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### The prevention of gross human rights violations under international human rights law

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## 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.<sup>1</sup> 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.<sup>2</sup> 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).<sup>3</sup> 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).<sup>4</sup> 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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<sup>1</sup> 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.

<sup>2</sup> 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](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.

<sup>3</sup> 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.

<sup>4</sup> See Chapter 1.3.2 Temporal Phases.

categories of obligations to prevent gross human rights violations.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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).<sup>8</sup> 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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<sup>5</sup> The term “crosscutting obligations” is used to describe obligations to prevent that are similar in the context of all three of the prohibitions.

<sup>6</sup> 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.

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

<sup>8</sup> 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).<sup>9</sup> 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).<sup>10</sup>

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.<sup>11</sup> 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.”<sup>12</sup>

The CAT Committee, the supervisory mechanism established under the treaty, has interpreted this obligation to be wide-ranging and dynamic.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> Articles 3 to 15 of the CAT all, to some extent, constitute specific obligations to prevent.<sup>16</sup> However, the CAT

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> CAT (n 8) art 2 and 16; IACPPT (n 8) art 1.

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

<sup>13</sup> CAT, General Comment 2 (n 6) para 3.

<sup>14</sup> CAT, General Comment 2 (n 6) para 3, 14 and 25.

<sup>15</sup> 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.

<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

The general universal and regional human rights instruments all dedicate a provision to the prohibition of torture.<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.

<sup>17</sup> CAT, General Comment 2 (n 6) para 3 and 25.

<sup>18</sup> 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.

<sup>19</sup> CRC (n 10) art 19(2); CRPD (n 10) art 15(2).

<sup>20</sup> ICCPR (n 9) art 7: States 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.

<sup>21</sup> 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.”

<sup>22</sup> 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.

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

<sup>24</sup> *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.”<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> It is considered the first human rights supervisory mechanism with a truly pro-active preventive focus.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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<sup>25</sup> *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.

<sup>26</sup> *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 [...]”

<sup>27</sup> 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.

<sup>28</sup> ECPT (n 8) art 1.

<sup>29</sup> 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.

<sup>30</sup> CAT Optional Protocol (n 8).

<sup>31</sup> CAT Optional Protocol (n 8) art 3.

<sup>32</sup> 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.

<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> More specified provisions containing the right to life have also been laid down in instruments protecting vulnerable groups, such as the CRC and CRPD.<sup>39</sup>

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.

<sup>34</sup> 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.

<sup>35</sup> ICCPR (n 9) art 6.

<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.”<sup>45</sup> 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.<sup>46</sup>

In 1982, a mandate was established for the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.<sup>47</sup> 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.<sup>48</sup> 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

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<sup>40</sup> HRC, General Comment 6 (n 34) para 5.

<sup>41</sup> HRC, General Comment 6 (n 34) para 3.

<sup>42</sup> HRC, General Comment 6 (n 34) para 2 and 4.

<sup>43</sup> *Velásquez Rodríguez v. Honduras* (n 23) para 166.

<sup>44</sup> *19 Tradersmen 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.

<sup>45</sup> *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.

<sup>46</sup> *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, AComHPR, Communication No. 245/02 (15 May 2006) para 144; In light its recent existence, the ACHPR has not yet pronounced itself on this matter.

<sup>47</sup> 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.

<sup>48</sup> Weissbrodt, David and Rosen, Teri, ‘Principles Against Executions’ (1990) 13 Hamline L Rev 579, 580.



situations that warrant immediate attention.<sup>49</sup> The role of the Special Rapporteur as an early warning mechanism for atrocity crimes has been acknowledged by the HRC.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

### 2.1.3 Genocide

The prohibition of genocide is a rule of customary international law and is unequivocally recognized to have *jus cogens* status.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> The Genocide Convention contains an express reference to prevention in its very first Article:

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

<sup>50</sup> HRC, 'Mandate of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions' (n 49) 2.

<sup>51</sup> 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.

<sup>52</sup> 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.

<sup>53</sup> *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.

<sup>54</sup> The Genocide Convention is most similar to the CAT and IACPPT.

<sup>55</sup> 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.”<sup>56</sup>

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.<sup>57</sup> Article 8 allows states to call upon the UN to take action to prevent and suppress acts of genocide.<sup>58</sup> Finally, the rules surrounding punishment of acts of genocide are also widely considered to have a deterrent effect.<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup>

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<sup>56</sup> 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.

<sup>57</sup> Genocide Convention (n 56) art 5.

