonstrated that states have obligations to prevent torture, arbitrary death and genocide in all four temporal phases.

Importantly, many of the obligations to prevent fit within certain categories that are similar for all three prohibitions, referred to as crosscutting obligations. States have: (i) Long-term obligations to introduce a proper legislative and administrative framework capable of deterring violations, (ii) Short-term obligations to take measures to prevent violations, (iii) Obligations to halt continuing violations by ceasing or intervening, and (iv) Obligations to prevent recurrence by investigating, prosecuting and punishing wrongdoers. Within these categories, there are various distinct requirements in the context of the different prohibitions, which illustrate the importance of the specific type of injury for the way obligations to prevent take shape. Indirect obligations in the acute phases of prevention (ii and iii) are

limited by diverse standards of reasonableness, which take into account the capacity of states to prevent offences by non-state actors in the particular circumstances.

Chapter 3: Extraterritorial Obligations to Prevent Based on Jurisdiction

Most human rights treaties contain a jurisdiction clause, which limits the applicability of the treaty to people within the state's jurisdiction. Courts and supervisory bodies have recognized that jurisdiction is not exclusively territorial. This means that states can incur human rights obligations towards people abroad, for example when they arrest people abroad or occupy territory abroad. The concept of jurisdiction is first analyzed through case law and other authoritative interpretations of human rights treaties relevant to this research. Jurisdiction generally functions as a threshold for extraterritorial applicability of a treaty. If the threshold is reached and the state exercises extraterritorial jurisdiction, there is a basis for extraterritorial obligations. To reach the threshold, a state needs to exercise certain forms of control over territory or people abroad. What level of control leads to extraterritorial applicability differs somewhat per treaty or even per provision, but can roughly be divided into effective control over territory and authority or control over individuals (the spatial model and the personal model).

Once the threshold is reached, the same rights and obligations as within state territory in principle apply. Yet, it may be impossible for states to ensure human rights in the same way as within state territory. The content and scope of extraterritorial human rights obligations has to be determined in a way that can ensure their realistic application in extraterritorial circumstances. Therefore, a set of legal, practical and power-related factors is formulated to be able take the state's capacity to ensure human rights in extraterritorial settings into account. Finally, these factors are used to translate the set of territorial obligations to prevent gross human rights violations as defined in Chapter 2, to extraterritorial obligations based on jurisdiction. States have: (i) Long-term obligations to prepare for extraterritorial operations through the state's own legislative and administrative framework. Long-term obligations to plan and equip extraterritorial operations in a way that allows them to function in accordance with a state's human rights obligations. Occupying powers may have long-term obligations to adjust the host-state's legislative and administrative system if it is not in line with requirements under international human rights law; (ii) Short-term obligations and obligations to prevent continuation by taking measures to prevent and halt violations/ offences in the course of extraterritorial operations; and (iii) Obligations to prevent recurrence by investigating, prosecuting and punishing violations by state officials and ensuring the prosecution of offences by non-state actors within their extraterritorial jurisdiction.

A clear example of the influence of legal factors is that, other than occupying powers, states cannot introduce new laws or adjust the legal framework of a host state. States therefore have to prepare for extraterritorial operations through their own legislative and administrative frameworks, for example by introducing safeguards against violations in the course of such operations and offering specific training to state officials. Practical and power-related factors are more directly relevant in the acute phases of prevention. Because it is much easier for

states to oversee and control the actions of its state officials abroad than of non-state actors, direct obligations to prevent violations by state officials in the phases of short-term prevention and preventing continuation are hardly affected by practical and power-related factors; whereas indirect obligations may sometimes be more easily limited abroad than within state territory, for example due to an unstable security situation. Finally, a legal factor to be taken into account in the phase of preventing recurrence is that states may not always be able to establish adjudicative criminal jurisdiction over non-state actors who commit offences within their extraterritorial jurisdiction. In such cases, states must seek alternative routes of prosecution.

