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

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### 3. EXTRATERRITORIAL OBLIGATIONS TO PREVENT BASED ON JURISDICTION

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

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

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<sup>1</sup> See Section 3.1 Extraterritorial Jurisdiction.

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

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

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

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

### 3.1 Extraterritorial Jurisdiction

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

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]”<sup>5</sup>

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

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”<sup>6</sup>

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

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

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

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

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

### 3.1.1 Instruments

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

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

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

<sup>10</sup> *Construction of a Wall Advisory Opinion* (n 9) para 108-9.

<sup>11</sup> *Construction of a Wall Advisory Opinion* (n 9) para 109.

<sup>12</sup> *Construction of a Wall Advisory Opinion* (n 9) para 109-10 and 112; Human Rights Committee, 'General Comment 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, Or in Relation to Declarations Under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 7: According to the HRCCee, the object and purpose of the ICCPR is "to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."

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

## A. ECHR, ACHR and ACHPR

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

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

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

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

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

<sup>14</sup> ECHR (n 6) art 1.

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

<sup>16</sup> *Loizidou v. Turkey* (n 9) para 62.

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

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

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

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<sup>18</sup> *Banković v. Belgium* (n 17) para 61 and 71.

<sup>19</sup> *Banković v. Belgium* (n 17) para 59.

<sup>20</sup> *Banković v. Belgium* (n 17) para 80.

<sup>21</sup> *Banković v. Belgium* (n 17) para 75; Lawson, Rick ‘Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights’ in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 83, 103 onwards.

<sup>22</sup> Lawson, ‘Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights’ (n 21) 85; Milanović, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 183 onwards.

<sup>23</sup> *Banković v. Belgium* (n 17) para 59-61; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 27: “[N]either the Commission nor the Court in its pre-*Banković* case law based their interpretation of Article 1 ECHR on the general international law doctrine of jurisdiction. (...) The purpose of the doctrine of jurisdiction in international law is precisely to establish whether a claim by a state to regulate some conduct is *lawful or unlawful*. Conversely, ‘effective overall control of an area’ is a question of *fact*, of actual physical power that a state has over a territory and its people”; Wilde, Ralph, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’ (2007) 40(2) *IsLR* 503, 513: “[T]he European Court of Human Rights seemed to suggest that the meaning of “jurisdiction” in the ECHR reflects the meaning of that term in public international law generally. However, insofar as the Court intended to make this suggestion, it does not fit with how the Court and other authoritative bodies have approached the issue in other cases, which is to define extraterritorial jurisdiction as simply a factual test, regardless of whether such a situation is lawful.”

<sup>24</sup> *Banković v. Belgium* (n 17) 59-60; Oxman, Bernard H., ‘Jurisdiction of States’ (November 2007) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law->

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

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

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

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

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

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

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

the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State.”<sup>30</sup>

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

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

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

<sup>32</sup> *Al-Skeini v. the United Kingdom* (n 4) para 138.

<sup>33</sup> *Al-Skeini v. the United Kingdom* (n 4) para 139.

<sup>34</sup> *Al-Skeini v. the United Kingdom* (n 4) para 139.

<sup>35</sup> *Al-Skeini v. the United Kingdom* (n 4) para 138.

<sup>36</sup> *Al-Skeini v. the United Kingdom* (n 4) para 134-6.

<sup>37</sup> *Al-Skeini v. the United Kingdom* (n 4) para 137.



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

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

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

<sup>40</sup> *Al-Skeini v. the United Kingdom* (n 4) para 9-19; *Jaloud v. the Netherlands* (n 39) para 10-6.

<sup>41</sup> *Al-Skeini v. the United Kingdom* (n 4) para 33-71.

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

<sup>43</sup> *Jaloud v. the Netherlands* (n 39) para 10-6.

<sup>44</sup> *Jaloud v. the Netherlands* (n 39) para 140-3.

<sup>45</sup> *Jaloud v. the Netherlands* (n 39) para 144-9.

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

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

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<sup>46</sup> *Jaloud v. the Netherlands* (n 39) para 152-3.

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

<sup>48</sup> ACHR (n 7) art 1; ECHR (n 6) art 1: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

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

<sup>50</sup> *Coard and Others v. the United States* (n 49) para 37.

<sup>51</sup> *Brothers to the Rescue v. Cuba* (n 49) para 586.

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

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

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

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

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

<sup>55</sup> African Commission on Human and Peoples' Rights, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)', Adopted during the 57<sup>th</sup> ordinary session 4-18 November 2015 in Banjul, Gambia, available at: <[http://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx\\_drblob\\_pi1%5BdownloadUid%5D=171](http://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=171)>.

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

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

## B. ICCPR

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

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

<sup>58</sup> AComHPR, ‘General Comment 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)’ (n 55) para 14.

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

<sup>60</sup> ICCPR (n 5) art 2(1).

<sup>61</sup> McGoldrick, Dominic, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 41, 55.

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

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

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

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<sup>63</sup> *Lopez Burgos v. Uruguay* (n 9).

<sup>64</sup> ICCPR (n 5) art 2(1); McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ (n 61) 55 and 66: Discusses the *travaux préparatoires* of the ICCPR, which also suggest that the phrase “within its territory and subject to its jurisdiction” should be read disjunctively; Despite the relevant interpretations by the HRCee and ICJ and broad support for the disjunctive reading of Article 2(1) ICCPR, the United States and Israel have for a long time continued to claim that the ICCPR only applies territorially: Concluding Observations HRCee on the United States of America (23 April 2014) UN Doc CCPR/C/USA/CO/4, para 4; Concluding Observations HRCee on Israel (21 November 2014) UN Doc CCPR/C/ISR/CO/4, para 5.

<sup>65</sup> *Lopez Burgos v. Uruguay* (n 9) para 12.3.

<sup>66</sup> *Lopez Burgos v. Uruguay* (n 9) para 12.2: “The reference in article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction’ does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”

<sup>67</sup> King, ‘The Extraterritorial Human Rights Obligations of States’ (n 62) 524-6 and 529: “In the absence of HRC elaboration, several possible relationships suggest themselves.” Continues to describe a legal relationship, factual relationship or relationship based on nationality.

<sup>68</sup> HRC, General Comment 31 (n 62) para 10.

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

### C. CAT and IACPPT

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

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

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

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

<sup>72</sup> CAT (n 7) art 2 and 16.

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

<sup>74</sup> *Al-Skeini v. the United Kingdom* (n 4) para 134-6.

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

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

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

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

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

<sup>78</sup> CAT (n 7) art 11.

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

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

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

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

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

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

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

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

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

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



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

#### D. Genocide Convention

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

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

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<sup>87</sup> *Victor Saldano v. Argentina* (n 49) para 19; *Hatian Centre for Human Rights v. the United States* (n 49) para 167; *Coard and Others v. the United States* (n 49) para 37; The application of the criterion of authority and control has sometimes led to different outcomes in similar situations. Compare the *Banković* bombing to the air-to-air missiles in: *Brothers to the Rescue v. Cuba* (n 49) para 23-25.

<sup>88</sup> IACPPT (n 84) art 12.

<sup>89</sup> *Genocide* case (n 7) para 183-4: In the *Genocide* case, the ICJ addressed the extraterritorial applicability of Articles 1, 3 and 6. Its conclusion was that Articles 1 and 3 “are not on their face limited by territory”, while Article 6 contains an express territorial limitation. Other provisions in the Genocide Convention which have been ascribed preventive effect, such as Articles 5 and 8, are also not on their face limited by territory. Therefore, it will be assumed that they apply when a state has extraterritorial jurisdiction.

<sup>90</sup> *Genocide* case (n 7) para 31.

<sup>91</sup> *Genocide* case (n 7) 154; See Chapter 4.1.2 Genocide Convention: Argues that the capacity to influence effectively has a threshold function similar to jurisdiction.

<sup>92</sup> *Genocide* case (n 7) para 183-2: “The substantive obligations arising from Articles I and III (...) apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below).”

<sup>93</sup> *Genocide* case (n 7) para 430-1.

<sup>94</sup> *Genocide* case (n 7) para 430.

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

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

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

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

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

<sup>96</sup> *Genocide* case (n 7) para 438.

<sup>97</sup> *Separate Opinion of Judge Tomka to the Genocide* case (n 7) para 67.

<sup>98</sup> See Chapter 4.1.2 Genocide Convention.

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

<sup>100</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 6.

<sup>101</sup> Genocide Convention (n 100) art 6.

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

### 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations

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

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

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<sup>102</sup> *Genocide case* (n 7) para 184 and 442; *Separate Opinion of Judge Tomka to the Genocide case* (n 7) para 65.

<sup>103</sup> *Genocide case* (n 7) para 442.

<sup>104</sup> Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 99) 255 para 56.

<sup>105</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 127 onwards and 173 onwards; Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 165.

<sup>106</sup> *Al-Skeini v. the United Kingdom* (n 4) para 139: It is primarily determined by "the strength of the State's military presence in the area", but "[o]ther indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region"; *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda* (n 54) para 91 and final holdings.

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

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<sup>107</sup> Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 165: "[J]urisdiction always denotes control over persons and [...] control over territory merely functions as a shorthand in this context"; Concurring opinion of Judge Bonello in the *Al-Skeini v. the United Kingdom* (n 4) para 24-8: Argues that military occupation should give rise to a presumption of jurisdiction, which can be rebutted by the state.

<sup>108</sup> Besson, Samantha, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25(4) LJIL 857, 874-5: "[J]urisdiction over territory is [...] an indirect and general form of jurisdiction over people."

<sup>109</sup> Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 876-7: Speaks of the "presumption of jurisdiction" and "facilitated evidence mechanisms" at least in the case of lawful occupation.

<sup>110</sup> Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 876-8 and her chart of the ECtHR's assessment of jurisdiction in terms of evidence on 871.

<sup>111</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) International Peace Conference, The Hague, Official Records (Hague Regulations) art 42; *Al-Skeini v. the United Kingdom* (n 4) para 112, 123-4, 135, 138 and 143-50: Lord Justice Brooke stated in the Court of Appeal: "In my judgment it is quite impossible to hold that the UK ... was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time." The ECtHR later implicitly confirmed this view by employing the personal model of jurisdiction, even though the UK was formally an occupying power.

<sup>112</sup> *Jaloud v. the Netherlands* (n 39) para 142: In *Al-Skeini* and *Al-Jedda* the status as occupying power was considered relevant, but the ECtHR also lists a series of cases in which it was not considered, such as *Ilasçu*.

<sup>113</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 171: Describes how the spatial model "collapses" into the personal model as it is applied to smaller and smaller spaces; Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (n 38) 165 and 167: Describes the spatial and personal models as complementary. The article also shows how in the *Jaloud* and *Pisari* cases the ECtHR itself does not make the distinction in establishing jurisdiction.

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

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

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

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

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

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

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

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

<sup>120</sup> Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 7.

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

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

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<sup>121</sup> Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 10.

<sup>122</sup> Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 31-2.

<sup>123</sup> In practice, this seems to make a difference especially for cases of bombings or shootings, where authority and control over the victim(s) can be harder to prove. See: Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 28: "Jurisdiction flows not only from the exercise of democratic governance, not only from ruthless tyranny, not only from colonial usurpation. It also hangs from the mouth of a firearm."

<sup>124</sup> Den Heijer, Maarten, *Europe and Extraterritorial Asylum* (Hart Publishing, 2012) 41; Duttwiler, Michael, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (n 28) 155.

<sup>125</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 173.

<sup>126</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 207-9; Milanović, Marko, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) EJIL 121, 129: Commenting on para 136-7 of the *Al-Skeini* case describing the personal model: "[T]he question that immediately arises is whether there should be any reason, or indeed whether there is any non-arbitrary way, to limit this personal conception of jurisdiction, for example to physical custody. Is it not true that having the power to *kill* a person, whether through a drone or from a rifle, is very much an exercise of 'physical power' over that individual? Does that not flatly contradict the *Bankovic* holding that a 'mere' power to kill cannot equal jurisdiction?"

<sup>127</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 119 and 209 onwards: He does make an exception for one category of positive obligations, namely procedural obligations, which are necessary to make the state's negative obligations effective. A good example of such a procedural obligation is the obligation to investigate human rights violations.

<sup>128</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 210.

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

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

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

<sup>131</sup> See Section 3.1.1 A Long-Term Prevention.

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

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

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

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

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

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

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

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

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

<sup>140</sup> *Jaloud v. the Netherlands* (n 39) para 154.

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



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

### 3.2 Corresponding Obligations

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

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

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<sup>142</sup> *Issa v. Turkey* (n 28): International mandate and military operations; *Al-Skeini v. the United Kingdom* (n 4): International mandate, military operations and detention; *Al-Jedda v. the United Kingdom* (n 29): Detention; *Jaloud v. the Netherlands* (n 39): Checkpoint; *Lopez Burgos v. Uruguay* (n 9): Arrest and Detention; See Introduction: This chapter deals chiefly with situations where states exercise such jurisdictional control through state officials acting outside state territory.

<sup>143</sup> *Banković v. Belgium* (n 17) para 46: The gradual approach proposed by the applicants in the *Banković* case is an example, making not only the scope of obligations, but also their applicability dependent on the state's capacity to ensure human rights in the given circumstances; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 119 and 209 onwards: Milanović's approach draws far-reaching conclusions for jurisdiction as a threshold based on the differences between negative and positive obligations.

<sup>144</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 210: Milanović's model, for example, is to a large extent based on the idea that negative and positive obligations are separable and easily recognizable, while in reality this is often not the case. He argues that obligations to prevent violations by third parties are positive and should only apply when a state has effective overall control over a territory. At the same time, Milanović's model is based on the benchmark of realistic compliance. Following this logic, it is unclear why lesser forms of control than effective overall control could not mean that states have certain positive extraterritorial obligations to prevent or protect; Parts of this criticism have been set out in: Have, Nienke van der, 'Extraterritorial Application of Human Rights Treaties and Shared Responsibility – A Comment on Marko Milanović's SHARES lecture' (n 129).

<sup>145</sup> Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878.

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

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

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

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

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

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

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

### 3.2.1 The Role of Capacity

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

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<sup>150</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.

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

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

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

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

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

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

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

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

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

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

<sup>159</sup> See for example *Ilaşcu v. Moldova and Russia* (n 4) para 300-5 and 353-8.

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

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

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

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

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

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

<sup>164</sup> *Al-Skeini v. the United Kingdom* (n 4) para 138.

<sup>165</sup> *Al-Skeini v. the United Kingdom* (n 4) para 137.

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

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

### 3.2.2 Factors Towards Realistic Application

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

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

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

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

<sup>169</sup> *Al-Skeini v. the United Kingdom* (n 4) para 161 onwards: The court conceded that when carrying out an effective investigation "in the aftermath of the invasion, during a period when crime and violence were endemic [...] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed."

<sup>170</sup> *Osman v. the United Kingdom* (n 153) para 116.

arbitrary deaths than when a state exercises extraterritorial jurisdiction over individuals in an area surrounded by conflict.<sup>171</sup> The obligation requiring “prompt” judicial intervention after an arrest, which contains a built-in standard of reasonableness, has also led to different outcomes in territorial as opposed to extraterritorial contexts.<sup>172</sup> When suspects are arrested on the high seas, bringing them promptly before a judge has been interpreted to span a much longer period of time than when suspects are arrested within state territory, because there is no judicial infrastructure close by.<sup>173</sup> Importantly, other obligations that are not subject to standards of reasonableness cannot normally be limited based on a state’s capacity.