<sup>58</sup> Genocide Convention (n 56) art 8.

<sup>59</sup> 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.”

<sup>60</sup> *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.

<sup>61</sup> *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.

<sup>62</sup> *Genocide* case (n 59) para 427 and 430.

<sup>63</sup> *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.<sup>64</sup> 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.<sup>65</sup> The OSAPG is informed in its work by the Framework of Analysis for Atrocity Crimes - A Tool for Prevention.<sup>66</sup> The Framework addresses three atrocity crimes: genocide, crimes against humanity and war crimes.<sup>67</sup> It contains fourteen risk factors, each with their own indicators.<sup>68</sup> 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.<sup>69</sup> Protected groups refer to the members of a national, ethnical, racial or religious group.<sup>70</sup> 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.<sup>71</sup> For each temporal

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<sup>64</sup> 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>>.

<sup>65</sup> Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council (n 64).

<sup>66</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2).

<sup>67</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 1-2.

<sup>68</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 6.

<sup>69</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 9 and 18-9.

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

<sup>71</sup> 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.<sup>72</sup> 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 the 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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

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<sup>72</sup> 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.

<sup>73</sup> See Chapter 1.3.2 Temporal Phases.

<sup>74</sup> 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.

<sup>75</sup> 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.<sup>76</sup> Very broadly speaking, this entails an obligation to organize the state apparatus in a manner that deters violations.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> Often, treaties attach requirements to the introduction and diligent implementation of the legislative framework in the area of monitoring, training and education.<sup>81</sup> The level of law reform that may be required

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<sup>76</sup> 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.

<sup>77</sup> *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.”

<sup>78</sup> 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.

<sup>79</sup> 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.

<sup>80</sup> 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.

<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> In other instruments, the obligation to criminalize acts of torture is implied by the obligation to ensure the right to be free from torture.<sup>85</sup> 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.<sup>86</sup> The IACtHR also underwrites the importance of criminalizing acts of torture and ill-treatment, considering that impunity fosters chronic recidivism.<sup>87</sup> 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.

<sup>82</sup> 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.

<sup>83</sup> 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.

<sup>84</sup> 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.

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

<sup>86</sup> CAT (n 8) art 4; CAT, General Comment 2 (n 6) para 8 and 11.

<sup>87</sup> *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.<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup> 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.”<sup>92</sup> Besides introducing appropriate rules and regulations, states should also ‘systematically review’ the continued effectiveness

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<sup>88</sup> 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.

<sup>89</sup> 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.

<sup>90</sup> 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.

<sup>91</sup> CAT (n 8) art 10-15.

<sup>92</sup> CAT, General Comment 2 (n 6) para 13; See also: HRC, General Comment 20 (n 22) para 11.

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

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.<sup>96</sup> 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.<sup>97</sup> In the case law of the IACoHR, 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> These documents outline a broad range of relevant preventive safeguards, such as adopting measures against overcrowded prisons.<sup>101</sup> States also have an obligation to prevent torture by non-state

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<sup>93</sup> CAT (n 8) art 11; CAT, General Comment 2 (n 6) para 23; HRC, General Comment 20 (n 22) para 11.

<sup>94</sup> IACPPT (n 8) art 8-10.

<sup>95</sup> CAT (n 8) art 10; IACPPT (n 8) art 7.

<sup>96</sup> 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.

<sup>97</sup> *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).

<sup>98</sup> *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.

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

<sup>100</sup> 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.

<sup>101</sup> 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.<sup>102</sup>

Aside from detainees, the state must also introduce special guarantees to protect minorities, women, children and people with disabilities from torture and ill-treatment.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> The CAT Committee has emphasized that states should take into account how violations of the Convention affect specific “sectors of the population.”<sup>106</sup> 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.<sup>107</sup> There exist different long-term obligations to establish monitoring frameworks, complaints procedures and assistance and sensitization programs.<sup>108</sup> 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).

<sup>102</sup> *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.

<sup>103</sup> 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.

<sup>104</sup> *A. v. the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VI, para 22-4.

<sup>105</sup> CAT, General Comment 2 (n 6).

<sup>106</sup> CAT, General Comment 2 (n 6) para 22-4.

<sup>107</sup> CRC (n 10) art 19; CRPD (n 10) art 15.

<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

## 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.<sup>111</sup> 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.<sup>112</sup> The ECtHR stated in the *Oneriyildiz 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

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<sup>109</sup> 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.

<sup>110</sup> 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](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."

