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

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#### 4. EXTRATERRITORIAL OBLIGATIONS TO PREVENT BEYOND JURISDICTION

Even though jurisdiction has traditionally served as the outermost border of the applicability of human rights treaties, there are exceptional situations in which states can incur human rights obligations while the people whose rights are affected are beyond their jurisdiction (hereinafter: third state obligations).<sup>1</sup> Third state obligations depart from the traditional working sphere of human rights law between a state and people it controls. Rather, they are based on the universalist conception that, in certain situations, states should help to ensure the rights of people regardless of where they are or whether the state has any control over them. An important example is the third state obligation to prevent genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), based on a state's capacity to influence effectively the (potential) perpetrators of genocide.<sup>2</sup> The concept of owing obligations towards people outside a state's jurisdiction is not entirely new, but has received increased attention in this era of modern communication in which state interdependence has become more recognized. When gross human rights violations (threaten to) take place and the territorial state is not able to act effectively against them, or is itself the wrongdoer, third states can be of crucial importance to prevent or halt violations.<sup>3</sup>

Third state obligations to prevent gross human rights violations are generally not as well-established or defined as human rights obligations based on territory or jurisdiction.<sup>4</sup> Furthermore, they have mostly been studied in fragmented fashion.<sup>5</sup> As such, there is very little clarity in regard to the content and scope of these obligations: on what basis do third states incur obligations to prevent, what are the triggers, what types of measures are third states expected to take and what is the influence of capacity on the scope of obligations? To start answering some of these

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<sup>1</sup> The term "third states" is used to describe states that do not exercise territorial or extraterritorial jurisdiction over the people whose human rights are affected. Third states are sometimes also referred to in literature as "bystander states." See for example: Hakimi, Monica, 'State Bystander Responsibility' (2010) 21(2) EJIL 341; Glanville, Luke, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) HRLR 1; The use of the term "third states" in this chapter is to be distinguished from the use of the term for states that are not individually affected, but have a legal interest in compliance with an international obligation in the sense of Article 41 of the Articles on State Responsibility. See: Bird, Annie, 'Third State Responsibility for Human Rights Violations' (2010) 21(4) EJIL 883.

<sup>2</sup> Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 1; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide case*) para 430.

<sup>3</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) Commentary to Article 41 para 3.

<sup>4</sup> Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 28.

<sup>5</sup> Hakimi, 'State Bystander Responsibility' (n 1) 344: Notes that the practice and research is piecemeal and disjointed.

questions, the first part of this chapter outlines which of the obligations distinguished as part of the set of obligations to prevent gross human rights violations in Chapter 2 can be incurred by third states and on what basis (Section 4.1). In the second part, the triggers, content and scope of these third state obligations to prevent gross human rights violations are discussed based on the timeline (Section 4.2). Finally, there is a shift towards recognizing the important role of third states for ensuring human rights. The third part of the chapter explores how developing third state obligations could contribute to strengthening the set of third state obligations to prevent gross human rights violations (Section 4.3).

#### **4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction**

Several of the obligations that are part of the set of obligations to prevent gross human rights violations distinguished in Chapter 2 are not limited in their application by territory or jurisdiction and can also be incurred by third states. More specifically, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Inter-American Convention to Prevent and Punish Torture (IACPPT) and Genocide Convention contain such obligations.<sup>6</sup> This section discusses the bases and limits for the extraterritorial applicability of these obligations beyond jurisdiction, before discussing their content and scope in Section 4.2.

##### **4.1.1 CAT and IACPPT**

The Convention against Torture (CAT) and Inter-American Convention to Prevent and Punish Torture (IACPPT) both contain jurisdiction clauses.<sup>7</sup> Most of the obligations in these treaties only apply extraterritorially when the state party exercises

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<sup>6</sup> Special Rapporteur Theo van Boven, 'Civil and Political Rights, Including the Questions of Torture and Detention' (15 December 2004) UN Doc E/CN.4/2005/62, para 37: Besides the third state obligations to prosecute and punish contained in the CAT and IACPPT that will be discussed below, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has argued that the "the obligation to prevent torture [...] necessarily includes the enactment of measures to stop the trade in instruments that can easily be used to inflict torture and ill-treatment." This interpretation would mean that third states are obligated to regulate trade of such instruments to prevent torture abroad. He adds a list of recommendations that states can follow, such as monitoring the development of such instruments, strictly regulating their export and consider setting up international regulatory mechanisms in this area; Council Regulation (EC) No 1236/2005, Concerning Trade In Certain Goods Which Could Be Used For Capital Punishment, Torture Or Other Cruel, Inhuman Or Degrading Treatment Or Punishment (27 June 2005) OJ L 200, 30.7.2005, 1-19: A mechanism has been introduced at European level to regulate the trade of goods that could be used for capital punishment or torture. This is an interesting development, albeit only as closely related to the prevention of torture as non-proliferation agreements are to the prevention of arbitrary death. Whether it can be seen as an obligation inherent to the prohibition of torture can be contested.

<sup>7</sup> Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 2, 11, 12 and 16; Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67 (IACPPT) art 6.

jurisdiction over territory or individuals abroad.<sup>8</sup> However, the CAT and the IACPPT also explicitly permit, and in some cases require, state parties to assume criminal jurisdiction over individuals suspected of having committed acts of torture on several bases that extend beyond their jurisdiction. State parties to the CAT and IACPPT are permitted, but not required, to assume criminal jurisdiction over cases of torture on the basis of the nationality of the victim (passive personality principle).<sup>9</sup> Furthermore, state parties to both treaties are required to assume criminal jurisdiction based on the nationality of the accused (active personality principle) and when an individual suspected of having committed acts of torture abroad is present “in any territory under the jurisdiction of a State party” (universal criminal jurisdiction).<sup>10</sup> The United Nations (UN) Special Rapporteur on Torture stated in a 2015 report on the extraterritorial application of the prohibition of torture that “the core purpose of the Convention Against Torture was the universalization of a regime of criminal punishment for perpetrators of torture [...]”<sup>11</sup> To achieve a worldwide regime of criminal punishment for acts of torture, the role of third states is considered of essential importance. It is generally accepted that states that are not party to the CAT or IACPPT are permitted to assume universal jurisdiction over suspects of torture based on customary international law.<sup>12</sup>

What distinguishes the obligations to assume criminal jurisdiction over suspects of torture based on the active nationality principle or universal jurisdiction from obligations to prosecute and punish based on territorial or extraterritorial jurisdiction, is that the state did not necessarily have any form of control over the victim or circumstances of the offence. The offence can have taken place abroad against an individual over whom the state did not exercise extraterritorial jurisdiction. The active personality principle means that a state must seek to establish criminal jurisdiction over any national suspected of having committed acts of torture, regardless of the

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<sup>8</sup> See Chapter 3.1.1 C CAT and IACPPT.

<sup>9</sup> CAT (n 7) art 5(1)c: “When the victim is a national of that State if that State considers it appropriate”; IACPPT (n 7) art 12c: Ibid.

<sup>10</sup> CAT (n 7) art 5(1) a, b and (2): The CAT also adds that a state should assume criminal jurisdiction when acts of torture are committed on board a ship or aircraft registered in the state; IACPPT (n 7) art 12; Nowak, Manfred, McArthur, Elizabeth and Buchinger, Kerstin, *The United Nations Convention Against Torture: A Commentary* (OUP, 2008) 310 and 314 onwards, 345; Committee Against Torture, ‘General Comment 2: Implementation of Article 2 by States Parties’ (24 January 2008) UN Doc CAT/C/GC/2, para 7: The phrase “in any territory under its jurisdiction” has been interpreted to include forms of personal jurisdiction. See also: Chapter 3.1 C. CAT and IACPPT.

<sup>11</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 44.

<sup>12</sup> 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?rskkey=v8P17C&result=1&prd=EPIL>> para 28; Rodley, Nigel S., *The Treatment of Prisoners under International Law* (OUP 2000) 129-30; Kamminga, Menno T., ‘Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses’ (2001) 23(4) HRQ 940, 946 and 949.

location of the crime.<sup>13</sup> The obligation to prosecute is based on the link of nationality between the state and the alleged perpetrator. The principle of universal criminal jurisdiction means that a state has to choose to extradite or prosecute suspects of acts of torture who are present in any territory under its jurisdiction, no matter where the alleged crime was committed and regardless of the nationality of the accused or victim. The rationale behind the principle is that certain crimes represent a “threat to the international legal order” for which there should be no safe haven, granting every state an interest in their punishment.<sup>14</sup> In practice, the obligation to establish universal criminal jurisdiction means that state parties to the CAT and IACPPT must choose to extradite suspects of acts of torture within their jurisdiction to another state or international penal tribunal that is willing to prosecute, or prosecute that person before their own domestic courts (*aut dedere aut judicare*).<sup>15</sup> The obligation is based on the presence of the suspect in any territory under its jurisdiction after committing acts of torture elsewhere, meaning that the state has the *de facto* capacity to influence whether the alleged perpetrator is prosecuted or not.

Both the CAT and IACPPT also include explicit and detailed provisions containing obligations to cooperate with other states or international tribunals for the prosecution and punishment of acts of torture.<sup>16</sup> For example, state parties are required to include torture as an extraditable offence in any extradition treaties they enter into.<sup>17</sup> State parties to the CAT are also explicitly required to assist each other in relation to criminal proceedings against alleged offenders, for example by providing evidence.<sup>18</sup> This interconnected set of obligations illustrates the important role of state cooperation and obligations beyond territory and jurisdiction to effectuate a worldwide regime of criminal punishment for acts of torture, as envisioned by the drafters of the treaties.<sup>19</sup> Finally, Article 14 of the CAT contains a right to an effective remedy for victims of torture without any geographic or jurisdictional limitation.<sup>20</sup> The CAT Committee and Special Rapporteur on Torture have interpreted the provision very widely, as meaning that states must provide victims of torture a

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<sup>13</sup> Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 310-11.

<sup>14</sup> Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 943.

<sup>15</sup> CAT (n 7) art 5; IACPPT (n 7) art 12; Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 948; Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 44-8: “[T]he rule of *aut dedere aut judicare* is clearly mandatory.”

<sup>16</sup> CAT (n 7) art 5-9; IACPPT (n 7) art 11-14.

<sup>17</sup> CAT (n 7) art 8; IACPPT (n 7) art 13.

<sup>18</sup> CAT (n 7) art 9.

<sup>19</sup> Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 44 onwards.

<sup>20</sup> CAT (n 7) art 14; Hall, Christopher Keith, ‘The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad’ (2007) 18(5) EJIL 921; See also the discussion of this provision in Chapter 3.1.1 C. CAT and IACPPT.

procedure to obtain reparations, even if the torture was committed outside the state's jurisdiction.<sup>21</sup> This means that a state may be required to exercise universal civil jurisdiction in cases for reparations against a foreign state and its officials, based on the state's practical capacity to grant the victim access to remedy.<sup>22</sup> However, this wide interpretation of Article 14 is contested and courts have been reluctant to admit such cases.<sup>23</sup> Although access to remedy is not as such part of the set of obligations to prevent gross human rights violations distinguished in Chapter 2, its potential applicability beyond territory and jurisdiction is a noteworthy development. It illustrates the broadening use of adjudicative jurisdiction by third states to punish and remedy gross human rights violations.<sup>24</sup>

#### 4.1.2 Genocide Convention

The Genocide Convention does not contain a jurisdiction clause and according to the International Court of Justice (ICJ) this should be read to mean that its provisions can in principle apply extraterritorially.<sup>25</sup> In the *Genocide* case, the ICJ addressed the extraterritorial applicability of Articles 1, 3 and 6.<sup>26</sup> Article 1 contains the general obligation to prevent genocide by employing all means reasonably available and Article 3 contains the definition of genocide. The Court concluded that, while Article 6 contains an express territorial limitation, Articles 1 and 3 "are not on their face limited by territory" and can apply extraterritorially.<sup>27</sup> The ICJ could have chosen jurisdiction as the basis for extraterritorial application of these Articles, thereby limiting the group of states that could potentially incur the obligation to prevent genocide to those that exercise extraterritorial jurisdiction over people whose rights

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<sup>21</sup> Concluding Observations CAT Committee on Canada (7 July 2005) UN Doc CAT/C/CR/34/CAN, 4(g) and 5(f); Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 55 onwards; Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (n 20) 922.

<sup>22</sup> Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 470-2.

<sup>23</sup> Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 492: In the drafting process, the phrase "committed in any territory under its jurisdiction" was removed from the text of the provision without reason. This could be argued to mean that the provision is not territorially limited, or that the limitation was so obvious that it seemed unnecessary to include it. In any case, courts have been reluctant to admit such cases; Parlett, Kate, 'Universal Civil Jurisdiction for Torture' (2007) 4 EHRLR 385, 403; *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014.

<sup>24</sup> See for example Section 4.3.2 Corporations Acting Abroad.

<sup>25</sup> See Chapter 3.1.1 D Genocide Convention.

<sup>26</sup> The extraterritorial applicability of other provisions of the Genocide Convention remains unclear. Other provisions that are relevant in this chapter are Article 5, containing the obligation to enact the necessary legislation for the prosecution and punishment of genocide, and Article 8, containing a right to call upon the competent UN organs to take action. Because Articles 5 and 8 are also not on their face limited by territory, discussion of these provisions will be included below.

<sup>27</sup> *Genocide* case (n 2) para 183-4.

are affected.<sup>28</sup> This was in fact argued by Serbia, which stated: “[T]he Genocide Convention can only apply when the State concerned has territorial jurisdiction or control in the areas in which the breaches of the Convention are alleged to have occurred.”<sup>29</sup> In his separate opinion to the *Genocide* case Judge Tomka agreed with Serbia’s argument, claiming that states have “an obligation to prevent genocide outside its territory to the extent that it exercises jurisdiction outside its territory, or exercises control over certain persons in their activities abroad.”<sup>30</sup> Instead, the Court deliberately chose a broader approach and decided that Serbia had an obligation to prevent the genocide in Bosnia based on its “capacity to influence effectively the action of persons likely to commit, or already committing, genocide.”<sup>31</sup> The capacity to influence effectively does not necessarily require that a state exercises authority and control over the individuals whose rights are affected.<sup>32</sup> Therefore, it goes beyond territory and jurisdiction as the traditional bases for obligations under most human rights treaties. Instead, the third state obligation to prevent genocide is based on influence over the (potential) perpetrators of genocide.<sup>33</sup>

The precise meaning of the capacity to influence effectively has remained obscure. Before and during the Bosnian genocide, Serbia had a particularly strong capacity to influence because it had close political, military and financial ties with the Bosnian

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<sup>28</sup> Tams, Christian, Berster, Lars and Schiffbauer, Bjorn, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck, co-published by Hart and Nomos, 2013) 47 para 35 onwards: Notes that Article 1 of the Genocide Convention is silent on the issue of geographical applicability.

<sup>29</sup> *Separate Opinion of Judge Tomka in the Genocide case* (n 2) para 64, quoting from Verbatim Record of Public Sitting (CR 2006/16, p. 15).

<sup>30</sup> *Separate Opinion of Judge Tomka in the Genocide case* (n 2) para 67.

<sup>31</sup> *Genocide case* (n 2) 183 and 430-1: The ICJ first reiterated its 1996 judgment on preliminary objections, in which it decided that Articles 1 and 3 of the Genocide Convention “apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question”; Gattini, Andrea, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’ (2007) 18(4) EJIL 695, 699-700: “On the one hand [the Court] audaciously decided to disentangle the obligation to prevent in Article I of the Genocide Convention from any territorial link, substituting for the traditional concept of ‘jurisdiction’ the new and much vaguer one of ‘capacity to effectively influence’”; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 48 para 38: “If the duty to prevent only applied within a state’s territory, or in areas under its jurisdiction, it would not go much beyond a duty of vigilance ‘at home’. [...] However, as in practice, genocide [...] ‘typically ... presume[s] state participation’, it would not go much beyond a duty not to commit the crime. By contrast, a ‘global’ construction of a duty to prevent is much better able to give effect to the solemn pledge of state parties [...] ‘to liberate mankind from [the] odious scourge [of genocide].’”

<sup>32</sup> *Separate Opinion of Judge Tomka in the Genocide case* (n 2) para 68: “In this case, it has not been established that the Federal Republic of Yugoslavia exercised jurisdiction in the areas surrounding Srebrenica where atrocious mass killings took place.”

<sup>33</sup> Hakimi, ‘State Bystander Responsibility’ (n 1) 342: Describes the obligation to prevent genocide as an obligation to restrain third parties from committing abuse. Framed as such, the influence over the (potential) perpetrator is of manifest importance.

Serbs.<sup>34</sup> This has led some commentators to suggest that the capacity to influence effectively exists only in situations where third states have very strong influence over the (potential) perpetrators, while other commentators have interpreted it more loosely.<sup>35</sup> Glanville and Gattini have gone as far as to claim that the third state obligation to prevent genocide is incumbent on all states, to a greater or lesser degree.<sup>36</sup> Yet, the fact that the term “effectively” was added to the phrase used by the ICJ, suggests that the capacity to influence effectively does have a limiting or threshold function, meaning that not all states automatically incur an obligation to prevent genocide as soon as they become aware of a serious risk of genocide somewhere in the world. Apart from this indication in the judgment, it seems very optimistic to expect all states to take measures to prevent genocide, while in reality past cases of genocide were often met with inaction by the international community of states. In his 1993 separate opinion to the second provisional measures order in the *Genocide* case proceedings, Judge Lauterpacht noted that “[t]he limited reaction of the parties to the Genocide Convention in relation to [past episodes of genocide] may represent a practice suggesting the permissibility of inactivity.”<sup>37</sup> In light of the above, it seems appropriate to understand the capacity to influence effectively as a limit to the potential duty-bearing states and at the same time threshold for the obligation’s extraterritorial applicability, albeit less strict than jurisdiction. In contrast to jurisdiction, the capacity to effectively influence is also an important parameter for the content and scope of each state’s ensuing obligation once the threshold has been reached.<sup>38</sup>

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<sup>34</sup> *Genocide* case (n 2) paras 388, 394, 434; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 19; Gibney, Mark, 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' (2011) 3(2) GR2P 123, 137: Points out the absurdity of the standards for direction or control and complicity, which are “virtually impossible to reach”.

<sup>35</sup> Rosenberg, Sheri P., 'Responsibility to Protect: A Framework for Prevention' (2009) 1(4) GR2P 442, 469: Argues that “the bar remains very high for establishing the sufficient level of influence necessary for the legal duty to prevent to arise”; Hakimi, 'State Bystander Responsibility' (n 1) 364-5: Suggests Serbia only had an obligation to prevent the genocide because it substantially enabled it; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 19: Mentions Rosenberg and Hakimi, but counters their interpretations; Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment' (n 31) 705 and 713: “(...) all states had, at least *in abstracto*, a duty to prevent it.”

<sup>36</sup> Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18: “The obligation (...) would appear to be borne by every state to a greater or lesser degree”; Gibney, 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' (n 34) 139: “In sum, each State Party has a legal obligation to take all measures within its powers (which will vary from state to state) to prevent genocide – in other lands.”

<sup>37</sup> *Separate opinion of Judge ad hoc Lauterpacht, Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) Order of 13 September 1993 [1993] ICJ Rep 325, para 115.