Chapter 4: Extraterritorial Obligations to Prevent Beyond Jurisdiction

Third states can sometimes incur human rights obligations towards people beyond territory and jurisdiction, meaning that the people whose rights are (potentially) affected do not have to be within the third state's territorial or extraterritorial jurisdiction. Several of the obligations that are part of the categories of obligations to prevent gross human rights violations distinguished in Chapter 2 are in fact not limited in their application by territory or jurisdiction and can also be incurred by third states. First, the obligations to prevent gross human rights violations that can be incurred by third states and their basis are outlined. The content and scope of these obligations are then analyzed based on the timeline. Third states have: (i) Long-term obligations to include bases in their legal framework to exercise criminal jurisdiction over acts of torture that took place outside the state's jurisdiction based on the principles of nationality or universal jurisdiction; (ii) Short-term obligations and obligations to prevent continuation to prevent genocide by employing all means reasonably available based on the capacity to influence effectively; and (iii) Obligations to prevent recurrence to investigate, prosecute and punish acts of torture that took place outside a state's jurisdiction based on the principles of nationality and universal jurisdiction.

Compared to the set of obligations to prevent gross human rights violations within state territory or based on extraterritorial jurisdiction, third state obligations appear fragmented and unevenly spread out over the different temporal phases. At the same time, there are developments in international law that indicate a shift towards recognizing the important role that third states can play in the prevention of gross human rights violations. Several areas are explored in which third state obligations are developing, such as obligations to assist and cooperate for the full realization of economic, social and cultural rights, obligations to prevent and remedy human rights abuses by corporations acting abroad, an obligation for states to cooperate to bring serious violations of peremptory norms to an end as part of the Articles on State Responsibility and finally a moral responsibility to assist and intervene in the context of the Responsibility to Protect. Together, these developments show that there is great potential to strengthen the patchwork of third state obligations to prevent gross human rights violations in all temporal phases.

Chapter 5: Conclusion

As a result of the systematic assessment based on injury, the timeline and three spatial layers, insight is gained into the content and scope of obligations to prevent gross human rights violations under international human rights law. The overview of obligations to prevent gross human rights violations in territorial and extraterritorial settings is outlined and discussed. This is followed by an analysis of the role played by the capacity of states to ensure human rights in the different spatial layers. The obligations to prevent gross human rights violations are then further analyzed by applying existing typologies of obligations within the framework created to study obligations to prevent. Finally, an assessment is made of the remaining challenges. First of all, extraterritorial obligations to prevent are relatively underdeveloped. Second, it is currently unclear what the consequences are when there are multiple duty-bearing states. Third, the effectiveness of the required measures to prevent in practice is sometimes questionable. There is therefore much room for development, but the increased attention for prevention and extraterritorial human rights obligations offers hope that these issues will attract more research and critical thought. This study offers an overview of the state of the law that can help provide clarity to (academic) debates about prevention and can be used as a basis for further efforts in the area of research and implementation.

SAMENVATTING: DE PREVENTIE VAN GROVE MENSENRECHTENSCHENDINGEN ONDER HET INTERNATIONALE MENSENRECHT

Hoofdstuk 1: Inleiding

In de laatste decennia is er veel aandacht geweest voor concepten die tot doel hebben om grove mensenrechtenschendingen te voorkomen, zoals conflictpreventie of de responsibility to protect-doctrine. Ondanks deze verschuiving in aandacht richting preventie is onduidelijk gebleven welke juridische verplichtingen staten hebben om grove mensenrechtenschendingen te voorkomen onder het internationale mensenrecht. Het is bijvoorbeeld onduidelijk welke verplichtingen staten hebben op verschillende momenten in tijd, wanneer die verplichtingen worden geactiveerd, wat ze vereisen qua concrete maatregelen en hoe ze van toepassing zijn buiten het territorium van de staat. Dit onderzoek heeft tot doel een systematische analyse uit te voeren van de inhoud en reikwijdte van verplichtingen om grove mensenrechtenschendingen te voorkomen. Om de verplichtingen ter voorkoming in hun onderlinge samenhang te kunnen begrijpen ligt de focus op drie soorten letsel die verboden zijn onder het internationale mensenrecht: foltering, arbitraire doding en genocide. Er wordt verder onderscheid aangebracht tussen vier tijdfasen (langetermijn-preventie, kortetermijn-preventie, preventie van het voortduren van een schending, preventie van toekomstige schendingen) en territoriale en extraterritoriale verplichtingen. Een punt van analyse dat terugkomt in alle hoofdstukken is hoe het vermogen van staten de inhoud en reikwijdte van verplichtingen om grove mensenrechtenschendingen te voorkomen beïnvloedt in territoriale en extraterritoriale situaties.