<sup>111</sup> *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.

<sup>112</sup> 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.”<sup>113</sup> 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.<sup>114</sup> 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.”<sup>115</sup> 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.”<sup>116</sup> 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.”<sup>117</sup> Similar requirements for a framework on the use

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<sup>113</sup> *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.”

<sup>114</sup> *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](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 of necessity and proportionality, are considered to reflect binding international law.

<sup>115</sup> HRC, General Comment 6 (n 34) para 3.

<sup>116</sup> *Makaratzis v. Greece* (n 114) para 58-9.

<sup>117</sup> *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.<sup>118</sup> 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.<sup>119</sup> 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.”<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> The training requirement is also elaborately addressed in the Basic Principles.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> 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

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<sup>118</sup> 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.”

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

<sup>120</sup> *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.

<sup>121</sup> 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.

<sup>122</sup> *Nachova and Others v. Bulgaria* (n 117) para 97.

<sup>123</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81) art 18-20.

<sup>124</sup> *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.

<sup>125</sup> *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.”<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> States also have to take measures to prevent and deal with emergency situations in detention centers, such as fires or riots.<sup>129</sup> 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.”<sup>130</sup> 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.”<sup>131</sup> 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.<sup>132</sup> Apart from living up to fair trial standards, there also has to

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<sup>126</sup> *McCann and Others v. the United Kingdom* (n 45) para 205.

<sup>127</sup> *Neira-Alegria et al. v. Peru* (Merits) Judgment of January 19, 1995, I/A Court HR Series C No. 20, para 60-1.

<sup>128</sup> 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.

<sup>129</sup> *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.

<sup>130</sup> “*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.

<sup>131</sup> *Paul and Audrey Edwards v. the United Kingdom* (n 128) para 62 and 64.

<sup>132</sup> *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.<sup>133</sup>

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.<sup>134</sup> 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.”<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup>

### 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.<sup>138</sup> 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.

<sup>133</sup> *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.

<sup>134</sup> 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.”

<sup>135</sup> HRC, General Comment 6 (n 34) para 5.

<sup>136</sup> *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.

<sup>137</sup> *Bulacio v. Argentina* (n 134); *The “Street Children” (Villagrán-Morales et al.) v. Guatemala* (n 109).

<sup>138</sup> 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."<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup>

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."<sup>142</sup> 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.<sup>143</sup> Drawing on the indicators of genocide, as

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<sup>139</sup> Genocide Convention (n 56) art 5.

<sup>140</sup> 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.

<sup>141</sup> 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.

<sup>142</sup> Genocide Convention (n 56) art 5: Refers "in particular" but not exclusively to enacting effective penalties; Rubebana, *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.

<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> 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.”<sup>146</sup> 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.<sup>147</sup> For example, states may introduce hate-speech laws or ban racist organizations.<sup>148</sup> 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.<sup>149</sup>

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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.

<sup>144</sup> Genocide Convention (n 56) art 2: Protected groups refer to the members of a national, ethnical, racial or 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.

<sup>145</sup> 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.

<sup>146</sup> 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.

<sup>147</sup> 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.

<sup>148</sup> Saul, 'The Implementation of the Genocide Convention at the National Level' (n 141) 76-7.

<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup> 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.”<sup>152</sup> 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.”<sup>153</sup> The OHCHR in a report on the prevention of genocide has also paid attention to the important role of systematic prevention and awareness raising.<sup>154</sup> 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.

<sup>150</sup> 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.

<sup>151</sup> 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 (...).”

<sup>152</sup> OGPRtoP, ‘Preventing Incitement: Policy Options for Action’ (n 140) 2, 3, 4, 6 and 14.

<sup>153</sup> 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](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.”

<sup>154</sup> OHCHR, ‘Prevention of Genocide’ (n 145) 59-60.

a resolution on the prevention of genocide adopted on the occasion of the 60<sup>th</sup> 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.”<sup>155</sup> 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.<sup>156</sup> 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.<sup>157</sup> 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).<sup>158</sup> 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

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<sup>155</sup> Human Rights Council, ‘Prevention of Genocide’ (25 March 2008) UN Doc A/HRC/7/L26, 15.

<sup>156</sup> See Chapter 1.3.2 Temporal Phases.

<sup>157</sup> Bellamy and McLoughlin, ‘Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation’ (n 75) 15-20.

<sup>158</sup> 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).<sup>159</sup> 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.”<sup>160</sup> 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.<sup>161</sup> 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.”<sup>162</sup> 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

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<sup>159</sup> 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.