<sup>38</sup> See Section B.1 Genocide: The role of the capacity to effectively influence as a parameter for the content and scope of the obligation is further explained; *Genocide* case (n 2) para 430: The capacity to influence effectively is described as a “parameter”; See Chapter 3.2 Corresponding Obligations: Jurisdiction follows from forms of control over territory or people. The content and scope of



The capacity to influence effectively has not yet been applied in other cases and it is hard to say how (strictly) it should be interpreted.<sup>39</sup> The ICJ stated that the capacity to influence effectively “varies greatly from one State to another” and attempted to clarify the concept of a capacity to influence effectively by putting forward three factors to assess a state’s capacity.<sup>40</sup> These factors are: (i) The geographical distance to the scene of the events; (ii) The strength of political and other links with the main actors involved in the events; and (iii) The legal position *vis a vis* the situation and persons facing the danger.<sup>41</sup> The first two factors are substantive, while the third is a legal factor. The first factor is relatively straightforward and stipulates that a state’s capacity to influence depends on the “presence in the area where acts of genocide threaten to take place, or close thereby.”<sup>42</sup> This factor points to neighboring or regional states, but also states that exercise extraterritorial jurisdiction in (potentially) affected areas. The second factor appears the widest, since a great number of states can have political or other links with the main actors involved in a (potential) case of genocide. The third factor seems to be added mostly to “stress the ‘limits’ imposed by international law on the actions of the states”, meaning for example that states cannot use force in or against another state without that state’s consent or Security Council (SC) authorization.<sup>43</sup> It is unclear how the different factors should be weighed.<sup>44</sup> For example, it is uncertain if one of the factors could be determinative or whether the factors should be considered cumulative.<sup>45</sup> Furthermore, given the fact that the ICJ

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corresponding obligations are not only informed by the level of control, but also by other legal, practical and power-related barriers.

<sup>39</sup> Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 51 para 45: “Delineation the general criterion of ‘capacity to influence’ is the key challenge.”

<sup>40</sup> *Genocide case* (n 2) para 430.

<sup>41</sup> *Genocide case* (n 2) para 430; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 52 para 46; See also Chapter 3.1.1 D Genocide Convention.

<sup>42</sup> Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 52 para 46 (ii).

<sup>43</sup> Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 31) 701; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(4) jo 42; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 51 para 45 and 52 para 46: These authors interpret the legal factor both as a limit, and as a power that forms a parameter for the capacity to influence. They note that legal powers can also “recognize rights or duties of particular states: treaties designating particular states as protective powers are one illustration, special powers enjoyed under regimes of occupation another.”

<sup>44</sup> Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 31) 699-700.

<sup>45</sup> Ruvebana, Etienne, *Prevention of Genocide Under International Law – An Analysis of the Obligations of States and the UN to Prevent Genocide at the Primary, Secondary and Tertiary Levels* (Intersentia, 2014) 172: Argues that the geographical factor should in any case not be determinative, because it would exclude other states that are further removed. “Yet, the capacity to prevent may be absent even for a state close to the scene of events and may exist between a state concerned and the

states that the capacity to influence effectively depends “among other things” on the three factors, it seems it was not intended to be an exhaustive list and leaves room for other relevant factors.<sup>46</sup> Other potentially relevant factors have been suggested, such as the “regularity of contact” or a state’s relative wealth or political (persuasive) power in the international community of states at large.<sup>47</sup> As it stands, the capacity to influence effectively remains an imprecise threshold and vague parameter for the content and scope of the obligation. In any case, the threshold will be more easily met and the corresponding obligation particularly burdensome for states that are present in or close by the area where a genocide threatens to take place, states that have political and other links with the (potential) perpetrators and states that do not have to act outside the limits of international law to employ measures to prevent.

As already discussed in Chapter 3.1.1 D, the obligation to prosecute and punish in Article 6 of the Genocide Convention contains an express territorial limitation.<sup>48</sup> Although provisions on punishment in earlier drafts of the Convention were more widely applicable, the drafting parties ultimately decided against the inclusion of an express obligation to prosecute based on nationality or universal jurisdiction.<sup>49</sup> In the 2007 *Genocide* case, the ICJ interpreted this as meaning that Article 6 does not obligate states to prosecute and punish alleged perpetrators of genocide on any other basis than that the acts took place on their territory.<sup>50</sup> This implies that the scope of applicability of the obligation to prosecute and punish is more limited under the Genocide Convention than under the CAT and IACPPT. Although third states are not required to prosecute wrongdoers who committed acts of genocide abroad under the ICJ’s interpretation, the Court confirmed that they are permitted to do so based on customary law.<sup>51</sup> The territorially limited scope of applicability is somewhat mitigated by an obligation to cooperate with international penal tribunals of which states have

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actors of genocide in a place very far from the scene of events [...] Thus the criterion may be relevant, but it needs to be supplemented by other criteria.”

<sup>46</sup> *Genocide* case (n 2) para 430.

<sup>47</sup> Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 52 para 45 (iii); Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18: Mentions that the obligation is presumably particularly burdensome for “a great power that possesses the ability to persuade or compel persons to refrain from committing the crime” and less so for a “less influential and weaker state [...]”; Pooter, de, Helene, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (2009) 17 *Afr Yearb Int Law* 287, 299 and 305: Wonders whether members of the SC have an obligation to use the UN machinery to prevent genocide. “It is surprising that the Court does not go further in its enumeration of the parameters [which she takes to mean that the Court] refuses to draw an exhaustive list of parameters, letting the door open for a free assessment of future situations.”

<sup>48</sup> Genocide Convention (n 2) art 6.

<sup>49</sup> Economic and Social Council Resolution 77 (V), 'Genocide' (6 August 1947) UN Doc E/573, art 6-8.

<sup>50</sup> *Genocide* case (n 2) para 184 and 442; *Separate Opinion of Judge Tomka in the Genocide* case (n 2) para 65.

<sup>51</sup> *Genocide* case (n 2) para 442.

accepted the jurisdiction also referred to in Article 6.<sup>52</sup> Examples of such tribunals are the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>53</sup>

It is odd that international treaty obligations for the prosecution and punishment of acts of torture are more demanding under positive international law than obligations for the prosecution and punishment of acts of genocide, which has been described as the “crime of crimes.”<sup>54</sup> Article 6 of the Genocide Convention and its interpretation by the ICJ have received much criticism for the limited approach in this regard, especially as many states have now embraced a more accepting attitude towards universal jurisdiction.<sup>55</sup> In light of this changing attitude, Tams, Berster and Schiffbauer have suggested that, because the obligation to punish genocide contained in Article 4 is phrased in absolute terms, an implied legal consequence of Article 4 jo 6 of the Genocide Convention should be that states other than the territorial state must ensure prosecution of suspects within their jurisdiction.<sup>56</sup> In practice, this would mean that when a suspect of acts of genocide is present within a state’s jurisdiction, it has a duty to promote prosecution by others. In the specific circumstances where there is no international penal tribunal or other state willing or able to prosecute, meaning that the absolute obligation to punish cannot be otherwise ensured, state parties would have a subsidiary duty to prosecute suspects before their domestic courts.<sup>57</sup> The argument offers a convincing solution for the perceived shortcomings of Article 6 in

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<sup>52</sup> Genocide Convention (n 2) art 6; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 255 para 56.

<sup>53</sup> Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 248-9.

<sup>54</sup> Schabas, William A., 'National Courts Finally Begin to Prosecute Genocide, The ‘Crime of Crimes’ (2003) 1(1) JICJ 39; Genocide Convention (n 2) preamble: Describes genocide as an “odious scourge” and an international crime that is “contrary to the spirit and aims of the United Nations and condemned by the civilized world.”

<sup>55</sup> Schabas, 'National Courts Finally Begin to Prosecute Genocide, The ‘Crime of Crimes’ (n 54) 60: Explains that the *travaux préparatoires* of the Genocide Convention show that the drafters sought to explicitly exclude universal jurisdiction for genocide, while it is now accepted at least as a permissive basis for prosecution; Ben-Naftali, Orna, 'The Obligation to Prevent and to Punish Genocide' in Paola Gaeta (ed), *The UN Genocide Convention – A Commentary* (OUP, 2009) 27, 48: Finds the ICJ’s interpretation of Article 6 “puzzling given that the interpretation of the Convention ‘must exclude any narrow or overly technical approach to the problems involved’, and that the judgment itself otherwise employs a purposive method of interpretation.” He claims that “a teleological reading of Article VI in the light of Article I and of other provisions of the Convention as well as in the light of later normative developments in both conventional and customary international law, supports the conclusion that the jurisdictional regime over perpetrators of genocide includes an obligation to exercise universal jurisdiction [...]”

<sup>56</sup> Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 256 para 58(2).

<sup>57</sup> Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 256 para 58 (3); Gaeta, Paola, *The UN Genocide Convention – A Commentary* (OUP, 2008) 46-8.

light of the object and purpose of the Genocide Convention, correlation between its different provisions and developments that have taken place since the Convention came into being, such as the adoption of the CAT and IACPPT with more demanding regimes of prosecution and punishment in the mid-80's.<sup>58</sup> Nevertheless, the subsidiary duty to prosecute acts of genocide based on universal jurisdiction is contentious in light of the ICJ's clear pronouncement in the 2007 *Genocide* case that the territorial limitation included in Article 6 should be respected. Therefore, it cannot be considered *lex lata* until it is either accepted as a valid interpretation of the Convention by an authoritative interpretative body or if a (subsidiary) obligation to prosecute genocide based on universal jurisdiction develops into customary law.<sup>59</sup>

#### **4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction**

From the above overview it can be inferred that third state obligations to prevent torture and genocide are commonly based on forms of influence that states have over (potential) perpetrators of these acts, either before, during or after they are committed.<sup>60</sup> The triggers, content and scope of the obligations introduced in Section 4.1 will now be discussed based on the timeline.<sup>61</sup> There are not many third state obligations to prevent gross human rights violations, nor are they spread out evenly over all the temporal phases. Third state obligations to prosecute and punish acts of torture that were committed outside the state's jurisdiction are part of the first and last temporal phase (long-term prevention and preventing recurrence). On the other hand, the third state obligation to employ all means reasonably available to prevent genocide outside the state's jurisdiction is part of the acute phases of prevention (short-term prevention and preventing continuation). Obligations to prevent arbitrary deaths beyond territory and jurisdiction do not have any recognized legal basis and are therefore altogether absent from this section.<sup>62</sup> Compared to the territorial and

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<sup>58</sup> CAT (n 7); IACPPT (n 7).

<sup>59</sup> Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 257 para 59: This position was not confirmed nor contradicted by the ICJ's judgment in the *Genocide* case, because that judgment was rendered in the context where there was an international penal tribunal available, namely the ICTY, to prosecute suspects. The ICJ affirmed Serbia's obligation to cooperate with the ICTY and no further discussion was needed; Schabas, 'National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'' (n 54) 60.

<sup>60</sup> CAT (n 7) art 5; IACPPT (n 7) art 12: Because of the presence of suspects who committed torture abroad within a state's jurisdiction; or; Genocide Convention (n 2) art 1 and *Genocide* case (n 2) para 430: Because of the geographical distance and close links with (potential) perpetrators of genocide abroad; CAT (n 7) art 14: There are exceptions, such as the claimed obligation to ensure the right to an effective remedy of victims of torture, even if the acts took place abroad.

<sup>61</sup> See Chapter 1.3.2 Temporal Phases and 1.3.4 Determining the Content and Scope of Obligations to Prevent.

<sup>62</sup> A recent development in the ECtHR's case law suggests that third state obligations to prosecute and punish may also develop for other rights, such as the right to life: *Gray v. Germany*, no. 49278/09, 22 May 2014, para 20, 29, 32, 40-1 and 93: The ECtHR took an unexpectedly broad approach towards the applicability of the procedural requirements attached to the right to life. The case concerned a German doctor who committed malpractice resulting in the death of a patient in the United Kingdom (UK), then

jurisdictional layers, the picture that emerges of obligations to prevent gross human rights violations beyond jurisdiction is that of a mere patchwork of rather incidental third state obligations.

### **A. Long-Term Prevention**

The phase of long-term prevention starts as soon as a state is bound by the relevant obligations under a treaty or customary international law and does not require knowledge of a concrete risk.<sup>63</sup> Long-term obligations seek to have a general deterrent effect and continue to be relevant in other phases. The main long-term obligation identified in Chapter 2 is the obligation to introduce a proper legislative framework that is in line with requirements under human rights law and capable of deterring violations. In this layer, long-term third state obligations are focused on: (i) Including bases in the domestic legal framework that allow for the establishment of criminal jurisdiction over acts of torture that took place outside the state's territory and jurisdiction; and (ii) Removing legal obstacles and including a basis in the domestic legal framework for the extradition of suspects and other forms of cooperation with other states and international penal tribunals.

#### **A.1 Torture**

The CAT and IACPPT require state parties to enact legislation prohibiting torture and providing for appropriate punishment where required.<sup>64</sup> As explained in Section 4.1.1, state parties to the CAT and IACPPT have obligations to prosecute suspects of torture based on nationality and universal jurisdiction, also if the acts were committed outside its jurisdiction. That means state parties are in the long-term obligated to include the relevant bases – the active nationality principle and universal criminal jurisdiction – in their domestic legal frameworks and taking other measures that will allow it to establish jurisdiction, investigate, prosecute or extradite suspects in line with these principles.<sup>65</sup> State parties must take steps to enact the necessary legislation as soon as

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to return to Germany. Both the UK and Germany started proceedings against the doctor, but he was tried in Germany. The victim's children complained about the procedures in Germany, which were ultimately dismissed on the merits. But a remarkable step was taken at the admissibility stage. Or rather, a step was missed that perhaps should have been taken. Neither Germany nor the court considered whether Germany was at all obligated, in light of the jurisdictional limitation in Article 1 of the ECHR, to extradite or prosecute the doctor in the first place, considering the malpractice took place in the UK; Milanović, Marko, 'Gray v. Germany and the Extraterritorial Positive Obligation to Investigate' (28 May 2014) EJIL Talk, available at: <<http://www.ejiltalk.org/gray-v-germany-and-the-extraterritorial-positive-obligation-to-investigate/>>: The case opens the door to the argument that states are required to extradite or prosecute suspects of crimes other than torture that took place abroad, if the suspect is a national or present on their territory. Still, there is no cause to overgeneralize, as the case was rendered in a context where no argument was brought forward to contest applicability and therefore the broad approach may not be upheld.

<sup>63</sup> See Chapter 1.3.2 Temporal Phases.

<sup>64</sup> CAT (n 7) art 2(1), 4; IACPPT (n 7) art 6.

<sup>65</sup> CAT, General Comment 2 (n 10) para 2 and 9; International Law Commission, 'Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (2014) Yearbook of the ILC, Vol II, Part 2, para 17: "The effective fulfilment of the obligation to extradite or prosecute requires undertaking necessary

they become a party to the treaty, since it is a necessary condition for the realization of their other obligations.<sup>66</sup> A general preventive effect is often ascribed to the adoption of punitive legislation, even though this effect has not been proven.<sup>67</sup> The ICJ stated in the *Belgium v. Senegal* case, brought before the Court after Belgium had unsuccessfully requested the extradition of former president of Chad Hissène Habré, that the worldwide regime of criminal punishment for acts of torture:

“[H]as in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.”<sup>68</sup>

Besides enacting such legislation, states should ensure that there are institutions capable of investigating and prosecuting crimes committed abroad.<sup>69</sup> State parties must also ensure that torture is an extraditable offence in extradition treaties they enter into *inter se* and state parties of the CAT must ensure they can afford other

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national measures to criminalize the relevant offences, establishing jurisdiction over the offences and the person present in the territory of the State, investigating or undertaking primary inquiry, apprehending the suspect, and submitting the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extraditing, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect.”

<sup>66</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep 422, para 76-77: “The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. [...] Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal’s implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention”; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 78; Koutroulis, Vaios, ‘Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)’ (May 2014) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2129?rskey=PhebjZ&result=1&prd=EPIL>> para 18.

<sup>67</sup> Andenaes, Johannes, ‘The General Preventive Effects of Punishment’ (1966) 114(7) UPaLRev 949, 952-4: Describes the belief in general prevention as mostly an ideological conviction, but does not exclude that it exists. There is just a lack of empirical research that can prove it. Although some progress has been made, generally this still seems to be the case today. The article also proposes a set of nuances to take into account, such as cultural and personal differences; See 2.2 A. Long-Term Prevention: Although the preventive effect of both national and international criminal law remains speculative, making offences punishable by law is reasoned to have a long-term deterrent effect on potential perpetrators and lays the groundwork for a system that is capable of tracking and punishing violations.

<sup>68</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 75.

<sup>69</sup> Kamminga, ‘Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses’ (n 12) 954.

states (judicial) assistance in connection with criminal proceedings for acts of torture.<sup>70</sup>

## A.2 Genocide

Like the CAT and IACPPT, the Genocide Convention requires state parties to “undertake to enact [...] the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.”<sup>71</sup> In light of its focus on effective penalties, the scope of the obligation to enact the necessary legislation is linked to Article 6, which contains an express territorial limitation. As discussed in Section 4.1.2, in the interpretation of the ICJ the obligation to prosecute and punish is more limited under the Genocide Convention than under the CAT and IACPPT.<sup>72</sup> Nevertheless, genocide has been widely accepted as a crime for which states are permitted to exercise universal criminal jurisdiction based on customary law.<sup>73</sup> So although states may not be required under the Genocide Convention to prosecute acts of genocide on any other basis than that the acts took place within their

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<sup>70</sup> CAT (n 7) art 8 and 9; IACPPT (n 7) art 13: These Articles seek to remove obstacles to extradition, to support the obligations to establish criminal jurisdiction over suspected torturers on different bases and avoid safe havens. Extradition can be subject to certain requirements in domestic law; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 369 and 383: Article 8 “establishes an obligation to treat torture as an extraditable offence in bilateral or multilateral extradition treaties between States parties and an obligation to recognize torture as an extraditable offence in domestic law.” Article 9 means that “the State in which the act of torture has been committed (the territorial State) and the State of which the suspected torturer is a citizen (the national State) are under an obligation to provide the forum State with all the evidence needed to proceed with the prosecution.”

<sup>71</sup> Genocide Convention (n 2) art 5: The obligation to criminalize acts of genocide in Article 5 can be seen as having a general preventive effect of its own; Andenaes, 'The General Preventive Effects of Punishment' (n 67) 952-4: Such a general preventive effect has never been empirically proven, but is an aspiration and motivation for legislative action; *Genocide* case (n 2) 162 and 430-1: In the Genocide case, the court expressly stated that the obligation to prevent contained in Article 1 is broader in scope than the Articles in the Genocide Convention. However, it also limited the temporal scope of the obligation to the phases of short-term prevention and prevention of continuation, after a state knows or should have known that there is a serious risk that genocide may occur. Therefore, it would go too far to claim that third states are obligated to take long-term measures to prevent genocide abroad under the auspices of Article 1 of the Genocide Convention; United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (2014) available at:

<[http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes\\_en.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf)>k 9 and 18-9: Although no long-term obligations exist in the context of the Genocide Convention, long-term measures to prevent genocide may be expected to focus mostly on mitigating preconditions of genocide. This could for example take the form of targeted assistance and development cooperation.

<sup>72</sup> *Genocide* case (n 2) para 184 and 442.

<sup>73</sup> Kamminga, Menno T., 'Extraterritoriality' (November 2012) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=Srx94t&result=2&prd=EPIL>> para 14.

territory, they can still choose to introduce legislation that allows them to prosecute suspects based on universal jurisdiction.<sup>74</sup> Many states have in fact enacted such legislation, such as the Netherlands, Germany and Canada.<sup>75</sup> If a (subsidiary) obligation to prosecute suspects based on universal jurisdiction is at some point accepted as *lex lata*, states will then be obligated to enact legislation that includes bases to establish criminal jurisdiction over acts of genocide that took place outside its jurisdiction.<sup>76</sup> State parties to the Genocide Convention do have certain other obligations that need to be translated into domestic law that can apply to suspects that committed acts of genocide outside the state's jurisdiction. For example, state parties are required to remove legal obstacles and ensure that a basis exists in domestic and treaty law for the cooperation with, and extradition of suspects to, international penal tribunals and other states.<sup>77</sup>

## B. Short-Term Prevention

The phase of short-term prevention starts when a violation has become foreseeable.<sup>78</sup> The measures relating to this phase are targeted at preventing a specific violation and can involve physical protection and operational measures.<sup>79</sup> The main obligation relating to short-term prevention identified in Chapter 2 is the obligation to take (operational or protective) measures to prevent, meaning that states must take positive action capable of averting a specific violation.<sup>80</sup> The only short-term obligation to prevent gross human rights violations that can be incurred by third states is the obligation to employ all means reasonably available to prevent genocide so far as possible.<sup>81</sup>

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<sup>74</sup> Genocide case (n 2) para 442; See also Chapter 3.3 A Long-Term Prevention: States must introduce legislation that ensures that state officials that commit offences abroad can be punished.

