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

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## 5. CONCLUSION

“Repeating the phrase “never again” is, in itself, a sign of continued failure.”<sup>1</sup>

“Never again”, the phrase that embodied the international community’s commitment to preventing gross human rights violations in the aftermath of the genocides in Rwanda and Srebrenica, appears rather hollow in light of the humanitarian tragedies currently unfolding in Syria, Iraq and South-Sudan. It is perhaps better understood as an ideal worth striving for: continued failures must be met with the continued effort to improve the prevention of gross human rights violations. Over the past decades, there has been much attention for concepts aimed at the prevention of gross human rights violations, like conflict prevention and the responsibility to protect (RtoP).<sup>2</sup> This has caused a normative and societal shift in attention towards prevention. At the same time, the legal obligations of states to prevent gross human rights violations under international human rights law remained cloaked in obscurity.<sup>3</sup> Core questions in relation to the content and scope of obligations to prevent gross human rights violations had remained unanswered. For example, it was unclear what types of obligations states have at different points in time, when they are triggered, what they require in terms of concrete measures and how they apply outside a state’s territory.

This study’s aim was to systematically assess the content and scope of obligations to prevent gross human rights violations under international human rights law. The study concentrated on particular types of injurious events that are prohibited under international human rights law: torture, arbitrary death and genocide (hereinafter: three prohibitions).<sup>4</sup> To understand obligations to prevent in their interconnection, they were studied based on a timeline with four temporal phases: long-term prevention, short-term prevention, preventing continuation and preventing recurrence.<sup>5</sup> The timeline made it possible to more clearly distinguish what types of obligations states have at different points in time and how they are triggered by knowledge that there is a risk of a violation or a continuing violation. Both territorial and extraterritorial obligations to prevent gross human rights violations were included, by dividing the research into three different spatial layers.<sup>6</sup>

The assessment resulted in an overview of obligations to prevent gross human rights violations under international human rights law. In this concluding chapter, the overview of obligations to prevent in territorial and extraterritorial contexts will be outlined and discussed (Section 5.1). Two overarching themes will then be examined. The first is the influence of a state’s capacity on obligations to prevent gross human rights violations in the territorial as

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<sup>1</sup> ‘Repeating ‘Never Again’ after Atrocity ‘a Sign of Continued Failure’, Deputy Secretary-General Says at Event on Rwanda Genocide’ (15 January 2014) Press Release DSG/SM/736-AFR/2794, available at: <<http://www.un.org/press/en/2014/dsgsm736.doc.htm>>.

<sup>2</sup> See Chapter 1.1 Context: Shift Towards Prevention.

<sup>3</sup> See Chapter 1.2 The Problem: The Content and Scope of Obligations to Prevent.

<sup>4</sup> See Chapter 1.3.1 Delineation.

<sup>5</sup> See Chapter 1.3.2 Temporal Phases.

<sup>6</sup> See Chapter 1.3.3 Territory, Jurisdiction and Beyond.

well as the extraterritorial layers (Section 5.2). The second is how existing typologies can be applied in the framework elaborated in this study to gain a proper understanding of obligations to prevent gross human rights violations (Section 5.3). Finally, an appraisal will be made of the overview of obligations to prevent gross human rights violations, describing several of its challenges and discussing where this leaves room for improvement (Section 5.4).

### **5.1 Overview of Obligations to Prevent Gross Human Rights Violations: Four Temporal Phases and Three Spatial Layers**

This study offers an overview and in-depth analysis of obligations to prevent gross human rights violations under international human rights law, which is in itself the most important outcome of the research. The exercise to distinguish and analyze the content and scope of obligations to prevent torture, arbitrary death and genocide based on the timeline was repeated in three different spatial layers: within state territory, extraterritorially based on jurisdiction and extraterritorially beyond jurisdiction.<sup>7</sup> This section will provide a short outline of the most important findings for each spatial layer.

#### **5.1.1 Territory**

Human rights treaties were devised to apply primarily within state territory. Therefore, it is unsurprising that human rights law prescribes a refined set of territorial obligations to prevent gross human rights violations that extends over all temporal phases. Significant overlap was found to exist in terms of the types of obligations to prevent violations of all three of the prohibitions. Most obligations to prevent fit within certain crosscutting categories. The crosscutting categories can be described as: (i) Long-term obligations to introduce a proper legislative and administrative framework capable of deterring violations; (ii) Short-term obligations to take measures to prevent violations; (iii) Obligations to halt continuing violations/offences by ceasing or intervening; and (iv) Obligations to prevent recurrence by investigating, prosecuting and punishing wrongdoers. These crosscutting categories can be seen as representative for the types of obligations to prevent gross human rights violations that states have under international human rights law more generally. They are referred to as the set of territorial obligations to prevent gross human rights violations.<sup>8</sup>

Notwithstanding the general division into crosscutting categories, the content of the obligations to prevent varies and is specified towards deterring violations of the specific prohibitions. For example, for the long-term prevention of arbitrary deaths, introducing a proper legislative and administrative system means that states must introduce a framework regulating the use of force and firearms by state officials.<sup>9</sup> For the long-term prevention of

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<sup>7</sup> See Chapter 1.3.3 Territory, Jurisdiction and Beyond.

<sup>8</sup> See Chapter 2.3 Conclusion.