Yet, extraterritorial contexts pose challenges that may require adjustments to the content and scope of obligations, which cannot be made solely based on standards of reasonableness also applied in territorial contexts. The ECtHR has stated that extraterritorial obligations under the Convention “must be applied realistically, to take account of specific problems.”<sup>174</sup> As explained above, there is very little guidance in existing case law that can further instruct such realistic application.<sup>175</sup> Therefore, factors will be introduced here that allow for a realistic assessment of the content and scope of extraterritorial obligations to prevent gross human rights violations in the third part of this chapter. These factors are legal, practical and power-related. The factors may affect the content and scope of obligations once the threshold of jurisdiction has been reached, but are submitted not to have a bearing on the formal applicability of obligations. There may be situations in which certain obligations attached to a right/prohibition do not arise due to a legal barrier or situations in which the scope of an obligation is reduced to zero because of practical difficulties, but this does not mean that the rights and corresponding obligations do not apply in the abstract. In general, these factors do not excuse states of extraterritorial obligations, but help specify corresponding obligations once the threshold of jurisdiction is reached by determining their content and scope while taking the state’s capacity to ensure human rights in extraterritorial settings into account.

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<sup>171</sup> *Mothers of Srebrenica against the State* (16 July 2014) The Hague District Court, C/09/295247 / HA ZA 07-2973, available at:

<<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>>: The Dutch troops exercised jurisdiction over a small compound and were allowed to use force only for particular reasons.

<sup>172</sup> ICCPR (n 5) art 9(3); ECHR (n 6) art 5(3); ACHR (n 7) art 7(5).

<sup>173</sup> *Rigopoulos v. Spain* (dec.), no. 37388/97, ECHR 1999-II, section B; *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010, para 130.

<sup>174</sup> *Al-Skeini v. the United Kingdom* (n 4) para 168.

<sup>175</sup> *Al-Skeini v. the United Kingdom* (n 4) para 137-8: Save for a distinction made by the ECtHR in the *Al-Skeini* case, stating that all rights must be ensured if a state carries out spatial jurisdiction and only the rights relevant to the situation if a state carries out personal jurisdiction.

- i) Legal factors: There are limits to what a state is lawfully allowed to do abroad.<sup>176</sup> As outlined in Section 3.1.1 A, the concept of jurisdiction under public international law determines when states have a lawful basis to exercise prescriptive, enforcement and adjudicative jurisdiction abroad.<sup>177</sup> It was explained that when states exercise extraterritorial enforcement jurisdiction unlawfully, human rights law can still apply.<sup>178</sup> At the same time, human rights law generally cannot be assumed to require unlawful extraterritorial conduct beyond what a state is already undertaking.<sup>179</sup> Therefore, rules relating to the lawful extraterritorial exercise of prescriptive and adjudicative jurisdiction – meaning the state’s “authority to lay down legal norms [and] decide competing claims” – must be taken into account when determining the content and scope of extraterritorial obligations to prevent gross human rights violations in the first and last temporal phase.<sup>180</sup> In this context, the influence of the law of occupation will be taken into consideration, as an express exception to the exclusion of humanitarian law from this study, because it marks a unique situation in which states have a form of prescriptive and adjudicative jurisdiction abroad.<sup>181</sup> Finally, the influence of a mandate, which can allow or restrict

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<sup>176</sup> Kamminga, 'Extraterritoriality' (n 24); Oxman, 'Jurisdiction of States' (n 24); Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31 and 53: General rules of interpretation in good faith and the primacy of *jus cogens*; Matz-Lück, Nele, 'Conflicts Between Treaties' (December 2010) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1485?rkey=50hssH&result=5&prd=EPIL>> para 3: “International law knows neither a general hierarchy between its different sources nor, in principle, between different international treaties”; Herdegen, Matthias, 'Interpretation in International Law' (March 2013) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723>> (f) Regard for Other International Rules para 22 onwards: On integrative interpretation: “The study group of the ILC on ‘Fragmentation of International Law’ considers harmonizing interpretation of treaties in terms of Art. 31 (3) (c) VCLT as an approach crucial to ensuring the coherence of international law”; Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (n 23) 502, 512 onwards and 525: “[T]he norms triggering the applicability of the law of occupation and the main treaties on civil and political rights are governed by contested notions of territorial control.”

<sup>177</sup> *Banković v. Belgium* (n 17) 59-60; Oxman, 'Jurisdiction of States' (n 24) para 1 and 3; Kamminga, 'Extraterritoriality' (n 24) para 1.

<sup>178</sup> *Loizidou v. Turkey* (n 9) para 62; See Section 3.1.1 A ECHR, ACHR and ACHPR; Kamminga, 'Extraterritoriality' (n 24) para 22 onwards.

<sup>179</sup> King, 'The Extraterritorial Human Rights Obligations of States' (n 62) 551: Argues that “the limited extent of lawful authority necessarily impacts on the extent of obligations and duties owed”; There may be exceptions, which will be discussed below.

<sup>180</sup> Kamminga, 'Extraterritoriality' (n 24) para 1.

<sup>181</sup> See Chapter 1.3.1 Delineation: “While the potential influence of armed conflict on the capacity to ensure human rights and scope of obligations will be duly explored, the study does not engage the question of the relationship or interaction between human rights law and humanitarian law. [...] An exception is made for the consideration of the influence of the law of occupation on the content and scope of extraterritorial obligations in Chapter 3, because it marks a unique situation in which a state may have a form of prescriptive jurisdiction abroad”; Hague Regulations (n 111).



certain forms of extraterritorial conduct, on the content and scope of human rights obligations will also be discussed.

- ii) Practical factors: There may be security-, language-, cultural or other practical factors that make it more difficult for states to live up to their human rights obligations in extraterritorial contexts. As mentioned in Section 3.2.1, practical difficulties cannot fully preclude human rights obligations, but the ECtHR does take them into account once jurisdiction has been established to assess what a state could realistically be expected to do in the particular circumstances.<sup>182</sup> If the obligation in question is not absolute, but leaves room for interpretation or can be limited by a standard of reasonableness, practical factors in extraterritorial settings can be additional reasons to adjust the content and scope of obligations.
- iii) Power-related factors: A state's powers are usually more limited when exercising extraterritorial jurisdiction, than within state territory.<sup>183</sup> This means that, depending on the state's extraterritorial powers and institutional infrastructure, it may be equipped to ensure all human rights or only rights relevant to the particular situation.<sup>184</sup> For example, a state that has a mandate to provide safety in a particular region cannot realistically be expected to simultaneously organize free and fair elections.<sup>185</sup> Another example is that a limited institutional infrastructure can influence the time it takes to carry out certain obligations, such as a prompt investigation if the investigative personnel is not yet present in the area concerned. This does not diminish the fact that there always remain

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<sup>182</sup> *Ilașcu v. Moldova and Russia* (n 4) para 339; *Al-Skeini v. the United Kingdom* (n 4) para 168: "The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war."; *Jaloud v. the Netherlands* (n 39) para 226: "The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population [...] clearly included armed hostile elements."

<sup>183</sup> Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' (n 21) 106: "[A] state's powers will normally be much more limited during operations abroad"; *Al-Skeini and Others v. the United Kingdom* (n 4) para 135: This has to be distinguished from the "public powers" criterion used in the *Al-Skeini* case to establish whether the threshold of jurisdiction had been reached.

<sup>184</sup> See for example: *Jaloud v. the Netherlands* (n 39) para 149; Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 4) para 32: Judge Bonello argues that this means that some rights fall within its jurisdiction, while other do not. In contrast, I submit that it does not influence the formal applicability of all rights and obligations based on jurisdiction, but rather the specification of corresponding obligations in the particular context.

<sup>185</sup> Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 878; *Al-Skeini v. the United Kingdom* (n 4) para 137: This fits with the ECtHR's statement that under the personal model of jurisdiction, a state only has to ensure the individual's rights as relevant to the specific situation.

certain minimum requirements for the powers a state exercises abroad, like the independence of investigators or the judiciary.<sup>186</sup>

### 3.3 Extraterritorial Obligations to Prevent Torture, Arbitrary Death and Genocide Based on Jurisdiction

This section studies how the crosscutting obligations in the four temporal phases to prevent torture, arbitrary death and genocide (hereinafter: gross human rights violations or the three prohibitions) distinguished in Chapter 2, translate to extraterritorial obligations based on jurisdiction.<sup>187</sup> The set of territorial obligations to prevent gross human rights violations is used as the basis for analysis, because all the same human rights obligations in principle apply when a state exercises extraterritorial jurisdiction and the point of departure for assessing the content and scope of obligations in extraterritorial settings is the same as for territorial settings.<sup>188</sup> The discussion will focus on the content and scope of corresponding obligations once the threshold of jurisdiction is met.<sup>189</sup> The legal, practical and power-related factors discussed in Section 3.2.2 will be used to help determine the content and scope of extraterritorial obligations. Existing case law containing relevant interpretations of the extraterritorial content and scope of obligations based on jurisdiction will be used to illustrate and support the analysis. The analysis in this section does not aim to be exhaustive, because no set of factors or typology of extraterritorial situations would allow for a full display of the ways that the content and scope of the relevant human rights obligations may differ in extraterritorial contexts. Nevertheless, this hypothetical exercise will present a basic idea of what states are required to do to prevent gross human rights violations when they exercise extraterritorial jurisdiction. That way, insight is gained into what is expected of states when they exercise

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<sup>186</sup> *Rigopoulos v. Spain* (n 173): “[T]he Court considers that it was [...] materially impossible to bring the applicant physically before the investigating judge any sooner”; *Al-Skeini v. the United Kingdom* (n 4) para 161: “[T]he fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.”

<sup>187</sup> Unlike Chapter 2, this chapter does not deal with obligations to prevent torture, arbitrary death and genocide in separate sections. They are dealt with together based on the timeline. The crosscutting obligations are assumed to be representative of the types of obligations that exist in the context of other gross human rights violations. See: Chapter 2.3 Conclusion.

<sup>188</sup> Note for example how the ECtHR often sets out the “general principles” in extraterritorial jurisdiction cases based on case law that is mostly rooted in territorial contexts, before applying it to the specific circumstances: *Al-Skeini v. the United Kingdom* (n 4) para 162 onwards; *Pisari v. Moldova and Russia* (n 39) 46 onwards.

<sup>189</sup> See Section 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: The threshold of jurisdiction is met as soon as state officials exercise effective control over a territory or authority and control over individuals abroad; See Section 3.1.1 Instruments: The specific obligations will be analyzed in connection with the relevant treaties/ provisions and the intricacies of their extraterritorial applicability.

extraterritorial jurisdiction in terms of preparation, preventing violations, reacting to ongoing violations and preventing recurrence.<sup>190</sup>

### A. Long-Term Prevention

The phase of long-term prevention starts as soon as a state is bound by the relevant obligations under a treaty or customary international law and does not require knowledge of a concrete risk of a particular violation.<sup>191</sup> Long-term obligations seek to have a general deterrent effect and continue to be relevant in other phases. The main crosscutting long-term obligation identified in Chapter 2 is the obligation to introduce a proper legislative and administrative framework that is in line with requirements under human rights law and capable of deterring violations. States also have obligations related to the diligent implementation of this legislative and administrative framework and obligations to put in place special guarantees to protect vulnerable groups.<sup>192</sup> The obligation to introduce and implement a legislative and administrative framework immediately touches upon an important legal factor inherent to extraterritorial contexts. When a state exercises extraterritorial jurisdiction, it is not automatically competent to prescribe rules in respect of the people or territory it controls. Although there are exceptions, like prescribing rules for nationals or in situations of occupation, a state's prescriptive jurisdiction is traditionally limited to its own territory.<sup>193</sup> There are two perspectives from which to review the content and scope of the obligation to introduce a proper legislative and administrative system when a state exercises extraterritorial jurisdiction, starting from either: (i) The domestic legal framework of the state that exercises extraterritorial jurisdiction (hereinafter: foreign state); or (ii) The domestic legal framework applicable in the territory where the state exercises extraterritorial jurisdiction (hereinafter: host state).

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<sup>190</sup> Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 108) 859; Lawson, Rick and den Heijer, Maarten, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in Langford, Malcolm, Vandenhole, Wouter and Scheinin, Martin (eds), *Global Justice, State Duties - The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP, 2012) 153, 191: That way human rights law can function as a code of conduct for extraterritorial undertakings.

<sup>191</sup> See Chapter 1.3.2 Temporal Phases.

<sup>192</sup> See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory A. Long-Term Prevention and Chapter 2.3 Conclusion.

<sup>193</sup> See Section 3.1.1 Instruments A. ECHR, ACHR and ACHPR: There is a distinction between jurisdiction under public international law, which is usually broken down into prescriptive, enforcement and adjudicative jurisdiction, and jurisdiction under human rights treaties, which is a threshold for human rights treaties to apply abroad; Kamminga, 'Extraterritoriality' (n 24) para 3: "The traditional view is that the exercise of extraterritorial jurisdiction is permissible in exceptional circumstances only. States enjoy full sovereign powers within their territories and any exercise of jurisdiction on another State's territory obviously risks infringing that State's sovereignty."

## A.1 Foreign State's Legal and Administrative Framework

The domestic legal framework of the foreign state has to include safeguards to prevent gross human rights violations, both within its territory and abroad when it exercises extraterritorial jurisdiction. For the latter, the state in effect has to extend the applicability of certain domestic laws to the territory over which it has effective control or people over whom it has authority and control, while respecting the limits to its prescriptive jurisdiction posed by international law.<sup>194</sup> Legal, practical and power-related factors in extraterritorial settings do not affect the content and scope of the obligations in relation to the foreign state's legal framework. Safeguards to prevent gross human rights violations in the exercise of extraterritorial jurisdiction can be introduced into the foreign state's legal framework by the legislative organs of the foreign state. States must first of all ensure that state officials can be punished by law for human rights violations they commit abroad, which is inherent to the state's obligation not to commit violations.<sup>195</sup> For armed forces, status of force agreements usually specify that the members of the armed forces are subject to the prescriptive, enforcement and adjudicative jurisdiction of the sending state.<sup>196</sup> For other state officials, states can exercise prescriptive and adjudicative jurisdiction over them based on their nationality.<sup>197</sup>

The foreign state also has to introduce other safeguards into its legislative system to regulate the activities of its officials abroad and deter violations. For example, states have to ensure that there are procedural guarantees to prevent torture and arbitrary deaths when it detains individuals abroad.<sup>198</sup> The Special Rapporteur on Torture has

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<sup>194</sup> *SS 'Lotus' France v. Turkey* (7 September 1927) PCIJ Series A no 10, para 19; Oxman 'Jurisdiction of States' (n 24) para 7-8 and 46 onwards; Kamminga, 'Extraterritoriality' (n 24) para 7, 9-10: "Exercise of extraterritorial prescriptive and adjudicative jurisdictions are permitted only if there is sufficient connection between the State exercising it and the extraterritorial event."

<sup>195</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 14-19, 28; *Al-Skeini v. the United Kingdom* (n 4) para 163-169; *Genocide* case (n 7) para 166 and 382; Concluding Observations HRCee on the United States of America 2014 (n 64) para 5: "The State party should ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies."