Hoofdstuk 2: Preventieve Verplichtingen Binnen het Grondgebied van de Staat

Internationale mensenrechtenverplichtingen zijn voornamelijk gericht op het reguleren van de verhouding tussen de staat en mensen binnen het grondgebied van de staat. Het is daarom weinig verrassend dat staten het meest geraffineerde netwerk aan verplichtingen om grove mensenrechtenschendingen te voorkomen hebben binnen hun eigen grondgebied. Om context te geven en achtergrondinformatie te verschaffen worden de drie geselecteerde verboden (foltering, arbitraire doding en genocide) eerst uiteengezet door bespreking van hun juridische status, relevante artikelen in verdragen, expliciete of impliciete preventieve verplichtingen en bestaande internationale mechanismen gericht op preventie. Verplichtingen om schendingen van de drie verboden te voorkomen worden vervolgens geanalyseerd door gebruik van de tijdlijn (langetermijn-preventie, kortetermijn-preventie, preventie van het voortduren van een schending, preventie van toekomstige schendingen). Daarbij wordt duidelijk dat staten verplichtingen hebben om foltering, arbitraire doding en genocide te voorkomen in alle vier de tijdfasen.

Een belangrijke bevinding is dat veel van de preventieve verplichtingen passen binnen bepaalde categorieën die voor alle drie de verboden gelijk zijn. Staten hebben: (i) Langetermijnverplichtingen om een gepast juridisch en administratief systeem te introduceren dat schendingen kan afschrikken; (ii) Kortetermijnverplichtingen om maatregelen te nemen om schendingen te voorkomen; (iii) Verplichtingen om voortdurende schendingen door statelijke actoren te beëindigen of om in voortdurende overtredingen door niet-statelijke actoren in te grijpen; (iv) Verplichtingen om toekomstige schendingen te voorkomen door onderzoek in te stellen en de verantwoordelijke individuen te vervolgen en straffen. Binnen deze categorieën bestaan specifieke vereisten in het kader van de drie verschillende verboden. Die illustreren het belang dat het specifieke soort letsel heeft voor de wijze waarop preventieve verplichtingen worden vormgegeven. Indirecte verplichtingen in de acute preventieve tijdfasen (ii en iii) worden beperkt door verscheidene standaarden van redelijkheid, die het mogelijk maken om rekening te houden met het vermogen van staten om schendingen van niet-statelijke actoren te voorkomen in de specifieke omstandigheden.

Hoofdstuk 3: Extraterritoriale Preventieve Verplichtingen op Basis van Jurisdictie

De meeste mensenrechtenverdragen bevatten een artikel waarin de toepasbaarheid van het verdrag wordt beperkt tot mensen binnen de jurisdictie van de staat. Gerechtshoven en toezichthoudende organen van verdragen hebben erkend dat jurisdictie niet noodzakelijkerwijs samenvalt met grondgebied. Dit betekend dat staten ook mensenrechtenverplichtingen kunnen hebben ten opzichte van mensen in het buitenland, bijvoorbeeld wanneer de staat mensen arresteert in het buitenland of grondgebied in het buitenland bezet. Het concept van jurisdictie wordt geanalyseerd op basis van rechtszaken en andere autoritaire interpretaties van mensenrechtenverdragen die relevant zijn voor dit onderzoek. Jurisdictie functioneert als een drempel voor de toepasbaarheid van een verdrag buiten het grondgebied van een staat. Als die drempel gehaald wordt, oefent de staat jurisdictie uit en is er een basis voor mensenrechtenverplichtingen. Om de drempel te halen

moet de staat een bepaalde mate van controle uitoefenen over grondgebied of mensen in het buitenland. Welke voor mate van controle daarvoor vereist is verschilt per verdrag of zelfs per artikel, maar kan ongeveer worden onderverdeeld in effectieve controle over grondgebied of autoriteit en controle over mensen (het ruimtelijke model en het persoonlijke model).