<sup>160</sup> CAT, General Comment 2 (n 6) para 26.

<sup>161</sup> 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.

<sup>162</sup> *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.<sup>163</sup>

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.”<sup>164</sup> Under the ACHR and ECHR, states must take measures to prevent acts of torture, also if non-state actors pose a threat.<sup>165</sup> 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.”<sup>166</sup> 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 interpreted 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.<sup>167</sup> 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.”<sup>168</sup> 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

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<sup>163</sup> CAT (n 8) art 2(3); IACPPT (n 8) art 4; HRC, General Comment 20 (n 22) para 3.

<sup>164</sup> HRC, General Comment 20 (n 22) para 2.

<sup>165</sup> *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.

<sup>166</sup> 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.”

<sup>167</sup> *X. v. Kazakhstan*, Comm. 554/2013, UN Doc CAT/C/55/D/554/2013 (CAT Committee October 9, 2015), para 12.7-13.

<sup>168</sup> *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.<sup>169</sup> The ECtHR concludes that Turkey “cannot be said [to have] displayed the required diligence to prevent.”<sup>170</sup> 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.”<sup>171</sup> 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 *Dorđević 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.”<sup>172</sup> 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.<sup>173</sup> 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.”<sup>174</sup>

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.<sup>175</sup> 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.<sup>176</sup> 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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<sup>169</sup> *Opuz v. Turkey* (n 45) para 162 and 170.

<sup>170</sup> *Opuz v. Turkey* (n 45) para 169-70.

<sup>171</sup> *Opuz v. Turkey* (n 45) para 176.

<sup>172</sup> *Dorđević 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 disproportionate 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.”

<sup>173</sup> *Dorđević v. Croatia* (n 165) para 7-60.

<sup>174</sup> *Dorđević v. Croatia* (n 165) para 148-9.

<sup>175</sup> *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.

<sup>176</sup> *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.<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup> 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.<sup>180</sup> 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."<sup>181</sup> 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.<sup>182</sup> States must

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<sup>177</sup> *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 24-30.

<sup>178</sup> *El Masri v. "the former Yugoslav Republic of Macedonia"* (n 168) para 223.

<sup>179</sup> See for example: CAT (n 8) art 1; CAT, General Comment 2 (n 6) para 18; Fabbri, 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.

<sup>180</sup> 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."

<sup>181</sup> *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."

<sup>182</sup> *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.<sup>183</sup>

Interestingly, the ECtHR seems to directly impute Mr. El Masri's treatment at the airport to Macedonia.<sup>184</sup> 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.”<sup>185</sup>

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.<sup>186</sup> 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.”<sup>187</sup> 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.”<sup>188</sup> 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.”

<sup>183</sup> *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.”

<sup>184</sup> *El Masri v. “the former Yugoslav Republic of Macedonia”* (n 168) para 223 and 240.

<sup>185</sup> *El Masri v. “the former Yugoslav Republic of Macedonia”* (n 168) para 211.

<sup>186</sup> 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.”

<sup>187</sup> *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.

<sup>188</sup> *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.<sup>189</sup>

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.<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> The ECtHR has

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<sup>189</sup> Articles on State Responsibility (n 6) art 2, 14(2) and 16.

<sup>190</sup> *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.

<sup>191</sup> Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program' (n 182) 448-9.

<sup>192</sup> *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.

<sup>193</sup> 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.”

<sup>194</sup> *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.<sup>195</sup>

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.<sup>196</sup> The case concerned the imprisonment and ill-treatment of several individuals in the Moldavian Republic of Transdnistria (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.<sup>197</sup> 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.”<sup>198</sup>

This means that when a state loses authority over part of its territory, it does not lose jurisdiction.<sup>199</sup> 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.”<sup>200</sup> The scope of

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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 extension 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.”

<sup>195</sup> Incorporating 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>>.

<sup>196</sup> *Ilaşcu and Others v. Moldova and Russia* (n 168).

<sup>197</sup> *Ilaşcu and Others v. Moldova and Russia* (n 168) para 331, 441, 448, 453.

<sup>198</sup> *Ilaşcu and Others v. Moldova and Russia* (n 168) para 335.

<sup>199</sup> *Ilaşcu and Others v. Moldova and Russia* (n 168) para 333 and 335.