<sup>196</sup> Oxman, 'Jurisdiction of States' (n 24) para 18 and 33; Kamminga, 'Extraterritoriality' (n 24) para 20.

<sup>197</sup> Oxman, 'Jurisdiction of States' (n 24) para 18-20.

<sup>198</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 33 and 37: "The obligation to take preventive measures under articles 2 (1) and 16 (1) [of the CAT] clearly encompasses action taken by States in their own jurisdictions to prevent torture or other ill-treatment extraterritorially." Relevant safeguards "include, but are not limited to, the right to legal assistance, access to independent medical assistance, notification of detention and communication with the outside world and the right of individuals deprived of their liberty in any situation to challenge the arbitrariness or lawfulness of their detention and receive remedies without delay. Such obligations apply whenever States detain persons extraterritorially [...]; For an overview of the rights of detainees, which are seen as being of particular importance for the prevention of torture and arbitrary death, see: ICCPR (n 5) art 9-11; ECHR (n 6) art

stated that the obligation to systematically review interrogation rules for custody and treatment of people in detention and the obligation to monitor facilities under the CAT should be applied extraterritorially whenever the factual situation involves “arrest, detention, imprisonment or interrogation of persons abroad.”<sup>199</sup> The content and scope of most of the basic guarantees for situations of detention, such as “maintaining an official register of detainees, the right of detainees to be informed of their rights [...] and to contact relatives”, are not usually altered in extraterritorial situations.<sup>200</sup> Yet, the implementation of procedural guarantees with a built-in standard of reasonableness, such as “the right promptly to receive independent legal assistance [...] and the availability [...] of judicial and other remedies that will allow [detainees] to have their complaints promptly and impartially examined” may sometimes be influenced by practical or power-related factors.<sup>201</sup> For example in the *Rigopoulos v. Spain* and *Medvedyev v. France* cases, both concerning the arrest of drug smugglers on the high seas, the ECtHR determined that the amount of time still considered prompt judicial intervention could be stretched up to thirteen days if it was “materially impossible to bring the applicant physically before the investigating judge any sooner” and handing them over to authorities elsewhere was “unrealistic.”<sup>202</sup>

States are also required to introduce a framework regulating the use of force and firearms when state officials exercise extraterritorial jurisdiction, especially because

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5 and 6; ACHR (n 7) art 7 and 8; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 6 and 7; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99 (Sect. 3), ECHR 2002-II, para 56; *Pacheco Teruel et al. v. Honduras* (Merits, Reparations and Costs) Judgment of April 27, 2012, I/A Court HR Series C No. 241, para 67: Enumerates “the main standards on prison conditions and the obligation of prevention that the State must guarantee to persons deprived of liberty” from the court’s case law; *Juan Humberto Sánchez v. Honduras* (Preliminary Objection, Merits, Reparations and Costs) Judgment of June 7, 2003, I/A Court HR Series C No. 99, para 84: Prompt judicial control of detention; *Morales Tornel v. Spain*, Comm. 1473/2006, No. CCPR/C/95/D/1473/2006 (HRC Mar. 20, 2009): Medical attention; *Juvenile Reeducation Institute v. Paraguay*, (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 2, 2004, I/A Court HR Series C No. 112, Commission’s Claims under A and D: Measures to deal with emergency situations.

<sup>199</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 34 and 36; The obligation to introduce protocols to deal with emergency situations also includes facilities abroad. See among others: “*Children’s Rehabilitation Institute v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 2, 2004, I/A Court HR Series C No. 112, para 178; *Pacheco Teruel et al. v. Honduras* (n 198) para 68.

<sup>200</sup> CAT, General Comment 2 (n 73) para 13; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 37: “[P]ractical difficulties’ encountered by States in securing the effective enjoyment of relevant rights in some extraterritorial scenarios can never displace their positive duties to guarantee and ensure these rights at all times.”

<sup>201</sup> CAT, General Comment 2 (n 73) para 13; See also: HRC, General Comment 20 (n 22) para 11.

<sup>202</sup> *Rigopoulos v. Spain* (n 173); *Medvedyev and Others v. France* (n 173) para 130; One may wonder whether physical presence of a judge is really necessary and whether technological advances may not make it possible to bring detainees under judicial supervision sooner. A simple skype call may do. Sometimes safeguards can be effectuated by making such arrangements with/ through the local authorities that similar basic guarantees can be offered extraterritorially.

situations of military intervention, occupation, arrest and detention all contain elements of force.<sup>203</sup> A framework regulating the use of force and firearms has to be established in the rules of engagement or elsewhere, so as to ensure that state officials are offered sufficient guidance in extraterritorial contexts to be able to determine when particular types of force are warranted.<sup>204</sup> For example, the British and Dutch troops in Iraq were issued a card with instructions that set out the rules of engagement, stipulating that firearms were to be used only as a last resort in self-defense or for the protection of human life.<sup>205</sup> The diligent implementation of the framework regulating the use of force by state agents also requires training law enforcement personnel to assess whether it is necessary to use firearms.<sup>206</sup> The HRCee has for example recommended Belgium that it should train its officials that act abroad “appropriately” in line with the safeguards established by the ICCPR.<sup>207</sup> States must provide specific training for state officials who undertake operations abroad, to account for cultural and practical challenges and psychological stress that

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<sup>203</sup> *Makaratzis v. Greece* [GC] no. 50385/99, ECHR 2004-XI, para 31 and 58-9; *Mahmut Kaya v. Turkey*, no 22535/93 (Sect. 1) ECHR 2000-III, para 85; *Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of January 31, 2006, I/A Court HR Series C No 140, para 62; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, AComHPR, Communication No. 279/03-296/05 (27 May 2009) para 147; Economic and Social Council Resolution 1989/65, ‘Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions’ (24 May 1989) UN Doc E/1989/89, at 1; *Juan Humberto Sánchez v. Honduras* (n 198) para 112; Human Rights Committee, ‘General Comment 6: The Right to Life (Article 6)’ (30 April 1982) UN Doc CCPR/C/GC/6, para 3; UN General Assembly Resolution 34/169 ‘Code of Conduct for Law Enforcement Officials’ (17 December 1979) UN Doc A/RES/34/169, art 3; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (27 August – 7 September 1990) adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, first provision; Secretary-General Kofi Annan, ‘Extrajudicial, Summary or Arbitrary Executions’ (5 September 2006) UN Doc A/61/311, para 33 onwards.

<sup>204</sup> Findlay, Trevor, *The Use of Force in UN Peace Operations* (SIPRI, 2002) 14: “[T]he ROE for peace operations aim to embody two important principles of peacekeeping – restraint and legitimacy.”

<sup>205</sup> *Al-Skeini v. the United Kingdom* (n 4) para 24: “The use of force by British troops during operations is covered by the appropriate rules of engagement. The rules of engagement governing the use of lethal force by British troops in Iraq during the relevant period were the subject of guidance contained in a card issued to every soldier, known as “Card Alpha”; *Jaloud v. the Netherlands* (n 39) para 55:

“Netherlands military personnel were issued with an *aide-mémoire* drawn up by the Netherlands Chief of Defence Staff (*Chef Defensiestaf*). This was a reference document containing a summary of the Rules of Engagement. They were also issued with Instructions on the Use of Force (*Geweldsinstructie*), likewise drawn up by the Chief of Defence Staff.”

<sup>206</sup> *Mahmut Kaya v. Turkey* (n 203) para 97; Martins, Mark S., ‘Rules of Engagement for Land Forces: A Matter of Training, not Lawyering’ (1994) 143 *Mil L Rev* 1; *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, para 202 onwards: The thought behind this obligation is that states must not place their officials in a situation in which they are likely to arbitrarily deprive someone of his or her life.

<sup>207</sup> Concluding Observations HRCee on Belgium (12 August 2004) UN Doc CCPR/CO/81/BEL para 6: “The State party should respect the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad, as for example in the case of peacekeeping missions or NATO military missions, and should train the members of such missions appropriately.”

may arise in extraterritorial settings.<sup>208</sup> A state can be held responsible for a failure to provide appropriate training even if its state official acts under the command of another state or International Organization (IO), because the obligation's "practical implementation is not contingent upon the State party's control or authority over a particular individual or area."<sup>209</sup> It is a necessary preparatory measure for the exercise of extraterritorial jurisdiction, but can be implemented within the state's own territory.

In analogy with territorial contexts, it is submitted that extraterritorial operations that could potentially result in the deprivation of life have to be carefully planned and controlled, so as to allow state officials to live up to human rights obligations in the course of the operation.<sup>210</sup> This should include introducing strategies detailing how to handle emergency situations abroad, for example when there is a risk of genocide.<sup>211</sup> So far, not much attention has been given to this particular planning aspect of extraterritorial operations in practice, case law or literature.<sup>212</sup> In the ECtHR *Pisari v. Moldova and Russia* case, which involved the killing of an individual at a checkpoint situated in a Transnistrian security zone, the Court noted "the lack of appropriate equipment at the checkpoint for immobilizing vehicles without recourse to lethal force."<sup>213</sup> This was used to back the Court's finding that Russia violated the right to life. It supports the argument that states are expected to plan and equip extraterritorial operations to allow them to function in a manner consistent with requirements under international human rights law.<sup>214</sup> States do not always have a determinative say in

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<sup>208</sup> CAT (n 7) art 10; IACPT (n 84) art 7; Martins, 'Rules of Engagement for Land Forces: A Matter of Training, not Lawyering' (n 206); Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 34: States that the obligations in Article 10 of the CAT to train state officials "do not contain a spatial reference, given that their practical implementation is not contingent upon the State party's control or authority over a particular individual or area."

<sup>209</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 34: This means that the obligation to provide training is not per se dependent on the actual exercise of extraterritorial jurisdiction, but it belongs to the necessary preparation for situations where a state does exercise extraterritorial jurisdiction.

<sup>210</sup> See Chapter 2.2 A.2 Arbitrary Death; *McCann and Others v. the United Kingdom* (n 206): In territorial contexts policing operations that could potentially result in the deprivation of life have to be diligently planned and controlled. Otherwise a state in effect sets the scene for gross human rights violations to occur.

<sup>211</sup> See Chapter 2.2 A.3 Genocide; *Mothers of Srebrenica against the State* case (n 171) para 4.264: One of the first measures relevant to such situations is to provide information to actors that could help prevent genocide.

<sup>212</sup> Katayanagi, Mari, *Human Rights Functions of United Nations Peacekeeping Operations* (Martinus Nijhoff Publishers, 2002) 259: After analysing the mandates and functioning of several UN peacekeeping operations states that: "There is a lack of attention to human rights issues at the phase of mission planning, and this needs to be addressed seriously."

<sup>213</sup> *Pisari v. Moldova and Russia* (n 39) para 13 and 57-8.

<sup>214</sup> Twelve Srebrenica Veterans Suing Dutch Government (30 June 2016) NL Times, available at: <<http://www.nltimes.nl/2016/06/30/twelve-srebrenica-veterans-suing-dutch-government/>>; A potentially relevant domestic case was brought before a Dutch Court by Dutchbat veterans in June 2016, who claim that they were sent on an impossible mission in Srebrenica. Although the applicable legal framework is different – laws applicable between the state as an employer and soldiers employed

regard to the terms of a mandate, for example in the context of multilateral peacekeeping operations. It can be argued that a state should not agree to take part in multilateral extraterritorial operations if the mandate, judged reasonably in light of the information available at the time, may obstruct its officials from living up to the state's human rights obligations.<sup>215</sup> Furthermore, if a change in circumstances during an extraterritorial operation causes the mandate to become an obstruction for the participating state's officials to live up to the state's human rights obligations, it can be argued that the participating state should endeavor to adjust the mandate to accommodate to the changed circumstances at the international level.<sup>216</sup>

On a final note, state parties to the CAT and IACPPT are also required to assume criminal jurisdiction to punish acts of torture on a range of other grounds than that the crime took place on its territory, including universal jurisdiction when an offender is present within its jurisdiction.<sup>217</sup> This means that states have to introduce laws that ground the competence to assume criminal jurisdiction over suspects of torture present in any territory under its jurisdiction, including extraterritorial jurisdiction, or

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in the army v. laws applicable between the state and people over whom it exercises extraterritorial jurisdiction – the outcome of the case may shed some light on the requirements attached to planning extraterritorial operations and the role of mandates in that regard. The Dutchbat troops were ill-prepared and operated under a restrictive mandate, which they allege resulted in their inability to live up to the state's human rights obligations. See for further reference: UN Security Council Resolution 819 (16 April 1993) UN Doc S/RES/819: Demanded that all concerned treat Srebrenica as a safe area; UN Security Council Resolution 836 (4 June 1993) UN Doc S/RES/836: Extended the mandate of UNPROFOR to enable it to deter attacks against the safe areas and monitor the ceasefire; Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (n 212) 230: Argues that deploying civilian human rights officers to conflict zones where there is no ceasefire in place, as in the case of UNPROFOR is "might not be considered appropriate for security reasons."

<sup>215</sup> See Section 3.3 B Short-Term Prevention: Argues in favor of an enabling instead of restricting role of mandates on a state's human rights obligations; Larsen, Kjetil M., *The Human Rights Treaty Obligations of Peacekeepers* (CUP, 2012) 392; Orford, Anne, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP, 2003) 199-201.

<sup>216</sup> *Ilaşcu v. Moldova and Russia* (n 4) para 337, 349 and 393: The ECtHR's reasoned that a state's positive obligations under the ECHR may require certain actions at the international level in relation to other involved states. This can be seen as support for the argument that a state that exercises extraterritorial jurisdiction must at least endeavor to change a mandate that obstructs it from living up to its human rights obligations at the international level; If a mandate is extended, it should be done in a manner that allows state officials to act in accordance with requirements under international human rights law. See for example: Akashi, Yasushi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate' (1995) 19 *Fordham Int'l LJ* 312, 314-5: Argues that SC Res 836, extending UNPROFOR's mandate to enable it to deter attacks, brought the Force in an uncomfortable position "between peacekeeping and peace-enforcement." The decision was moreover taken "without sufficient consideration of the existing mandates or capabilities of UNPROFOR." The SC therewith "entrusted UNPROFOR with a mandate that it knew, or ought to have known, was not only unrealistic, but impossible to implement."

<sup>217</sup> See Section 3.1.1 C CAT and IACPPT; CAT (n 7) art 5; IACPPT (n 84) art 6 and 12-14: Under the IACPPT, states are even required to cooperate to prevent lacunas in prosecution through extradition arrangements; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46.



extradite them to another state where they will be prosecuted.<sup>218</sup> This far-reaching set of obligations related to the prosecution and punishment of torture makes a difference especially for the prosecution and punishment of non-state actors over whom the state exercises extraterritorial jurisdiction. The rules imply that it has to be made legally possible to prosecute non-state actors within a state's extraterritorial jurisdiction who are suspected of torture based on the foreign state's legal framework, unless it ensures an alternative route of prosecution.<sup>219</sup> There are no equivalent treaty-provisions requiring states to prosecute non-state actors of alleged offences related to the right to life or prohibition of genocide which take place extraterritorially.<sup>220</sup>

## A.2 Host State's Legal and Administrative Framework

Whether a foreign state can alter the legal framework of the host state is a more contentious question. Can a foreign state adjust applicable laws or even introduce new laws to ensure that they are in line with requirements under international human rights law? There is only one situation in which this is considered permissible: if the state is an occupying power.<sup>221</sup> A state cannot introduce new laws abroad if it only carries out personal or spatial jurisdiction, but cannot also be defined as an occupying power.<sup>222</sup> Article 43 of the Hague Regulations requires an occupying state to "take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>223</sup> This provision has been recognized as customary international law and prohibits foreign

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<sup>218</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 44-8: "[T]he rule of *aut dedere aut judicare* is clearly mandatory."