<sup>75</sup> Netherlands International Crimes Act (19 June 2003) Stb 2003, 270, available at: <[http://wetten.overheid.nl/BWBR0015252/geldigheidsdatum\\_03-08-2009](http://wetten.overheid.nl/BWBR0015252/geldigheidsdatum_03-08-2009)> art 2 and 3; Schabas, 'National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'' (n 54) 60: Mentions Canada and Germany as countries that "explicitly authorize universal jurisdiction for genocide."

<sup>76</sup> Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 252-4 and 256 para 58(3).

<sup>77</sup> Genocide Convention (n 2) art 6 and 7: "Genocide and the other acts enumerated in Article III shall not be considered political crimes for the purpose of extradition"; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 261 onwards: Extradition can be subject to other requirements in domestic law, for example based on the risk of death penalty or torture or protecting nationals against foreign jurisdiction.

<sup>78</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>79</sup> See for a more detailed description Section 1.3.3 Method: Timeline.

<sup>80</sup> See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory B. Short-Term Prevention.

<sup>81</sup> *Genocide* case (n 2) para 430-1; See Section 4.1.2 Genocide Convention.



## B.1 Genocide

In the *Genocide* case, the ICJ explicitly stated that the obligation to prevent genocide in Article 1 means that, if states have the capacity to influence effectively and once they learn or should normally have learned of the “serious risk” that genocide will be committed, they must “employ all means reasonably available to them, so as to prevent genocide so far as possible.”<sup>82</sup> The trigger of knowledge is objective, so it does not have to be proven that a state actually knew about the risk of genocide.<sup>83</sup> It is enough that it “should normally have learned of” the serious risk.<sup>84</sup> In the specific context of the *Genocide* case, the Court noted that:

“[A]lthough it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent [...], they could hardly have been unaware of the serious risk of it once the VRS [Army of Republika Srpska] forces had decided to occupy the Srebrenica enclave.”<sup>85</sup>

The Court supported this statement with reference to several official documents that showed that such awareness existed.<sup>86</sup> State representatives are often reluctant to expressly recognize a risk of genocide in an attempt to evade obligations.<sup>87</sup> Because

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<sup>82</sup> *Genocide* case (n 2) para 430-1.

<sup>83</sup> Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 49 para 40-1: According to the authors, the trigger contains two elements: (i) A credible, plausible or real threat of genocide, meaning there is a background of “military build-up or incitement”; and (ii) Awareness of the risk, which is a matter of evidence.

<sup>84</sup> *Genocide* case (n 2) para 431:

<sup>85</sup> *Genocide* case (n 2) para 436.

<sup>86</sup> *Genocide* case (n 2) para 436-7: Several documents detailing meetings between third state and IO officials with Milosevic, which were also used in the Milosevic trial before the ICTY, prove his awareness of the risk of a massacre when the VRS forces occupied the Srebrenica enclave.

<sup>87</sup> Grünfeld, Fred and Huijboom, Anke, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (BRILL, 2007) 240 citing Kofi Annan: “One of the reasons for our failure in Rwanda was that [...] once it started, for too long we could not bring ourselves to recognize it, or call it by its name; Hong, Mai-Linh K., ‘A Genocide by Any Other Name: Language, Law, and the Response to Darfur’ (2008) 49 *Va J Int’l L* 235, 265: “[D]etermining whether or not a situation constitutes genocide is a process fraught with biases”; Sarkin, Jeremy and Fowler, Carly, ‘The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and the Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia’ (2010) 33 *Suffolk Transnat’l L Rev* 35, 23: “It is important to address the use of the word “genocide” as the word itself is inherently political and comes, as argued above, with moral—if not legal—obligations. As noted, the word “genocide” was first applied to the situation in Rwanda by the RPF on April 13—just six days after the onset of violence. The events were not called “genocide” publicly, however, until fifteen days later, on April 28”; Sometimes situations are still not recognized as genocide *ex post facto*, even though it does fit the legal criteria. Think of the controversy surrounding the Armenian Genocide. Recently, a UNSC resolution was vetoed by Russia that calls the Srebrenica massacre genocide, despite the fact that multiple international and national courts have already identified it as such. See: *The New York Times*, ‘Russia Vetoes UN Resolution Calling Srebrenica ‘Crime of Genocide’ (8 July 2015) available at: <[http://www.nytimes.com/2015/07/09/world/europe/russia-vetoes-un-resolution-calling-srebrenica-massacre-crime-of-genocide.html?\\_r=0](http://www.nytimes.com/2015/07/09/world/europe/russia-vetoes-un-resolution-calling-srebrenica-massacre-crime-of-genocide.html?_r=0)>; There is a push to move beyond semantics and act to prevent

of the objective trigger of knowledge, it should not matter whether a state itself or the international community labels a situation as (a serious risk of) genocide. All that is legally relevant for the obligation to be triggered is whether states are aware of the serious risk that elements of genocide will come together: the intent to destroy in whole or in part one of the protected groups combined with acts of killing, torture or other acts mentioned in Article 2 of the Genocide Convention.<sup>88</sup>

The content and scope of the corresponding third state obligation can only be described in tentative fashion.<sup>89</sup> There is little guidance in that regard in the Genocide Convention itself or the treaty's *travaux préparatoires*.<sup>90</sup> Ben-Naftali describes that “[a]t the time the Genocide Convention was concluded, the ‘obligation to prevent’ in Article I was a morally pregnant but a normatively empty concept.”<sup>91</sup> The ICJ took important steps to clarify the obligation to prevent in the *Genocide* case, by claiming that it has a separate existence from the obligation to punish genocide and deciding the basis upon which it can be incurred by third states and parameters for its scope. At the same time, the Court made little effort in terms of clarifying what type of measures may be required, describing the obligation to prevent as one of due-diligence to “employ all means reasonably available to them.”<sup>92</sup> It later decided that Serbia violated its obligation to prevent genocide, because it did not show “that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed.”<sup>93</sup> The Court does not explore what Serbia should have done, giving little guidance to the question what measures third states in general may be

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the risk and continuation of mass atrocities in general: OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71); Jacobs, Dov, 'Moving Beyond the Genocide Debate: Mass Atrocities and the International Community' (Presented at the ISA Annual Convention 2010, New Orleans) available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1564901](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564901)>.

<sup>88</sup> Genocide Convention (n 2) art 2; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) 19, risk factor 10: “Signs of an intent to destroy in whole or in part a protected group” can manifest itself, among others, through official documents, media records or other documents showing an intent/ incitement to target a protected group, widespread discriminatory practice, dehumanization of a protected group, physical elimination or other forms of violence against members of a protected group; Ruvebana, *Prevention of Genocide Under International Law* (n 45) 109: “[T]he knowledge (or awareness) of the risk of genocide should not be confused with the certainty that genocide will occur.”

<sup>89</sup> Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 53 para 48: “Outside these special settings [referring to the territorial state and state’s that exercise extraterritorial jurisdiction], the specific conduct required of third states where genocide appears likely to occur in a foreign country can only be described tentatively.”

<sup>90</sup> Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 33; Tams, Berster, and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 45 para 31 and 33: “Unlike the duty to punish, the duty to prevent genocide is not elaborated in any detail in the subsequent provisions of the Convention. [...] Because this is so, the precise scope of the duty to prevent is difficult to assess.”

<sup>91</sup> Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 33.

<sup>92</sup> Genocide case (n 2) para 430.

<sup>93</sup> Genocide case (n 2) para 438.

required to take to prevent genocide.<sup>94</sup> Only a few works in literature have tried to further substantiate what it may mean in practice, describing the obligation as “a large shell yet to be filled.”<sup>95</sup>

The content and scope of the obligation to prevent genocide of each individual third state that has a capacity to influence effectively can be approximated based on a few considerations. First of all, the capacity to influence effectively and factors formulated by the ICJ to assess that capacity does not only act as a threshold, but also as a parameter for the content and scope of the third state’s obligation.<sup>96</sup> A geographically close state with close political or other ties may be required “to exercise massive diplomatic or economic pressure on a foreign regime seriously threatening to commit acts of genocide.”<sup>97</sup> Whereas a state that is further removed and does not have particularly strong ties, may only be required to support international prevention efforts.<sup>98</sup> Furthermore, states must act within the limits of international law, meaning for example that they cannot use force in or against another state without that state’s consent or authorization by the SC.<sup>99</sup> Second, the third state obligation to prevent

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<sup>94</sup> Genocide case (n 2) para 429: The Court confined itself “to determining the specific scope of the duty to prevent in the Genocide Convention [...] to the extent that such a determination is necessary to the decision to be given on the dispute before it.”

<sup>95</sup> Pooter, de, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (n 47); Ruvebana, *Prevention of Genocide Under International Law* (n 45).

<sup>96</sup> *Genocide case* (n 2) para 430: “Various parameters operate when assessing whether a State has duly discharged the obligation concerned”; See Section 4.1.2 Genocide Convention; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 53 para 49; Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 40; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18-20: Suggests that for larger and wealthier states, the obligation to prevent will be more demanding than for smaller and less wealthy states.

<sup>97</sup> Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 54 para 49; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 18-20.

<sup>98</sup> Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20.

<sup>99</sup> Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 53 para 49.

<sup>99</sup> *Genocide case* (n 2) para 430: “The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law”; UN Charter (n 43) art 2(4) jo 42; See Chapter 3.3 A.1 Foreign State’s Legal and Administrative Framework and B Short-Term Prevention: Discusses whether and how the particular terms of a mandate affect the content and scope of extraterritorial human rights obligations. The role of a specific mandate is similar in the context of third state obligations: once a mandate exists it should allow state officials to function in a manner consistent with requirements under international human rights law. If a mandate is too restrictive in this regard, this points to a failure of a state’s long-term obligations, but it may nevertheless indirectly impact the content and scope of short-term obligations or obligations to prevent continuation. The biggest initial hurdle to third state obligations is often that there is no mandate in the first place. As long as there is no mandate (to use force), this does not obviate a third state’s obligation to prevent genocide by taking all other means reasonably available; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 51 para 45.

genocide is limited by a standard of reasonableness, because states are only required to employ measures that are “reasonably available to them.”<sup>100</sup> Which means, as Glanville has convincingly argued, that a third state is not expected to take measures to prevent genocide “to an extent that is excessively costly to itself.”<sup>101</sup>

What may be required of states in terms of specific measures is mostly an open question that can only be answered in the specific circumstances. If the risk of genocide stems from a group of non-state actors within a state, which the territorial state is willing to suppress, the role of third states will be one of facilitation and support. If on the other hand the territorial state is involved in acts prohibited in the Convention, third states will have to take measures against that state.<sup>102</sup> The ICJ referred to the importance of assessing the necessary measures *in concreto*, meaning they must respond to the concrete threat.<sup>103</sup> Similar to short-term obligations in other layers, the obligation to prevent genocide is formulated in an open-ended manner, meaning that the measures states may have to take are not specified. Yet, in the other layers, it is clearer what measures states may be expected to take to satisfy those open-ended obligations. There are many possible measures that third states can take that might be reasonably available to them and could contribute to preventing a concrete threat of genocide, some of which may depend on a specific state’s capacity to influence. A few examples are: neighboring states opening their borders for protected groups under the Genocide Convention, informing or calling upon other actors such as states or UN organs to take action, exercising diplomatic pressure, negotiating with the (potential) perpetrators, suspending treaty benefits or membership of an IO, imposing sanctions or arms embargoes and finally taking coercive measures within the limits of what is allowed under international law.<sup>104</sup>

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<sup>100</sup> *Genocide case* (n 2) para 430; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; See Chapter 2.2 B.3 Genocide and 2.3 Conclusion.

<sup>101</sup> Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20.

<sup>102</sup> *Genocide case* (n 2) para 430 ; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 53 para 48; Milanović, Marko, 'State Responsibility for Genocide: A Follow-Up' (2007) 18(4) EJIL 669, 686.

<sup>103</sup> Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment' (n 31) 704: “[I]t is only through temporally determinable elements, e.g. the presence of a real and serious danger of genocide, that the duty to prevent can be concretized”; *Genocide case* (n 2) 430; To further concretize the short-term obligation to prevent genocide, studies on causes and paths of escalation are very useful; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) 4: Explains that from the ability to identify risk factors “it follows that we can also identify measures that can be taken by States and the international community to prevent these crimes.” Because of authoritative studies on paths of escalation leading to genocide, states are now more aware of what to look for to determine whether genocide is unfolding and what action could be required of them.

<sup>104</sup> *Genocide Convention* (n 2) art 2: Protected groups refer to the members of a national, ethnical, racial or religious group; Pooter, de, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (n 47) 306; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (n 28) 53-4; Bellamy, Alex J. and McLoughlin, Stephen, 'Preventing Genocide and Mass

Because states must act to prevent genocide within the limits of international law, coercive measures may only amount to the use of force by third states with the consent of the territorial state or when authorized by the SC.<sup>105</sup> Once a SC mandate under Article 42 of the UN Charter exists, it brings with it a new set of obligations for UN member states to negotiate making available the necessary means to undertake the mission.<sup>106</sup>

The fact that the SC has to sanction the use of force is sometimes problematic, given the possibility of political deadlock. Glanville has argued that states that are members of the SC have a “particular obligation to facilitate the prevention of genocide.”<sup>107</sup> Given the references to geographical distance and political and other links, it seems unlikely that members of the SC would per definition be considered to pass the

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Atrocities: Causes and Paths of Escalation' Asia Pacific Centre for the Responsibility to Protect (8 June 2009) available at:

<<https://r2pasiapacific.org/filething/get/1281/Causes%20and%20Paths%20of%20Escalation%20Report%20June%202009.pdf>> 17 and and more detailed list of elements on 19-20.

<sup>105</sup> Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 51 para 45: “[T]he recognition of a duty to prevent adds very little to debates about the unilateral use of force to stop genocide in so-called ‘humanitarian interventions’”; Two other measures indicated in the Genocide Convention could have a short-term preventive effect: calling upon UN organs to take action and prosecuting suspects of genocide. Neither of these are international obligations for third states. See: Genocide Convention (n 2) art 4 jo 6 and 8: Article 6 contains an express territorial limitation and Article 8 allows but does not require states to call upon UN organs; *Genocide* case (n 2) para 184 and 442: States may exercise universal jurisdiction for acts of genocide; Ruvebana, Etienne and Brus, Marcel, 'Before It's Too Late: Preventing Genocide by Holding the Territorial State Responsible for Not Taking Preventive Action' (2015) 62(1) *Neth Int'l L Rev* 25, 29: Prosecuting suspects of acts of genocide can have a preventive effect. Prosecution by a third state could have a short-term preventive effect, for example when an individual suspected of committing acts prohibited under Article 3 of the Convention travels abroad and the third state takes action to prevent them from returning or committing acts of genocide in the direct future; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58(2) and 53-4; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; Bellamy and McLoughlin, 'Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation' (n 104) 17 and and more detailed list of elements on 19-20.

<sup>106</sup> UN Charter (n 43) art 43(1): "All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security"; *Genocide* case (n 2) 430; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 53-4 para 49; Simma, Bruno and others, *The Charter of the United Nations: A Commentary* (OUP, 2002) 1351 onwards: “This fundamental obligation, however, exists only in accordance with one or more special agreements, and it is therefore transformed into a duty *de negotiando et de contrahendo*. Such negotiations should concern only the ‘how’, not the ‘if’, of the provision of forces [...]”; Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; Glanville argues that states are legally bound to contribute troops if this is a measure “reasonably available” to them.

<sup>107</sup> Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20 and 21-3; Peters, Anne, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) *EJIL* 513, 540: “[T]he exercise of the veto may under special circumstances constitute an *abus de droit* by a permanent member.”

threshold to incur the obligation to prevent genocide. Rather, the question is whether – in a situation where member states of the SC do incur the obligation to prevent genocide – they are obligated not to obstruct resolutions that could contribute to preventing genocide. De Pooter considers this possibility, but calls it a “progressive” interpretation and explains that “[w]hat is more certain is that in case of obstruction within the [SC] because of a lack of majority or the use of veto, the obligation to prevent supported by the individual members of the Security Council would not be extinguished.”<sup>108</sup> Given the perceived need for discretion of state delegates to vote freely in the context of political IO organs and ambiguity in relation to the type of measures third states may be required to take to prevent genocide, it would be premature to claim that the obligation to prevent genocide requires SC member states to vote in a certain way in the context of IO organs.<sup>109</sup> An important initiative that may change the attitude of states, is the call for the permanent members of the SC to withhold from their right to veto in mass atrocity situations.<sup>110</sup> The initiative underlines the fact that SC member states cannot be required to vote in any particular way, because it calls on them to withhold from the permanent members’ right to veto on a voluntary basis.

Finally, when a state agrees to contribute to a peacekeeping mission, it must continue to assess what measures may contribute to preventing genocide in the concrete circumstances. This is to some extent illustrated by the *Mothers of Srebrenica v. the Netherlands* case decided by the Dutch District Court in the Hague, based on complaints about the actions of the Dutch troop contingency Dutchbat during its withdrawal out of Srebrenica, which was already discussed in Chapter 3.3 B.<sup>111</sup> The Court concluded that the Netherlands was responsible, among other things, for failing to ensure the physical protection and evacuation of endangered individuals who were within their jurisdiction and failing to report the war crimes it had witnessed to the

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<sup>108</sup> Pooter, de, 'The Obligation to Prevent Genocide: A Large Shell Yet to be Filled' (n 47) 299-300.

<sup>109</sup> Ryngaert, Cedric and Buchanan, Holly, 'Member State Responsibility for the Acts of International Organizations' (2011) 7(1) Utrecht L Rev 131: Another way to approach this, is through the responsibility of the IO. States may be held responsible for offering “aid or assistance” to a violation by an IO, although it is questionable whether a vote would be sufficient. First, it would have to be established whether the IO is obligated to prevent genocide.

<sup>110</sup> President of France H.E. Mr. François Hollande, in his address at the General Debate of the 68th Session of the UNGA in 2013, called upon the permanent members of the SC to “collectively renounce their veto powers” in mass atrocity situations, see:

<[http://www.globalr2p.org/our\\_work/un\\_security\\_council\\_code\\_of\\_conduct](http://www.globalr2p.org/our_work/un_security_council_code_of_conduct)>; Accountability Coherence Transparency Group, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (New York, 24 October 2015) available at: <[http://www.unelections.org/files/Code%20of%20Conduct\\_EN.pdf](http://www.unelections.org/files/Code%20of%20Conduct_EN.pdf)>.