<sup>9</sup> See Chapter 2.2 A.2 Arbitrary Death; Human Rights Committee, 'General Comment 6: The Right to Life (Article 6)' (30 April 1982) UN Doc CCPR/C/GC/6, para 3; *Makaratzis v. Greece* [GC] no. 50385/99, ECHR 2004-XI, para 31; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII, para

torture, introducing a proper legislative and administrative system entails adopting strict rules and regulations in regard to situations of detention.<sup>10</sup> The emphasis on certain obligations or their distribution in time also varies in the context of the different prohibitions. For example, the obligations to investigate, prosecute and punish wrongdoers can arise before genocide occurs, because it is a more large-scale violation and punishing individual wrongdoers for incitement or other genocide-related offences can already have a preventive effect at an early stage.<sup>11</sup> States can also have more specific obligations to prevent in the context of the different prohibitions that do not necessarily fit the crosscutting categories, such as the obligation of *non refoulement* if people run a real risk of being tortured or arbitrarily deprived of their life in a receiving state.<sup>12</sup> All of these variations underline the importance of the specific type of injury for the way that obligations to prevent are shaped.<sup>13</sup>

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99-102; *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004 – XII, para 89-90; *Juan Humberto Sánchez v. Honduras* (Preliminary Objection, Merits, Reparations and Costs) Judgment of June 7, 2003, I/A Court HR Series C No. 99, para 112; UN General Assembly Resolution 34/169 ‘Code of Conduct for Law Enforcement Officials’ (17 December 1979) UN Doc A/RES/34/169; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (27 August – 7 September 1990) adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba.

<sup>10</sup> See Chapter 2.2.A.1 Torture; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 10-13 and 15; Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67 (IACPPT) art 7; Human Rights Committee, ‘General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7)’ (10 March 1992) UN Doc CCPR/C/GC/20, para 8; *Ali Bashasha v. Libya*, Comm. 1776/2008, No. CCPR/C/100/D/1776/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 504 (HRC, Oct. 20, 2010) para 7.4; *Juan Humberto Sánchez v. Honduras* (n 9) para 83-4; Economic and Social Council Resolutions 663C(XXIV) and 2076(LXII), ‘Standard Minimum Rules for the Treatment of Prisoners’ (31 July 1957 and 13 May 1977) UN ESCOR, Supp. No. 1, at 11, UN Doc E/3048 (1957), amended by UN ESCOR, Supp. No. 1, at 35, UN Doc E/5988 (1977); Office of the United Nations High Commissioner for Human Rights, ‘Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Professional Training Series’ (9 August 1999) UN Doc HR/P/PT/8/Rev.1 (Istanbul Protocol).

<sup>11</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 jo 3; Chapter 2.2.B.3 Genocide: “According to Article 6 of the Convention, states must prosecute and punish individuals who commit any of the acts prohibited in Article 3 on their territory, which includes incitement. Such acts can already occur before the actual process of genocide as described in Article 2 has started.”

<sup>12</sup> States have obligations of *non refoulement* in the context of torture and arbitrary death. Although these obligations cover situations of genocide, they have not been expressly formulated as separate obligations in the context of genocide. See Chapter 2.2.B.1 Torture and B.2 Arbitrary Death; CAT (n 10) art 3; IACPPT (n 10) art 13; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 24 March 1976) 999 UNTS 171 (ICCPR) art 6 and 7 jo 13; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) art 2 and 3 jo 6 and 7 and Protocol 7; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 5 jo 22(5); African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 4 and 5 jo 12; *Tebourski v. France*, Comm. 300/2006, UN Doc CAT/C/38/D/300/2006, A/62/44 (2007) Annex VII at 317 (CAT Committee May 01, 2007) para 8.2-3; *Pillai v. Canada*, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part 1 (2011), Annex VI at 473 (HRC, Mar. 25, 2011) para 11.4.

<sup>13</sup> See Chapter 1.2 The Problem: The Content and Scope of Obligations to Prevent and 2.3 Conclusion.

Because of the timeline, it not only became more clear what types of obligations states have at different points in time, but also how they are triggered by knowledge that there is a risk or continuing violation. In the long-term phase, knowledge does not play a role as trigger, because the obligations are aimed at general deterrence and are incurred by states immediately after they are bound by the relevant obligation.<sup>14</sup> In the two acute phases of prevention – short-term prevention and preventing continuation – knowledge plays an important triggering role in relation to indirect obligations to take measures to prevent and intervene in (continuing) offences by non-state actors.<sup>15</sup> The triggers of knowledge are broadly similar in the context of the three prohibitions, only differing somewhat in terms of their formulation.<sup>16</sup> In the short-term phase, the state is required to take measures if it knew or ought to have known of a real and immediate risk. In the phase of preventing continuation, the state is required to intervene if it knows or should have known about a continuing offence. Both triggers are objective, meaning that it does not have to be proven that the state had actual knowledge. This implies that states must diligently investigate and assess information that may indicate a real and immediate risk of a violation or a continuing offence.<sup>17</sup> For the direct obligations to prevent or cease continuing violations by state officials in the acute phases of prevention, the standard of the trigger of knowledge is lower – meaning that it is more easily attained – because a state is expected to know and control the way its state officials act.<sup>18</sup> In the last phase of preventing recurrence, there is a low trigger of knowledge for the obligation to investigate that a violation/offence has occurred.<sup>19</sup> The state must investigate as soon as a violation/offence is alleged or it has reason to believe it occurred. The investigation, in turn, can provide information that triggers the obligation to prosecute.

### 5.1.2 Extraterritorial Jurisdiction

Extraterritorial human rights obligations based on jurisdiction have developed through a practice of applying human rights treaties to extraterritorial forms of states conduct, such as

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<sup>14</sup> See Chapter 2.2 A Long-Term Prevention.

<sup>15</sup> See Chapter 2.2 B Short-Term Prevention and C Preventing Continuation.