<sup>219</sup> See Section 3.3 D Preventing Recurrence.

<sup>220</sup> Genocide Convention (n 100) art 6: Article 6 of the Genocide Convention, which contains the obligation to prosecute and punish acts of genocide, has an express territorial limitation; *Genocide case* (n 7) para 184 and 442: The ICJ has explained that Article 6 does not obligate states to prosecute and punish alleged perpetrators of genocide on any other ground than that the acts took place on its territory.

<sup>221</sup> See Section 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: Exercising spatial jurisdiction and being an occupying power do not always necessarily go hand in hand; *Jaloud v. the Netherlands* (n 39) para 142: To establish jurisdiction "the status of "occupying power" within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative"; Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (n 23) 502, 512 onwards and 525: "[T]he norms triggering the applicability of the law of occupation and the main treaties on civil and political rights are governed by contested notions of territorial control."

<sup>222</sup> Hague Regulations (n 111) art 43; Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (n 23) 510-12: The trigger for the law of occupation is still contentious, but requires some level of authority over the territory. Wilde discusses four issues in establishing spatial jurisdiction, such as whether it requires states to exercise civil authority or overall control, and states that "[t]his in part determines the degree of overlap in the circumstances where human rights law and the law of occupation apply"; See Chapter 1.3.1 Delineation.

<sup>223</sup> Hague Regulations (n 111) art 43; Dennis, Michael J., 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99(1) *The AJIL* 119; Lawson and den Heijer, 'Extraterritorial Human Rights and the Concept of Jurisdiction' (n 190) 168.

states from changing host states' legislation "unless absolutely prevented."<sup>224</sup> However, exceptions to the general prohibition to legislate have been carved out in state practice and law, illustrated by Article 64 of the Fourth Geneva Convention, which provides a *lex specialis* and less restrictive formulation of when occupying powers are "absolutely prevented" from respecting existing laws.<sup>225</sup> Consequently, it has been argued that occupying powers are required to "abolish legislation and institutions which contravene international human rights standards" and may adjust or introduce new laws to ensure human rights.<sup>226</sup>

Occupying powers that exercise spatial or personal forms of extraterritorial jurisdiction have a responsibility to ensure public order and safety in the occupied territory, as informed by its human rights obligations.<sup>227</sup> Sometimes, this means states will have to suspend or adjust laws applicable in the host state or introduce new laws entirely.<sup>228</sup> If an occupying power does change or introduce laws, it must be in the

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<sup>224</sup> *Construction of a Wall Advisory Opinion* (n 9) para 89 and 124; Sassòli, Marco, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) EJIL 661, 662; Wilde, 'Compliance with Human Rights Norms Extraterritorially: 'Human Rights Imperialism'?' (n 166): There is a risk of imposing culturally inappropriate and democratically illegitimate standards on populations abroad through human rights law.

<sup>225</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 64; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 669-70.

<sup>226</sup> Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 676-7; The Coalition Provisional Authority (CPA) established after the invasion of Iraq even established a Ministry of Human Rights: Coalition Provisional Authority Order Number 60, Establishment of the Ministry of Human Rights (22 February 2004) available at: <[http://www.iraqcoalition.org/regulations/20040220\\_CPAORD60.pdf](http://www.iraqcoalition.org/regulations/20040220_CPAORD60.pdf)> last accessed on 5 January 2016, Section 2(1): "The MOHR shall work to establish [...] conditions conducive to the protection of human rights [...] and the prevention of human rights violations in Iraq."

<sup>227</sup> Hague Regulations (n 111) art 43; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 663: "The two issues – maintenance of public order and safety, and legislative action by an occupying power – are closely interrelated. Human rights and the rule of law [...] demand that the maintenance of public order be based on law"; Benvenisti, Eyal, 'Belligerent Occupation' (May 2009) MPEPIL, available at: <<http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359?rskey=QwSS5O&result=7&prd=EPIL>>.

<sup>228</sup> Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 676-7; Schwenk, Edmund H., 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54(2) Yale Law J 393, 406-7: An example is the abolishment of all Nazi laws by the Allies after the second World War which "express racial, religious, or political discrimination"; *Xenides - Arestis v. Turkey*, no. 46347/99, 22 December 2005, holding 5: "[T]he respondent State must introduce a remedy, which secures the effective protection of the rights laid down in Articles 8 of the Convention and 1 of Protocol No. 1 in relation to the present applicant as well as in respect of all similar applications pending before the Court"; Office of the United Nations High Commissioner for Human Rights, Report on the Question of Human Rights in Cyprus – Note by the Secretary General (7 January 2011) UN Doc A/HRC/16/21, para 20-1: In response to the *Xenides - Arestis v. Turkey* case, the Turkish authority in Northern Cyprus set up an Immovable Property Commission (IPC) under Law No. 67/2005 for the compensation, exchange and restitution of immovable properties; If the host state's

interest of the people and the laws must as far as possible be in line with “local standards and the local cultural, legal and economic traditions.”<sup>229</sup> For example, the caretaker administration established by the US, UK and other states after the invasion in Iraq decided to abolish capital punishment and prohibit torture, “[r]ecognizing that the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards.”<sup>230</sup> Occupying powers will have to ensure that there is a legal basis and institutional infrastructure to prosecute and punish offences related to the three prohibitions by both state officials and non-state actors. This obligation is inherent both to the relevant rights and prohibitions under human rights law and the obligation to maintain or restore public order and safety under the law of occupation.<sup>231</sup> Public order and safety cannot be maintained if there is no system in place that is capable of tracking and punishing gross human rights violations. Under the law of occupation, states may even be required to set up tribunals “to replace the regular courts if the local administration of justice is completely disorganized” or re-organize the existing court-system.<sup>232</sup>

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legislation allows confessions extracted through methods of torture to be admitted in a court of law, this law cannot be left intact: CAT (n 7) art 15; IACPPT (n 84) art 10; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 27: This obligation is also inherent to the prohibition of torture in other instruments and is customary international law.

<sup>229</sup> Hague Regulations (n 111) art 43; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 673 and 677; *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Rep 16, p. 56, para 125: The ICJ has noted that, although official acts including acts of legislation by an occupying power may be illegal and invalid “this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.”

<sup>230</sup> *Al-Skeini v. the United Kingdom* (n 4) para 12 and 145: “Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of 16 April 2003 shall continue to apply in Iraq”; Coalition Provisional Authority Order Number 7, Penal Code (10 June 2003) available at:

<[http://www.iraqcoalition.org/regulations/20030610\\_CPAORD\\_7\\_Penal\\_Code.pdf](http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf)> last accessed on 5 January 2016, Section 3 Penalties: Abolishes capital punishment and torture. See also: Section 4 Nondiscrimination in the exercise of public functions; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 224) 680-2: The authority to legislate in this case was arguably based on a SC authorization.

<sup>231</sup> Hague Regulations (n 111) art 43; Fourth Geneva Convention (n 225) art 64: Mentions “the necessity for ensuring the effective administration of justice” as a relevant consideration; See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory A. Long-Term Prevention; Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 406: “It is an established general principle that the local civil and criminal law should be respected by the occupant. However, necessity created [...] by the occupied country's interest in the restoration of public order and civil life [...] may justify a great number of changes; If a basis does not exist under the host state's legal framework, the foreign state can choose to make use of permissive bases of criminal jurisdiction and prosecute offenders under its own legal framework – see previous section – or alter the host-state's legal framework.

<sup>232</sup> Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 405; See for example: Coalition Provisional Authority Order Number 35, Re-establishment of the

Other legislative and administrative changes related to the maintenance of public order and safety may also be called for. For example, states may be required to regulate dangerous activities and possibly life-harming practices, such as disappearances, medical malpractice or epidemic outbreaks.<sup>233</sup> States also have to introduce safeguards to protect vulnerable groups. For example, in the reporting procedures with Israel, the CAT Committee expressed its concern in relation to the treatment of Palestinian juvenile detainees by Israel. In Israel, juveniles are treated as minors when under the age of 18, whereas in Palestine they are treated as minors only under the age of 16 and are prosecuted by military courts. The CAT Committee advised Israel to amend the relevant military order to “ensure that the definition of minor is set at the age of 18, in line with international standards.”<sup>234</sup> Furthermore, the CAT Committee expressed its concern at reports about interrogation of juveniles in the absence of a lawyer or family member and their detainment in Israel, far away from their families. It advised Israel to establish a youth court as a matter of priority and to ensure basic safeguards like access to lawyer and visits from family members.<sup>235</sup> The example of the CAT reporting procedure illustrates that occupying powers that exercise extraterritorial jurisdiction are expected to introduce safeguards to protect vulnerable groups in line with requirements under human rights treaties to which they are a party.<sup>236</sup>

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Council of Judges (18 September 2003) available at:

<[http://www.iraqcoalition.org/regulations/20030921\\_CPAORD35.pdf](http://www.iraqcoalition.org/regulations/20030921_CPAORD35.pdf)> last accessed on 5 January 2016; Coalition Provisional Authority Order Number 48, Delegation of Authority Regarding an Iraqi Special Tribunal (10 December 2003) available at:

<[http://www.iraqcoalition.org/regulations/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf)> last accessed on 5 January 2016: Sets up a special tribunal “to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws.”

<sup>233</sup> HRC, General Comment 6 (n 203) para 5; *Öneriyıldız v. Turkey* [GC], no. 48939/99, ECHR 2004 – XII, para 89-90.

<sup>234</sup> Hague Regulations (n 111) art 43; Concluding Observations CAT Committee on Israel 2002 (n 77); Concluding Observations CAT Committee on Israel 2009 (n 77) para 27.

<sup>235</sup> Concluding Observations CAT Committee on Israel 2009 (n 77) para 27-8.

<sup>236</sup> Beyond the general human rights treaties and their interpretations, there are several instruments that can inform the proper interpretation of the obligation to introduce special guarantees to protect vulnerable groups in extraterritorial context. An example is the Convention for the Protection of All Persons from Enforced Disappearances, which lays a strong emphasis on the need for prevention and international cooperation: International Convention for the Protection of All Persons From Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) preamble and art 6(3), 12(4), 22, 23 and 25; Another example is the Geneva Convention relative to the Treatment of Prisoners of War, which contains rules regarding the food ration, hygiene and medical attention for prisoners of war: Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) art 26, 29 and 30.

## B. Short-Term Prevention

The phase of short-term prevention starts when a violation becomes foreseeable.<sup>237</sup> The measures are targeted at preventing a specific violation and can involve physical protection and operational measures.<sup>238</sup> The main crosscutting short-term obligation identified in Chapter 2 is the obligation to take (operational or protective) measures to prevent, meaning that states should take positive action capable of averting a specific violation.<sup>239</sup> The obligation first and foremost applies in regard to a state's own officials, which is given further content and meaning by the long-term legislative and administrative framework. States are also required to take (protective) measures to prevent offences related to the three prohibitions by non-state actors. Finally, states have obligations related to *non-refoulement*, which means they cannot send individuals to a third state where they would run the risk of torture or arbitrary death. States are in principle prohibited from exercising enforcement jurisdiction – meaning the authority to ensure compliance with its laws – outside their territory.<sup>240</sup> Extraterritorial enforcement activities involving acts of force are only lawful when the foreign state has the consent of the host state, in self-defense or when mandated by the UN Security Council (SC).<sup>241</sup> Regardless of the lawfulness of a state's extraterritorial enforcement actions, human rights treaties apply to these actions as soon as the threshold of jurisdiction is reached.<sup>242</sup> Otherwise, it would be too easy for states to evade their human rights obligations. Quite a different question is however whether human rights law can impose obligations that would require states to engage into internationally unlawful acts.

A legal factor that may have to be taken into account in that respect, is the mandate based on which an extraterritorial operation is undertaken.<sup>243</sup> The discourse in theory and practice seems to be leaning towards an understanding of the role of mandates as enabling instead of restricting state officials to live up to the state's human rights

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<sup>237</sup> See Chapter 1.3.2 Temporal Phases; The term “violation” is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.

<sup>238</sup> See for a more detailed description Section 1.3.3 Method: Timeline.

<sup>239</sup> See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory B. Short-Term Prevention.

<sup>240</sup> Kamminga, 'Extraterritoriality' (n 24) para 1 and 22-3.

<sup>241</sup> Kamminga, 'Extraterritoriality' (n 24) para 22-3; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 42 and 51.

<sup>242</sup> See Section 3.1.1 A ECHR, ACHR and ACHPR: Acting abroad lawfully does not automatically mean that a state exercises the level of control required for jurisdiction under human rights treaties. Nor does acting abroad unlawfully mean that human rights treaties do not apply. The fact that human rights law may apply to unlawful extraterritorial conduct implies that human rights obligations may require a state to take further unlawful actions in the context of the unlawful conduct it was already undertaking for the purposes of ensuring human rights.

<sup>243</sup> See Section 3.1.1 A: The role a mandate can play in establishing jurisdiction was considered.

obligations.<sup>244</sup> This means that a mandate should be formulated or interpreted as far as possible in a way that allows state officials to live up to extraterritorial human rights obligations. A mandate that is too restrictive in this regard points in the direction of a failure of the long-term obligation to carefully plan the operation.<sup>245</sup> In Section 3.3 A it was argued that states should plan extraterritorial operations to allow them to function in a manner consistent with requirements under international human rights law.<sup>246</sup> If circumstances during a mission change, it can be argued that states should endeavor to adjust the mandate accordingly. However, when gross human rights violations are imminent, it may be too late to change the terms of a mandate. Because of a restrictive mandate, state officials acting extraterritorially may experience difficulty in living up to the state's short-term human rights obligations while acting within their mandate, for example because they are not allowed to use force to protect civilians.<sup>247</sup>

The question whether and how an existing mandate affects the content and scope of a state's human rights obligations in the more acute phases of prevention has so far remained obscure.<sup>248</sup> A mandate demarcates the conduct that state officials are allowed to undertake in the course of an extraterritorial operation. On the one hand, to assert that human rights obligations can require states to engage in internationally unlawful conduct by acting outside the terms of a mandate would be progressive.<sup>249</sup>

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<sup>244</sup> Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (n 215) 392; A practical form of support for the enabling instead of restricting role of mandates speaks from the UN Rights up Front Initiative to prioritize human rights in all operational decisions: Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka (November 2012) available at: <[http://www.un.org/News/dh/infocus/Sri\\_Lanka/The\\_Internal\\_Review\\_Panel\\_report\\_on\\_Sri\\_Lanka.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf)>; Rights up Front Summary (May 2014) available at: <<http://www.un.org/News/dh/pdf/english/2016/Human-Rights-up-Front.pdf>>: The Rights Up Front initiative was taken by the SG in reaction to a 2012 Internal Review Panel's findings on UN action in Sri Lanka, where it failed to respond to humanitarian needs during a surge of violence in the civil war in 2008-9, mostly because of mandate restrictions and a lack of inter-department and -agency coordination.