<sup>200</sup> *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."<sup>201</sup> The Court further clarified that:

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

Because of the factual situation underlying the *Ilașcu* case, the ECtHR considered the question whether Moldova had discharged its positive obligations in the context of its relationship with Russia.<sup>203</sup> 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."<sup>204</sup> 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.<sup>205</sup> 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).<sup>206</sup> After Mr. Ilașcu 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.<sup>207</sup> It no longer raised the issue in its bilateral relations with Russia.<sup>208</sup> On those grounds, the Court concluded that Moldova had failed to live up to its positive obligations.<sup>209</sup> The ECtHR confirmed its reasoning in the 2011 *Ivanțoc a.o. v. Moldova and Russia* judgment, which was predicated on similar circumstances to the *Ilașcu* case.<sup>210</sup>

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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."

<sup>201</sup> *Ilașcu 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.

<sup>202</sup> *Ilașcu and Others v. Moldova and Russia* (n 168) para 339.

<sup>203</sup> *Ilașcu and Others v. Moldova and Russia* (n 168) para 337.

<sup>204</sup> *Ilașcu and Others v. Moldova and Russia* (n 168) para 341.

<sup>205</sup> *Ilașcu and Others v. Moldova and Russia* (n 168) para 342-5.

<sup>206</sup> *Ilașcu and Others v. Moldova and Russia* (n 168) para 346-7.

<sup>207</sup> *Ilașcu and Others v. Moldova and Russia* (n 168) para 348.

<sup>208</sup> *Ilașcu and Others v. Moldova and Russia* (n 168) para 349-50.

<sup>209</sup> *Ilașcu 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. Ilașcu was imputed to Moldova for the period after 2001, when it failed to discharge its positive obligations towards them.

<sup>210</sup> *Ivanțoc 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 *Ilașcu* 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.<sup>211</sup> 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.<sup>212</sup> 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.”<sup>213</sup> The ECtHR similarly requires a “real risk”, meaning that the mere possibility that an individual will be tortured or ill-treated is not enough.<sup>214</sup> 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.<sup>215</sup> 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.

<sup>211</sup> 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.

<sup>212</sup> *Pillai v. Canada*, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part I (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.

<sup>213</sup> *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.

<sup>214</sup> *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.

<sup>215</sup> *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.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> The ECtHR has explained that the assurances must “in their practical application” be sufficient to prevent the risk of torture from materializing.<sup>219</sup> 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.”<sup>220</sup>

## 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.<sup>221</sup> For example, whenever possible they should give caution when they intend to use their firearm.<sup>222</sup> 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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<sup>216</sup> *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.”

<sup>217</sup> *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.

<sup>218</sup> 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.

<sup>219</sup> *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.

<sup>220</sup> Special Rapporteur Theo van Boven, ‘Report Submitted Pursuant to General Assembly Resolution 58/164’ (1 September 2004) UN Doc A/59/324, para 37.

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

<sup>222</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 81) art 10.

state. In the *Öneryıldız 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.<sup>223</sup> 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 resources.<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup> 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.<sup>227</sup> 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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<sup>223</sup> *Öneryıldız v. Turkey* (n 113) para 101.

<sup>224</sup> *Öneryıldız v. Turkey* (n 113) para 107.

<sup>225</sup> *Öneryıldız v. Turkey* (n 113) para 90 and 108.

<sup>226</sup> 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.

<sup>227</sup> 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.”<sup>228</sup> 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.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> 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.<sup>232</sup> 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.<sup>233</sup>

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.”<sup>234</sup> In any case, the obligation “must be interpreted in a way which

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<sup>228</sup> *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para 116.

<sup>229</sup> *Osman v. the United Kingdom* (n 228) para 118.

<sup>230</sup> 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.

<sup>231</sup> *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.

<sup>232</sup> *Osman v. the United Kingdom* (n 228) para 116; *Mastromatteo v. Italy* [GC], no. 37703/97, ECHR 2002-VIII, para 69.

<sup>233</sup> *Mastromatteo v. Italy* (n 232) para 76.

<sup>234</sup> *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.”<sup>235</sup> 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.<sup>236</sup> 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.<sup>237</sup> 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.<sup>238</sup> 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.<sup>239</sup> 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.”<sup>240</sup> 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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<sup>235</sup> *Osman v. the United Kingdom* (n 228) para 116.

<sup>236</sup> *Branko Tomašić and Others v. Croatia*, no. 46598/06, 15 January 2009, para 58.

<sup>237</sup> *Branko Tomašić and Others v. Croatia* (n 236) para 53 and 61.

<sup>238</sup> *Opuz v. Turkey* (n 45).