<sup>16</sup> *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para 116: States have a short-term due diligence obligation under the ECHR to prevent arbitrary death if “the authorities knew or ought to have known (...) of the existence of a real and immediate risk”; *Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of January 31, 2006, I/A Court HR Series C No 140, para 123: States have a short-term due-diligence obligation under the IACHR to prevent arbitrary death if the authorities have “awareness of a situation of real and immediate danger”; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case) para 431: States have a short-term due-diligence obligation to prevent genocide when the authorities learn or should have learned of the “serious risk” that genocide will be committed; *Pillai v. Canada* (n 12) para 11.4: *Non-refoulement* involves a risk assessment and applies when there are “substantial grounds to believe that there is a real risk” of torture or death upon return.

<sup>17</sup> See Chapter 2.3 Conclusion.

<sup>18</sup> See Section 2.2 B.1 Torture, B.2 Arbitrary Death, C.1 Torture and C.2 Arbitrary Death; *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, series A no 25, para 159: The ECtHR stated that in the context of an administrative practice of torture it would be “inconceivable that the higher authorities of a state should be, or should be entitled to be, unaware of the existence of such a practice.”

<sup>19</sup> See Chapter 2.2 D Preventing Recurrence.

situations of occupation, military intervention or arrest and detention. All of the instruments that contain obligations to prevent gross human rights violations included in this research allow for extraterritorial applicability when a state exercises jurisdiction over individuals extraterritorially.<sup>20</sup> Despite an increasing body of case law and scholarly attention, uncertainty has continued to surround the precise meaning of jurisdiction for the extraterritorial applicability of human rights treaties.<sup>21</sup> Based on an overview of existing case law and scholarly work, it was concluded that jurisdiction functions as a threshold and basis for extraterritorial human rights obligations.<sup>22</sup> To reach the threshold, states must exercise effective control over territory (spatial model) or authority and control over individuals (personal model) abroad.<sup>23</sup> Most of the scholarly attention has so far been focused on the precise levels of control for the threshold to be reached.<sup>24</sup>

Once the threshold of jurisdiction is reached, a next step is to determine the content and scope of corresponding extraterritorial obligations.<sup>25</sup> When a state exercises extraterritorial jurisdiction, the same rights and obligations as within state territory apply in principle. However, extraterritorial contexts are in many ways different from a territorial context.<sup>26</sup> Accordingly, there are additional factors that have to be taken into account as influencing the content and scope of extraterritorial obligations.<sup>27</sup> A set of legal, practical and power-related factors was formulated to be able to take the state's capacity to ensure human rights in extraterritorial settings into account. Legal factors tackle the reality that there are limits to what a state is lawfully allowed to do abroad in terms of prescribing rules, enforcing them and adjudicating disputes.<sup>28</sup> Practical factors encompass all kinds of security, language, cultural or

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<sup>20</sup> See Chapter 3.1.1 Instruments; Genocide Convention (n 11); *Genocide* case (n 16) 183-4: Only the Genocide Convention does not contain a jurisdiction clause, but this has been interpreted by the ICJ as permitting extraterritorial applicability for most of its provisions.

<sup>21</sup> Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); Milanović, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011); Besson, Samantha, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25(4) LJIL 857.

<sup>22</sup> See Chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations.

<sup>23</sup> See Chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: The two models cannot be strictly separated. The spatial model is merely a shorthand for the personal model, by introducing a presumption that everyone within that territory is within the controlling state's jurisdiction; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, para 134-9.

<sup>24</sup> Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 21); Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (n 21); Raible, Lea, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers' (2016)(2) EHRLR 161.

<sup>25</sup> See Chapter 3.2 Corresponding Obligations.

<sup>26</sup> See Chapter 3.2.1 The Role of Capacity.

<sup>27</sup> See Chapter 3.2.2 Realistic Application: Although these factors may mean that certain obligations do not arise or their scope is reduced to zero under particular circumstances, they are not linked with the threshold and do not influence the formal applicability of a state's rights and obligations.

<sup>28</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>>; Oxman, Bernard H., 'Jurisdiction of States' (November 2007) MPEPIL, available at: <<http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690>>

other concerns that make it more difficult for states to live up to their human rights obligations in specific extraterritorial contexts.<sup>29</sup> Finally, power-related factors take into account the fact that a state usually exercises more limited powers and has a more limited institutional infrastructure at its disposal abroad.<sup>30</sup> By using these factors to translate the crosscutting obligations to prevent gross human rights violations identified in Chapter 2 to extraterritorial settings based on jurisdiction, the following overview of obligations emerged: (i) Long-term obligations to prepare for extraterritorial operations through the state's own legislative and administrative framework. Long-term obligations to plan and equip extraterritorial operations in a way that allows them to function in accordance with a state's human rights obligations. Occupying powers may have long-term obligations to adjust the host-state's legislative and administrative system if it is not in line with requirements under international human rights law; (ii) Short-term obligations and obligations to prevent continuation by taking measures to prevent and halt violations/ offences in the course of extraterritorial operations; and (iii) Obligations to prevent recurrence by investigating, prosecuting and punishing violations by state officials and ensuring the prosecution of offences by non-state actors within their extraterritorial jurisdiction.<sup>31</sup>

Legal factors primarily have a bearing on obligations in the phases of long-term prevention and preventing recurrence, while practical and power-related factors primarily have a bearing on obligations in the phases of short-term prevention and preventing continuation.<sup>32</sup> A clear

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e1436>: States' prescriptive, enforcement and adjudicative jurisdiction are in principle limited to their territory, although there are exceptions; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) International Peace Conference, The Hague, Official Records (Hague Regulations) art 42-3: Occupying powers have certain forms of prescriptive and adjudicative jurisdiction in the occupied territory. This was taken into account as an express exception to the exclusion of humanitarian law from the scope of this study; See Chapter 1.3.1 Delineation and 3.2.3 Realistic Application.