<sup>111</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>> para 5.1: The Dutch State was held responsible for its cooperation with the VRS in the deportation of the relatives of ten claimants from the compound over which it had jurisdictional control, after which most of them were ill-treated and killed

UN.<sup>112</sup> Because the obligation to prevent genocide was not considered to have direct effect, the substance of the obligation was indirectly applied through a general tort provision in Dutch domestic law.<sup>113</sup> As a consequence of this indirect application, the Court did not separately discuss the obligation to prevent genocide, but considered it together with the state's other human rights obligations only in the context of the compound over which the state was judged to have extraterritorial jurisdiction.<sup>114</sup> As such, the Netherlands was not held responsible for measures it arguably should have taken to prevent genocide, based on its capacity to influence effectively. As explained in Section 4.1.2, the obligation to prevent genocide is based on the capacity to influence effectively the (potential) perpetrators of genocide, which extends beyond extraterritorial jurisdiction. Based on its presence with troops on the ground and political and other links with the VRS, the Netherlands arguably had a capacity to influence effectively and therefore an obligation to prevent genocide also beyond jurisdiction. Measures to prevent genocide that were arguably reasonably available that could have contributed to preventing genocide were further negotiation about the terms of the withdrawal, applying more diplomatic pressure, raising alarm among other actors in light of its first-hand information about the acts committed by the VRS and possibly even sending further backup.<sup>115</sup>

A final issue that may influence the content and scope of the third state obligation to prevent genocide but has so far remained unresolved, is the interconnection between different third states acting to prevent. In the *Genocide* case, the ICJ underlined that it is irrelevant to an individual state's obligation to prevent genocide, whether it alone

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<sup>112</sup> *Mothers of Srebrenica against the State* case (n 111) para 4.264, 4.329 and 4.331.

<sup>113</sup> *Mothers of Srebrenica against the State* case (n 111) para 4.151-4.164 and 4.179: The court did not apply Article 1 of the Genocide Convention directly, because it was considered to hold between Convention states and not grant rights directly to individuals. However, the court does consider the standard of care required by Article 6:162 (2) Burgerlijk Wetboek to be informed by art 1 of the Genocide Convention.

<sup>114</sup> *Mothers of Srebrenica against the State* case (n 111) para 4.160-1 and 4.179: "The District Court is of the opinion however that through Dutchbat after the fall of Srebrenica the State had effective control as understood in the Al-Skeini judgment over the compound. [...] The foregoing leads the District Court to the conclusion that by means of Dutchbat the State was only able to supervise observance of the human rights anchored in the ECHR and ICCPR vis-à-vis those persons who as of the fall of Srebrenica were in the compound."

<sup>115</sup> *Genocide* case (n 2) 430; *Mothers of Srebrenica against the State* case (n 111) para 4.264: The court states that: "It is indisputable that during the transition period Dutchbat could not protect the refugees inside and around the *mini safe area* located outside the compound on its own, i.e. without outside help [...]" This does not exclude the option that the Netherlands could have raised alarm at the international level, pushed for further negotiations about its withdrawal or even sent more military backup; A case has been brought against the Netherlands by Dutchbat veterans, claiming that they were sent on an impossible mission because they were ill-prepared and operated under limiting rules of engagement that resulted in their inability to protect the civilian population. This may point to a long-term failure on behalf of the state to carefully plan the operation: Twelve Srebrenica Veterans Suing Dutch Government (30 June 2016) NL Times, available at: <<http://www.nltimes.nl/2016/06/30/twelve-srebrenica-veterans-suing-dutch-government/>>.

could or could not have succeeded in preventing genocide.<sup>116</sup> From the viewpoint of each third state employing all means reasonably available, this makes sense. However, given the fact that multiple third states may be obligated to prevent in reaction to the same threat of genocide, it is unsatisfactory to see their obligations as completely separate. The Court acknowledges this only to the extent that is absolutely necessary, by stating that “the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result.”<sup>117</sup> Yet, for achieving the aim of preventing genocide as far as possible, collective action may be more effective.<sup>118</sup> Furthermore, the involvement of multiple third states acting to prevent genocide can have consequences for each individual state. In the *Mothers of Srebrenica v. the Netherlands* case, for example, complicating factors that remained unacknowledged by the District Court were the fact that Dutchbat operated under a mandate that limited the use of force to self-defense and protection of the safe areas and was promised backup in the form of air support by other states, which never came.<sup>119</sup> In light of such interconnections and the aim of preventing genocide as far as possible, it can be questioned whether the third state obligation to prevent genocide should be interpreted to include an obligation to cooperate, even if this only means that states must make an effort to inform other relevant actors of their plans and

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<sup>116</sup> *Genocide* case (n 2) 430.

<sup>117</sup> *Genocide* case (n 2) 430.

<sup>118</sup> Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 55) 42: “In cases where, arguably, only a combined effort may generate an effective ‘capacity to influence’, the line to be drawn between the capacity—and ensuing responsibility—of a single state and collective action is blurred.”

<sup>119</sup> UN Security Council Resolution 819 (16 April 1993) UN Doc S/RES/819: Demanded that all concerned treat Srebrenica as a safe area; UN Security Council Resolution 836 (4 June 1993) UN Doc S/RES/836: Extended the mandate of UNPROFOR to enable it to deter attacks against the safe areas and monitor the ceasefire; See Chapter 3.3 A.1 Foreign State’s Legal and Administrative Framework: It was argued that states have an obligation to carefully plan and control extraterritorial operations that could potentially result in deprivation of life, so as to allow state officials to live up to human rights obligations in the course of the operation; Twelve Srebrenica Veterans Suing Dutch Government (n 115): A domestic case was brought before a Dutch Court by Dutchbat veterans in June 2016, who claim that they were sent on an impossible mission in Srebrenica. As argued in Chapter 3.3 A.1 this could point to a failure of the long-term obligation to carefully plan and control the mission; Srebrenica is a disastrous example of inaction on the part of several other states that arguably had a capacity to influence effectively. Even though several states had made promises of air support and intelligence came to the attention of high state officials that Srebrenica would likely be attacked, US and NATO-led airstrikes were quietly paused shortly before the attack took place and the VRS killed over 8000 Muslim men and boys: Memo, Anthony Lake to President Clinton, SUBJ: Policy for Bosnia Use of US Ground Forces to Support NATO Assistance for Redeployment of UNPROFOR within Bosnia (29 May 1995) available at: <<http://www.foia.cia.gov/document/523c39e5993294098d51764a>> stating on page 1 in the para “Prospects of additional airstrikes” point (3) that “privately we will accept a pause, but make no public statement to that effect” and on page 3 warning that withdrawal from the Eastern enclaves had “the associated potential for a humanitarian nightmare for the civilians in the safe areas currently under the promise of UN protection”; UN Security Council Resolution 713 (25 September 1991) UN Doc S/RES/713; UN Security Council Resolution 819 (n 119) para 4: “Requests the Secretary-General [...] to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings; demands that all parties and others concerned cooperate fully and promptly with UNPROFOR towards that end.”



coordinate where necessary.<sup>120</sup> Several developing obligations requiring states to cooperate to ensure human rights in different areas will be discussed in Section 4.3, which could influence the development of the obligation to prevent genocide in a similar direction.

### **C. Preventing Continuation**

The phase of preventing continuation or aggravation spans the time after the injurious event has started until it ends.<sup>121</sup> Long-term and short-term measures remain relevant depending on the specific circumstances. The main obligation to prevent continuation identified in Chapter 2 is the obligation to halt continuing violations, either by ceasing the wrongful act by state officials or by intervening in offences of non-state actors. In this layer, the only existing obligation to prevent continuation is the obligation to employ all means reasonably available to prevent genocide so far as possible. Discussion of the trigger, content and scope of the obligation need not be repeated. Measures required in the phase of short-term prevention remain applicable and should be introduced, maintained or intensified as relevant in the concrete circumstances after genocide has started.

### **D. Preventing Recurrence**

The phase of preventing recurrence starts once the violation has ended.<sup>122</sup> Obligations in this phase are aimed at taking remedial measures and ensuring the violation does not recur. The main obligations to prevent recurrence identified in Chapter 2 are the inter-related obligations to investigate, prosecute and punish. In this layer, third state obligations are focused on: (i) Investigating and prosecuting acts of torture that took place outside the state's jurisdiction; and (ii) Cooperating with and extraditing suspects of torture to other states and international penal tribunals.

#### **D.1 Torture**

State parties to the IACPPT and CAT have obligations to investigate, prosecute and punish acts of torture that took place outside their territory and jurisdiction based on the principles of active nationality or universal jurisdiction, thereby putting the

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<sup>120</sup> Support can be found in the obligation to report war crimes: *Mothers of Srebrenica against the State* case (n 111) para 4.264: "In the opinion of the District Court Dutchbat's failure to report war crimes observed during the transition period constitutes a violation of generally accepted standards in accordance with law of custom, in connection with which special reference is made to 4.175-4.177 for the interpretation of the standard of care [referring to the obligation to prevent genocide]."

<sup>121</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>122</sup> See Chapter 1.3.2 Temporal Phases.

legislation introduced in the long-term preventive phase into practice.<sup>123</sup> As such, the obligations to investigate, prosecute and punish acts of torture enforce the worldwide regime of criminal punishment and are thought to have a general preventive effect.<sup>124</sup> They also have a specific preventive effect by ensuring that perpetrators cannot repeat their offences.

The obligation to investigate is an important part of the obligations to prosecute and punish.<sup>125</sup> If a national suspected of committing acts of torture is still outside the state's jurisdiction, this may involve alerting the authorities of the so-called forum state of the individual's presumed presence and suspected offences and requesting them to open an investigation, ensure the presence "by effective custodial or non-custodial measures" of and prosecute or extradite the national.<sup>126</sup> If a suspect is present in any territory under a state party's jurisdiction, the ICJ explained the relevant provisions under the CAT in the *Belgium v. Senegal* case as meaning that steps must be taken to investigate "as soon as the suspect is identified in the territory" and at the latest when a complaint is filed against the suspect.<sup>127</sup> A preliminary enquiry must be carried out to corroborate suspicions regarding a person.<sup>128</sup> States are thereby obligated to seek cooperation with other states that have relevant information, especially if complaints have been filed there against the suspect.<sup>129</sup>

If the preliminary enquiry provides sufficient reason to pursue the case, the state may then choose to extradite the suspect or fully investigate and prosecute the case before its domestic courts (*aut dedere aut judicare*).<sup>130</sup> According to the ICJ's assessment of the CAT in the *Belgium v. Senegal* case, extradition and prosecution do not have

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<sup>123</sup> See Section 4.1.1 CAT and IACPPT and 4.2 A Long-Term Prevention; CAT (n 7) art 7 and 8; IACPPT (n 7) art 11-14; Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 948.

<sup>124</sup> See Section 4.2 A.1 Long-Term Prevention; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 75.

<sup>125</sup> CAT (n 7) art 6(2); IACPPT (n 7) art 8 jo 14.

<sup>126</sup> CAT (n 7) art 5(1)b; IACPPT (n 7) art 12b; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 310-11 and 345: "The active nationality principle serves the purpose of maintaining good relations with other States by ensuring that nationals of State A do not go unpunished in the event they escape prosecution by State B in which they committed a crime." The forum state is required to "ensure the presence of such persons by effective custodial or non-custodial measures" and "carry out preliminary inquiries into the facts and notify other States parties of the custody and the findings of their investigations in order to facilitate possible extradition requests."

<sup>127</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 86 and 88; Koutoulis, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (n 66) para 19.

<sup>128</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 83-85: It is not sufficient for this preliminary enquiry to question the suspect to establish his or her identity and inform them of the charges against them.

<sup>129</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 83.

<sup>130</sup> Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 345 onwards.

equal weight.<sup>131</sup> Extradition is not a separate obligation under the Convention, merely a means to relieve itself of the obligation to prosecute.<sup>132</sup> If no other state has requested extradition or is willing to take the case, the custodial state is still required to prosecute the suspect. Vice versa, a custodial state that is unwilling to prosecute is not then under an obligation to extradite the suspect to another state instead.<sup>133</sup> States may, however, be under a separate obligation to extradite a suspect based on extradition agreements or statutes of international penal tribunals.<sup>134</sup> If the state chooses to prosecute the suspect, proceedings must be undertaken “without delay”, “within a reasonable time” and states must “take all measures necessary for its implementation as soon as possible [...]”.<sup>135</sup> That means a state must submit the case to the competent authorities. Those authorities may still decide that the evidence is not sufficient to convince a judge to find the suspect guilty and therefore decide not to further pursue the case, in the same manner as it would in cases involving other serious offences.<sup>136</sup> However, internal law or financial difficulties cannot justify a

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<sup>131</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 95: Note that the ICJ’s assessment pertains only to the CAT, but its considerations are likely to be of analogous relevance for the IACPPT.

<sup>132</sup> If a custodial state refuses both to extradite or prosecute, that state will only be in violation of its obligation to prosecute.

<sup>133</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 92 and 95: Despite Belgium’s claim that Senegal would be obligated to extradite Habré if it did not prosecute him, the ICJ stated that: “[E]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State”; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 359-60: “Since Article 5 does not establish any order of priority among the various grounds of jurisdiction, there exists no obligation of the forum State to extradite the alleged torturer to a State with a ‘better’ jurisdiction. But the forum State is under an *obligation to proceed to prosecution*. The choice between prosecution and extradition (*aut dedere aut iudicare*) is, therefore, an uneven choice”; Nollkaemper, André, ‘Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ’s Judgment in *Belgium v Senegal*’ (2013) 4(3) *JIDS* 501, 504: Argues that the ICJ’s interpretation hampers the aim of the CAT to prevent impunity, by annihilating entitlements of other states instead of ensuring that a suspect is prosecuted by the state that has the “best normative entitlements to prosecute and that may be best equipped to do so.”

<sup>134</sup> CAT (n 7) art 8 and 9; IACPPT (n 7) art 13: Extradition can be subject to certain requirements in domestic law.

<sup>135</sup> CAT (n 7) art 7(2): “These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1”; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 114-7.

<sup>136</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 94; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 361: “As one cannot establish any meaningful obligation of a State to the effect that its independent courts shall convict and punish a perpetrator, international law cannot effectively oblige a public prosecutor to indict and prosecute a suspected torturer if the evidence available to the prosecution is not sufficient to proceed with the case.”

decision not to prosecute.<sup>137</sup> State parties to the CAT are also explicitly required to assist each other in relation to criminal proceedings against alleged perpetrators, for example by providing evidence.<sup>138</sup>

Although the set of inter-related obligations and (permissive and obligatory) bases for criminal jurisdiction aiming at a worldwide regime of criminal punishment for torture have been implemented by states in practice, this has not always led to the desired result of promptly punishing perpetrators of torture. Over the past decades, domestic courts have regularly sought to establish criminal jurisdiction over suspects of torture.<sup>139</sup> For example, the Spanish examining magistrate Judge Baltasar Garzon sought to try former Chilean President Augusto Pinochet of Chile for among others the crimes of torture committed during his dictatorship.<sup>140</sup> He issued two international warrants for arrest, invoking universal jurisdiction and the passive personality principle, as some of Pinochet's victims had been Spanish.<sup>141</sup> Pursuant to a European Arrest Warrant, Pinochet was arrested in London in 1998, which made headline news as exemplifying state cooperation for the prosecution of perpetrators of gross human rights violations and challenging the impunity of former heads of state.<sup>142</sup> Pinochet was eventually allowed to return to Chile due to concerns about his health, where he was subsequently stripped of his immunity and a series of cases were lodged against him.<sup>143</sup> Pinochet ultimately wasn't convicted, because he died in 2006 while awaiting trial under house arrest.

A more recent example is the indictment of the former president of Chad Hissène Habré in 2005 by a Belgian court for crimes against humanity, torture, war crimes and other human rights violations based on universal jurisdiction.<sup>144</sup> After Senegal refused to extradite Habré to Belgium for various legal reasons, Belgium brought the case before the ICJ, requesting the Court to find that Senegal should either extradite or

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<sup>137</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 112-3.

<sup>138</sup> CAT (n 7) art 9.

<sup>139</sup> Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 289 onwards.

<sup>140</sup> Gattini, Andrea, 'Pinochet Cases' (June 2007) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e859?rskey=MvsOgn&result=1&prd=EPIL>>.

<sup>141</sup> Van Alebeek, Rosanne, 'The Pinochet Case: International Human Rights Law on Trial' (2001) 71(1) BYIL 29, 29-30 and 32; *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (1999) House of Lords, 2 All ER 97, 101-4.

<sup>142</sup> Gattini, 'Pinochet Cases' (n 140) para 1 and 8.

<sup>143</sup> Gattini, 'Pinochet Cases' (n 140) para 5-7; Nowak, McArthur and Buchinger, *The United Nations Convention Against Torture: A Commentary* (n 10) 294.

<sup>144</sup> Koutroulis, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (n 66) para 3: In 2000 and 2001, 21 people filed complaints against Habré in Belgium. Some of the complainants had (dual) Belgian nationality.

prosecute Habré based on the CAT and customary international law.<sup>145</sup> According to the ICJ, the object and purpose of the CAT is “to make more effective the struggle against torture (...) throughout the world.”<sup>146</sup> It found Senegal to be in violation of its obligations to investigate (Article 6(2) CAT) and prosecute (Article 7(1) CAT) Habré and ordered it to submit the case to the competent authorities for prosecution without delay, if it did not choose to extradite him.<sup>147</sup> A trial against Habré finally started in 2015 before the Extraordinary African Chambers, especially established as a part of the Senegalese court system by the African Union (AU) for this particular case, marking the first trial in the world in which a former head of state is prosecuted for torture and other offences in a third state.<sup>148</sup> The Chambers delivered its judgment on 30 May 2016, finding Habré guilty of among others forced sexual slavery, disappearances, summary executions and torture committed in Chad between 1982 and 1990 and sentenced him to life in prison.<sup>149</sup>

There has been growing attention for the use of universal jurisdiction, also in relation to other crimes than torture.<sup>150</sup> For example, the ILC has used the obligation in the CAT and the ICJ’s interpretation of this obligation in the *Belgium v. Senegal* case as

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<sup>145</sup> Koutroulis, ‘Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)’ (n 66) para 3-7.

<sup>146</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 68.

<sup>147</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 66) para 121-2; Koutroulis, ‘Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)’ (n 66) para 24.

<sup>148</sup> The New York Times, ‘A Milestone for Justice in Africa’ (22 July 2015) available at: <[http://www.nytimes.com/2015/07/22/opinion/a-milestone-for-justice-in-africa.html?emc=edit\\_tnt\\_20150722&nliid=9510037&ntemail0=y&\\_r=0](http://www.nytimes.com/2015/07/22/opinion/a-milestone-for-justice-in-africa.html?emc=edit_tnt_20150722&nliid=9510037&ntemail0=y&_r=0)>; Williams, Sarah, ‘The Extraordinary African Chambers in the Senegalese Courts an African Solution to an African Problem?’ (2013) 11(5) JICJ 1139.

<sup>149</sup> Secretary General, With Thoughts on Victims, Applauds Senegal, African Union on Judgment in Case Against Former Chad President Hissene Habré (30 May 2016) UN Press Release SG/SM/17806- AFR/3390, available at: <<http://www.un.org/press/en/2016/sgsm17806.doc.htm>>; African Union Welcomes the Judgment of an Unprecedented Trail of Hissene Habré (1 June 2016) AU Press Release, available at: <<http://www.au.int/en/pressreleases/30728/au-welcomes-judgement-unprecedented-trial-hiss%C3%A8ne-habr%C3%A9>>.