<sup>239</sup> *Opuz v. Turkey* (n 45) para 145 and 153.

<sup>240</sup> *Pueblo Bello Massacre v. Colombia* (n 36) para 123.

was considered to be met based on objective terms.<sup>241</sup> 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.”<sup>242</sup> 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.<sup>243</sup> 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.”<sup>244</sup> 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.”<sup>245</sup>

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<sup>241</sup> *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.

<sup>242</sup> *Pueblo Bello Massacre v. Colombia* (n 36) para 123.

<sup>243</sup> 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, 'Supreme 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."

<sup>244</sup> *Pueblo Bello Massacre v. Colombia* (n 36) para 125; *González et al. (“Cotton Field”) v. Mexico* (n 136) para 243.

<sup>245</sup> *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.<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> Under the ECHR, states are also prohibited from extraditing individuals who run a risk of receiving capital punishment in the receiving state.<sup>251</sup> In

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<sup>246</sup> *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.

<sup>247</sup> *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.

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

<sup>249</sup> *Fong v. Australia* (n 249) para 9.6-7.

<sup>250</sup> 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.

<sup>251</sup> *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.<sup>252</sup>

### 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.<sup>253</sup> 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.<sup>254</sup> 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.”<sup>255</sup> 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.”<sup>256</sup> The Court refers to the concept of due-diligence and the importance of an assessment of the necessary measures *in concreto*.<sup>257</sup> 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.”<sup>258</sup>

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.<sup>259</sup> 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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<sup>252</sup> *Soering v. the United Kingdom* (n 251) para 122.

<sup>253</sup> *Genocide* case (n 59) para 431.

<sup>254</sup> 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.

<sup>255</sup> *Genocide* case (n 59) 430-1.

<sup>256</sup> *Genocide* case (n 59) 430-1.

<sup>257</sup> *Genocide* case (n 59) 430.

<sup>258</sup> *Genocide* case (n 59) 430.

<sup>259</sup> Pooter, *The Obligation to Prevent Genocide: A Large Shell Yet to Be Filled* (n 254) 311.

“reasonably at [a state’s] disposal.”<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup> For example, states can counter hate speech by “positive messages of inclusivity.”<sup>263</sup> 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.<sup>264</sup> 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.<sup>265</sup> 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.”<sup>266</sup> 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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<sup>260</sup> *Genocide* case (n 59) 430-1.

<sup>261</sup> 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.”

<sup>262</sup> 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.”

<sup>263</sup> OGPRtoP, ‘Preventing Incitement: Policy Options for Action’ (n 140) 5.

<sup>264</sup> Genocide Convention (n 56) art 1 jo 3.

<sup>265</sup> Ruwebana, *Prevention of Genocide under International Law* (n 61) 166.

<sup>266</sup> 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.<sup>267</sup> The state can also request international assistance beyond making an appeal to the UN based on Article 8 of the Convention.<sup>268</sup> 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.<sup>269</sup>

### C. Preventing Continuation

Obligations to prevent the continuation of a violation arise after the injurious event has started until it ends.<sup>270</sup> 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.”<sup>271</sup> The wrongful act either covers a longer period of time or consists of a pattern of instant but interconnected 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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<sup>267</sup> 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.

<sup>268</sup> 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.

<sup>269</sup> 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.

<sup>270</sup> See Chapter 1.3.2 Temporal Phases.

<sup>271</sup> 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.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup> 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.”<sup>278</sup> Measures subsequently taken by higher authorities to end the violation “must be on a scale which is sufficient to put an

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<sup>272</sup> 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.”

<sup>273</sup> 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.

<sup>274</sup> 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.

<sup>275</sup> Articles on State Responsibility (n 6) art 30(1); *Trail Smelter Arbitration* case (n 273).

<sup>276</sup> CAT, General Comment 2 (n 6) para 26; *Ireland v. the United-Kingdom* (n 88) para 239.

<sup>277</sup> *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.

<sup>278</sup> *Ireland v. the United-Kingdom* (n 88) para 159.

end to the repetition of acts or to interrupt the pattern or system.”<sup>279</sup> 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.<sup>280</sup> 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.”<sup>281</sup> 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.”<sup>282</sup> Examples of this rationale can be found in the *Osmani v. Serbia* and *Dzemajl v. Yugoslavia* decisions of the CAT Committee.<sup>283</sup> 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.<sup>284</sup> 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.<sup>285</sup> 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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<sup>279</sup> *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, no. 9940-9944/82, EComHR judgment on admissibility (6 December 1983) para 30.