<sup>29</sup> See for example: *Al-Skeini v. the United Kingdom* (n 23) para 168: "The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war."; *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014, para 226: "The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population – witness the first shooting incident on 21 April 2004 (see paragraph 10 above) – clearly included armed hostile elements."

<sup>30</sup> Lawson, Rick 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans, Fons and Kamminga, Menno T., *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 83, 106: "[A] state's powers will normally be much more limited during operations abroad"; *Rigopoulos v. Spain* (dec.), no. 37388/97, ECHR 1999-II, section B: In a case concerning an arrest on the high seas and the obligation of prompt judicial review "the Court considers that it was [...] materially impossible to bring the applicant physically before the investigating judge any sooner."

<sup>31</sup> See Chapter 3.4 Conclusion: The long-term obligation to prepare for extraterritorial operations through the state's own legislative and administrative framework, entails: making provision to punish gross human rights violations by state officials abroad, introducing safeguards against gross human rights violations and training state officials.

<sup>32</sup> Note that the role of a mandate as a legal factor in the phases of short-term prevention and preventing continuation is still unclear. See: 3.3 B Short-Term Prevention; Larsen, Kjetil M., *The Human Rights Treaty Obligations of Peacekeepers* (CUP, 2012) 392.

example of the influence of a legal factor in the long-term phase is that, other than occupying powers, states cannot introduce new laws or adjust the legal framework of a host state.<sup>33</sup> This impacts the long-term obligation to introduce a proper legislative and administrative system capable of deterring gross human rights violations. States therefore mainly have to prepare for extraterritorial operations through their own legislative and administrative frameworks, for example by introducing safeguards against violations in the course of such operations and offering specific training to state officials.<sup>34</sup> They also have to plan and equip operations to allow them to function in accordance with human rights obligations. In the phases of short-term prevention and preventing continuation, practical and power-related factors like an unstable security situation or a lack of resources may influence the time it takes to carry out certain obligations or type of measures a state is required to take. Because states oversee and control the actions of their state officials abroad, direct obligations in these acute phases of prevention hardly differ from territorial obligations; whereas indirect obligations to prevent offences by non-state actors may sometimes be more easily limited in scope abroad than within state territory due to practical and power-related factors.<sup>35</sup> Finally, a legal factor to be taken into account in the phase of preventing recurrence is that states may not always be able to establish adjudicative criminal jurisdiction over non-state actors who commit offences within their extraterritorial jurisdiction.<sup>36</sup> In such cases states must seek alternative routes of prosecution, for example by transferring the suspect to the host-state or a third state that has a basis to establish adjudicative criminal jurisdiction.

### 5.1.3 Beyond Territory and Jurisdiction

Although the applicability of human rights treaties is normally limited by jurisdiction, there are situations in which states can incur human rights obligations beyond jurisdiction (third state obligations). These obligations are based on the universalist conception that sometimes states have to (help) ensure human rights regardless of their relationship with the people affected. In practical terms, this means that the people whose rights are affected do not have to be within the third state's territorial or extraterritorial jurisdiction. Some of the obligations that are part of the set of obligations to prevent gross human rights violations distinguished in Chapter 2, are in fact not limited by territory or jurisdiction and can also be incurred by third states.<sup>37</sup> Third state obligations exist in the context of the Convention against Torture and

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<sup>33</sup> See Chapter 3.3 A Long-Term Prevention; Kamminga, 'Extraterritoriality' (n 28) para 3.

<sup>34</sup> See Chapter 3.3 A Long-Term Prevention; Concluding Observations HRCee on Belgium (12 August 2004) UN Doc CCPR/CO/81/BEL, para 6: "The State party should respect the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad [...] and should train the members of such missions appropriately"; Martins, Mark S., 'Rules of Engagement for Land Forces: A Matter of Training, not Lawyering' (1994) 143 *MilLRev* 1.

<sup>35</sup> See Chapter 3.3 B. Short-Term Prevention and C. Preventing Continuation; *Mothers of Srebrenica against the State* (16 July 2014) The Hague District Court, C/09/295247 / HA ZA 07-2973, available at: <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>>: Contains a careful consideration of the measures that Dutchbat could reasonably have been expected to take in light of the resources available, the harsh circumstances and the pressure higher officials were under.

<sup>36</sup> See Chapter 3.3 D Preventing Recurrence.

<sup>37</sup> See Chapter 4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction.



Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Inter-American Convention to Prevent and Punish Torture (IACPPT) and Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Under these treaties, third states have: (i) Long-term obligations to include bases in their legal framework to exercise criminal jurisdiction over acts of torture that took place outside the state's jurisdiction based on the principles of nationality or universal jurisdiction; (ii) Short-term obligations and obligations to prevent continuation to prevent genocide by employing all means reasonably available based on the capacity to influence effectively; and (iii) Obligations to prevent recurrence to investigate, prosecute and punish acts of torture that took place outside a state's jurisdiction based on the principles of nationality and universal jurisdiction.<sup>38</sup> All of these obligations are based on forms of influence over the (potential) perpetrator(s). Compared to the much more refined set of obligations to prevent gross human rights violations that applies within state territory and when a state exercises extraterritorial jurisdiction, third state obligations to prevent gross human rights violations is more aptly described as a patchwork of incidental obligations.