<sup>245</sup> See Chapter 2.2 A. 2 Arbitrary Death and Section 3.3 Extraterritorial Obligations to Prevent Torture, Arbitrary Death and Genocide Based on Jurisdiction A. Long-Term Prevention; *McCann and Others v. the United Kingdom* (n 206).

<sup>246</sup> See Section 3.3 A Foreign State's Legal and Administrative Framework.

<sup>247</sup> Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (n 212) 235; *Mothers of Srebrenica against the State* case (n 171).

<sup>248</sup> Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (n 215) 392: Outlines three different arguments to describe the relationship between a peacekeeping mandate and human rights obligations: i) The mandate provides a separate obligation to "protect civilians under relevant imminent threats", but if a more extensive obligation to protect follows from another basis like human rights law, the mandate does not impact the interpretation of those obligations; or ii) Mandates "represent an exhaustive description of the obligation to protect civilians, tot the exclusion of more extensive obligations"; or iii) Mandates "have nothing to do with [human rights] obligations [...] they simply provide an authorization to use the necessary force to protect individuals under threat." She prefers the third interpretation, but remark that "the issue has not been authoritatively decided."

<sup>249</sup> See Section 3.2.2 Factors Towards Realistic Application; King, 'The Extraterritorial Human Rights Obligations of States' (n 62) 551: Argues that "the limited extent of lawful authority necessarily impacts on the extent of obligations and duties owed"; See: VCLT (n 176) art 31 and 53: General rules

States are generally expected to stay within the limits of international law when carrying out their human rights obligations.<sup>250</sup> On the other hand, allowing mandate restrictions to affect the content and scope of human rights obligations would make it easier for states to escape their human rights obligations. There may therefore be exceptions to the rule that human rights obligations cannot require a state to undertake unlawful extraterritorial conduct. For example, when a state is already acting extraterritorially without the required mandate under public international law, its human rights obligations may require further unlawful action for the purpose of ensuring human rights in the course of its actions.<sup>251</sup> Courts have so far tended to avoid directly confronting the terms of a mandate and a state's extraterritorial human rights obligations, but have taken practical and power-related factors stemming from a mandate into account when determining the content and scope of obligations.<sup>252</sup> For example, there may be insufficient resources available or there may be restrictions to the use of force that make it more difficult to deal with threats posed in a particular situation.<sup>253</sup> Courts have thereby implicitly acknowledged that a mandate can at least indirectly affect a state's capacity to ensure human rights through its practical effects. Because the influence of a mandate as a legal factor in this temporal phase remains unclear, this section will only take into account practical and power-related factors to determine the content and scope of obligations to prevent gross human rights violations in this temporal phase.

States have a direct obligation to prevent violations by state officials acting abroad, no matter what practical and power-related factors they encounter. It is much easier for states to control the actions of their state officials than of non-state actors. In the long-

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of interpretation in good faith and the primacy of *jus cogens*. Both human rights treaties and a mandate underlying international operations are international agreements. In case of a conflict at the level of implementation, there is no agreed hierarchy determining which should prevail apart from the concept of *jus cogens*; Matz-Lück, Nele, 'Conflicts Between Treaties' (December 2010) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1485?rskey=5OhssH&result=5&prd=EPIL>> para 3: "International law knows neither a general hierarchy between its different sources nor, in principle, between different international treaties"; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, para 92-7: As this case shows, even *jus cogens* norms do not always automatically prevail.

<sup>250</sup> *Genocide case* (n 7) para 430: Mentions in the context of the obligation to prevent genocide that "every State may only act within the limits permitted by international law."

<sup>251</sup> See Section 3.1.1 A ECHR, ACHR and ACHPR: Human rights treaties can apply when a state acts abroad unlawfully.

<sup>252</sup> *Mothers of Srebrenica against the State case* (n 171) Avoids directly addressing the mandate. Discussed below; *Pisari v. Moldova and Russia* (n 39); *Al-Skeini v. The United Kingdom* (n 4).

<sup>253</sup> *Mothers of Srebrenica against the State case* (n 171); Twelve Srebrenica Veterans Suing Dutch Government (n 214): A case has been brought against the Netherlands by Dutchbat veterans, claiming that they were sent on an impossible mission; Akashi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate' (n 216) 316: Describes how there was on the one hand a strong commitment to protecting the civilians in the safe areas, but on the other hand "none of the [SC] members [...] were willing or able to provide the resources necessary to carry out the mandate." There was moreover unclarity with regard to the "extent of the use of force UNPROFOR was entitled to employ"; Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (n 212) 235.

term, state officials have been trained and instructed on how to deal with different emergency situations abroad.<sup>254</sup> In the short-term, state officials should bring the training into practice when faced with an immediate risk and refrain from human rights violations. If state officials fail in this regard, they are subject to their own state's legislative framework for prosecution and punishment, which further enhances the control over state official's actions.<sup>255</sup> For example, in the context of the prevention of torture, superior state officials are obligated to prevent violations by subordinates.<sup>256</sup> In the context of preventing arbitrary deaths, state officials must respect the principles of subsidiarity and proportionality when they use potentially lethal force.<sup>257</sup> In the IACoMHR *Brothers to the rescue v. Cuba* case, Cuba was held responsible for bringing down a civil aircraft with air-to-air missiles and "did nothing to employ methods other than the use of lethal force to conduct the civil aircraft out of the restricted or danger zone."<sup>258</sup> Another example of the importance of the principles of subsidiarity and proportionality in the extraterritorial use of force is the ECtHR *Pisari v. Moldova and Russia* case discussed in Section 3.3 A.<sup>259</sup> The case concerned the killing of an individual passing through a checkpoint by shots fired by Russian state officials and Russia was held responsible, among other things, for its "automatic recourse to lethal force."<sup>260</sup> The only practical factor that can limit the scope of the direct short-term obligation to prevent arbitrary death is the existence of an armed conflict.<sup>261</sup> Under the ECHR, "deaths resulting from the lawful acts of war" is

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<sup>254</sup> See Section 3.3 A. Long-Term Prevention.

<sup>255</sup> Oxman, 'Jurisdiction of States' (n 24) para 18 and 33; Kamminga, 'Extraterritoriality' (n 24) para 20.

<sup>256</sup> *Ireland v. the United-Kingdom*, no. 5310/71, 18 January 1978, Series A no. 25, para 239:

"[A]uthorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected"; Concluding Observations HRCee on the United States of America 2014 (n 64) para 5: In the context of its recommendation that the United States should investigate, prosecute and punish alleged human rights violations by state officials in the course of international operations, the HRCee also recommends "the full incorporation of the doctrine of "command responsibility" in its criminal law." The doctrine of command responsibility implies the duty to supervise subordinates.

<sup>257</sup> *Solomou and Others v. Turkey*, no. 36832/97, 24 June 2008: TRNC officials shot dead unarmed protester Solomos Solomou, who entered the buffer zone and started climbing a flagpole bearing a Turkish flag. The court concluded that the use of force could not be justified under art 2 for reasons of self-defence and was not absolutely necessary for the aim of quelling the riot.

<sup>258</sup> *Brothers to the Rescue v. Cuba* (n 49) para 40-2 and 45.

<sup>259</sup> *Pisari v. Moldova and Russia* (n 39) para 13.

<sup>260</sup> *Pisari v. Moldova and Russia* (n 39) para 58.

<sup>261</sup> See Chapter 1.3.1 Delineation: The effects of the co-applicability of humanitarian law is a matter outside the scope of this research. It is mentioned here only as a permissible derogation from human rights obligations; Under humanitarian law it is considered permissible to kill members of the armed forces of parties to the conflict (also known as combatants): Fourth Geneva Convention (n 225) common art 2 and 3; Doswald-Beck, Louise and Henckaerts, Jean-Marie, *Customary International Humanitarian Law - Volume I Rules* (CUP, 2005) Rule 1: The Principle of Distinction Between Civilians and Combatants: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians"; Sassòli, Marco and Olson, Laura M., 'The Relationship Between International Humanitarian



mentioned as the only permissible derogation from the right to life in times of emergency.<sup>262</sup>

States that exercise extraterritorial jurisdiction may also be required to take measures to prevent offences related to the three prohibitions by non-state actors (including third state officials), if they are aware, or should have been aware of a real and immediate risk thereof.<sup>263</sup> The obligation to prevent offences by non-state actors is formulated in an open-ended manner so as to be able to apply in a multitude of situations. When applied within state territory this obligation is limited in scope by standards of reasonableness. When applied in extraterritorial settings, these standards of reasonableness are further informed by practical or power-related factors.<sup>264</sup> What measures a state is required to take depends on the concrete threat and on what can be reasonably expected of the state in light of practical and power-related factors in the

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and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts' (2008) 90(871) IRRIC 599, 605 onwards.

<sup>262</sup> ECHR (n 6) art 15(2): "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war."

<sup>263</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 35 and 51: "A state may also be responsible for "indirectly attributable extraterritorial wrongfulness" owing to a failure to fulfil its positive human rights obligations"; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 121: Even Milanović, who proposes a stark distinction between the applicability of positive and negative obligations states: "However, killings by third parties can engage the state's positive obligation to do all it reasonably can to prevent such killings, and the obligation to investigate them"; The existence of a short-term obligation to prevent violations of the three prohibitions within state territory as outlined in the case law of the different courts and supervisory bodies: *Velásquez Rodríguez v. Honduras* (n 154) para 173-5; *Opuz v. Turkey*, Appl no. 33401/02 (Sect. 3), ECHR 2009 (9 June 2009) para 159 and 176: The obligation to prevent acts of torture by non-state actors is based on knowledge or acquiescence on the side of the state of the threat that such offences will occur; *Osman v. the United Kingdom* (n 153) para 116: States have a clear indirect obligation to prevent if state authorities knew (or ought to have known) of the existence of a real and immediate risk to someone's life at the hands of a non-state actor; *Pueblo Bello Massacre v. Colombia* (n 203) para 123: "States' obligation to adopt measures of prevention and of protection of individuals in their relations with each other are conditioned by their awareness of a situation of real and immediate danger to a specific individual or group of individuals and to the reasonable possibility of preventing or avoiding that risk"; *Genocide* case (n 7) para 430-1: The obligation to prevent genocide is triggered when a state knows or should have known of the "serious risk" that genocide may be committed.

<sup>264</sup> See Section 3.2.1 The Role of Capacity: States that exercise spatial jurisdiction generally have a greater capacity to take measures to prevent offences by non-state actors than states that exercise personal jurisdiction. States that exercise personal jurisdiction often have less control over the surroundings of the targeted individual and generally have a more limited institutional infrastructure available extraterritorially. Furthermore, a state that exercises extraterritorial jurisdiction may face difficult practical circumstances, such as having to deal with rebel movements, terrorist attacks, armed conflict and other factors making it extremely difficult to protect the local population from offences by non-state actors; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 34, para 179: The ICJ interpreted Article 43 of the Hague Regulations as containing an obligation to protect inhabitants of occupied territories against violations of their human rights by third parties.

particular context.<sup>265</sup> Those measures can range from forms of negotiation to forcefully intervening in violence between non-state actors and physically protecting endangered individuals. An example related to the right to life can be found in the 2008 ECtHR case of *Isaak v. Turkey*.<sup>266</sup> In 1996, Mr. Isaak took part in an unarmed demonstration against the Turkish occupation of Northern-Cyprus in the buffer zone between Northern and Southern Cyprus. Soldiers and policemen of the Turkish Republic of Northern Cyprus (TRNC) were present in the buffer zone and had allowed a counter-rally by Turkish-Cypriots armed with sticks and iron bars to assemble there. The UN buffer zone is an area beyond Turkish territory, even beyond Turkish occupied territory.<sup>267</sup> Mr. Isaak was isolated, surrounded by around fifteen to twenty people and kicked and beaten to death, while eight TRNC police officers stood nearby. Because Mr. Isaak was unarmed and attacked by a group of more than ten people, the ECtHR concluded that the force used against him was not “absolutely necessary”, neither in self-defense nor for the purpose of quelling the violence.<sup>268</sup> Because TRNC officials were present at the scene of the crime and several of them allegedly even participated in the beating, the ECtHR concluded that Turkey “manifestly failed to take preventive measures to protect the victim’s life.”<sup>269</sup> The officials could reasonably have been expected to intervene, because they belonged to an enforcement branch, were armed and standing close by, which means there were no practical or power-related factors obstructing intervention.

Several cases decided by Dutch domestic courts contain interesting examples of assessments of what can be reasonably required of states to prevent gross human rights violations by non-state actors or third state officials in extraterritorial settings.

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<sup>265</sup> *Opuz v. Turkey* (n 263) para 159 and 176: The state has a large amount of discretion in terms of the type of measures it takes to respond to threats of torture or ill-treatment, but these measures must eventually amount to “effective deterrence” and in any case *not* to complete inaction; *Osman v. the United Kingdom* (n 153) para 116: In response to a threat to the right to life of an identified individual or individuals, states are required to “take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, AComHPR, Communication No. 245/02 (15 May 2006) para 156-7; *Genocide case* (n 7) para 430-1: In reaction to a threat of genocide, states must “employ all means reasonably available to them, so as to prevent genocide so far as possible”; De Pooter, Helene, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (2009) 17 Afr Yearb Int Law 287, 311: The short-term due-diligence obligation to employ all available means to prevent genocide poses a heavy burden, for a state is expected to deploy all available means, even if the state cannot by itself avert the commission of genocide.

<sup>266</sup> *Isaak v. Turkey*, no. 44587/98, 24 June 2008.

<sup>267</sup> *Isaak v. Turkey* (n 266) para 106: Interestingly, the ECtHR never considered whether Mr. Isaak was within Turkey’s jurisdiction, but seems to assume that this is the case and Turkey does not argue otherwise. If it had been explored, Turkish forces would probably have been found to have effective control over the Turkish side of the buffer zone.

<sup>268</sup> ECHR (n 6) art 2(2): Under the ECHR, there are several permissible exceptions to the right to life; *Isaak v. Turkey* (n 266) para 115-8.

<sup>269</sup> *Isaak v. Turkey* (n 266) para 119-20: “[T]he Court is of the opinion that Anastasios Isaak was killed by, and/or with the tacit agreement of, agents of the respondent State.”

Note that they are not determinative for the content of human rights obligations and not legally binding on other states, but interesting examples of the practice of courts nonetheless.<sup>270</sup> The cases find their roots in the Srebrenica genocide. The Dutch state delivered troops under the name Dutchbat to the UN Protection Force (UNPROFOR) peacekeeping operation in former Yugoslavia. In 1995 Dutchbat III, led by Lieutenant Colonel Karremans, was forced to retreat and hand over the Srebrenica enclave to Colonel General Ratko Mladic' Army of Republika Srpska (VRS). Arrangements were made between Dutchbat and the VRS for the evacuation of inhabitants and refugees in the enclaves, but contrary to the agreement the VRS proceeded to kill more than 8000 Muslim men after they has been handed over. The 2013 *Nuhanović* and *Mustafić* cases from the Dutch Supreme Court are based on claims brought by relatives of several of the men who had been expelled from a compound under Dutchbat's control and were subsequently killed.<sup>271</sup> Hasan Nuhanović, for example, brought a claim on behalf of his brother and father, who were murdered after having been sent off the compound.<sup>272</sup> Hasan himself was part of the local personnel of the compound and arrangements were made to evacuate him with the Dutch troops. His brother Mohamed was not so fortunate and Dutchbat refused to put him on the list of local personnel. He had to leave the compound, followed by his father, and both were killed shortly thereafter.<sup>273</sup> The Court of Appeals, in a reasoning later confirmed by the Supreme Court, concluded that the Dutch troops should not have sent Mohamed off the compound since they had already received reports of the crimes the VRS was committing against Muslim men outside the safe areas.<sup>274</sup> They were aware of the risk that Mohamed would be murdered and by causing him to leave the compound regardless of this knowledge and not taking him to another safe haven, they violated his right to life.<sup>275</sup> As the case did not involve a direct transfer to another state, it is not a clear-cut case of *non-refoulement*, but the reasoning is much the same.