<sup>280</sup> 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.

<sup>281</sup> 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.

<sup>282</sup> CAT, General Comment 2 (n 6) para 18.

<sup>283</sup> *Osmani v. Serbia* (n 159) para 10.5.

<sup>284</sup> *Dzemajl et al. v. Yugoslavia* (n 159) para 9.2.

<sup>285</sup> *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.<sup>286</sup> 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.”<sup>287</sup> 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.<sup>288</sup> 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.<sup>289</sup> 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.<sup>290</sup> 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.”<sup>291</sup>

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<sup>286</sup> CAT, General Comment 2 (n 6) para 18.

<sup>287</sup> *Z. and Others v. United Kingdom* (n 159) 73.

<sup>288</sup> *El Masri v. “the former Yugoslav Republic of Macedonia”* (n 168) para 206 and 211.

<sup>289</sup> *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.

<sup>290</sup> *Mahmut Kaya v. Turkey* (n 25) para 115; *Z. and Others v. United Kingdom* (n 159); *Velásquez Rodríguez v. Honduras* (n 23) para 174.

<sup>291</sup> 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.<sup>292</sup> 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.<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup>

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<sup>292</sup> *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.”

<sup>293</sup> 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.

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

<sup>295</sup> *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.<sup>296</sup> This obligation has been confirmed by the IACtHR and AComHPR.<sup>297</sup> 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.<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup> 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.<sup>301</sup>

### 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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<sup>296</sup> *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.

<sup>297</sup> It is unimaginable that other tribunals and supervisory bodies would not rule similarly if confronted with these circumstances.

<sup>298</sup> *Osman v. the United Kingdom* (n 228) para 116.

<sup>299</sup> *Pueblo Bello Massacre v. Colombia* (n 36) para 139.

<sup>300</sup> *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* (n 296) para 22.

<sup>301</sup> *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 [...]”<sup>302</sup> 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.<sup>303</sup> State institutions or officials that are not involved should employ all means reasonably available to bring the violation to a halt.<sup>304</sup> 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.<sup>305</sup>

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.<sup>306</sup> States can also choose to refer the situation to the ICC.<sup>307</sup> Requesting international or UN assistance, as discussed in Section B.3, remain important measures in this phase.<sup>308</sup> 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.<sup>309</sup>

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<sup>302</sup> Articles on State Responsibility (n 6) Commentary to Article 15 para 3.

<sup>303</sup> 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).

<sup>304</sup> *Genocide* case (n 59) para 430.

<sup>305</sup> 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.”

<sup>306</sup> Genocide Convention (n 56) art 6.

<sup>307</sup> 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.

<sup>308</sup> 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.

<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup> 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.<sup>312</sup> 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.<sup>313</sup> These obligations arise when the state is alerted to a violation or has other reasons to suspect that a violation occurred.<sup>314</sup> 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.<sup>315</sup> 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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<sup>310</sup> See Chapter 1.3.2 Temporal Phases.

<sup>311</sup> 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.”

<sup>312</sup> 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).

<sup>313</sup> 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.

<sup>314</sup> *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.

<sup>315</sup> *Blanco Abad v Spain* (n 314) para 8.2.

these acts will not go unpunished.<sup>316</sup> 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.<sup>317</sup> 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.<sup>318</sup> 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.<sup>319</sup> States may also sometimes be required to offer assurances of non-repetition.<sup>320</sup>

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<sup>316</sup> *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.

<sup>317</sup> 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.

<sup>318</sup> 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.

<sup>319</sup> 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).

<sup>320</sup> 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.<sup>321</sup> A formal complaint is not necessary for a state to be obligated to investigate.<sup>322</sup> In fact, if a state requires a formal complaint to start an investigation, this in itself may violate that state's obligations.<sup>323</sup> 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.<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup> 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."<sup>327</sup> The Committee also made clear that amnesties may not be

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<sup>321</sup> 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.

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

<sup>323</sup> *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.

<sup>324</sup> 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.

<sup>325</sup> *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."

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

<sup>327</sup> 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.<sup>328</sup>

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.”<sup>329</sup> 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.<sup>330</sup>

## 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.<sup>331</sup> 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.”<sup>332</sup> 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

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<sup>328</sup> CAT, General Comment 2 (n 6) para 5 last sentence.