The patchwork of third state obligations to prevent gross human rights violations is fragmented and the obligations are unevenly spread out over the different temporal phases. Third state obligations to prevent torture focus on long-term prevention and preventing recurrence, before and after violations occur, with the view of achieving a worldwide system of criminal punishment for torture.<sup>39</sup> This means that states have to investigate and extradite or prosecute suspects of torture who committed their acts outside the state's territory and jurisdiction, because the suspect is either a national of the state or present in any territory under the state's jurisdiction.<sup>40</sup> On the other hand, third state obligations to prevent genocide are concentrated in the phases of short-term prevention and preventing continuation.<sup>41</sup> In other words, there is an obligation to prevent genocide beyond territory and jurisdiction in the acute phases of prevention. A third state accrues the obligation to prevent genocide if it learns or should have learned of the serious risk that genocide will occur and has the capacity to effectively influence the (potential) perpetrators.<sup>42</sup> When states have such a capacity to influence effectively is not yet entirely clear, nor is the content and scope of the ensuing obligation to prevent.<sup>43</sup> Oddly, the Genocide Convention takes a more restrictive approach to the prosecution and punishment of wrongdoers based on the principles of nationality or universal jurisdiction for the crime of genocide than the CAT and IACPPT for torture.<sup>44</sup>

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<sup>38</sup> See Chapter 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction.

<sup>39</sup> CAT (n 10) art 2(1), 4; IACPPT (n 10) art 6; Committee Against Torture, 'General Comment 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2, para 2 and 9.

<sup>40</sup> See Chapter 4.2 A Long-Term Prevention and D Preventing Recurrence.

<sup>41</sup> Genocide Convention (n 11) art 1; *Genocide* case (n 16) para 430.

<sup>42</sup> Genocide Convention (n 11) art 1; *Genocide* case (n 16) para 430.

<sup>43</sup> *Genocide* case (n 16) para 430; See Chapter 4.1.2 Genocide Convention: The ICJ introduced three factors to assess a state's capacity to influence effectively: geographical distance, political and other links and legal position. However, it is unclear how these factors are to be weighed and whether there may be other relevant factors to take into account.

<sup>44</sup> Genocide Convention (n 11) art 6: Contains an express territorial limitation to the obligation to punish; *Genocide* case (n 16) para 184 and 442: The ICJ interpreted this as meaning that Article 6 does not obligate

Finally, third state obligations to prevent arbitrary death are wholly absent from all of the phases of prevention.

The patchwork of third state obligations to prevent gross human rights violations under international human rights law shows that there is a big gap between a state's legal obligations and concepts like conflict prevention and the RtoP. While human rights obligations are built on the assumption of a relatively well-functioning governmental structure and primarily focused on regulating the relationship between that government and individuals on its territory or within its jurisdiction; concepts like conflict prevention and the RtoP have been developed to deal with situations where such a relationship of governmental protection fails disastrously, potentially resulting in large-scale crises and mass atrocities. However, international human rights law and conflict prevention and the RtoP have slowly been developing towards each other. There are developments in international law that signify a shift towards recognizing the important role that third states can play, for example if the territorial state cannot effectively prevent gross human rights violations or is itself the perpetrator.<sup>45</sup> There is a push for the development and acceptance of state obligations to assist and cooperate for the worldwide realization of economic, social and cultural (ESC) rights.<sup>46</sup> Furthermore, there are rudimentary indications that third state obligations may develop to prevent human rights abuses by corporations and crimes against humanity abroad.<sup>47</sup> The

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states to prosecute and punish alleged perpetrators of genocide on any other basis than that the acts took place on their territory; See Chapter 4.1.2 Genocide Convention: In part this state of affairs can be explained by the fact that the CAT and IACPPT were adopted later in time, when universal jurisdiction was already more accepted.

<sup>45</sup> See Chapter 4.3 Shift Towards Third State Obligations.

<sup>46</sup> See Chapter 4.3.1 Economic, Social and Cultural Rights and 4.3.3 Article 41 of the Articles on State Responsibility; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 55 and 56: States pledge themselves to take "joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55"; UN General Assembly Resolution 25/2625, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/25/2625; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2 (1): Obligates states to devote "the maximum of [...] available resources" to the realization of economic and social rights through "assistance and cooperation"; De Schutter, Olivier and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084 (Maastricht Principles and Commentary) Principle 9(c), 27 Obligation to cooperate in the context of protection against violations of ESC rights by non-state actors and 28-35 On international assistance and cooperation to fulfil ESC rights.

<sup>47</sup> See Chapter 4.3.1 Economic, Social and Cultural Rights and 4.3.2 Corporations Acting Abroad; Concluding Observations HRCee on Germany (November 2012) UN Doc CCPR/C/DEU/CO/6, para 16: "The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations"; Concluding Observations HRCee on Canada (13 August 2015) UN Doc CCPR/C/CAN/CO/6, para 6: "The State Party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad"; Maastricht Principles and Commentary (n 46) Principle 13 Obligation to Avoid Causing Harm and 14 Impact Assessment and Prevention; Special Rapporteur Sean D. Murphy, 'First Report on Crimes Against Humanity' (17 February 2015) 67th session of the ILC, UN Doc A/CN.4/680, chp.5(a) Obligation to prevent crimes against humanity.