Als de drempel eenmaal gehaald is, zijn in principe dezelfde rechten en verplichtingen van toepassing als binnen het grondgebied van de staat. Toch kan het onmogelijk zijn voor staten om mensenrechten op dezelfde manier te waarborgen buiten hun grondgebied als binnen hun grondgebied. De inhoud en reikwijdte van verplichtingen moeten worden vastgesteld op een manier die realistisch is in extraterritoriale omstandigheden. Daarom wordt er een reeks juridische, praktische en aan macht gerelateerde factoren geformuleerd om rekening te kunnen houden met het vermogen van staten om mensenrechten te waarborgen in extraterritoriale omstandigheden. Tenslotte worden deze factoren gebruikt om territoriale verplichtingen om grove mensenrechtenschendingen te voorkomen te vertalen naar extraterritoriale verplichtingen op basis van jurisdictie. Staten hebben: (i) Langetermijnverplichtingen om zich voor te bereiden op extraterritoriale ondernemingen middels het eigen juridische en administratieve kader. Langetermijnverplichtingen om extraterritoriale ondernemingen te plannen en uit te rusten op een manier die het mogelijk maakt om te opereren in lijn met mensenrechtenverplichtingen. Een bezettende macht zal mogelijk langetermijnverplichtingen hebben om het juridische en administratieve kader van de gast staat moeten aanpassen als dat niet voldoet aan mensenrechtenstandaarden; (ii) Kortetermijnverplichtingen en verplichtingen om de voortduring van schendingen te voorkomen door maatregelen te nemen om schendingen of overtredingen in de loop van extraterritoriale ondernemingen te voorkomen of beëindigen; (iii) Verplichtingen om toekomstige schendingen te voorkomen door onderzoek in te stellen, verantwoordelijke statelijke actoren te vervolgen en straffen en de vervolging van niet-statelijke actoren binnen de extraterritoriale jurisdictie van de staat te waarborgen.

Een duidelijk voorbeeld van de invloed van juridische factoren is dat, behalve als het gaat om een bezettende macht, staten niet bevoegd zijn om nieuwe wetten in te voeren of bestaande wetten aan te passen in de gaststaat. Daarom moeten staten zich voorbereiden op extraterritoriale operatie door middel van hun eigen juridische en administratieve kader, bijvoorbeeld door beschermende maatregelen in te voeren tegen mensenrechtenschendingen in de loop van extraterritoriale operaties en het aanbieden van specifieke training aan statelijke actoren. Praktische en aan macht gerelateerde factoren zijn relevanter in de acute fasen van preventie. Omdat het makkelijker is voor staten om de acties van statelijke actoren dan van niet-statelijke actoren te overzien, worden directe verplichtingen om schendingen door statelijke actoren te voorkomen nauwelijks aangetast door praktische en aan macht gerelateerde factoren; terwijl indirecte extraterritoriale verplichtingen soms makkelijker kunnen worden beperkt dan binnen het grondgebied, bijvoorbeeld door een instabiele veiligheidstoestand. Tenslotte is een juridische factor waar rekening mee moet worden gehouden in de fase van het voorkomen van toekomstige schendingen, dat staten niet altijd strafrechtelijke jurisdictie hebben over niet statelijke actoren die overtredingen plegen in hun

extraterritoriale jurisdictie. In zo’n geval moet de staat de vervolging van niet-statelijke verdachten op een andere manier waarborgen.

Hoofdstuk 4: Extraterritoriale Preventieve Verplichtingen Buiten Jurisdictie

Derde staten hebben soms mensenrechtenverplichtingen ten opzichte van mensen buiten hun grondgebied en jurisdictie, wat betekent dat de mensen wiens rechten (potentieel) beïnvloed worden niet binnen het grondgebied of de jurisdictie van de derde staat aanwezig hoeven te zijn. Enkele van de verplichtingen die werden geïdentificeerd als onderdeel van de categorieën van verplichtingen om grove mensenrechtenschendingen te voorkomen in Hoofdstuk 2, zijn in werkelijkheid niet beperkt tot grondgebied of jurisdictie en kunnen ook derde staten verplichten tot maatregelen. Allereerst worden de verplichtingen van derde staten om grove mensenrechtenschendingen te voorkomen en hun basis uiteengezet. Dan wordt de inhoud en reikwijdte van deze verplichtingen geanalyseerd op basis van de tijdlijn. Derde staten hebben: (i) Langetermijnverplichtingen om een juridische basis te introduceren om strafrechtelijke jurisdictie te kunnen uitoefenen over verdachten van foltering die heeft plaatsgevonden buiten jurisdictie, op basis van het principe van nationaliteit of universele jurisdictie; (ii) Kortetermijnverplichtingen en verplichtingen om de voortduring van schendingen te voorkomen om alle maatregelen te nemen die redelijkerwijs beschikbaar zijn om genocide te voorkomen op basis van het vermogen om effectieve invloed uit te oefenen; (iii) Verplichtingen om toekomstige schendingen te voorkomen door onderzoek in te stellen naar gevallen van foltering die plaatsvonden buiten jurisdictie en verdachten te vervolgen op basis van het principe van nationaliteit of universele jurisdictie.