<sup>329</sup> *Gutiérrez-Soler v. Colombia* (Merits, Reparations and Costs) Judgment of September 12, I/A Court HR 2005 Series C No. 132, para 107-11.

<sup>330</sup> CAT (n 8) art 14; IACPPT (n 8) art 9.

<sup>331</sup> 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.

<sup>332</sup> *Yaşa v. Turkey*, 2 September 1998, Reports of Judgments and Decisions 1998-VI, para 104

violation of the right to life.”<sup>333</sup> 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.<sup>334</sup> With regard to the obligation to prosecute and punish wrongdoers, states have to submit cases involving suspicious deaths to the competent authorities for consideration.<sup>335</sup> 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.”<sup>336</sup> 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.<sup>337</sup>

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.”<sup>338</sup> 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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<sup>333</sup> *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.

<sup>334</sup> *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.

<sup>335</sup> 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.

<sup>336</sup> *Öneryıldız v. Turkey* (n 113) para 96.

<sup>337</sup> *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.”

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

shall build a monument and place it in a suitable public location.”<sup>339</sup> 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.<sup>340</sup>

### D.3 Genocide

States are explicitly obligated to investigate, prosecute and punish acts of genocide under the Genocide Convention.<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup> 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.<sup>344</sup> A prominent example of national proceedings against a suspect of genocide is the trial against former Guatemalan president Rios Montt.<sup>345</sup> 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.<sup>346</sup> 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.<sup>347</sup> This can relieve some of the political tension at

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<sup>339</sup> *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.

<sup>340</sup> 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.”

<sup>341</sup> Genocide Convention (n 56) art 1 jo 6.

<sup>342</sup> Genocide Convention (n 56) art 6.

<sup>343</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 2) 3.

<sup>344</sup> Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 138) 240 para 14-5.

<sup>345</sup> *Sala Tercera de la Corte de Apelaciones del Ramo Penal, Narcoactividad y Delitos contra el Ambiente* (10 May 2013) Judgment against Efraim Rios Montt.

<sup>346</sup> 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>>.

<sup>347</sup> 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 *proprio 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.<sup>348</sup>

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.<sup>349</sup> 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.<sup>350</sup> Truth and reconciliation initiatives could ease remaining tensions in society.<sup>351</sup> Further, practices of commemoration and remembrance are considered very important in the context of genocide and could potentially help prevent recurrence.<sup>352</sup> 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

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<sup>348</sup> 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 to the 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.”

<sup>349</sup> Articles on State Responsibility (n 6) art 30.

<sup>350</sup> 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.

<sup>351</sup> 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.

<sup>352</sup> See among others: Williams, Paul, 'Witnessing Genocide: Vigilance and Remembrance at Tuol Sleng and Choeng 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.<sup>353</sup>

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.<sup>354</sup> For the long-term prevention of torture, states must adopt strict rules and regulations in regard to situations of detention.<sup>355</sup> 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.<sup>356</sup> 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.<sup>357</sup> 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.<sup>358</sup>

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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<sup>353</sup> 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.

<sup>354</sup> 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); *Öneriyıldız v. Turkey* (n 113) para 89-90.

<sup>355</sup> 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).

<sup>356</sup> See Section 2.2 B.2 Arbitrary Death.

<sup>357</sup> See Section 2.2 B.3 Genocide.

<sup>358</sup> 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.<sup>359</sup> 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.<sup>360</sup> 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 a 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.<sup>361</sup> 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.<sup>362</sup> 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.<sup>363</sup> 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.<sup>364</sup> 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.<sup>365</sup> 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.<sup>366</sup> 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.<sup>367</sup> 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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<sup>359</sup> See Section 2.2 A Long-Term Prevention.

<sup>360</sup> See Section 2.2 B Short-Term Prevention.

<sup>361</sup> See Section 2.2 B.2 Arbitrary Death.

<sup>362</sup> See Section 2.2 C Preventing Recurrence.

<sup>363</sup> See Section 2.2 B.1 Torture, B.2 Arbitrary Death, C.1 Torture and C.2 Arbitrary Death.

<sup>364</sup> See Section 2.2 D Preventing Recurrence.

<sup>365</sup> *Ilaşcu and Others v. Moldova and Russia* (n 168) para 339.

<sup>366</sup> See Section 2.2 B Short-Term Prevention and C Preventing Continuation.

<sup>367</sup> 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.<sup>368</sup> 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.<sup>369</sup> 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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<sup>368</sup> 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."

<sup>369</sup> See Chapter 1.2: The Problem: The Content of Obligations to Prevent.