Articles on State Responsibility contain a developing obligation for states to cooperate to bring to an end serious violations of peremptory norms abroad.<sup>48</sup> Finally, there is growing support for an obligation to prosecute and punish acts of genocide based on universal jurisdiction.<sup>49</sup> More in general, there is a trend towards extending forms of criminal and civil adjudicative jurisdiction to be able to punish and remedy gross human rights violations that took place abroad.<sup>50</sup> Together, these developments show that there is great potential to strengthen obligations to prevent gross human rights violations in all temporal phases.

## 5.2 Capacity in Territorial and Extraterritorial Settings

A consistent point of analysis throughout the research has been to consider how a state's capacity to ensure human rights in particular circumstances may influence the content and scope of its obligations to prevent gross human rights violations. Capacity as understood in the context of this study refers to expressions used in treaties, case law or other sources of interpretation that take into account a state's resources, powers or other factors that influence what it is capable of doing to ensure human rights obligations in particular circumstances. Capacity plays a role both in regard to the basis of obligations to prevent gross human rights violations and their content and scope. However, the influence of capacity is different in the

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<sup>48</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (November 2001) UN GAOR Suppl No 10 (A/56/10) chpIVE1 (Articles on State Responsibility) art 41(1): Contains a developing obligation for states to cooperate to bring to an end serious violations of peremptory norms.

<sup>49</sup> See Chapter 4.1.2 Genocide Convention and 4.2 D Preventing Recurrence; Ben-Naftali, Orna, 'The Obligation to Prevent and to Punish Genocide' in Paola, Gaeta (ed), *The UN Genocide Convention – A Commentary* (OUP, 2009) 27, 48: Finds the ICJ's interpretation of Article 6 "puzzling given that the interpretation of the Convention 'must exclude any narrow or overly technical approach to the problems involved', and that the judgment itself otherwise employs a purposive method of interpretation." He claims that "a teleological reading of Article VI in the light of Article I and of other provisions of the Convention as well as in the light of later normative developments in both conventional and customary international law, supports the conclusion that the jurisdictional regime over perpetrators of genocide includes an obligation to exercise universal jurisdiction [...]"; Tams, Christian, Berster, Lars and Schiffbauer, Bjorn, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck, co-published by Hart and Nomos, 2013) 256 para 58: Claims that states other than the territorial state must ensure prosecution of suspects within their jurisdictional control, which means state parties would have a subsidiary duty to prosecute suspects before their domestic courts if there is no international penal tribunal or other state willing or able to prosecute, meaning that the absolute obligation to punish cannot be otherwise ensured.

<sup>50</sup> See Chapter 4.1.1 CAT and IACPPT and 4.3.2 Corporations Acting Abroad; CAT (n 10) art 14: Contains a right to effective remedy for victims of torture, without a geographical limitation; Concluding Observations HRCee on Canada 2015 (n 47) 4(g) and 5(f); Article 14 of the CAT has been interpreted to mean that states must provide victims of torture a procedure to obtain reparations, even if the torture was committed outside the state's territorial and other jurisdiction; *Gray v. Germany*, no. 49278/09, 22 May 2014, para 20, 29, 32, 40-1 and 93: The ECtHR took an unexpectedly broad approach towards the applicability of the procedural requirements attached to the right to life; Concluding Observations HRCee on Germany 2012 (n 47) para 16: The state party is "encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad"; Special Rapporteur Sean D. Murphy, 'Second Report on Crimes Against Humanity' (21 January 2016) 68th session of the ILC, UN Doc A/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.

three spatial layers. While a state's capacity to ensure human rights is presumed by the basis of obligations in the territorial and extraterritorial jurisdiction layers, it is not presumed in the layer beyond territory and jurisdiction. Furthermore, although the same rights and obligations apply in the territorial and extraterritorial jurisdiction layers, additional capacity related factors may influence the content and scope of obligations in the latter.

Within their territory, states are presumed to have the capacity to ensure human rights. Human rights treaties were devised primarily for the territorial context. As such, the obligations laid down in human rights treaties are catered to the territorial context and the requisite institutional infrastructure. Furthermore, the ECtHR has stated that "jurisdiction is presumed to be exercised normally throughout the State's territory."<sup>51</sup> The "territorial bias in the system of human rights protection" means that the territorial state has the primary responsibility to ensure human rights to the people within its territory and must for example rebut the presumption of jurisdiction if it has lost authority over parts of its territory.<sup>52</sup> Even then, it will still have positive obligations to ensure the rights of people in an area of its territory over which it has lost authority.<sup>53</sup> At the same time, states have to balance the application of their attention, powers and resources in response to varying threats to be able to live up to the many human rights obligations that usually apply within state territory. To make this balance manageable, there are limits of reasonableness to certain types of obligations, especially in relation to obligations to prevent offences by non-state actors.<sup>54</sup> It is impossible to foresee all the ways that non-state actors may commit offences related to the three prohibitions and the types of measures states may have to take. Therefore, indirect obligations to prevent in the acute phases of prevention are usually formulated in an open-ended manner and limited based on a standard of reasonableness that will allow consideration of a state's capacity in the particular circumstances.<sup>55</sup> Other than these standards of reasonableness, there are many

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<sup>51</sup> *Al-Skeini v. the United Kingdom* (n 23) para 131; *Ilaşcu v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para 333.

<sup>52</sup> Den Heijer, Maarten, 'Issues of Shared Responsibility before the European Court of Human Rights' SHARES Research Paper 06 (2012), ACIL 2012-04, available at: <<http://www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-european-court-of-human-rights/>> 4; *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, para 139: "The Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence. The Court must now determine whether there is valid evidence to rebut that presumption"; A direct consequence of the territorial bias for a state's obligations is that, if the territorial state does lose control over people or parts of its territory, it will still have positive obligations to continue to ensure human rights. See: *Ilaşcu and Others v. Moldova and Russia* (n 51) para 333 onwards; *Ivantoc a.o. v Moldova and Russia*, no. 23687/05, 15 November 2011, para 105-8; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012, para 109.