<sup>150</sup> Kamminga, Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses (n 12) 946-8: For example, for crimes against humanity, war crimes and genocide; Oxman, Bernard H., ‘Jurisdiction of States’ (November 2007) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1436>> para 39: “As the human rights content of international law expanded, universal adjudicative jurisdiction also expanded to embrace universally condemned crimes”; Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, GA Res 3074 (XXVIII) UN Doc A/9030/Add1 (1973): Non-binding document that lays down principles for co-operation between states in the area of collection of evidence and information, detection, arrest and extradition; Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Countries, The Law Library of Congress, Global Legal Research Center (April 2010) available at: <<http://www.loc.gov/law/help/crimes-against-humanity/crimes-against-humanity.pdf>>; List of countries that have included universal criminal jurisdiction for crimes against humanity in domestic criminal law.

authoritative examples to formulate a Draft Article on the obligation *aut dedere aut judicare* in the context of other crimes that are of international concern, based on customary law.<sup>151</sup> There is, however, a tension between the principle of universal jurisdiction and the principle of state sovereignty and its elements of non-interference in a state's internal affairs and immunity of state officials. This has led to some concern that the principle of universal jurisdiction is open to abuse through its selective use for political reasons.<sup>152</sup> Furthermore, many practical issues attached to the implementation of universal jurisdiction remain unresolved. For example, the interpretation of extradition as an option, rather than an international obligation, means that a state in whose territory the suspect is present can deny requests for extradition from states who are actually more closely connected to the offence. It is still an open question whether, in some cases in which there are competing claims for jurisdiction, priority should be afforded to states on whose territory the crime was committed or states that have a link with the perpetrator or victim.<sup>153</sup>

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<sup>151</sup> Note that an obligation of *aut dedere aut judicare* is not necessarily synonymous with universal jurisdiction. It could also be based on other grounds of jurisdiction, such as the principle of nationality; ILC, 'Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (n 65) para 15 onwards; Special Rapporteur Zdzislaw Galicki, 'Fourth Report on the Obligation to Extradite or Prosecute' (31 May 2011) 63rd session of the ILC, UN Doc A/CN.4/648, chp.4(h) para 95: Draft Article 4: International custom as a source of the obligation *aut dedere aut judicare*. Draft Article 4(2) notes: "Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes]." Para 96 of the report states that the list of crimes covered by Draft Article 4(2) is still contested and open to further discussion.

<sup>152</sup> UN General Assembly Sixth Committee, 'The Scope and Application of the Principle of Universal Jurisdiction' (11 November 2015) 70<sup>th</sup> session, UN Doc A/C.6/70/L.12; UN General Assembly Sixth Committee, Summary Record of the 12<sup>th</sup> Meeting (5 November 2015) UN GAOR A/C.6/70/SR.12, para 2: The Assembly of the African Union "reiterated its request that warrants of arrest issued on the basis of the abuse of the principle of universal jurisdiction should not be executed in any member State." Para 3: The Movement of Non-Aligned Countries "cautioned against unwarranted expansion of the range of [crimes that fall within the scope of universal jurisdiction]." Para 8: The African Group was of the opinion that "abuse of universal jurisdiction could undermine efforts to combat impunity; it was therefore vital, when applying the principle, to respect other norms of international law, including the sovereign equality of States, territorial jurisdiction and the immunity of State officials under customary international law." Similar opinions and concerns were voiced by the Caribbean Community and other states.

<sup>153</sup> UNGA Sixth Committee, Summary Record of the 12<sup>th</sup> Meeting (n 152) Para 80: The delegate of the US noted that further analysis of the "practical application" of the principle would be useful, adding that the US "for example, might refrain from exercising universal jurisdiction when the State in which the crime was committed or the State whose citizens were the primary victims of the crime was able and willing to prosecute"; Nollkaemper, 'Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in Belgium v Senegal' (n 133) The latter statement fits with the approach promoted in this article that a suspect is prosecuted by the state that has the "best normative entitlements to prosecute and that may be best equipped to do so."

## D.2 Genocide

It has been explained above that states are in principle not obligated to investigate, prosecute and punish on any other basis than that acts of genocide took place on their territory.<sup>154</sup> States do have obligations to cooperate with other states for the extradition of suspects and international penal tribunals of which it has accepted jurisdiction.<sup>155</sup> There is an argument to be made that states should, under particular circumstances, ensure punishment of suspects of acts of genocide that took place outside its territory if a suspect is present within their territory or jurisdiction.<sup>156</sup> In this line of reasoning, a state has a duty to promote prosecution and punishment by other states or an international penal tribunal. If no international tribunals or other states are willing or able to prosecute, states have a subsidiary obligation to prosecute the suspect before its own courts.<sup>157</sup> It was concluded in Section 4.1.2 that the argument is still too contentious to be able to conclude that it is currently an existing obligation under the Genocide Convention, but that may change. Although states are currently not required to prosecute suspects of genocide when the acts took place outside their territory, it is generally accepted that states are allowed to do so based on universal jurisdiction.<sup>158</sup>

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<sup>154</sup> Genocide Convention (n 2) art 6; See Section 4.1.2 Genocide Convention.

<sup>155</sup> Genocide Convention (n 2) art 1, 6 and 7: “Genocide and the other acts enumerated in Article III shall not be considered political crimes for the purpose of extradition”; Genocide case (n 2) para 443; See for example: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 58, 59, 86 and 89; Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 261 onwards: Extradition can be subject to certain requirements in domestic law, for example based on the risk of death penalty or torture or protecting nationals against foreign jurisdiction.

<sup>156</sup> Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58: This also implies a duty to investigate once a state learns or is made aware of the presence of suspects within its jurisdiction.

<sup>157</sup> Tams, Berster and Schiffbauer, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (n 28) 256 para 58(3); Gaeta, *The UN Genocide Convention – A Commentary* (n 57) 46-8.

<sup>158</sup> *Genocide* case (n 2) para 442; Kamminga, 'Extraterritoriality' (n 73) para 14; Schabas, 'National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'' (n 54) 60: Explains that the *travaux préparatoires* of the Genocide Convention show that the drafters sought to explicitly exclude universal jurisdiction for genocide, while it is now accepted at least as a permissive basis for prosecution; Spijkers, Otto, 'Universal Jurisdiction in the Case of Jorgic v. Germany' (18 July 2007) School of Human Rights Research Blog, available at: <<http://invisiblecollege weblog.leidenuniv.nl/2007/07/18/universal-jurisdiction-in-the-case-of-jo/>>: An example of an exercise of permissive universal jurisdiction by a third state over a suspect of acts of genocide in another state, is the prosecution and punishment of Nikola Jorgic; *Jorgic v. Germany*, no. 74613/01, ECHR 2007-III, para 68: After his conviction, Nikola Jorgic complained to the ECtHR that Germany had not had criminal jurisdiction over him. The ECtHR disagreed, and stated that “the national courts’ reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing).”

### 4.3 Shift Towards Third State Obligations

The moral and societal shift towards prevention, described in the introductory chapter, has been accompanied by a shift towards recognizing the important role third states can play in ensuring human rights.<sup>159</sup> The territorial state cannot always effectively prevent gross human rights violations, or may itself be the perpetrator.<sup>160</sup> In such situations, third states can play an important role to (help) prevent violations. Both the shift towards prevention and the shift towards recognizing the important role of third states are clearly illustrated by the attention for the Responsibility to Protect (RtoP) concept, which advances the notion that the international community has responsibilities to assist states in protecting their populations and ultimately take timely and decisive action if any particular state manifestly fails to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing.<sup>161</sup>

There are many other areas in which the important role of third states to ensure human rights has gained attention, such as state assistance and cooperation for the full realization of economic social and cultural (ESC) rights, preventing and remedying human rights abuses by corporations acting abroad and state cooperation to bring serious violations of peremptory norms to an end as part of the Articles on State Responsibility.<sup>162</sup> There is some cautious evidence of developing third state obligations in the above-mentioned areas.<sup>163</sup> These developing obligations supplement

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<sup>159</sup> Hakimi, 'State Bystander Responsibility' (n 1); Bird, 'Third State Responsibility for Human Rights Violations' (n 1); Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 28.

<sup>160</sup> For example: i) Developing states cannot ensure all human rights to the people in their territory partly as a result of structures at the international level; ii) Non-state actors sometimes commit human rights abuses that are hard to control, like transnational corporations or rebel movements; iii) A state may itself be the perpetrator of human rights violations against people on its territory.

<sup>161</sup> See Chapter 1.1 Context: Shift Towards Prevention; Secretary-General Ban Ki-Moon, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677, summary, 10, 15 and 22; The RtoP is pre-dated by and builds on the notion of humanitarian intervention.

<sup>162</sup> Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties Obligations (Art 2 par 1 of the Covenant)' (14 December 1990) UN Doc 14/12/90, para 13-4; Concluding Observations HRCee on Germany (November 2012) UN Doc CCPR/C/DEU/CO/6, para 16; Articles on State Responsibility (n 3) art 41(1): Which peremptory norms will be discussed in Section 4.3.3.

<sup>163</sup> Chapter 1.3.1 Delineation: Note that this section diverges from the main focus in this research on human rights law, for the sake of finding ways that third state obligations to prevent gross human rights violations might develop and can be strengthened. There are other areas beyond the four discussed below in which third state obligations may develop that could strengthen the set of obligations to prevent gross human rights violations, such as the obligation not to avoid causing extraterritorial harm and the obligation to exercise universal jurisdiction for war crimes and crimes against humanity. The four areas that have been chosen are the ones most discussed in literature in relation to the prevention of gross human rights violations and are indicative of the theoretical and methodological challenges third state obligations entail. For further reading, see: Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (n 12) 946-8; De Schutter, Olivier and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States



the patchwork of existing obligations beyond territory and jurisdiction discussed in Sections 4.1 and 4.2 and could eventually strengthen the set of obligations to prevent gross human rights violations. Most of the third state obligations discussed below have not been fully accepted as *lex lata*, but some have the potential to develop into (customary) law, while others may influence the development of international law in other ways. The different sections will consider the basis, triggers, content and scope of these developing obligations – as far as these are clear at this point in time – and how they may strengthen obligations to prevent gross human rights violations beyond jurisdiction.

### 4.3.1 Economic, Social and Cultural Rights

There is a strong push for the further development and acceptance of third state obligations for states to assist each other and cooperate with each other for the worldwide realization of ESC rights.<sup>164</sup> A long history lies behind the argument that the realization of ESC rights requires more cooperative efforts than civil and political (CP) rights.<sup>165</sup> As the source of obligations of assistance and cooperation, the Committee on Economic, Social and Cultural Rights (CESCR) and scholars mainly refer to Articles 55 and 56 in the UN Charter, Article 28 of the Universal Declaration of Human Right (UDHR) and finally Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>166</sup> Article 56 UN Charter proclaims that:

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in the area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084 (Maastricht Principles and Commentary) Principle 13 and 14.

<sup>164</sup> ESC rights and obligations were not included in the discussion of obligations to prevent in the territorial and jurisdictional layers because instruments containing these rights do not contain obligations that directly aim, either expressly or impliedly, to prevent torture, arbitrary death or genocide. Nevertheless, the discussion on extraterritorial ESC rights is broader than just the third state obligations to assist and cooperate. For example, states may also have obligations based on extraterritorial jurisdiction not to destroy houses, hospitals, schools or crops; Salomon, Margot E., *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, 2007); Sepúlveda, Magdalena, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 Neth Q Hum Rts 271; Maastricht Principles and Commentary (n 163).

<sup>165</sup> See for example: International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2 (1) which obligates states to devote "the maximum of [...] available resources" to the realization of economic and social rights through "assistance and cooperation"; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164); Howland, Todd, 'The Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights' (2007) 35(3/4) Denver J Int Law Policy 389.

<sup>166</sup> UN Charter (n 43) art 55 and 56; UN General Assembly Resolution 217 (A), 'Universal Declaration of Human Rights' (10 December 1948) UN Doc A/RES/3/217A (UDHR) art 28: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"; ICESCR (n 165) art 2.

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”<sup>167</sup>

The purposes in Article 55 of the UN Charter include, among others, the universal observance of human rights and economic and social progress and development.<sup>168</sup> The ICESCR, like the Genocide Convention, does not contain a jurisdiction clause.<sup>169</sup> Article 2 of the ICESCR reads:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means [...]”<sup>170</sup>

In view of the references to joint action and international assistance and cooperation in the above provisions, coupled with the lack of a jurisdiction clause in the ICESCR, the CESCR and scholars have argued that states have legally binding obligations to ensure ESC rights beyond state territory and jurisdiction.<sup>171</sup> Yet, the basis, content and scope of these obligations are by no means settled. Many states, fearing potentially significant resource implications, therefore do not accept third state obligations for the realization of ESC rights as *lex lata*, but argue that they are only of a moral character.<sup>172</sup> By further clarifying the basis, content and scope of these obligations, the CESCR and scholars have attempted to push for their further acceptance.<sup>173</sup>

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<sup>167</sup> UN Charter (n 43) art 56.

<sup>168</sup> UN Charter (n 43) art 55.

<sup>169</sup> This may partly illustrate the universalist intention of the drafters, but most importantly it has allowed room for broad teleological interpretation to that effect: Alston, Philip and Quinn, Gerard, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 2, 156, 191: Explain that, based on the *travaux préparatoires* of the ICESCR, the argument that the obligation of cooperation is legally binding cannot be sustained, but that subsequent developments may necessitate a re-interpretation.

<sup>170</sup> ICESCR (n 165) art 2.

<sup>171</sup> CESCR, General Comment 3 (n 162) para 13-4: The CESCR explains that the “available resources” refer both to the resources within a state and those available from the international community. “The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States”; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164).

<sup>172</sup> Sepúlveda, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n 164) 273.

<sup>173</sup> Maastricht Principles and Commentary (n 163); Sepúlveda, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n 164) 300 onwards; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) 999 UNTS 171 (OP-ICESCR) art 14: Article 14 of the OP, which gives the CESCR the right to receive individual (and inter-state, see Article 10) complaints, is focused on the role of the CESCR in the context of international assistance and cooperation. The provision gives the CESCR the right to bring the need for assistance and cooperation to the attention of specialized UN bodies.

In regard to the basis of third state obligations of assistance and cooperation, the CESCR has stated that they are “particularly incumbent upon those States which are in a position to assist others in this regard.”<sup>174</sup> The CESCR has so far not specified any criteria to determine when states are in a position to assist.<sup>175</sup> In 2011, a group of experts adopted the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, followed by a Commentary in 2012, which aim to elucidate the extraterritorial application of ESC rights.<sup>176</sup> Although these documents were devised by experts and are not legally binding, they have gained some authority based on the qualifications of the drafting experts.<sup>177</sup> The Preamble notes:

“Drawn from international law, these principles aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights.”<sup>178</sup>

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<sup>174</sup> CESCR, General Comment 3 (n 162) para 14; Repeated in: Committee on Economic Social and Cultural Rights, ‘General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)’ (11 August 2000) UN Doc E/C12/2000/4, para 45; Committee on Economic Social and Cultural Rights, ‘General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)’ (20 January 2003) UN Doc E/C12/2002/11 para 38; Committee on Economic Social and Cultural Rights, ‘General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting From any Scientific, Literary or Artistic Production of Which He or She is the Author (Article 15, paragraph 1 (c), of the Covenant)’ (12 January 2006) UN Doc E/C12/GC/1712, para 37; See also: Committee on Economic Social and Cultural Rights, ‘General Comment 18: The Rights to Work (Art 6 of the Covenant)’ (6 February 2006) UN Doc E/C12/GC/18, para 29-30.

<sup>175</sup> Sepúlveda, ‘Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (n 164) 277 onwards: Refers to the CESCR’s division between developed and developing states and regards the obligation to cooperate from those perspectives.

<sup>176</sup> Maastricht Principles and Commentary (n 163).

<sup>177</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)d; Maastricht Principles and Commentary (n 163) The commentary straight away addressed the geographical dispersion and status of the experts involved in the drafting; The Maastricht Principles have already been referred to in General comments: Committee on Economic Social and Cultural Rights, ‘General Comment 23: On the Right to Just and Favourable Conditions of Work’ (27 April 2016) UN Doc E/C12/GC/23, para 70: “States parties should also provide guidance to employers and enterprises on how to respect the right extraterritorially”; Committee on Economic Social and Cultural Rights, ‘General Comment 22 On the Right To Sexual and Reproductive Health’ (2 May 2016) UN Doc E/C12/GC/22, para 60: “States also have an extraterritorial obligation to ensure that transnational corporations, such as pharmaceutical companies operating globally, do not violate the right to sexual and reproductive health of people in other countries, for example through non-consensual testing of contraceptives or medical experiments”; It will be interesting to see what the influence of the Maastricht Principles will be in the CESCR individual complaints cases. So far, only 4 individual complaints have been dealt with by the CESCR, of which two led to inadmissibility decisions and none refer to the Maastricht Principles.

<sup>178</sup> Maastricht Principles and Commentary (n 163) Preamble.

The phrase “drawn from international law” in a way acknowledges that many of the principles include *lege ferenda* elements. This becomes apparent for example when viewing the Principles’ approach to jurisdiction and other bases for extraterritorial applicability.

Principle 9 of the Maastricht Principles sets out to clarify the “scope of jurisdiction.”<sup>179</sup> First of all, since the ICESCR does not contain a jurisdiction clause, it is not readily apparent why the drafters of the Principles chose jurisdiction as a basis for extraterritorial obligations in the area of ESC rights. Second, the way jurisdiction is described in the Maastricht Principles is much wider than the understanding of jurisdiction in CP rights context.<sup>180</sup> Principle 9 sub a refers to “situations over which [a state] exercises authority or effective control, whether or not such control is exercised in accordance with international law”, which describes jurisdiction as it has been interpreted in the context of CP rights.<sup>181</sup> Principle 9 sub c, however, refers to situations where a state, acting separately or jointly, “is in a position to exercise decisive influence or to take measures to realize” ESC rights, which according to the Commentary “refers, in particular, to the role of international assistance and cooperation in the fulfillment of economic, social, and cultural rights.”<sup>182</sup> Being in such a position to exercise decisive influence does not necessarily require forms of control over territory or people and therefore goes well beyond the interpretation of jurisdiction in the context of other human rights treaties. Because the Principles nevertheless categorize Principle 9 sub c as a form of jurisdiction, this would lead to a separate understanding of jurisdiction in ESC as opposed to CP context.

It is submitted that it offers more conceptual clarity to distinguish between jurisdiction as described in Chapter 3 and Principle 9 sub a as a form of control over territory or people and other bases for extraterritorial human rights obligations that go

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<sup>179</sup> Maastricht Principles and Commentary (n 163) Principle 9.

<sup>180</sup> Parts of these paragraphs have also been used in a blogpost: Have, Nienke van der, ‘The Maastricht Principles on Extraterritorial Obligations in the Area of ESC Rights – Comments to a Commentary’ (25 February 2013) SHARES blog, available at: <<http://www.sharesproject.nl/the-maastricht-principles-on-extraterritorial-obligations-in-the-area-of-esc-rights-comments-to-a-commentary/>>: In this blog, I criticized the fact that the Maastricht Principles categorize Principle 9 sub c as a form of jurisdiction, because it is much wider than the understanding of jurisdiction in CP rights context. For reasons of conceptual clarity, this chapter categorizes obligations of assistance and cooperation as obligations beyond territory and jurisdiction.

<sup>181</sup> Maastricht Principles and Commentary (n 163) Principle 9 sub a and b: Note that sub b refers to “situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights” including extraterritorially. This is also somewhat wider than jurisdiction as it has been interpreted in CP rights context. In the Principles it is used as a basis of third state obligations to respect and protect. See also principles 13 and 14; See Chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations.