In the 2014 *Mothers of Srebrenica v. the Netherlands* case, the Dutch District Court in The Hague held the Dutch State responsible for its cooperation with the VRS in the deportation of the relatives of ten claimants from the compound over which it had

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<sup>270</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art 38 1(b): When state practice becomes general practice, it can be evidence of customary international law.

<sup>271</sup> *Nuhanović v. The Netherlands* (n 26).

<sup>272</sup> *Nuhanović v. The Netherlands* (n 26) para 3.5.3.

<sup>273</sup> *Mustafić v. The Netherlands* (6 September 2013) Supreme Court of the Netherlands, 12/03329: The Mustafić case is broadly similar, with the difference that Mr. Mustafić and his family had sought refuge in the compound and he had no links with the local personnel. This made little difference for the outcome.

<sup>274</sup> *Nuhanović v. The Netherlands* (n 26) para 3.2 point xii.

<sup>275</sup> *Nuhanović v. The Netherlands* (n 26): It was also considered foreseeable, on the basis of what seems a common-sense assessment of the situation, that Hasan and Muhamed's father Ibro would accompany his minor son Muhamed. Therefore the court concluded that the Netherlands also violated Ibro's right to life.

jurisdictional control, after which they were ill-treated and killed.<sup>276</sup> The Court based responsibility on art 2 ECHR (right to life), art 6 ICCPR (right to life) and a standard of care under domestic law Article 6:162(2) Burgerlijk Wetboek as informed by Article 1 of the Genocide Convention (obligation to prevent and punish genocide) and it limited its considerations to the area over which Dutchbat had jurisdiction based on the “effective control” test.<sup>277</sup> It posed the question: “Given what the management knew at that point during the actions of which they are accused could they reasonably have decided and acted in the way in which they did?”<sup>278</sup> After carefully reviewing a large number of statements, the Court ruled that in the afternoon of July 13<sup>th</sup> 1995, Dutchbat was “aware of a serious risk of genocide of the men separated and carried off.”<sup>279</sup> The Court then assessed the alleged wrongful acts. For many of these acts, such as not allowing more refugees into the compound or supporting the evacuation of refugees from the safe area outside of the compound, the Court concluded that the acts were understandable and expecting more from Dutchbat would have been unreasonable under the circumstances.<sup>280</sup> However, regarding the refugees already present in the compound the Court considered that Dutchbat should have let the able-bodied men stay there until they would have been evacuated together with the Dutchbat troops.<sup>281</sup> If they had done so, many of the men may have been alive today. The Court concluded: “Dutchbat’s acts are unlawful with respect to the male refugees who left the compound late in the afternoon on July 13<sup>th</sup> 1995.”<sup>282</sup>

The case illustrates that the measures a state is required to take must be reasonable in the given circumstances. The Court painstakingly analyzed and discussed the different alleged wrongful acts in light of the knowledge at the time, the resources available, the pressure the higher officials of Dutchbat were under and the harsh circumstances in which Dutchbat was functioning. According to the Dutch District Court, Dutchbat in the prevailing circumstances was obligated to ensure the physical protection and

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<sup>276</sup> *Mothers of Srebrenica against the State* case (n 171) para 5.1.

<sup>277</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.151-4.161, 4.164 and 4.179: The court did not apply Article 1 of the Genocide Convention directly, because “the obligation to prevent genocide as is evidenced by the text of the Convention and the history of how it came about now holds only between Convention states themselves, [therefore], the Dutch Constitution does not provide for its direct effect.” However, it considered the standard of care required by Article 6:162 (2) Burgerlijk Wetboek to be informed by art 1 of the Genocide Convention; In Chapter 4.2 B.1 Genocide it is argued that the District Court should have used the broader “capacity to influence effectively” criterion as a basis for the state’s obligation to prevent genocide, which would then have been broader in scope.

<sup>278</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.180.

<sup>279</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.255 and 4.257.

<sup>280</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.288-91: The court noted that the living conditions in the compound were precarious, the importance of maintaining freedom of movement in the compound, the fact that Dutchbat had too little manpower to go out into the crowd of refugees and select men to admit to the compound and finally that admitting more men would have endangered the evacuation of refugees.

<sup>281</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.329 and 4.331.

<sup>282</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.329.

evacuation of endangered individuals over whom they had jurisdiction.<sup>283</sup> The Court discussed the state's human rights obligations without directly considering the mandate, but taking practical and power-related factors stemming from the mandate into account when considering what could have been reasonably expected in the short-term. This does not preclude a potential failure of the long-term obligation to carefully plan extraterritorial operations and formulate the mandate in a way that allows state officials to live up to the state's extraterritorial human rights obligations.<sup>284</sup>

The *Mothers of Srebrenica* judgment can be considered a progressive judgment in many respects. For example, the Court took an important step in the direction of requirements of information sharing. The Dutch District Court considered the alleged failure to report war crimes as follows:

“It is indisputable that during the transition period Dutchbat could not protect the refugees inside and around the *mini safe area* located outside the compound on its own, i.e. without outside help, due to its limited manpower and due to the superior military strength of the Bosnian Serbs. Furthermore, Dutchbat at most had a clear view of the men selected by the Bosnian Serbs who were being held in various buildings outside the *mini safe area*. In these circumstances Dutchbat had the obligation to report the war crimes it had directly and indirectly witnessed up to that point as well as from that moment onwards to the UN chain of command.”<sup>285</sup>

This obligation to report the witnessed crimes caters to the reasoning of the ICJ in the *Genocide* case, that “the combined efforts of several States, each complying with its obligation to prevent, might [achieve] the result – averting the commission of genocide – which the efforts of only one State [are] insufficient to produce.”<sup>286</sup> The obligation to provide information about witnessed crimes, to the UN or other important actors, is a crucial stepping-stone for measures to be taken by these other actors.<sup>287</sup> The Dutch District Court also emphasized that Dutchbat, because of its presence there, had unique insight into the situation. Furthermore, it is a measure that

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<sup>283</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.329 and 4.331.

<sup>284</sup> See Section 3.3 A.1 Foreign State's Legal Framework; Twelve Srebrenica Veterans Suing Dutch Government (n 214): A case has been brought against the Netherlands by Dutchbat veterans, claiming that they were sent on an impossible mission because they were ill-prepared and operated under limiting rules of engagement that resulted in their inability to protect the civilian population. This may point to a long-term failure on behalf of the state to carefully plan the operation.

<sup>285</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.264.

<sup>286</sup> *Genocide case* (n 7) para 430 [changed to present tense]; Genocide Convention (n 100) art 8: Stipulates that contracting parties “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III, without any territorial limitation.”

<sup>287</sup> See Chapter 5.4.1 Challenges: Employs the example of the Srebrenica genocide to illustrate the point that the consequences of the involvement of multiple duty-bearing states for the content and scope of each state's obligations and their implementation are still largely obscure.

can hardly be considered unreasonable, especially in an age of easy online and telecommunication, even when officials are under extreme pressure.<sup>288</sup> At the same time, the Court restricted its consideration only to the wrongful acts that had been alleged, while it could have broadened its consideration to other measures that could have been reasonably expected of the Netherlands.

Finally, states have short-term obligations in extraterritorial settings related to the prohibition of *refoulement*. Whether a transfer takes place from within the state's own territory or outside of it is irrelevant for the absolute obligation not to expose individuals within the state's jurisdiction to the real risk of torture or ill-treatment or arbitrary death in a receiving state.<sup>289</sup> In extraterritorial contexts, *non-refoulement* also applies if the foreign state plans to hand an individual over to the authorities of the host state.<sup>290</sup> The Special Rapporteur for the Prevention of Torture has stated that the prohibition of *refoulement* under the CAT is not geographically limited and that "the individual being transferred need not cross an international border for this obligation to apply."<sup>291</sup> In the *Al-Saadoon and Mufdhi v. the United Kingdom* case, for example, the UK was held responsible for a violation of the prohibition of torture because an individual held by UK state officials acting in the territory of Iraq, was handed over to Iraqi authorities, while there was a risk of the imposition of the death penalty.<sup>292</sup> The ECtHR ventured that no "real attempt was made to negotiate with the Iraqi authorities to prevent it" while "this could have provided an opportunity to seek the consent of the Iraqi Government to an alternative arrangement involving, for example, the applicants being tried by a United Kingdom court, either in Iraq or in the United Kingdom."<sup>293</sup> Arrangements should be made to be able to review in extraterritorial

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<sup>288</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.265: "The District Court finds that the argument put forward by the State, namely that reporting war crimes did not have the highest priority in Dutchbat as it lacked the manpower to maintain order on site does not constitute a justification defence, not even when it is taken into consideration that decisions were made under great pressure in a war situation."

<sup>289</sup> See for the thresholds required among others: *Pillai v. Canada*, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 473 (HRC, Mar. 25, 2011) para 11.4: Substantial grounds for believing that there is a real risk; *Tebourski v. France* (n 76) para 8.2-3; *Salah Sheekh v. the Netherlands*, no. 1948/04, ECHR 2007-I, para 148: Real and personal risk; Member states of the ICCPR and ECHR that have abolished the death penalty are also not allowed to extradite individuals to a state where he or she might receive a sentence of capital punishment, see: *Fong v. Australia*, Comm. 1442/2005, No. CCPR/C/97/D/1442/2005 (HRC Oct. 23, 2009); *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010, para 120.

<sup>290</sup> *Al-Saadoon and Mufdhi v. the United Kingdom* (n 289) para 141-3; *Mothers of Srebrenica against the State* case (n 171): Involving the handover of Muslim men to the troops of General Mladic by Dutch state officials acting as part of a peacekeeping mission in Bosnia, while there was a risk that they would be killed.

<sup>291</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 38: "Whenever States are operating extraterritorially and are in a position to transfer persons, the prohibition against *non-refoulement* applies in full."

<sup>292</sup> *Al-Saadoon and Mufdhi v. the United Kingdom* (n 289) para 141-3.

<sup>293</sup> *Al-Saadoon and Mufdhi v. the United Kingdom* (n 289) para 141.

contexts whether a real risk exists, which is part of the standard precautionary measures attached to transfers of individuals.<sup>294</sup> If a real risk of torture or arbitrary death is found to exist, the state can choose not to transfer the individual and if necessary transfer the individual to another safe location or attain effective assurances from the receiving state.<sup>295</sup>

### C. Preventing Continuation

The phase of preventing continuation or aggravation spans the time after the injurious event has started until it ends.<sup>296</sup> Long-term and short-term measures remain relevant depending on the specific circumstances. The main crosscutting obligation to prevent continuation identified in Chapter 2 is the obligation to halt continuing violations, either by ceasing the wrongful act by state officials or by intervening in offences of non-state actors. An important procedural obligation attached to the obligation to halt continuing violations, is the obligation to investigate to ascertain whether gross human rights violations are indeed taking place and what measures may be required.<sup>297</sup> A prerequisite for this phase to exist is that the violation is of a continuing character.<sup>298</sup> Genocide extends over the time from the moment when the definition of genocide is reached, for as long as acts of killing or causing harm continue to occur with genocidal intent.<sup>299</sup> It is therefore always of a continuing character. Torture can

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<sup>294</sup> *A. v. the Netherlands*, no. 4900/06, 20 July 2010, para 157; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 43: Stresses the importance of procedural obligations attached to *non-refoulement*, such as ensuring the right to challenge detention and potential transfer and ensuring there is an independent decision maker with the power to suspend the transfer.

<sup>295</sup> See for example: *Alan v. Switzerland*, Comm. 21/1995, UN Doc CAT/C/16/D/21/1995, A/51/44 (1996) Annex V at 68 (CAT Committee May 08, 1996) para 11.5; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012 (extracts) para 187; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 40: “States cannot resort to diplomatic assurances against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to such treatment.”

<sup>296</sup> See Chapter 1.3.2 Temporal Phases; The term “violation” is used here as synonymous to an injurious event, referring to the substantive violation of an individual’s right either by state officials or private individuals.

<sup>297</sup> *Al-Adsani v. the United Kingdom* (n 154) para 38: The ECtHR stated that the obligation to carry out an effective and official investigation applies “in relation to ill-treatment allegedly committed within its jurisdiction”; The obligation to investigate in this phase can be seen as accessory to or the procedural side of the obligation to cease or intervene. As such, it is central to ensuring the effectiveness of the right concerned.

<sup>298</sup> Commentary to the Articles on State Responsibility (n 137) art 14(1) and (2) and Commentary to Article 14 para 5: “In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time.”

<sup>299</sup> Genocide Convention (n 100) art 2: Genocidal intent is the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”; See Chapter 2.2 C.3 Genocide; Commentary to the Articles on State Responsibility (n 137) Commentary to Article 15 para 3: “Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed [...]”

be of a continuing character in individual cases for as long as acts of torture occur against one individual, or form a pattern or practice of inter-connected acts of torture against one or multiple individuals.<sup>300</sup> Arbitrary deaths are, in individual cases, instant in nature and only have a continuing character when they form a pattern or practice of inter-connected killings.<sup>301</sup> Similar to the short-term phase, human rights treaties apply to a state's actions abroad as soon as the threshold of jurisdiction is reached, regardless of the lawfulness of the extraterritorial exercise of enforcement jurisdiction.<sup>302</sup> Yet, practical and power-related factors may influence the content and scope of obligations to prevent continuation.

The direct obligation to cease violations by state officials is inherent to the primary norms prohibiting torture, arbitrary death and genocide and is also a customary rule of international state responsibility, codified in Article 30 of the Articles on State Responsibility.<sup>303</sup> For it to be triggered there must be an attributable breach of an international obligation.<sup>304</sup> These requirements will be met as soon as an individual acting on behalf of the state commits continuing gross human rights violations abroad.<sup>305</sup> An example of a situation in which a state has an obligation to cease a violation would be the obligation to cease continuing acts of torture or a practice of disproportionate use of force by state officials resulting in the arbitrary death of

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<sup>300</sup> See Chapter 2.2 C.1 Torture; Commentary to the Articles on State Responsibility (n 137)

Commentary to Article 14 para 6: A violation of the prohibition of torture continues for as long as acts of torture take place. The consequences of acts of torture may also extend in time, but are not part of the continuing violation if the acts of torture have ceased; Pauwelyn, Joost, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' (1996) 66(1) BYIL 415, 418 and 427-8; *Ireland v. the United-Kingdom* (n 256) para 159.

<sup>301</sup> See Chapter 2.2 C.2 Arbitrary Death; The term "killings" is used because it concerns deaths directly caused by people, as opposed to more circumstantial violations of the right to life; Pauwelyn, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' (n 300) 418 and 427-8; *Ireland v. the United-Kingdom* (n 256) para 159.

<sup>302</sup> See Section 3.1.1 A ECHR, ACHR and ACHPR.