<sup>53</sup> *Ilaşcu v. Moldova and Russia* (n 51) para 331: "[E]ven in the absence of effective control over the Transnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."

<sup>54</sup> See Chapter 2.2 B Short-Term Prevention and C Preventing Continuation and 2.3 Conclusion.

<sup>55</sup> See Chapter 2.3 Conclusion; *Osman v. the United Kingdom* (n 16) para 116: An example is the *Osman* formula that describes that the short-term obligation to prevent arbitrary deaths must not be interpreted so as to place an impossible or disproportionate burden on authorities.

obligations with a built-in reasonableness check, for example with the words “prompt” or “effective” incorporated in the obligation.<sup>56</sup> These phrases offer some leeway to consider what can be reasonably expected of a state in the particular circumstances.

When states exercise extraterritorial jurisdiction, the capacity to ensure human rights is also to a certain extent presumed. The forms of control that lead to the exercise of extraterritorial jurisdiction – effective control over territory or authority and control over individuals – imply that the state has a minimum capacity to ensure the human rights of people it controls.<sup>57</sup> Because the same rights and obligations apply as within state territory, the standards of reasonableness that limit certain obligations territorially also apply extraterritorially. These reasonableness checks may lead to different outcomes in extraterritorial context. For example, when suspects are arrested on the high seas, bringing them “promptly” before a judge has been interpreted to span a longer period of time than when suspects are arrested within state territory.<sup>58</sup> But these standards of reasonableness alone cannot ensure the realistic application of human rights obligations in extraterritorial settings. Human rights treaties were not devised to apply in extraterritorial settings and there are many factors that influence the state’s capacity to ensure human rights that are different from territorial settings. States may lack certain powers and parts of its institutional infrastructure or encounter legal barriers or practical difficulties abroad that make it impossible to ensure human rights in the same way as within state territory. Therefore, other legal, practical or power-related factors in extraterritorial contexts have to be taken into account when determining the content and scope of extraterritorial obligations.<sup>59</sup> By using such factors when translating territorial obligations to extraterritorial obligations based on jurisdiction, the content and scope of extraterritorial obligations to prevent gross human rights violations is adjusted to a state’s capacity to ensure human rights in specific extraterritorial contexts.

Beyond territory and jurisdiction, the capacity to ensure human rights is not presumed. In general, human rights treaties were not intended to apply between third states and people outside their territory and jurisdiction. Yet, some treaties do contain provisions that apply regardless of the relationship with the person whose rights are potentially affected.<sup>60</sup> These obligations are therefore not based on forms of control over territory or individuals, but on other forms of influence. Such forms of influence are in essence a form of capacity to ensure a certain aspect of a right. For example, states may be obligated to prosecute and punish suspects of torture based on universal jurisdiction, who committed their acts outside the state’s jurisdiction but are later present in a territory over which the state exercises

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<sup>56</sup> For example prompt judicial intervention, see: ICCPR (n 12) art 9(3); ECHR (n 12) art 5(3); ACHR (n 12) art 7(5); CAT (n 10) art 13; Or effective investigation, see: *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI – (21.11.01) para 38: “Article 13 in conjunction with Article 3 impose an obligation on States to carry out a *thorough and effective investigation* of incidents of torture”; *Velásquez Rodríguez v. Honduras* (Merits) Judgment of July 29, 1988, I/A Court HR (Ser C) No. 4 (1988) para 177: The duty to investigate “must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.”

<sup>57</sup> See Chapter 3.2.1 The Role of Capacity.

<sup>58</sup> *Rigopoulos v. Spain* (n 30); *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010, para 130.

<sup>59</sup> See Chapter 3.2 Corresponding Obligations.

<sup>60</sup> See Chapter 4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction.

jurisdiction.<sup>61</sup> Another example is the obligation to prevent genocide, which is based on the capacity to influence effectively the (potential) perpetrators of genocide.<sup>62</sup> These obligations are based on a legal and practical capacity in relation to the (potential) perpetrators or circumstances of a gross human rights violation. Other third state obligations may develop based on, for example, the capacity to prescribe rules for corporations domiciled in a state's territory that act abroad or being in a position to assist other states in the realization of their ESC rights.<sup>63</sup> Because there is not one single basis – like territory or jurisdiction – that immediately grounds a range of human rights obligations, capacity is closely related to both the basis and content and scope of third state obligations. Similar to the other layers, there are also certain standards of reasonableness that limit third state obligations.<sup>64</sup>

### 5.3 Applying Existing Typologies Within the New Framework

An important presumption adopted at the start of this study and confirmed throughout, is that obligations to prevent under international law are not homogenous and cannot be easily categorized based on existing typologies of obligations. Obligations to prevent are often described as obligations of best effort or conduct.<sup>65</sup> However, in the context of this research many different types of obligations to prevent were revealed to be part of the set of obligations to prevent gross human rights violations. This includes for example both obligations of result – such as introducing a proper legislative and administrative system – and obligations of conduct – such as taking short-term measures to prevent violations.<sup>66</sup> The framework offered by injury, timeline and spatial layers allowed for a more differentiated overview of obligations to prevent gross human rights violations. Importantly, the type of injury that an obligation aims to prevent from occurring strongly influences the way obligations to prevent are shaped.<sup>67</sup> The timeline proved an invaluable tool to understand obligations to prevent a certain type of injury in their interconnection and reveal when particular obligations are triggered. By using the timeline, several crosscutting categories of obligations to prevent gross human rights were distinguished. Finally, the spatial layers further made insightful how these categories of obligations are applied in territorial and extraterritorial contexts.