<sup>182</sup> Maastricht Principles and Commentary (n 163) Principle 9 sub c.

beyond this understanding of jurisdiction.<sup>183</sup> Therefore, Principle 9 sub c and the related obligations of assistance and cooperation are not discussed under the heading of jurisdiction in this study, but as developing third state obligations beyond jurisdiction. It has so far remained unclear when third states are in a position to exercise decisive influence and thereby incur obligations to assist and cooperate. Although Principle 9 sub c resembles the CESCR's concept of states in a position to assist, like the CESCR, the Principles and Commentary fail to specify further criteria to establish when a state is in such a position.<sup>184</sup> The drafting experts of the Principles did, however, recognize that the lack of such criteria hampers the implementation of obligations of assistance and cooperation and advanced an interesting solution to this deficiency. Alongside the substantive obligation for states to cooperate, they chose to introduce a procedural obligation in Principle 30 to devise a system of burden sharing so as to create "criteria and indicators to assist in the allocation of particular obligations of international assistance and cooperation."<sup>185</sup> The Principles thereby recognize the need for such criteria while leaving it up to states to devise them. This construction resembles the obligation "*de negotiando et de contrahendo*" to make available the necessary means for a mission authorized by the SC under Article 42 or the UN Charter.<sup>186</sup> In reality, however, it seems unlikely that states will take up the practice of establishing burden sharing systems for obligations of assistance and cooperation in the context of ESC rights in the near future.

Similar to the basis, the content and scope of the developing obligations to assist and cooperate are far from clear. The CESCR and Maastricht Principles have interpreted Article 2(1) of the ICESCR to mean that states have obligations to support the realization of ESC rights in other states, which has been categorized primarily as an obligation to fulfill.<sup>187</sup> The CESCR has explained in General Comment 3 that the

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<sup>183</sup> Maastricht Principles and Commentary (n 163) Principle 9 sub a; See Chapter 1.3.3 Territory, Jurisdiction and Beyond and 3.1.2 Jurisdiction as a Basis and Threshold for Extraterritorial Obligations.

<sup>184</sup> Maastricht Principles and Commentary (n 163) Commentary to Principle 9c para 9.

<sup>185</sup> Maastricht Principles and Commentary (n 163) Principle 30 and Commentary to Principle 30 para 2: The commentary to the Maastricht Principles refers to the potential use of the principle of common but differentiated responsibility, a principle mainly used in the area of environmental law as a way to distribute obligations serving a common goal on a differentiated basis.

<sup>186</sup> UN Charter (n 43) art 43(1); Simma and others, *The Charter of the United Nations: A Commentary* (n 106) 1351 onwards: Such negotiations should concern only the 'how', not the 'if', of the provision of forces [...]."

<sup>187</sup> ICESCR (n 165) art 2(1); Maastricht Principles and Commentary (n 163) Principle 33 and 35: "As part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States." Principle 35 elaborates that states that receive a request for assistance must consider it in good faith and respond in a manner consistent with their obligation to support the realization of ESC rights in other states; Shue, Henry, *Basic Rights* (2nd edn, Princeton UP, 1996) 52: The respect, protect and fulfill distinction is often used in the context of ESC rights; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164) 75-7 and 191: Notes that the ICESCR defines obligations on the basis of

reference in Article 2 ICESCR to “international assistance and cooperation” to “the maximum of [...] available resources” refer both to “resources existing within a State and those available from the international community through international cooperation and assistance.”<sup>188</sup> Principle 31 of the Maastricht Principles asserts that individual states must jointly contribute to the extraterritorial fulfillment of ESC rights “commensurate with, *inter alia*, its economic, technical and technological capacities, available resources, and influence in international decision-making processes.”<sup>189</sup> The Principles thereby propose that the scope of these third state obligations is limited by every individual states’ capacity and resources.<sup>190</sup> Article 23 of the ICESCR further specifies several means for international assistance and cooperation, such as technical assistance, consultation and study.<sup>191</sup> In other General Comments, the CESCR has tried to elucidate the content of the obligations to assist and cooperate in relation to particular rights.<sup>192</sup> For example, in General Comment 18 the CESCR stated that obligations of assistance and cooperation in relation to the right to work mean that due attention must be paid to the right in international agreements and that states should promote the right to work in bilateral and multilateral negotiations.<sup>193</sup>

In this context, mention should also be made of solidarity rights, such as the rights to peace and development.<sup>194</sup> These rights were recognized in UN General Assembly (GA) resolutions several decades ago, but have not been generally accepted as *lex lata*. They were born from the realization that many individual CP and ESC rights cannot be achieved without states cooperatively addressing the underlying structural

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international co-operation, requiring pro-active steps; Vandenhole, Wouter, ‘A Partnership for Development: International Human Rights Law as an Assessment Instrument’ (November 2005) Submission to the UN High-Level Task Force on the Right To Development for its 2nd session, 3, para 4: “[...] States parties to the ICESCR, are to respect, protect and fulfil economic, social and cultural rights not only domestically but also abroad. Though these extraterritorial obligations may still be in need of further conceptualization, their existence should go undisputed.”

<sup>188</sup> CESCR, General Comment 3 (n 162) para 13.

<sup>189</sup> Maastricht Principles and Commentary (n 163) Principle 31.

<sup>190</sup> Maastricht Principles and Commentary (n 163) Principle 13-14 and 21-22: Some of the obligations proposed by the Maastricht Principles are specifically focused on prevention, such as Principles 13 and 14 which address the duty to avoid causing harm extraterritorially and the importance of impact assessments and prevention efforts in that regard. The Maastricht Principles also address the negative effects of sanctions or other indirect interference with another state’s capacity to ensure human rights within their own territory.

<sup>191</sup> ICESCR (n 165) art 23; CESCR, General Comment 3 (n 162) para 13: Refers to Articles 11, 15, 22 and 23 of the ICESCR as underlining the “essential role of such cooperation in facilitating the full realization of the relevant rights.”

<sup>192</sup> CESCR, General Comment 14 (n 174) para 45; CESCR, General Comment 15 (n 174) para 38; CESCR, General Comment 17 (n 174) para 37; CESCR, General Comment 18 (n 174) para 29-30.

<sup>193</sup> CESCR, General Comment 18 (n 174) para 29-30.

<sup>194</sup> UN General Assembly Resolution 39/11 ‘Declaration on the Right of Peoples to Peace’ (12 November 1984) UN Doc A/RES/39/11; UN General Assembly Resolution 41/128, ‘Declaration on the Right to Development’ (4 December 1986) UN Doc A/41/53; Sachs, Albie, ‘Social and Economic Rights: Can They Be Made Justiciable’ (2000) 53 SMU L Rev 1381, 1383.

and global causes of inequality. Solidarity rights bestow primary responsibility for their realization on the territorial state. However, they also have a clear collective dimension, calling on states to cooperate for the realization of the right worldwide.<sup>195</sup> A pragmatic approach is to view solidarity rights as having an internal and external dimension.<sup>196</sup> The internal dimension contains obligations that states owe towards people within their jurisdiction, whereas the external dimension contains obligations of states towards people outside their territory and jurisdiction and the obligation of all states to cooperate for the realization of the right.<sup>197</sup> However, there is currently very little guidance with regard to the basis or content and scope of obligations in the external dimension.<sup>198</sup> These aspects of the external dimension of solidarity rights could be further clarified and developed along the same lines as the obligations of assistance and cooperation for the worldwide realization of ESC rights.<sup>199</sup>

Although prevention of the types of injury associated with gross human rights violations is not the only or even principal aim of ESC rights, the developing third state obligations to assist and cooperate signify an advancing interest in addressing root causes of human rights violations within the international human rights law framework at a level surpassing territory and jurisdiction.<sup>200</sup> As such, the development of these obligations forms a strong contribution to the concepts used to further clarify the basis, content and scope of human rights obligations beyond territory and jurisdiction. If these obligations become more accepted, they could also have a practical impact on the long-term prevention of gross human rights violations. Different forms of economic and social instability can be risk factors that lead to gross human rights violations.<sup>201</sup> Obligations of assistance and cooperation for the realization of ESC rights target such economic and social instabilities and are generally focused on creating an enabling environment for the realization of human rights.<sup>202</sup> As such, they may contribute to mitigating risk factors for gross human rights violations.

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<sup>195</sup> Working Group on the Right to Development, Report on its Ninth Session (10 September 2008) UN Doc A/HRC/9/17, para 27: The remarks made by Cuba, Egypt and Pakistan are illustrative of the push and pull between developing states, who emphasize the collective external dimension and western states who emphasize the territorial dimension.

<sup>196</sup> Have, Nienke van der, 'The Right to Development: Can States Be Held Responsible?' in Foeken, Dick and others (eds), *Development and Equity* (BRILL, 2014) 191, 195.

<sup>197</sup> Have, van der, 'The Right to Development: Can States Be Held Responsible?' (n 196) 195.

<sup>198</sup> Have, van der, 'The Right to Development: Can States Be Held Responsible?' (n 196) 198-202.

<sup>199</sup> Maastricht Principles and Commentary (n 163) Principle 9.

<sup>200</sup> See Chapter 1.1.3 International Human Rights Law: "The type of injury that [...] express obligations to prevent seem to focus on, are violations of a person's life, body or dignity"; ICESCR (n 165) art 2: This interest is expressed in, but also shaped, by the entry point offered by Article 2.

<sup>201</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) risk factors 1.7-11.

<sup>202</sup> Maastricht Principles and Commentary (n 163) Preamble and Principle 28-35; Declaration on the Right to Development (n 194) art 3-6.

### 4.3.2 Corporations Acting Abroad

There are some rudimentary legal and practical developments suggesting that obligations beyond territory and jurisdiction may develop for states to prevent and remedy human rights abuses by corporations acting abroad. The issue of human rights violations caused by corporations has been on the international agenda for several decades.<sup>203</sup> Corporations are not parties to treaties and are not directly bound by human rights standards, yet they have the potential to cause much harm. In 2008, UN Special Representative John Ruggie presented a report, which described the need for states to “foster a corporate culture respectful of human rights at home and abroad.”<sup>204</sup> The report was followed in 2011 by Ruggie’s Guiding Principles for Business and Human Rights, based on a protect, respect and remedy framework.<sup>205</sup> The Human Rights Council (HRC) unanimously endorsed the framework.<sup>206</sup> The Guiding Principles strike a careful balance between the state’s obligations to protect against and remedy human rights violations by corporations within their jurisdiction and the responsibility of corporations to respect human rights.<sup>207</sup> In terms of obligations beyond territory and jurisdiction, the Commentary to the Guiding Principles notes that:

“At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.”<sup>208</sup>

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<sup>203</sup> Ruggie, John G., 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) AJIL 819.

<sup>204</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5, para 27.

<sup>205</sup> Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (n 204); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework' (21 March 2011) UN Doc A/HRC/17/31 (Guiding Principles on Business and Human Rights).

<sup>206</sup> Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4: In the same resolution, the HRC established a Working Group on the issue of human rights and transnational corporations and other business enterprises.

<sup>207</sup> Guiding Principles on Business and Human Rights (n 205) Commentary to Foundational Principle I. A 1: It stresses that it does not create new legally binding obligations for states, but is based on existing human rights obligations; Principle 17-21: Warn that adverse human rights impacts can result in criminal charges or civil claims for compensation against business enterprises and encourages businesses to carry out human rights impact assessments. States could choose to include this as a requirement in their regulation of business enterprises domiciled in their territory.

<sup>208</sup> Guiding Principles on Business and Human Rights (n 205) Commentary to Foundational Principle 2.



There are quite a few examples of recommendations to prevent and remedy human rights abuses by corporations acting abroad in the reporting procedures of UN Treaty Bodies.<sup>209</sup> Two concluding observations of the Human Rights Committee (HRCee) will be highlighted. The first example concerns the HRCee's concluding observations in its 2012 reporting procedure with Germany. According to a parallel report by a non-governmental organization (NGO), the Neumann Kaffee Gruppe, which is a German company, carried out forced evictions in Uganda at gunpoint, during which the victims were beaten and their houses were demolished.<sup>210</sup> The HRCee stated:

“The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.”<sup>211</sup>

A second example can be found in the HRCee's concluding observations in its 2015 reporting procedure with Canada, in relation to concerns about allegations of human rights abuses committed by Canadian mining companies abroad. The language in these concluding observations is stronger and more mandatory in nature:

“The State party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad.”<sup>212</sup>

The HRCee thus recommended to both Germany and Canada that they should regulate against, investigate and remedy human rights abuses of corporation acting abroad, despite the lack of jurisdictional control over the victims.<sup>213</sup> Instead, states are expected to wield the influence they have over the (potential) perpetrators of human

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<sup>209</sup> The Global Initiative for Economic, Social and Cultural Rights, ‘Human Rights Law Sources: UN Pronouncements on Extraterritorial Obligations’ (Working Paper July 2015) available at: <<http://globalinitiative-eser.org/wp-content/uploads/2015/07/150706-Human-Rights-Law-Sources-ETOs.pdf>>.

<sup>210</sup> Parallel Report Submitted by the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) to the Country Report Task Force of the Human Rights Committee on the Occasion of the Consideration of List of Issues related to the Sixth Periodic Report of Germany During the Committee's 105th Session (April 2012) available at: <[http://www.ccprcentre.org/wp-content/uploads/2012/07/GI\\_Germany105.pdf](http://www.ccprcentre.org/wp-content/uploads/2012/07/GI_Germany105.pdf)>.

<sup>211</sup> Concluding Observations HRCee on Germany (November 2012) UN Doc CCPR/C/DEU/CO/6, para 16.

<sup>212</sup> Concluding Observations HRCee on Canada (13 August 2015) UN Doc CCPR/C/CAN/CO/6, para 6.

<sup>213</sup> See also: Maastricht Principles and Commentary (n 163) Principle 25c.

rights abuses abroad, namely corporations domiciled in their territory or jurisdiction.<sup>214</sup>

In June 2014, the HRCee established an open-ended intergovernmental working group with the mandate to elaborate on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.<sup>215</sup> At the open-ended intergovernmental working group's first session during the summer of 2015, a panel was dedicated to obligations of states to guarantee the respect of human rights by transnational corporations and other business enterprises, including corporations operating abroad.<sup>216</sup> There was wide agreement among the panelists that states "should be responsible for indirect facilitation of human rights abuses, or failing to act to curb private actions."<sup>217</sup> Beyond improving domestic regulation of the activities of corporations abroad, suggestions were also made towards creating prevention and disclosure requirements and incorporating human rights in free trade and investment agreements.<sup>218</sup>

Together, the developments described above may spark a development in customary or treaty law towards binding obligations of states to regulate against and remedy human rights abuses by corporations abroad. The development of third state obligations in this area is rudimentary and the content and scope can only be very generally assessed. States would be expected to regulate the activities of corporations domiciled in their territory, by incorporating safeguards against human rights abuses abroad. Among possible remedies is the option to litigate for compensation for business related human rights harm caused abroad, before the domestic courts of the state where a company is domiciled. An example of such litigation practice is the case brought against Shell before a Dutch court based on oil leaks in Nigeria.<sup>219</sup>

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<sup>214</sup> Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (12 July 2011) UN Doc E/C.12/2011/1, para 5: The CESCR has also stated that "states parties should [...] take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction"; See also: Maastricht Principles and Commentary (n 163) Commentary to Principle 24.

<sup>215</sup> Human Rights Committee, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (14 July 2014) UN Doc A/HRC/RES/26/9.

<sup>216</sup> Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Draft Report (10 July 2015) UN Doc A/HRC... available at:

<<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Draftreport.pdf>>.

<sup>217</sup> Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Draft Report (n 216) para 61.

<sup>218</sup> Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Draft Report (n 216) para 64 and 67.

<sup>219</sup> *Vereniging Milieusdefensie v. Royal Dutch Shell PLC* (30 January 2013) Rechtbank Den Haag, C/09/330891 / HA ZA 09-0579, para 2.2; Another example of three separate ongoing cases brought in Canada against a corporation allegedly involved in human rights violations in Guatemala: *Choc v. Hudbay Minerals Incorporated* (14th February 2013) Superior Court of Justice, Canada, Ontario, 2013

The development of obligations to prevent and remedy human rights abuses by corporations acting abroad underlines the important role of third states in counteracting certain forms of human rights abuses by non-state actors that are otherwise hard to address. It also illustrates and supports two broader developments. The first is the growing support for third state obligations to avoid causing harm extraterritorially.<sup>220</sup> The second is the broadening forms of adjudicative jurisdiction used by third states for the purpose of punishing and remedying gross human rights violations abroad.<sup>221</sup> If the obligations to prevent and remedy human rights abuses by corporations abroad become accepted as customary law or are laid down in a treaty, they might sometimes directly help prevent the type of injury associated with gross human rights violations, such as in the case of the Neumann Kaffee Gruppe.<sup>222</sup> Even if abuses by corporations acting abroad generally cause other types of injury than those associated with gross human rights violations, tolerance towards human rights

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ONSC 1414: Permitting the three lawsuits to proceed to trial in Canada; Seibert-Fohr, Anja, 'United States Alien Tort Statute' (October 2015) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e743?rskkey=935ZHH&result=1&prd=OPIL>>: The Alien Tort Statute or Alien Torts Claim Act (ATCA) enacted in 1789 allows aliens to file civil claims for damages of international law in United States domestic courts; *Kiobel et al v. Royal Dutch Petroleum Company* (17 April 2013) Supreme Court of the United States, 10 US 1491: In this case, brought against Shell for human rights violations allegedly committed in Nigeria, the Supreme Court decided that a "presumption against extraterritoriality" applies to claims under the ATCA and the "mere corporate presence" of the corporation in the United States was not enough to trigger adjudicative jurisdiction. It thereby rejected universal civil jurisdiction and limited the opportunities for civil litigation in the United States for business-related human rights harm abroad. This does not necessarily preclude claims from being accepted if a company is domiciled in the United States; Ward, Halina, 'Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options' (2000) 24 HICLR 451: Discusses the "increasing trend for parent companies of multinational corporate groups to face litigation in developed country courts over environmental, social and human rights impacts in developing countries."

<sup>220</sup> McCorquodale, Robert and Simons, Penelope, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) MLR 598, 617 onwards; See also: Maastricht Principles and Commentary (n 163) Principle 9(b) and Principles 13 and 14.

<sup>221</sup> See for example: *Gray v. Germany* (n 62): Germany prosecuted a German doctor for malpractice that resulted in a death in the UK, even though Germany was arguably not required to do so given the fact that the doctor was not a state official and the crime was committed outside its jurisdiction; Concluding Observations CAT Committee on Canada (7 July 2005) UN Doc CAT/C/CR/34/CAN, 4(g) and 5(f); Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 11) para 55 onwards: Article 14 providing a right to remedy for acts of torture has been interpreted widely by the CAT Committee and Special Rapporteur on Torture as meaning that states must provide victims of torture access to remedy, even if the torture was committed outside their territory and jurisdiction.

<sup>222</sup> See Chapter 1.1.3 International Human Rights Law: "The type of injury that [...] express obligations to prevent seem to focus on, are violations of a person's life, body or dignity"; Parallel Report Submitted by GI-ESCR to the Country Report Task Force of the Human Rights Committee on the Occasion of the Consideration of List of Issues Related to the Sixth Periodic Report of Germany During the Committee's 105th Session (n 210): The German Kaffee Gruppe allegedly evicted people using grave forms of violence.

abuses and impunity are risk factors that may lead to gross human rights violations.<sup>223</sup> Third state obligations to prevent and remedy human rights abuses could help mitigate these risk factors.

### 4.3.3 Article 41 of the Articles on State Responsibility

The International Law Commission's (ILC) Articles on State Responsibility contain a special regime dealing with serious breaches of peremptory norms. The regime arose as a compromise, after the proposal to include a set of Articles on crimes of states was removed because of widespread resistance to the notion.<sup>224</sup> It does not necessarily apply to all gross human rights violations, only when it amounts to a serious breach of an obligation arising under a peremptory norm such as the prohibitions of genocide and torture.<sup>225</sup> According to Article 53 of the Vienna Convention on the Law of Treaties (VCLT) a peremptory norm is one that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is

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<sup>223</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) Risk factors 2.3, 2.4 and 2.8.