<sup>303</sup> Commentary to the Articles on State Responsibility (n 137) Commentary to art 30 para 5: "The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule"; Zemanek, Karl, 'New Trends in the Enforcement of Erga Omnes Obligations' in Frowein, Jochen A., Wolfrum, Rudiger (eds), *Max Planck Yearbook of United Nations Law, Volume 4, 2000* (Kluwer, 2000) 1, 27: "[T]he obligation to perform the obligation under the primary norm is inherent in the latter"; *Trail Smelter Arbitration (United States v Canada)* 3 RIAA 1905-1982 (16 April 1938 and 11 March 1941).

<sup>304</sup> Articles on State Responsibility (n 137) art 2: The breach of an internationally wrongful act and attribution to a state are the two main requirements for state responsibility; Articles on State Responsibility (n 137) art 16: The obligation to cease violations by state officials also covers situations of complicity by aiding and assisting officials of the host state in committing gross human rights violations, for which it is required that the foreign state officials have "knowledge of the circumstances of the internationally wrongful act" and therefore knowingly contribute to these acts; Genocide Convention (n 100) art 3e; *Genocide* case (n 7) para 419-21: Complicity in genocide requires that the aiding state was aware of the specific intent (*dolus specialis*) to commit genocide of the principal wrongdoer.

<sup>305</sup> Articles on State Responsibility (n 137) Chapter II.



people within its extraterritorial jurisdiction.<sup>306</sup> The trigger of knowledge for the obligation to cease is low, as state officials are directly involved and superiors are expected to know and control the manner in which their subordinates carry out their tasks. If acts of torture or arbitrary killings amount to a pattern or practice, the trigger of knowledge is wholly objective, which means the state “should have known” about the continuing violation.<sup>307</sup> The measures taken to end the violation “must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system.”<sup>308</sup> Similar to the reasoning in the short-term phase, practical and power-related factors in extraterritorial contexts cannot normally affect the content and scope of the direct obligation to cease an ongoing violation. It is much easier for the state to control the acts of its own officials than of non-state actors, especially in light of the state’s long-term obligations to provide training and carefully plan extraterritorial operations and the obligation to prosecute and punish state officials when they commit human rights violations. Moreover, it would be absurd to allow a state that exercises extraterritorial jurisdiction by its own choosing, to refer to practical and power-related factors in the extraterritorial context in an attempt to justify ongoing violations of absolute prohibitions by its own officials.<sup>309</sup>

States also have an obligation to intervene in offences related to the three prohibitions by non-state actors if they know or should have known of these acts. The obligation to intervene is an extension of the short-term obligation to take measures to prevent the materialization of threats posed by non-state actors. The scope of the obligation is limited to what can be reasonably expected of a state, which is informed by practical and power-related factors in extraterritorial contexts. The ECtHR *Ilaşcu v. Moldova and Russia* case concerned among other things Russia’s obligations to prevent acts of torture by the separatist regime Moldovan Republic of Transnistria (MRT) that it helped create and maintain, even though Russia’s officials were not directly involved in the acts of torture.<sup>310</sup> The applicants in the case had been detained and severely ill-

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<sup>306</sup> Note that deaths resulting from lawful acts of war are a permissible derogation from human rights obligations: ECHR (n 6) art 15(2); Fourth Geneva Convention (n 225) common art 2 and 3; Doswald-Beck and Henckaerts, *Customary International Humanitarian Law - Volume I Rules* (n 261) Rule 1.

<sup>307</sup> *Ireland v. the United-Kingdom* (n 256) para 159: In such cases, the ECtHR has stated that it is “inconceivable that the higher authorities of a state should be, or at least should be entitled to be, unaware of the existence of such a practice.”

<sup>308</sup> *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, no. 9940-9944/82, EComHR judgment on admissibility (6 December 1983) para 30.

<sup>309</sup> See Chapter 2 Sections 2.1.1 Torture: The prohibition of torture is *jus cogens* and therefore absolute; 2.1.2 Arbitrary Death: There are permissible exceptions to the right to life like self-defence. The right to life is therefore not absolute, but the prohibition of arbitrary deaths is; 2.1.3 Genocide: The prohibition of genocide is *jus cogens* and therefore absolute.

<sup>310</sup> *Ilaşcu v. Moldova and Russia* (n 4) para 392: “[T]he “MRT”, set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event [...] it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.”

treated in the MRT.<sup>311</sup> Both Moldova and Russia were considered to exercise jurisdiction in the area and were held responsible for their respective failures to prevent the ill-treatment inflicted by MRT officials.<sup>312</sup> Only Russia exercised extraterritorial jurisdiction in the Transdniestrian region, because the region is formally within Moldovan territory.<sup>313</sup> Russia was held responsible because it actively helped create and maintain the situation by supporting the MRT and “made no attempt to put an end to the applicants' situation [initially] brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998”, which is when the ECHR entered into force for Russia.<sup>314</sup> This was decided even though “agents of the Russian Federation ha[d] not participated directly in the events complained of in the present application”, which suggests that the Court considered the MRT a subordinate local administration.<sup>315</sup> The case shows that, despite practical or power-related factors, states cannot remain passive bystanders when gross human rights violations are taking place against people within their extraterritorial jurisdiction.<sup>316</sup> They must do everything that can be reasonably expected to intervene, which may entail forms of negotiation, physical protection, evacuation or providing information to the UN or other relevant actors.<sup>317</sup>

#### D. Preventing Recurrence

The phase of preventing recurrence starts once the violation has ended.<sup>318</sup> Obligations in this phase are aimed at taking remedial measures and ensuring the violation does not recur. The main crosscutting obligations to prevent recurrence identified in Chapter 2 are the inter-related obligations to investigate, prosecute and punish. These

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<sup>311</sup> The MRT is part of Moldovan territory, but proclaimed independence in 1991. Neither Moldova nor the international community has recognized it as a state.

<sup>312</sup> *Ilașcu v. Moldova and Russia* (n 4) para 331, 441, 448, 453.

<sup>313</sup> *Ilașcu v. Moldova and Russia* (n 4) para 339: Moldova failed its positive obligation to take “measures needed to re-establish its control over Transdniestrian territory (...) and measures to ensure respect for the applicants' rights, including attempts to secure their release.”

<sup>314</sup> *Ilașcu v. Moldova and Russia* (n 4) para 393.

<sup>315</sup> *Ilașcu v. Moldova and Russia* (n 4) para 393 [changed to past tense]. See para 314 and 316: Explains the concept of jurisdiction, which “also extends to acts of the local administration which survives there by virtue of [a foreign state’s] military and other support.” See para 392: The Court does not explicitly use the term “subordinate local administration”, but its reasoning does resemble the principles set out in para 314 and 316. See Dissenting Opinion Of Judge Kovler: Argues against the idea that the MRT is a local subordinate administration of Russia, implicitly revealing that this was the dominant position among the other judges.

<sup>316</sup> *Osmani v. Serbia*, Comm. 261/2005, UN Doc CAT/C/42/D/261/2005, A/64/44 (2009) Annex XIII at 273 (CAT Committee May 08, 2009) para 10.5; *Dzemajl et al. v. Yugoslavia*, Comm. 161/2000, UN Doc CAT/C/29/D/161/2000, A/58/44 (2003) Annex VI at 85 (CAT Committee Nov. 21, 2002) para 9.2; *Isaak v. Turkey* (n 266); *El Masri v. “the former Yugoslav Republic of Macedonia”* [GC], no. 39630/09, ECHR 2012: Especially if state officials are present at the scene of the crime, inaction is an unacceptable form of state acquiescence or consent.

<sup>317</sup> *Mothers of Srebrenica against the State* case (n 171) para 4.264.

<sup>318</sup> See Chapter 1.3.2 Temporal Phases.

obligations are considered to support both specific and general prevention of future violations.<sup>319</sup> States cannot always lawfully exercise adjudicative jurisdiction abroad, meaning the power of courts to settle legal disputes.<sup>320</sup> There are grounds upon which adjudicative criminal jurisdiction can be exercised abroad, based on: (i) The active personality principle, when an offence was committed abroad by a national of the state; (ii) The passive personality principle, when a crime was committed abroad against a national of the state; (iii) The protective principle, when an offence was committed abroad against vital state interests; or (iv) The universality principle, when offences committed abroad concern the international community as a whole, such as war crimes, crimes against humanity, torture and genocide.<sup>321</sup> Adjudicative civil jurisdiction may also extend abroad, albeit more exceptionally than adjudicative criminal jurisdiction, for example to effectuate an individual's right to remedy, or when companies acting abroad have their center of activity in the state in which a case is brought.<sup>322</sup> The scope of the obligation to investigate, prosecute and punish gross human rights violations when a state exercises extraterritorial jurisdiction will be discussed both in relation to: (i) The domestic legal framework of the foreign state; and (ii) The domestic legal framework of the host state.<sup>323</sup>

If an allegation has been made or there is a suspicion that a violation or offence related to one of the three prohibitions was committed in a territory or against individuals over whom the state has extraterritorial jurisdiction, the first step towards ensuring that suspects can be prosecuted and punished, is to undertake a prompt, serious and effective investigation.<sup>324</sup> This obligation has a built-in standard of

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<sup>319</sup> *Blanco Abad v. Spain*, Comm. 59/1996, UN Doc CAT/C/20/D/59/1996 (CAT Committee May 14, 1998) para 8.2; *Blake v. Guatemala* (Reparations and Costs) Judgment of January 22, 1999, I/A Court HR Series C No 48, para 61 and 64; *Bulacio v. Argentina* (Merits, Reparations and Costs) Judgment of September 18, 2003, I/A Court HR Series C No 100; *Giuliani and Gaggio v. Italy*, no. 23458/02, 25 August 2009 para 306; *Opuz v. Turkey* (n 263) para 153; *Juan Humberto Sánchez v. Honduras* (n 198) para 143; See also the *Pueblo Bello Massacre v. Colombia* (n 203) para 149.

<sup>320</sup> Kamminga, 'Extraterritoriality' (n 24) para 1 and 8; Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 22) 23: It is sometimes seen as a part of enforcement jurisdiction.

<sup>321</sup> Kamminga, 'Extraterritoriality' (n 24) para 11-4; Oxman 'Jurisdiction of States' (n 24) 34 onwards.

<sup>322</sup> Kamminga, 'Extraterritoriality' (n 24) para 15; Donovan, Donald F. and Roberts, Anthea, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 AJIL 142; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 55-61: The right to remedy for torture has been argued to exist irrespective of where the violation took place and states may accordingly be obligated to allow civil proceedings against another state or private wrongdoer abroad; See for example the *Vereniging Milieudefensie v. Royal Dutch Shell PLC* (30 January 2013) Rechtbank Den Haag, C/09/330891 / HA ZA 09-0579, para 2.2.

<sup>323</sup> See Section 3.3 A. Long-Term Prevention: This distinction was also used in the long-term phase to discuss the limits of a state's prescriptive jurisdiction and scope of the obligation to introduce a proper legislative framework to deter violations.

<sup>324</sup> Both the CAT and IACPPT contain express provisions to that effect: CAT (n 7) art 12; IACPPT (n 84) art 8 jo 12; In the context of the other treaties the extraterritorial obligation to investigate follows from the jurisdiction clauses (or lack thereof) combined with the obligation to ensure the relevant rights or prevent violations: ICCPR (n 5) art 2 jo 6 and 7; ECHR (n 6) art 1 jo 2 and 3; ACHR (n 7) art 1 jo 4

reasonableness, meaning that what is considered prompt, serious and effective may differ according to the practical circumstances. In terms of power-related factors, it is relevant for the interpretation of the requirement of promptness whether the state's infrastructure abroad (or local subordinate administration) contains an independent investigative branch, or if the state has to deploy investigative personnel to the location where the violation occurred. Practical factors, such as an unstable security situation, may make it more difficult to carry out a prompt, serious and effective investigation. At the same time, the obligation to investigate is a stepping-stone for the obligations to prosecute and punish and therefore a central requirement for the overall effectiveness of the relevant right. The state that exercises extraterritorial jurisdiction must meet at least the basic requirements for the investigation to be capable of leading to the identification and punishment of the individual(s) responsible.<sup>325</sup>

In the *Al-Skeini v. the United Kingdom* case, the ECtHR discussed the scope of the extraterritorial obligation to investigate killings in which state officials were allegedly involved.<sup>326</sup> The facts of the case played out against the background of the occupation of Iraq in 2003 to 2004.<sup>327</sup> In 2003 the CPA was created to act as a caretaker administration until an Iraqi government could be established. It had power, *inter alia*, to issue legislation. The administration of the CPA was divided in regional areas and the south was placed under responsibility of the UK.<sup>328</sup> The complainants brought a case against the UK on behalf of two Iraqis who had been killed in the South in an exchange of gunfire with British military forces. One individual had been killed at a funeral, where guns were shot as a tribute to the dead, which triggered a British soldier to shoot at the group of people attending the funeral. The second individual had been shot in the house of his brother-in-law during a search and arrest operation. The Court recognized the practical factor caused by an unstable security situation and breakdown of civilian infrastructure, but stated that the right to life, being one of the

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and 5; ACHPR (n 198) art 4 and 5; Genocide Convention (n 100) art 1; The investigation must be serious and effective and must be capable of leading to the identification and punishment of the individual(s) responsible: *Pestano v. Philippines*, Comm. 1619/2007, No. CCPR/C/98/D/1619/2007, A/65/40, Vol. II (2010), Annex V at 309 (HRC, Mar. 23, 2010) para 7.5; *Yaşa v. Turkey* (n 155) para 100: Authorities are bound to investigate in good faith all *allegations* of violations, but also if they are otherwise informed about a death which took place in suspicious circumstances; *Velásquez Rodríguez v. Honduras* (n 154) para 177: The duty to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective"; *Amnesty International and Others v. Sudan*, AComHPR, Communication No. 48/90, 50/91, 52/91, 89/93 (15 November 1999) para 51: Officials investigating the case must be completely independent and the findings must be made public.

<sup>325</sup> *Al-Skeini v. the United Kingdom* (n 4) para 169-70: At the very least, states must ensure the independence of the investigators and do everything it can to secure witness statements.

<sup>326</sup> *Al-Skeini v. the United Kingdom* (n 4) para 151; The case is of analogous importance for the prohibitions of torture and genocide.

<sup>327</sup> In 2003 a coalition of armed forces under unified command, led by the United States with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, invaded Iraq. Other States later sent personnel to support the reconstruction effort.

<sup>328</sup> *Al-Skeini v. the United Kingdom* (n 4).

most fundamental rights, must be made practical and effective by ensuring an effective investigation in situations where it may have been violated.<sup>329</sup> It remarked that “in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.”<sup>330</sup> The Court concluded that the independence of the investigators was of particular importance.<sup>331</sup> Similarly, identifying eyewitnesses and securing witness testimonies was considered central to an effective investigation.<sup>332</sup> Because the UK had failed to meet these basic requirements, which were reasonable under the circumstances, it had failed its obligation to investigate and therefore violated the right to life.