Vergeleken met verplichtingen om grove mensenrechtenschendingen te voorkomen binnen het grondgebied of op basis van extraterritoriale jurisdictie, zijn verplichtingen om grove mensenrechtenschendingen te voorkomen van derde staten gefragmenteerd en ongelijk verdeeld over de verschillende tijdfasen. Tegelijkertijd zijn er ontwikkelingen in internationaal recht die wijzen op een verschuiving naar het onderkennen van de belangrijke rol die derde staten kunnen spelen in het voorkomen van grove mensenrechtenschendingen. Enkele rechtsgebieden waarin verplichtingen van derde staten zich ontwikkelen worden onderzocht, zoals verplichtingen om te assisteren en samen te werken voor de verwezenlijking van economisch, sociale en culturele rechten, verplichtingen om overtredingen van mensenrechten door bedrijven in het buitenland te voorkomen en compenseren, verplichtingen om samen te werken om ernstige schendingen van *jus cogens*-normen te beëindigen als onderdeel van de Artikelen voor Staatsaansprakelijkheid en tenslotte morele verplichtingen om te assisteren en interveniëren in het kader van de responsibility to protect. Tezamen laten deze ontwikkelingen zien dat er veel potentie is om het gefragmenteerde overzicht van verplichtingen om grove mensenrechtenschendingen te voorkomen van derde staten te versterken in alle tijdfasen.

Hoofdstuk 5: Conclusie

Als resultaat van deze systematische analyse gebaseerd op bepaalde vormen van letsel, drie ruimtelijke lagen en vier tijdfasen, wordt inzicht verkregen in de inhoud en reikwijdte van

verplichtingen ter voorkoming van grove mensenrechtenschendingen. Het overzicht van verplichtingen in territoriale en extraterritoriale lagen wordt uiteengezet en besproken. Dit wordt gevolgd door een analyse van de rol die gespeeld wordt door het vermogen van staten om mensenrechten te waarborgen in de verschillende ruimtelijke lagen. De verplichtingen om grove mensenrechtenschendingen te voorkomen worden dan verder geanalyseerd door bestaande typologieën van verplichtingen toe te passen binnen het kader dat is opgezet om preventieve verplichtingen te bestuderen. Tenslotte wordt het overzicht van verplichtingen om grove mensenrechtenschendingen te voorkomen beoordeeld. Ten eerste zijn extraterritoriale verplichtingen relatief onderontwikkeld. Ten tweede is het op dit moment onduidelijk wat de gevolgen zijn als er meerdere plichtdragende staten zijn. Ten derde is de effectiviteit van de maatregelen om te voorkomen in de praktijk soms twijfelachtig. Er is daarom nog veel ruimte voor verdere rechtsontwikkeling, maar de toename in aandacht voor preventie en extraterritoriale mensenrechtenverplichtingen biedt hoop dat er meer onderzoek en kritisch denkwerk aan deze kwesties zal worden besteed. Dit onderzoek biedt een overzicht van de huidige staat van het recht en kan daarmee bijdragen aan de helderheid van (academische) discussies over preventie en kan worden gebruikt als basis voor toekomstige inspanningen op het gebied van onderzoek en implementatie.

Over the past decades there has been a great deal of attention for concepts aiming to prevent gross human rights violations, such as conflict prevention and the responsibility to protect. Despite this shift in attention towards prevention, it has remained unclear what legal obligations states have to prevent gross human rights violations under international human rights law. For example, it is unclear what types of obligations states have at different points in time, when they are triggered, what concrete measures they may require and how they apply outside a state's territory.

This study sets out to systematically assess the content and scope of obligations to prevent gross human rights violations. To be able to understand obligations to prevent in their interconnection, the focus is on three specific types of injury prohibited under international human rights law: torture, arbitrary death and genocide. Further distinctions are made between four temporal phases (long-term prevention, short-term prevention, preventing continuation, preventing recurrence) and territorial and extraterritorial obligations. A point of analysis throughout the study is how the capacity of states influences the content and scope of obligations to prevent gross human rights violations in territorial and extraterritorial settings.