<sup>224</sup> Special Rapporteur Mr. Gaetano Arangio-Ruiz, 'Seventh Report on State Responsibility' (9, 24 and 29 May 1995) 47th session of the ILC, UN Doc A/CN.4/469 and Add.1-2, chp.1D1: Objections to article 19 part 1; Special Rapporteur Mr. Gaetano Arangio-Ruiz, 'Eighth Report on State Responsibility' (14 and 24 May 1996) 48th session of the ILC, UN Doc A/CN.4/476 & Corr.1 and Add.1, chp1: Problems relating to the regime of internationally wrongful acts singled out as crimes in article 19 of part one of the draft articles; Special Rapporteur Mr. James Crawford, 'Third Report on State Responsibility' (15 March, 15 June, 10 and 18 July and 4 August 2000) 52nd session of the ILC, UN Doc A/CN.4/507 and Add. 1-4, chp4C, Additional consequences of "gross breaches" of obligations to the international community as a whole: fn 819: "In the draft articles adopted on first reading, it was noted that "alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime'." Para 412 onwards proposes the set of Draft Articles more or less as they were included in the final document; Dupuy, Pierre-Marie, 'Implications of the Institutionalization of International Crimes of States' in Weiler, Joseph H., Antonio Cassese and Marina Spinedi, *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter, 1989) 170: Outlines arguments against the concept of crimes of states.

<sup>225</sup> Articles on State Responsibility (n 3) Commentary to art 40 para 4 and 5: In its commentary to Article 40 ASR, the ILC confirms that both the prohibition of genocide and the prohibition of torture are considered to be peremptory norms; See also: CAT, General Comment 2 (n 10) para 1; Besides the main examples of peremptory norms, which are few, some room is left to consider certain fundamental human rights as such. Note that many very general claims granting all kinds of human rights *jus cogens* status have made legal scholars somewhat wary of the concept: Frowein, Jochen A., 'Ius Cogens' (March 2013) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1437?rskey=UuqDvP&result=1&prd=EPIL>> para 6-8; For the right to life it is unclear whether it qualifies as a peremptory norm. It is certainly a fundamental right from which no derogation is permitted. It is moreover considered to be of fundamental importance as the very first and basic right, without which no other individual rights can exist: Human Rights Committee, 'General Comment 6: The Right to Life (Article 6)' (30 April 1982) UN Doc CCPR/C/GC/6, para 1-3; Other well-recognized peremptory norms such as war crimes and genocide often involve arbitrary killings. Therefore, arguably at least a core part of the right to life is protected by a peremptory norm. If acts of genocide, torture and arbitrary deaths occur on a gross or systematic basis, Article 41(1) applies to them.

permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>226</sup> A second question is whether the violation in question is a “serious breach.”<sup>227</sup> To qualify as a serious breach, Article 40(2) explains that a breach must amount to “a gross or systematic failure by the responsible State to fulfill the obligation.”<sup>228</sup> In its commentary to that Article, the ILC clarifies that the word “gross” means that a “certain order of magnitude of violation is necessary” and, alternatively, the word systematic describes “violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule.”<sup>229</sup> The ILC adds that genocide is an example of a violation that is by its very nature a serious breach.<sup>230</sup>

Article 41 of the Articles on State Responsibility contains several obligations for third states that result from the existence of a serious breach of a peremptory norm. Starting with the obligations that have already been accepted as *lex lata*, Article 41(2) of the Articles on State Responsibility contains an obligation to refrain from recognizing as lawful or rendering aid and assistance in maintaining a situation created by a serious breach.<sup>231</sup> The obligation of non-recognition is an existing customary obligation of abstention, which has been confirmed by the ICJ.<sup>232</sup> However, its content is somewhat unclear, because for example torture or genocide do not necessarily produce legal consequences that other states can deny.<sup>233</sup> An example would be to not allow state organs to use evidence that may have resulted from the use of torture in another state.<sup>234</sup> The second obligation contained in Article 41(2) of the Articles on

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<sup>226</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155b UNTS 331 (VCLT) art 53.

<sup>227</sup> Articles on State Responsibility (n 3) art 40(2) jo 41.

<sup>228</sup> International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) Report on the Work of its Sixty-Third Session, UN Doc A/66/10, art 40.

<sup>229</sup> Articles on State Responsibility (n 3) Commentary to art 40, para 7 and 8.

<sup>230</sup> Articles on State Responsibility (n 3) Commentary to art 40, para 8.

<sup>231</sup> Articles on State Responsibility (n 3) art 41(2).

<sup>232</sup> *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 126, para 125: The obligation of non-recognition is qualified by the consideration that it should not lead to depriving individuals of any advantages derived from international cooperation, such as refusing to accept the registration of births, deaths and marriages; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 188; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 160; Articles on State Responsibility (n 3) Commentary to art 41 para 6-10: Also refers to several SC resolutions in support of the obligation of non-recognition as a customary rule of international law.

<sup>233</sup> Talmon, Stefan, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?' in Tomuschat, Christian and Thouvenin, Jean-Marc (eds), *The Fundamental Rules of the International Legal Order* (BRILL, 2006).

<sup>234</sup> *A (FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004) House of Lords, Conjoined Appeals [2005] UKHL 71: Based on Article 41 of the Articles on

State Responsibility prohibits states to render aid and assistance towards maintaining a situation created by a serious breach of a peremptory norm. This obligation finds support in Security Council resolutions and ICJ case law.<sup>235</sup> The obligation extends beyond the scope of the general prohibition of aid and assistance in the commission of a wrongful act contained in Article 16 of the Articles on State Responsibility, because it also targets the situation after the wrongful act has ended.<sup>236</sup> Therefore, states are also not allowed to render aid and assistance to maintaining a situation created after a serious violation of a peremptory norm.<sup>237</sup>

Article 41(1) contains a developing third state obligation to “cooperate to bring to an end” serious breaches of peremptory norms.<sup>238</sup> This signifies a progressive *lege ferenda* element of the ILC Articles.<sup>239</sup> The Commentary explains that:

“It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy.”<sup>240</sup>

In the report in which Special Rapporteur Crawford proposes the Article more or less in its current form, he states:

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State Responsibility, the House of Lords concluded that “there is reason to regard it as a duty of states [...] to reject the fruits of torture inflicted in breach of international law.”

<sup>235</sup> Articles on State Responsibility (n 3) Commentary to art 41 para 12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 232) para 160.

<sup>236</sup> Articles on State Responsibility (n 3) Commentary to art 41 para 11.

<sup>237</sup> Articles on State Responsibility (n 3) Commentary to art 41 para 12: Refers to the regime of apartheid.

<sup>238</sup> Articles on State Responsibility (n 3) art 41(1); Special Rapporteur Mr. James Crawford, ‘Fourth Report on State Responsibility’ (2 and 3 April 2001) 53rd session of the ILC, UN Doc A/CN.4/517 and Add.1, chp.3, para 43 onwards: An earlier draft of the Article raised concern among states that it supported the notion of state crimes and punitive responses by the international community. In its current form they reflect a compromise, leaving room for the further development of the law. Para 44: “Other Governments (e.g. Austria, 67 the Netherlands, 68 Slovakia) also support the compromise embodied in chapter III, on the basis that its substantive provisions are reasonable and do not impose onerous burdens on third States.” Para 52: “In the Special Rapporteur’s view, chapter III is indeed a framework for the progressive development [...]it recognizes that there can be egregious breaches of obligations owed to the community as a whole, breaches which warrant some response by the community and by its members.”

<sup>239</sup> Articles on State Responsibility (n 3) Commentary to art 41 para 3; Wyler, Eric and Castellanos-Jankiewicz, Leon, ‘Serious Breaches of Peremptory Norms’ in Nollkaemper, André and Plakokefalos, Ilias, *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP, 2014), 284, 305: Refers to Article 49 of the UN Charter and the ICJ’s Wall opinion as support for the existence of an obligation to cooperate, but conclude that the legal status of Article 41(1) is “rather indeterminate.”

<sup>240</sup> Articles on State Responsibility (n 3) Commentary to art 41 para 3.

“It is obvious that issues of the salience and enforcement of community obligations are undergoing rapid development. Older structures of bilateral State responsibility are plainly inadequate to deal with gross violations of human rights and humanitarian law, let alone situations threatening the survival of States and peoples. The draft articles cannot hope to anticipate future developments, and it is accordingly necessary to reserve to the future such additional consequences [...] to the international community as a whole.”<sup>241</sup>

Article 41(1) was therefore included as a savings clause for future developments, which explains why it does not offer much clarity in relation to the obligation’s content and scope. The trigger for Article 41(1) requires a serious breach of a peremptory norm to already have started. Article 41(1) is therefore more temporally limited than for example the obligation to prevent genocide, which can be triggered by a serious risk.<sup>242</sup> The Commentary to the Articles on State Responsibility claims that “it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State”, which in effect eliminates any meaningful trigger of knowledge.<sup>243</sup> When a serious breach of a peremptory norm occurs somewhere, other states are assumed to know. In regard to the basis of the obligation, it is unclear if Article 41(1) is based on any sort of pre-existing influence, like the capacity to influence effectively for the obligation to prevent genocide. In the Commentary to Article 41, the ILC clarifies that states do not have to be individually affected by the serious breach and what is called for is “a joint and coordinated effort by all States to counteract the effects of these breaches.”<sup>244</sup> This seems to suggest that there is no threshold of influence and that all states are under a positive obligation to seek international cooperation if a serious breach of a peremptory norm occurs anywhere in the world.

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<sup>241</sup> Special Rapporteur Mr. James Crawford, ‘Third Report on State Responsibility’ (n 224) para 411; Comments and Observations Received from Governments (19 March, 3 April, 1 May and 28 June 2001) 53rd session of the ILC, UN Doc A/CN.4/515 and Add.1–3, chp3 Serious breaches of essential obligations to the international community: Most states approved the move away from the concept of state crimes. On 70 Spain requests that: “The Commission should enlarge upon and clarify to the extent possible the obligations of all States provided for [...]. The reference in paragraph 2 (c) to cooperation among States “to bring the breach to an end” is also problematic, as it is unclear whether a separate obligation is involved or whether it is related to the taking of countermeasures under article 54. On 72 China adds: “A question arises regarding the relationship of article 42, paragraph 2, with Security Council resolutions. For example, for an act that threatens international peace and security, would the obligations set out in article 42, paragraph 2, arise automatically, or only after a decision has been made by the Security Council?” The Netherlands adds: “The Netherlands assumes that the emphasis in subparagraph (c) (the obligation for all States “[t]o cooperate as far as possible to bring the breach to and end” is on cooperation, i.e. maximizing the collective response, for example, through the collective security system of the United Nations, and preventing States from going it alone.”

<sup>242</sup> Genocide case (n 2) para 431; Glanville, ‘The Responsibility to Protect Beyond Borders’ (n 1) 27.

<sup>243</sup> Articles on State Responsibility (n 3) Commentary to Article 41, para 11.

<sup>244</sup> Articles on State Responsibility (n 3) Commentary to art 41 para 3.

What measures may be required and the scope of any particular state's obligation is not specified nor well established.<sup>245</sup> The Commentary to the Articles on State Responsibility clarifies that Article 41(1) puts forward a positive obligation to cooperate, which can either be realized within the framework of an International Organization (IO) or outside.<sup>246</sup> According to the ILC, the choice of means "will depend on the circumstances of the given situation."<sup>247</sup> Examples of means to cooperate to bring to an end a serious breach of a peremptory norm are negotiation, (economic) sanctions and public condemnation. Such measures could gain in force if they are discussed and carried out in cooperation, for example in the context of an IO. For example, in its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* opinion, the ICJ stated that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation."<sup>248</sup> Under article 41, states are required to cooperate to bring the violation to an end through lawful means.<sup>249</sup> This confirms that they cannot use force unless sanctioned by the SC.<sup>250</sup> Article 41 adds force to the arguments that permanent members should refrain from using their veto in case of mass atrocities and that states should endeavor to contribute to peacekeeping missions once SC authorization exists.<sup>251</sup>

Article 41(1) supports the more general claim that third states should act to halt gross human rights violations and can inspire and strengthen the development of other third state obligations in this regard.<sup>252</sup> Interestingly, the Commentary to Article 41 states that, although the positive duty to cooperate is still developing, it may be the "only way of providing an effective remedy" in response to the gravest breaches of international law.<sup>253</sup> This underlines the importance the ILC members attached to further developing this obligation and implores states to make a serious effort to that effect. In that context, the ILC's work on a Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity should be noted, which will likely contain a state obligation to prevent as well as robust forms of state cooperation

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<sup>245</sup> Nollkaemper, André, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52(3) *Int'l & Comp LQ* 615, 626-7: "It need not be detailed here that the implementation of aggravated responsibility is not satisfactorily regulated by international law and that much work needs to be done to bring them under proper legal control."

<sup>246</sup> Articles on State Responsibility (n 3) Commentary to Article 41, para 2; Klein, Pierre, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13(5) *EJIL* 1241: Focuses on the important role that the UN could and arguably should play in initiating and coordinating forms of cooperation, the inadequacies in the current UN system, as well as proposals for new institutional mechanisms.

<sup>247</sup> Articles on State Responsibility (n 3) Commentary to art 41, para 3.

<sup>248</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 232) para 160.

<sup>249</sup> Articles on State Responsibility (n 3) art 41(1).

<sup>250</sup> UN Charter (n 43) art 2(4) and 42.

<sup>251</sup> Glanville, 'The Responsibility to Protect Beyond Borders' (n 1) 20; UN Charter (n 43) art 43.

<sup>252</sup> See Section 4.2 B.2 Genocide and 4.4.4 The Responsibility to Protect.

<sup>253</sup> Articles on State Responsibility (n 3) art 41(2) and Commentary to Article 41, para 3.



for the punishment of crimes against humanity.<sup>254</sup> The third state obligation to cooperate to bring to an end serious violations of peremptory norms could also be of immense practical relevance in strengthening third state obligations to prevent gross human rights violations. If the obligation contained in Article 41(1) gains acceptance in state practice and *opinio juris*, it could become a rule of customary international law.<sup>255</sup> Article 41(1) of the Articles on State Responsibility would then be a directly relevant legal basis for third state obligations to prevent the continuation of gross human rights violations abroad.<sup>256</sup>

#### 4.3.4 The Responsibility to Protect

The term responsibility to protect (RtoP) is generally used in a non-legal sense and “fix[es] a clear set of rules, procedures, and criteria” relating to the prevention of and intervention in the occurrence of four specified crimes.<sup>257</sup> The RtoP has shifted the discussion on humanitarian intervention from the right of third states and IOs to intervene in atrocity crimes, to their responsibility to prevent, assist and, only as an ultimate measure, intervene. The historic development of the concept of the RtoP has

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<sup>254</sup> International Law Commission, Report on the Work of its 66th Session (5 May–6 June and 7 July–8 August 2014) UN GAOR Supplement No. 10 (A/69/10) chp.14(a) para 1: “At its 3227th meeting, on 18 July 2014, the Commission decided to include the topic “Crimes against humanity” in its programme of work and to appoint Mr. Sean D. Murphy as Special Rapporteur”; Special Rapporteur Sean D. Murphy, ‘First Report on Crimes Against Humanity’ (17 February 2015) 67th session of the ILC, UN Doc A/CN.4/680, chp.5(a) Obligation to prevent crimes against humanity: Draft Article 1 contains a general obligation to prevent, similar to the Genocide Convention, but also specifies that states will take “effective legislative, administrative, judicial or other measures to prevent”, similar to the CAT; Special Rapporteur Sean D. Murphy, ‘Second Report on Crimes Against Humanity’ (21 January 2016) 68th session of the ILC, UN Doc A/CN.4/690, chp. 4 and 5: Draft Article 9 outlines the obligation of *aut dedere aut judicare* based on the presence of the alleged offender in any territory under the state party’s jurisdiction. By combining these elements of prevention and universal jurisdiction from the Genocide convention and CAT, the proposed convention could mitigate the lack of an obligation to establish universal jurisdiction over acts of genocide and help push beyond legalistic discussions on the nature of a crime before taking measures to prevent.

<sup>255</sup> Although state practice is scant, support for an obligation to cooperate based on customary law can be found in, for example: UN Charter (n 43) art 55 and 56; UN General Assembly Resolution 25/2625, ‘Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations’ (24 October 1970) UN Doc A/RES/25/2625, Preamble and Principle 4: The duty of States to co-operate with one another in accordance with the Charter; Gattini, Andrea, ‘A Return Ticket to ‘Communitarisme’, Please’ (2002) 13(5) EJIL 1181, 1186: “[O]ne can infer that, if the obligation to cooperate has been recognized as a general rule for the protection of peace and the promotion of human rights, the same must be true when these supreme values are seriously violated. Taking account of the strong political connotation of the Declaration, it is apparent that the ILC codified, rather than developed, the obligation the obligation to cooperate in bringing the violation to an end.”

<sup>256</sup> Jorgensen, Nina H. B., “The Next Darfur” and Accountability for the Failure to Prevent Genocide’ (2012) 81 NJIL 407, 411-2.

<sup>257</sup> Winkelmann, Ingo, ‘Responsibility to Protect’ (2010) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1464?rskey=sDiXW0&result=1&prd=EPIL>> para 2.

already been addressed in the introductory chapter in the context of the shift towards prevention.<sup>258</sup> The RtoP will now be discussed in the context of a shift towards recognizing the importance of the role of third states to ensure human rights. In 2005, after intense last-minute debates on the wording and content, the RtoP was accepted in non-binding form in the World Summit Outcome Document (WSOD).<sup>259</sup> Paragraphs 138 and 139 read:

“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. [...]

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [...] We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”<sup>260</sup>

Heads of state and government unanimously adopted the WSOD and the SC reaffirmed the relevant paragraphs on the RtoP in 2006.<sup>261</sup> The WSOD specified the crimes to which the RtoP applies as: genocide, war crimes, crimes against humanity and ethnic cleansing.<sup>262</sup>

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<sup>258</sup> See Chapter 1.1.2 Responsibility to Protect; International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ (International Development Research Centre, Ottawa 2001) (ICISS Report); UN General Assembly Resolution 60/1, ‘2005 World Summit Outcome’ (24 October 2005) UN Doc A/RES/60/1 (2005 World Summit Outcome) para 138-9.

<sup>259</sup> 2005 World Summit Outcome (n 258) para 138-9; On the drafting history, see: Strauss, Ekkehard, ‘A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect’ (2009) 1 GR2P 291, 293-9.

<sup>260</sup> 2005 World Summit Outcome (n 258) para 138-9, emphasis added.

<sup>261</sup> UN Security Council Resolution 1674 (28 April 2006) UN Doc S/RES/1674, para 4; The SC also reaffirmed the RtoP in later resolutions: UN Security Council Resolution 1894 (11 November 2009) UN Doc S/RES/1894; UN Security Council Resolution 2117 (26 September 2013) UN Doc S/RES/2117; UN Security Council Resolution 2150 (16 April 2014) S/RES/2150.