If the investigation leads to the identification of suspects, the state has to submit the case to the competent authorities, which can be the prosecutorial service of the foreign state, of the host state or reference to a third state or international penal tribunal.<sup>333</sup> State officials in principle have to be prosecuted and punished in accordance with the foreign state’s legal framework.<sup>334</sup> The obligation to punish violations by state officials is inherent to the primary obligation not to commit gross human rights violations abroad. The HRCee has for example expressed its concern “at the limited number of investigations, prosecutions and convictions of members of the Armed Forces and other agents of the US Government, including private contractors, for unlawful killings during its international operations” and asserted that the “State party should ensure that all cases of unlawful killing, torture or other illtreatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned.”<sup>335</sup> The official can be tried either by the foreign state’s domestic courts or by special tribunals set up for the purpose of dealing with members of the forces to which the official belongs.<sup>336</sup> Because the obligation to

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<sup>329</sup> *Al-Skeini v. the United Kingdom* (n 4) para 152, 158 and 162-3: The UK argued that it had met its investigative duty in relation to some of the applicants, taking the security-circumstances and lack of full control in the area into account. The applicants stated that the UK should have made provision for difficulties related to the security situation and lack of control.

<sup>330</sup> *Al-Skeini v. the United Kingdom* (n 4) para 168.

<sup>331</sup> *Al-Skeini v. the United Kingdom* (n 4) para 169.

<sup>332</sup> *Al-Skeini v. the United Kingdom* (n 4) para 170.

<sup>333</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep 422, para 94; Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 405: States may be required to set up tribunals “to replace the regular courts if the local administration of justice is completely disorganized”; See Section 3.3 Long-Term Prevention.

<sup>334</sup> See Section 3.3 A.1 Foreign State’s Legal Framework: This includes officials of subordinate local administrations or any other agent acting on the state’s behalf; Oxman, 'Jurisdiction of States' (n 24) para 18 and 33; Kamminga, 'Extraterritoriality' (n 24) para 20: For armed forces, status of force agreements specify that the members of the armed forces are subject to the prescriptive, enforcement and adjudicative jurisdiction of the sending state.

<sup>335</sup> Concluding Observations HRCee on the United States of America 2014 (n 64) para 5.

<sup>336</sup> Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 405: States may set up special tribunals “to deal with the members of the military forces of the occupying power.”

prosecute and punish can be implemented by the state's own (especially established) prosecutorial and adjudicative institutions, it is not contingent upon the particular extraterritorial circumstances and cannot be limited based on legal, practical or power-related factors.

Matters can get more complicated when it concerns non-state actors suspected of committing offences related to the three prohibition over whom the foreign state exercises extraterritorial jurisdiction. In theory, non-state can be prosecuted either in accordance with the foreign state's own legal framework (i), the host state's legal framework (ii) or alternative routes of prosecution.<sup>337</sup> In practice, foreign states typically cannot choose between these three options. State parties of the CAT and IACPPT are required to prosecute and punish offences on several grounds, including the fact that the offence took place within its jurisdiction, the active and passive personality principles and principle of universal jurisdiction.<sup>338</sup> State parties are also required to cooperate to prosecute and punish perpetrators of torture.<sup>339</sup> The Special Rapporteur on Torture has stated that "the core purpose of the [CAT] was the universalization of a regime of criminal punishment for perpetrators of torture."<sup>340</sup> This demanding regime of punishment means that a foreign state is required to establish adjudicative criminal jurisdiction over non-state actors suspected of committing acts of torture within its extraterritorial jurisdiction.<sup>341</sup> The suspects must then be prosecuted in accordance with the foreign state's legal framework, unless it ensures an alternative route of prosecution.

If a non-state actor is suspected of committing offences related to arbitrary death or genocide within a state's extraterritorial jurisdiction, the foreign state may be unable to establish adjudicative criminal jurisdiction in accordance with its own legal

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<sup>337</sup> When a state exercises personal jurisdiction, it has an obligation to investigate, prosecute and punish only in relation to state officials and the individual(s) over whom it has jurisdiction, not in relation to non-state actors who wage an attack on the rights of the individual(s) but are not themselves within its jurisdiction.

<sup>338</sup> See Section 3.1.1 C CAT and IACPPT and Section 3.3 A.1 Foreign State's Legal Framework; CAT (n 7) art 5; IACPPT (n 84) art 6 and 12-14: Under the IACPPT, states are even required to cooperate to prevent lacunas in prosecution through extradition arrangements; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46

<sup>339</sup> CAT (n 7) art 8; IACPPT (n 84) art 11 and 13; Economic and Social Council Resolutions 663C(XXIV) and 2076(LXII), 'Standard Minimum Rules for the Treatment of Prisoners' (31 July 1957 and 13 May 1977) UN ESCOR, Supp. No. 1, at 11, UN Doc E/3048 (1957), amended by UN ESCOR, Supp. No. 1, at 35, UN Doc E/5988 (1977), Chapter III.

<sup>340</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 44.

<sup>341</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46-8: "The [CAT] requires States to criminalize all acts of torture "wherever they occur, and to establish criminal jurisdiction over various extraterritorial acts of torture, including universal jurisdiction when an offender is present in 'any territory under its jurisdiction'." The phrase 'any territory under its jurisdiction' in the CAT has been interpreted to include forms of authority and control over individuals.

framework.<sup>342</sup> The obligation to prosecute and punish acts of genocide under Article 6 of the Genocide Convention, for example, contains an express limitation to acts committed within the state's own territory.<sup>343</sup> States are permitted to assume universal jurisdiction over acts of genocide, but not all states have introduced legislation to that effect.<sup>344</sup> If there is no basis for the foreign state to establish adjudicative jurisdiction in accordance with its own legal framework, it must find another way to ensure prosecution and punishment of non-state actors suspected of committing offences related to the prohibitions of genocide or arbitrary death within its extraterritorial jurisdiction.<sup>345</sup> For example, the foreign state could transfer the suspect to the authorities of the host state or to a third state with a basis to establish adjudicative criminal jurisdiction. For acts of genocide, this reasoning is supported by Article 7 of the Genocide Convention, which contains a pledge to extradite individuals to other states that want to prosecute.<sup>346</sup> Another alternative route is to transfer the suspect to an international penal tribunal.<sup>347</sup> Before transferring a suspect to another state or international penal tribunal, the foreign state should consider whether the prosecution and punishment would be in line with requirements under international human rights law.<sup>348</sup>

Finally, if the foreign state is also an occupying power, the obligations to investigate, prosecute and punish offences by non-state actors are part of the obligation to “restore, and ensure, as far as possible, public order and safety”, as prescribed by Article 43 of the Hague Regulations, which has customary law status.<sup>349</sup> Accordingly,

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<sup>342</sup> Genocide Convention (n 100) art 6: Contains an express territorial limitation; *Genocide* case (n 7) para 184 and 442: States are only obligated to prosecute and punish people charged with genocide or other acts in Article 3 if the acts were committed on their territory. This does not exclude criminal prosecution on other grounds, such as the nationality of the accused or universal jurisdiction; *Separate Opinion of Judge Tomka to the Genocide* case (n 7) para 65; Note that the obligation to investigate, prosecute and punish acts of torture can already come into play in the short-term phase and phase of preventing continuation, because genocide is a more large-scale and composite violation and punishing individual offences can have a preventive effect at an earlier stage. For the sake of clarity, it is only discussed in the last temporal phase in this chapter. See: Chapter 2.2 B.3 and 2.3 Conclusion.

<sup>343</sup> Genocide Convention (n 100) art 6.

<sup>344</sup> Kamminga, 'Extraterritoriality' (n 24) para 14: If the acts qualify as war crimes or crimes against humanity, states are also allowed to assumed universal jurisdiction; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 75) para 46.

<sup>345</sup> The obligation to prosecute and punish offenders is inherent to the obligation to ensure the right to life and right to be free from genocide. See Chapter D.2 Arbitrary Death and D.3 Genocide.

<sup>346</sup> Genocide Convention (n 100) art 7.

<sup>347</sup> States are in any case obligated to cooperate with international tribunals if they have accepted the tribunal's jurisdiction and the tribunal requests their assistance in the arrest of alleged offenders within the state's jurisdictional control. See: *Genocide* case (n 7) para 443-450: Serbia was held responsible for refusing to fully cooperate with the ICTY in the arrest of General Mladic.

<sup>348</sup> CAT, General Comment 2 (n 73) para 10: Conduct may not be prosecuted as ill-treatment if elements of torture were present; *Öneryıldız v. Turkey* (n 233) para 116-7.

<sup>349</sup> Hague Regulations (n 111) art 43; Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (n 223).

the foreign state has to make a structural effort to investigate, prosecute and punish offences that occur in the territory over which it exercises spatial jurisdiction or by or against people over whom it exercises authority and control. In principle, the prosecution and punishment of non-state actors will happen in accordance with the host state's legal framework, or in accordance with the (adjustments to) laws that the occupying power has introduced to that effect.<sup>350</sup>

### 3.4 Conclusion

This chapter set out to explore how the territorial set of obligations to prevent gross human rights violations can be translated to extraterritorial obligations based on jurisdiction. The first step was to outline the interpretation of extraterritorial jurisdiction for instruments relevant to this research. Importantly, instruments containing obligations to prevent gross human rights violations all in principle allow for extraterritorial applicability based on jurisdiction.<sup>351</sup> It was concluded that jurisdiction in human rights treaties functions as a threshold and basis for extraterritorial applicability.<sup>352</sup> To reach the threshold, states need to exercise certain forms of control over territory or people abroad. The forms of control that lead to extraterritorial applicability can roughly be divided into: effective control over territory or authority and control over individuals. These forms of jurisdictional control have been termed the spatial and personal models. The spatial model introduces a presumption that everyone within a certain territory over which the state has effective control is within a state's jurisdiction. The personal model requires that there is a relationship of authority and control between a state and individual that warrants the state to ensure that individual's rights, such as arrest and detention, but arguably also bombings and shootings.

Once the threshold has been reached, a second – often disregarded – step is the process of determining the content and scope of corresponding extraterritorial obligations. As human rights treaties were devised for territorial context, the capacity to ensure human rights within state territory is presumed. Only the scope of certain types of obligations, like obligations to prevent formulated in an open-ended manner or obligations that leave room for interpretation, may be limited by standards of reasonableness. When a state exercises extraterritorial jurisdiction, the capacity to ensure human rights is also to a certain extent presumed. Yet, extraterritorial contexts pose challenges that may require other adjustments to the content and scope of obligations than in territorial contexts. Therefore, legal, practical and power-related factors were formulated to allow for a realistic assessment of the content and scope of extraterritorial obligations. Importantly, these factors only influence the content and

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<sup>350</sup> Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (n 111) 406; Coalition Provisional Authority Order Number 7, Penal Code (n 230).

<sup>351</sup> See Section 3.1.1 Instruments.

<sup>352</sup> See Section 3.1.2 Jurisdiction as a Threshold.



scope of extraterritorial obligations once the threshold has been reached, not their formal applicability. Once the threshold of extraterritorial jurisdiction has been reached, all rights and obligations in a treaty in principle apply.<sup>353</sup> However, certain obligations may not arise in extraterritorial settings due to legal barriers and the scope of other obligations may be reduced to zero because of practical or power-related factors.

The third and final step was to use these factors to translate the set of territorial obligations to prevent gross human rights violations in the four temporal phases (long-term prevention, short-term prevention, preventing continuation, preventing recurrence), to extraterritorial obligations based on jurisdiction.<sup>354</sup> In the long-term phase, states have an obligation to introduce a proper legislative and administrative system capable of deterring violations.<sup>355</sup> In extraterritorial context, attention must be paid to the limits of a state's prescriptive jurisdiction. The state that exercises extraterritorial jurisdiction is required to make provision in its own domestic legal framework to punish gross human rights violations by its state officials abroad. It also has to introduce safeguards in its domestic legal framework to regulate the activities of state officials abroad, such as procedural safeguards for situations of detention or a framework regulating the use of force and firearms. Furthermore, states must plan and equip extraterritorial operations to allow them to function in a manner consistent with requirements under international human rights law. Finally, occupying powers may also have to adjust the domestic legal framework of the host-state, to abolish laws that are not in line with requirements under international human rights law, ensure a basis to punish non-state actors for offences related to the three prohibitions and other legislation necessary to ensure public order and safety, like regulating dangerous activities and introducing guarantees to protect vulnerable groups.

In the short-term phase, states have to take measures to prevent gross human rights violations when they are aware or should have been aware of an immediate risk.<sup>356</sup> There is a difference in the influence of the factors in relation to the scope of direct *versus* indirect obligation to take measures to prevent. It is much easier for states to oversee and control the actions of its state officials abroad, than of non-state actors. Officials are trained and instructed how to prevent gross human rights violations. If the officials fail in that regard, they will have to be prosecuted and punished based on the foreign state's legal framework. On the other hand, the obligation to prevent offences by non-state actors requires positive state action to avert danger posed by non-state actors, over whom the state does not necessarily have any control. When

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<sup>353</sup> See Section 3.2 Corresponding Obligations: That way, a treaty's formal applicability is not diminished and separate criteria can be employed to determine the content and scope of corresponding obligations, which fully take the specificities of an extraterritorial context into account.

<sup>354</sup> See Chapter 1.3.2 Temporal Phases and Section 3.3 Extraterritorial Obligations to Prevent Torture, Arbitrary Death and Genocide.

<sup>355</sup> See Section 3.3 A Long-Term Prevention.

<sup>356</sup> See Section 3.3 B Short-Term Prevention.

applied within state territory this obligation is in any case limited by standards of reasonableness and its scope may be further limited in extraterritorial settings due to practical or power-related factors. What measures a state is required to take depends on what can be reasonably expected of the state in the particular context. Accordingly, the direct obligation cannot be limited, but the indirect obligation to prevent offences by non-state actors may be more easily limited than within state territory. Examples of measures the state may be required to take are negotiation, informing other actors, physical protection and *non-refoulement* if there is a risk of torture or arbitrary death. In the phase of preventing continuation, states have an obligation to halt continuing violations.<sup>357</sup> The state has to cease continuing violations by state officials, which cannot be limited. States must also intervene in offences by non-state. The considerations discussed above in relation to the short-term obligation to prevent offences by non-state actors in terms of reasonability and practical and power-related factors, also apply in relation to the obligation to intervene in continuing violations.

Finally, in the phase of preventing recurrence, states have obligations to investigate, prosecute and punish violations.<sup>358</sup> In extraterritorial context, there are limits to a state's adjudicative jurisdiction that have to be kept in mind. The first step towards ensuring the prosecution and punishment of wrongdoers is to investigate. It is a stepping-stone for the obligations to prosecute and punish and therefore central to the effectiveness of the right concerned. The state must in any case meet the basic requirements of a prompt, serious and effective investigation capable of leading to the identification and punishment of those responsible. What is considered prompt, serious and effective in extraterritorial contexts may differ based on practical or power-related factors. If the infrastructure abroad (or local subordinate administration) contains an investigative branch, the state will be able to act more promptly and effectively. If not, deployment of investigative personnel is required to the location where the offence occurred. If state officials were allegedly involved, they must be prosecuted and punished based on the foreign state's legal framework. States must also ensure the prosecution and punishment of offences by non-state actors within its extraterritorial jurisdiction, either based on its own legal framework, the legal framework of the host state, or alternative routes of prosecution like transfer to a third state with a claim to criminal jurisdiction or international penal tribunal.

The next chapter will review the content and scope of extraterritorial obligations to prevent gross human rights violations beyond jurisdiction and discuss relevant trends for the future development of those obligations.

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<sup>357</sup> See Section 3.3 C Preventing Continuation.

<sup>358</sup> See Section 3.3 D Preventing Recurrence.