<sup>262</sup> Rome Statute (n 155) art 6, 7 and 8: These categories show great similarity to the crimes contained in the Rome Statute, the founding document of the ICC aimed at holding individuals responsible for international crimes. Despite the fact that the Rome Statute and RtoP developed in the around the same time and are both aimed at offering guidance for grave humanitarian crises, the overlap in the types of crimes between the Rome Statute and RtoP is somewhat odd. Whereas the Rome Statute is aimed at grounding individual criminal responsibility ex-post facto, the RtoP is aimed at preventing and reacting

In a 2009 Secretary General (SG) report on implementation of the RtoP, the SG further elaborated on the paragraphs in the WSOD on the RtoP with a three-pillar structure.<sup>263</sup> The three pillars are: (i) States' responsibility to protect their own population; (ii) The international community's responsibility to assist states in meeting their pillar one responsibilities; and (iii) The international community's responsibility to take timely and decisive action if a state is manifestly failing in regard to its pillar one responsibilities.<sup>264</sup> As pointed out by Bellamy, there is a difference in the "legal quality" of the three RtoP pillars.<sup>265</sup> The first pillar of the RtoP, responsibilities of states towards their own populations, is largely based on existing obligations codified in human rights treaties, which prohibit arbitrary deaths, torture and genocide, and international humanitarian law treaties, which prohibit war crimes.<sup>266</sup> The same is not true for the second and third pillars.<sup>267</sup> The third state obligation to prevent genocide and developing obligations discussed in Section 4.3 offer some weight to the argument that the second and third pillar are partially based on international obligations, but together they are not sufficient to ground these pillars entirely in existing international law.<sup>268</sup> GA resolutions such as the WSOD can spark

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to a specified set of crimes by states; Bellamy and McLoughlin, 'Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation' (n 104) 10-4: The content and delineation of the four RtoP crimes has therefore principally been explained with reference to the Rome Statute, but also International Humanitarian Law, the Genocide Convention and a great deal of other sources; Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (n 35) 461: Of the four RtoP crimes, ethnic cleansing is the odd one out, because it does not have an independent legal foundation, meaning that there is no treaty or other source of international law prohibiting this specific act, making its delineation and content more elusive than the other three crimes; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71) 1: Depending on the circumstances, ethnic cleansing can be classified in legal terms as a war crime or a crime against humanity.

<sup>263</sup> Secretary-General Ban Ki-Moon, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677; Luck, Edward C., 'The Responsibility to Protect: The First Decade' (2011) 3(4) GR2P 387.

<sup>264</sup> Secretary-General Report, 'Implementing the Responsibility to Protect' (n 263) summary, 10, 15 and 22.

<sup>265</sup> Bellamy, Alex J. and Reike, Ruben, 'The Responsibility to Protect and International Law' (2010) 2 GR2P 267, 274.

<sup>266</sup> The category of crimes against humanity first arose in the field of international criminal law and its scope in relation to obligations of states is still debated. Ethnic cleansing has no distinct pre-existing legal content at all. Therefore, state obligations to prevent genocide and war crimes are better defined in the body of international law as it stands today. The claim that states may not commit the acts comprising the RtoP crimes towards its own population has a strong basis in international law: Genocide Convention (n 2); ICCPR (n 5) art 6 and 7; ECHR (n 6) art 2 and 3; ACHPR (n 198) art 4 and 5; ACHR (n 7) art 4 and 5; CAT (n 7); IACPPT (n 7); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention); Bellamy and Reike, 'The Responsibility to Protect and International Law' (n 265) 275-80.

<sup>267</sup> Glanville, 'The Responsibility to Protect Beyond Borders' (n 1).

<sup>268</sup> All of this is further complicated by the fact that the international community, being the bearer of responsibilities under the second and third pillar, does not only comprise of states, but also IOs and to a certain extent non-state actors; Secretary-General Ban Ki-Moon, 'Responsibility to Protect: Timely and

the development of new rules of customary international law.<sup>269</sup> However, a review of the negotiation process and the subsequent practice of the GA, SC and states show little intention of laying down a new rule of international law and cannot be assumed to evidence *opinio juris*.<sup>270</sup> Although it is unlikely that the RtoP will be fully accepted as customary international law, elements of the second and third pillar may inspire the development of new obligations.<sup>271</sup>

None of the above documents discusses the basis of the second and third pillar responsibilities and whether states should have any form of pre-existing influence to incur responsibility under those pillars. The 2012 SG report on the third pillar refers to the obligation of states to prevent genocide and the capacity to influence effectively the (potential) perpetrators of genocide, but does not clarify the relevance of this concept for the RtoP.<sup>272</sup> The 2014 SG report on the second pillar states that:

“Those with the proximity, trust, knowledge, capacity or legitimacy to best provide assistance may take the lead in certain situations. This does not absolve other actors,

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Decisive Response’ (25 July 2012) UN Doc A/66/874–S/2012/578, para 45-7; Secretary-General Ban Ki-Moon, The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect’ (28 June 2011) UN Doc A/65/877–S/2011/393; The degree to which these other actors have obligations under international law is still contested: Chapter 1.3.1 Delineation: This study focuses only on state obligations.

<sup>269</sup> ICJ Statute (n 177) art 38(b); Ian Shaw, *International Law* (6th edn, CUP, 2008) 70; Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 164) 89: There are several factors which can predict if and how fast a resolution may be accepted into custom, such as the use of mandatory language, the voting pattern with which it was adopted and the follow-up mechanisms erected to further its implementation.

<sup>270</sup> Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 259) 293-12; Hehir, Aidan, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect' (2013) 38(1) *Int Secur* 137: The record of application of the RtoP in practice is patchy. A widely acclaimed success is the role the RtoP played in Kenya in 2007, where pressure by the international community and a mediation process under the leadership of former Secretary-General Kofi Annan helped halt post-election violence. However, the lack of third pillar action in regard to Syria is seen as a failure. Due to the complexity of the conflict in Syria and differing political interests, the SC has remained in a political deadlock; Bellamy, Alex J., 'Libya and the Responsibility to Protect: The Exception and The Norm' (2011) 25(03) *Ethics Int Aff* 263; Weiss, Thomas G., 'RtoP Alive and Well After Libya' (2011) 25(03) *Ethics Int Aff* 287: Recently, supporters of the RtoP have eagerly acclaimed the intervention in Libya as a new sign of the norm's progressive acceptance. However, NATO's intervention has also been much criticized for going beyond the mandate of protection to ensure regime change and in the aftermath of the intervention Libya has remained very internally unstable; Orford, Anne, *International Authority and the Responsibility to Protect* (CUP, 2011) 90 onwards: Sees the patchy record of the RtoP's application as proof of the fact that the RtoP is merely a new concept justifying politically motivated action, which would be undertaken regardless of its existence.

<sup>271</sup> Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 259) 317-20 and 323.

<sup>272</sup> Secretary-General Report, 'Responsibility to Protect: Timely and Decisive Response' (n 268) para 40.

however, of their continuing responsibility to support policies that are directed at atrocity crime prevention and response.”<sup>273</sup>

The dominant position seems to be that all three pillars of the RtoP always apply to all states, but that the manner of implementation differs based on the particular risk and the state’s capacity.<sup>274</sup> The lack of a threshold and references to capacity suggest that all states have a responsibility to protect at all times, to differing degrees.

In terms of the content and scope, measures that have been forwarded as part of the second and third RtoP pillars are wide-ranging.<sup>275</sup> States are expected, *inter alia*, to encourage and support capacity that will strengthen resilience to atrocity crimes and offer protection assistance to other states.<sup>276</sup> The 2012 SG report on the third pillar outlines the tools available under Chapter VI, VII and VIII of the UN Charter for a timely and decisive response, which include both non-coercive and coercive measures.<sup>277</sup> The initiative calling for permanent members of the SC to refrain from using their veto in votes regarding mass atrocity crimes, mentioned in Sections 4.2 B2 and 4.3.3, was largely inspired by the RtoP.<sup>278</sup> The initiative is now supported by 109 UN member states, including permanent SC members France and the UK.<sup>279</sup> For both second and third pillar action, measures must be concretized in accordance with the

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<sup>273</sup> Secretary-General Ban Ki-Moon, ‘Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect’ (11 July 2014) UN Doc A/68/947–S/2014/449, para 20, 34: The report also refers to regional actors as being particularly well-placed to engage in forms of encouragement.

<sup>274</sup> Bellamy, Alex J., ‘The Responsibility to Protect – Five Years On’ (2010) 24(2) *Ethics Int Aff* 143, 158 “First, as agreed by member states, RtoP is universal and enduring—it applies to all states, all the time. [...] The question should not be whether it applies, but how it is best exercised.”

<sup>275</sup> ICISS Report (n 258) 22-7: Although the understanding of the RtoP has developed and narrowed since the introduction of the ICISS report, the report contains an interesting set of proposals for the types of measures states should take. The report differentiates between root cause and direct prevention and measures addressing political, economic, legal and military dimensions.

<sup>276</sup> Secretary-General Ban Ki-Moon, ‘Responsibility to Protect: State Responsibility and Prevention’ (9 July 2013) UN Doc A/67/926-S/2013/399, para 7-15: The 2013 SG report on the RtoP that focuses on state responsibility and prevention, clusters different policy options for atrocity prevention, such as economic development, strengthening accountability and the rule of law. The SG report also states that promoting and protecting human rights is key to a state’s resilience to conflict. The direct preventive measures in the SG report are much less far-reaching and less focused on international support and intervention than the direct preventive measures suggested in the ICISS report; Secretary-General Report, ‘Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect’ (n 273) Summary: The 2014 SG report on the second pillar outlines the main forms of assistance as: encouragement, capacity building and protection assistance.

<sup>277</sup> Secretary-General Report, ‘Responsibility to Protect: Timely and Decisive Response’ (n 268) para 25 onwards.

<sup>278</sup> ACT Group, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (n 110).

<sup>279</sup> See: <<http://www.globalr2p.org/resources/893>>.

particular risks.<sup>280</sup> In 2014, the Office on Genocide Prevention and the Responsibility to Protect (OGPRtoP) introduced its Framework of Analysis for Atrocity Crimes - A Tool for Prevention.<sup>281</sup> The Framework makes different risk factors for RtoP crimes insightful and thereby aims to support states in formulating strategies to prevent, assist and intervene.

Elements of the RtoP's second and third pillar may, in time, spark the development of new customary obligations.<sup>282</sup> Regardless of its legal status, the RtoP can strengthen the prevention of gross human rights violations in practice by supporting the process of systematizing preventive efforts and increasing the focus on human rights in (potential) mass atrocity situations.<sup>283</sup> The SG has clearly stated that the RtoP above all else "provides a political framework based on fundamental principles of international law for preventing and responding to genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>284</sup> Therefore, the RtoP is a useful tool to help streamline efforts for the prevention of mass atrocities and the universal protection of human rights. Furthermore, the RtoP provides a clear moral claim, supported by a great number of states, that third states have a responsibility to prevent, assist and respond to certain mass atrocities.<sup>285</sup> As such, the RtoP can inspire and support the further acceptance and development of other third state obligations to prevent and halt gross human rights violations abroad.

#### 4.4 Conclusion

Only a few of the obligations that comprise the system to prevent gross human rights violations within state territory or jurisdiction can be incurred by states towards

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<sup>280</sup> Secretary-General Report, 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect' (n 273) 7-11; Secretary-General Report, 'Responsibility to Protect: Timely and Decisive Response' (n 268) para 20 and 35.

<sup>281</sup> OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 71).

<sup>282</sup> Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 259) 317-20 and 323: Strauss reasons that the SC could build on its practice to consider internal conflicts as a threat to international peace and security. Nevertheless, he argues there is still a long way to go: "Ultimately, this practice, based on a common ethic vision supporting the agreement that such action was required to meet existing legal obligations, might lead to a new norm of international customary law."

<sup>283</sup> Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (n 35) 459 and 463; Bellamy, 'The Responsibility to Protect - Five Years On' (n 274) 158, 161-6: The discussions surrounding the RtoP are all too often focused on a very small aspect of the RtoP: military intervention under the third pillar. Bellamy states that it is unlikely that the RtoP can offer a strong compliance pull to catalyze third pillar action that states would not otherwise be willing to undertake, largely due to the norm's indeterminacy. It is in its function as "a policy agenda in need of implementation" that Bellamy truly sees an added value.

<sup>284</sup> Secretary-General Report, 'Responsibility to Protect: Timely and Decisive Response' (n 268) para 59.

<sup>285</sup> Rosenberg 'Responsibility to Protect: A Framework for Prevention' (n 35) 459 and 463: The RtoP offers a "directive to act in the face of mass atrocities" with a strong focus on prevention and assistance and only as an ultimate measure to take timely and decisive action to respond.

people who are not within their territory or jurisdiction (third state obligations).<sup>286</sup> Third state obligations to prosecute and punish torture were developed under the CAT and IACPPT, with the aim of consolidating a worldwide regime of criminal punishment.<sup>287</sup> These obligations are based on the active personality principle or universal jurisdiction, which are forms of influence over the (potential) perpetrator, but do not require that the state had any form of influence over the victim or circumstances of the crime.<sup>288</sup> The obligations are part of the phases of long-term prevention and preventing recurrence and their content and scope are relatively well defined.<sup>289</sup> A worldwide regime of criminal punishment was not given as much priority in the context of the Genocide Convention, though a (subsidiary) obligation to prosecute and punish genocide based on universal jurisdiction may develop in time.<sup>290</sup> Importantly, the ICJ has interpreted the obligation to prevent genocide as applying beyond territory and jurisdiction, based on a state's capacity to influence effectively the (potential) perpetrators of genocide.<sup>291</sup> The obligation is part of the phases of short-term prevention and preventing continuation and is triggered when third states learn or should have learned of a serious risk of genocide, but its basis, content and scope are still somewhat unclear.

Compared to the set of obligations to prevent gross human rights violations in the territorial and jurisdictional layers, third state obligations to prevent gross human rights violations are better described as a patchwork of incidental obligations to prevent, which developed in rather uncoordinated fashion.<sup>292</sup> Third state obligations to prevent torture and genocide are unevenly spread out over the different temporal phases and third state obligations to prevent arbitrary deaths are wholly absent. At the same time, there is a shift towards recognizing the important role of third states for ensuring human rights, in light of the fact that the territorial state cannot always effectively prevent violations or may itself be the perpetrator.<sup>293</sup> This shift has fostered the development of new obligations that could supplement and strengthen the

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<sup>286</sup> The term "third states" is used to describe states that do not exercise territorial or extraterritorial jurisdiction over the people whose human rights are affected.

<sup>287</sup> CAT (n 7) art 5(1) b and (2); IACPPT (n 7) art 12; See Section 4.2 A.1 and D.1 Torture.

<sup>288</sup> See Section 4.1.1 CAT and IACPPT.

<sup>289</sup> See Section 4.2 A.1 and D.1 Torture: They require third states to include the relevant bases to establish criminal jurisdiction into their domestic legal system and take steps to investigate and prosecute when acts of torture by nationals or people within their jurisdiction are suspected or alleged to have taken place abroad.

<sup>290</sup> Genocide Convention (n 2) art 6: Contains an express territorial limitation; See Section 4.2 A.2 and D.2 Genocide.

<sup>291</sup> See Sections 4.1.2 Genocide Convention and 4.2 B.1 Genocide.

<sup>292</sup> See Section 4.1.2 Genocide Convention: For example, the Genocide convention was adopted before the CAT and IACPPT, at a time in which universal jurisdiction was less accepted. This has resulted in a situation where states are often obligated to exercise universal jurisdiction for acts of torture, but not for acts of genocide.

<sup>293</sup> See Section 4.3 Shift Towards Third State Obligations.

patchwork of existing third state obligations to prevent gross human rights violations. Four relevant areas were discussed:

- i) There is a strong push for the acceptance and refinement of third state obligations to assist and cooperate for the realization of ESC rights when states are in a position to assist.<sup>294</sup>
- ii) There are rudimentary developments suggesting that third state obligations may develop to regulate against and remedy human rights violations by corporations acting abroad.<sup>295</sup>
- iii) Article 41(1) of the Articles on State Responsibility contains a developing obligation requiring third states to cooperate to bring to an end serious violations of peremptory norms.
- iv) The RtoP advances a moral responsibility to assist and intervene when a state fails to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing.

Developing obligations in the first two areas are not necessarily aimed at preventing the type of injury typically associated with gross human rights violations.<sup>296</sup> However, these developing obligations support the creation of an internationally enabling environment for the realization of human rights and can help mitigate risk factors that could lead to gross human rights violations. As such, they could contribute to the long-term prevention of gross human rights violations by third states.<sup>297</sup> Developing obligations in the latter two areas are directly aimed at preventing and halting types of injury associated with gross human rights violations. As such, they could contribute to the phases of short-term prevention and preventing the continuation of gross human rights violations by third states.<sup>298</sup> Together with the growing acceptance of universal jurisdiction for crimes like genocide, the four areas illustrate several broader developments. There is growing support for obligations to avoid causing harm abroad.<sup>299</sup> There is a push for the development and acceptance of state obligations to assist and cooperate.<sup>300</sup> Finally, there is a trend towards extending forms of criminal and civil adjudicative jurisdiction to be able to punish and remedy gross human rights

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<sup>294</sup> See Section 4.3.1 Economic and Social Rights.

<sup>295</sup> See Section 4.3.2 Corporations Acting Abroad.

<sup>296</sup> See Chapter 1.1.3 International Human Rights Law: “The type of injury that [...] express obligations to prevent seem to focus on, are violations of a person’s life, body or dignity.”

<sup>297</sup> See Sections 4.3.1 and 4.3.2 last para’s: Furthermore, they illustrate and support the acceptance of third state obligations to avoid causing harm extraterritorially and assist and cooperate for the worldwide realization of human rights.

<sup>298</sup> See Sections 4.3.3 and 4.4.4 last para’s: Furthermore, they underline the claim that third states should act in the face of gross human rights violations and inspire and support the development of third state obligations in that regard.

<sup>299</sup> See Sections 4.3.1 Economic Social and Cultural Rights and 4.3.2 Corporations Acting Abroad.

<sup>300</sup> See Sections 4.3.1 Economic Social and Cultural Rights and 4.3.3 Article 41 of the Articles on State Responsibility.



violations that took place abroad.<sup>301</sup> These developments show that there is great potential to strengthen the set of third state obligations to prevent gross human rights violations in all temporal phases. However, the basis, triggers, content and scope of developing obligations are often elusive. Much work will need to be done to clarify these different aspects of the developing obligations by supervisory bodies, courts and academics, so they become easier for states to accept and implement.<sup>302</sup>

In this layer of third state obligations, a state's capacity to ensure human rights is much more closely entwined with both the basis, content and scope of obligations than in the previous two layers. Within state territory or when a state exercises extraterritorial jurisdiction, the capacity to ensure human rights is to some extent presumed. Capacity-related factors can only incidentally limit the scope of obligations.<sup>303</sup> In contrast, the capacity to ensure human rights is not generally presumed to exist in regard to people who are outside a state's territory and jurisdiction. Unlike territorial control or extraterritorial jurisdictional, there is not just one basis upon which states can incur obligations beyond territory and jurisdiction. Third states may incidentally incur (developing) obligations based on different forms of influence, for example influence over (potential) perpetrators or being in a position to assist other states. As such, it is not surprising that the content and scope of third state obligations are strongly connected with capacity in general and the specific forms of influence upon which they are based.<sup>304</sup>

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<sup>301</sup> See Sections 4.1.1 CAT and IACPPT, 4.1.2 Genocide Convention and 4.3.2 Corporations Acting Abroad.

<sup>302</sup> See Chapter 1.3.4 Clarifying the Content of Obligations: It is assumed in this research that clarifying the content of obligations will at the very least add clarity to the debate about them and can at best induce efforts of implementation and enforcement.

<sup>303</sup> See Chapter 2.3 Conclusion and Chapter 3.4 Conclusion.

<sup>304</sup> See Section 4.2 D.1 Torture: When suspects of acts of torture reside within a state's jurisdiction, it has the obligation to extradite or prosecute the suspect in line with the practical control it has over them; See Section 4.2 B.1 Genocide: When a state has a capacity to influence effectively the (potential) perpetrators of genocide, it is expected to employ all means reasonably available to prevent genocide, the scope of which is partly determined by the same factors that also determine whether there is a basis for the obligation at all; See Section 4.3.1 Economic, Social and Cultural Rights: When a state is in a position to assist, it must assist and cooperate with other states for the realization of ESC rights in line with its capacity and resources.