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<sup>61</sup> CAT (n 10) art 5 (2); IACPPT (n 10) art 12.

<sup>62</sup> Genocide Convention (n 11) art 1; *Genocide case* (n 16) para 430.

<sup>63</sup> See Chapter 4.3.1 Economic, Social and Cultural Rights and 4.3.2 Corporations Acting Abroad; ICESCR (n 46) art 2; Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties Obligations (Art 2 par 1 of the Covenant)' (14 December 1990) UN Doc 14/12/90, para 14; Concluding Observations HRCee on Germany 2012 (n 47) para 16.

<sup>64</sup> *Genocide case* (n 16) para 430: States with the capacity to influence effectively have to "employ all means reasonably available to them, so as to prevent genocide so far as possible."

<sup>65</sup> Articles on State Responsibility (n 48) Commentary to Article 14 para 14: "Obligations of prevention are usually construed as best efforts obligations [...] without warranting that the event will not occur."

<sup>66</sup> See Chapter 2.3 Conclusion.

<sup>67</sup> See Chapter 1.2 The Problem: The Content and Scope of Obligations to Prevent; Special Rapporteur Roberto Ago, 'Seventh Report on State Responsibility' (1978) 30th session of the ILC, UN Doc A/CN.4/307 and Add 1-2 and Add2/Corr 1, chp.3(8), para 15: Special Rapporteur Mr. Roberto Ago introduced the idea that obligations to prevent are aimed at preventing an injurious event.

By using this framework, the danger of drawing overgeneralized conclusions about obligations to prevent based on existing typologies is largely avoided. Several useful observations about obligations to prevent gross human rights violations can be made by combining the new framework with existing typologies:

- i) Conduct and result: Obligations to prevent gross human rights violations in the phases of long-term prevention and preventing recurrence are usually obligations of result, such as the introduction of legislation or maintaining an official register of detainees.<sup>68</sup> On the contrary, obligations in the phases of short-term prevention and preventing continuation are usually obligations of conduct, such as taking measures reasonably available to prevent violations.<sup>69</sup> However, there are exceptions to keep in mind. An example of an obligation of result in the short-term phase is related to *non-refoulement*. Before expelling an individual the state has to investigate whether it would not be exposing him or her to the grave risk of being tortured or killed in the receiving state, which is a short-term obligation of result.<sup>70</sup> Examples of obligations of conduct in the phase of preventing continuation are the obligations to investigate and prosecute. Although the investigation and prosecution must live up to certain standards, they do not necessarily have to lead to a certain outcome, such as punishment.<sup>71</sup>
- ii) Positive and negative: In general, the distinction between positive and negative obligations is quite hard to maintain.<sup>72</sup> Most rights require states to both adopt and refrain from certain conduct and obligations that are phrased negatively may still require a state to take positive measures or *vice versa*. The two types of obligations therefore often overlap. Obligations to prevent gross human rights violations are no different in that regard. Nevertheless, it is remarkable that almost all obligations to prevent require some form of positive action from the state.<sup>73</sup> For example, the obligation to cease a continuing violation by a state official, which can in principle

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<sup>68</sup> See Chapter 2.2 A Long-Term Prevention and D Preventing Recurrence; CAT (n 10) art 2; ICCPR (n 12) art 2(2) jo 6 and 7; ECHR (n 12) art 1 jo 2 and 3; ACHR (n 12) art 1 jo 4 and 5; ACHPR (n 12) art 1 jo 4 and 5; CAT, General Comment 2 (n 39) para 13.

<sup>69</sup> See Chapter 2.2 B Short-Term Prevention and C Preventing Continuation; *Opuz v. Turkey*, no. 33401/02, ECHR 2009, para 176: Turkey was held responsible for its “failure to take *protective measures* in the form of effective deterrence”; *Osman v. the United Kingdom* (n 16) para 116: States must do “all that could be reasonably expected” or take “measures within the scope of their powers which might be expected to avoid the risk”; *Genocide* case (n 16) para 430: States must “employ all means reasonably available to them, so as to prevent genocide so far as possible.”

<sup>70</sup> CAT (n 10) art 3; ICCPR (n 12) art 7 jo 13; ECHR (n 12) art 6 jo 7 and Protocol 7; ACHR (n 12) art 5 jo 22(5); ACHPR (n 12) art 4 jo 5 jo 12.

<sup>71</sup> See Chapter 2.2 D Preventing Recurrence.

<sup>72</sup> Concurring opinion of Judge Bonello in *Al-Skeini v. the United Kingdom* (n 23) para 10 and 31-2: States may have obligations, whether positive or negative, at any level of observance.

<sup>73</sup> See Chapter 2.3 Conclusion.

be categorized as a negative obligation, may still require a higher-ranking official to take action to intervene in the wrongful conduct of a subordinate.<sup>74</sup>

- iii) Direct and indirect: Many obligations to prevent in the long-term phase and phase of preventing recurrence contain aspects aimed at both direct prevention (violations by a state's officials) and indirect prevention (offences by non-state actors).<sup>75</sup> For example, making certain acts punishable by law and investigating, prosecuting and punishing wrongdoers target both violations by state officials and offences by non-state actors. At the same time, a significant portion of long-term obligations focus on direct prevention, such as safeguards for situations of detention or regulating the use of force and firearms and training state officials.<sup>76</sup> In the acute phases of prevention, the distinction between direct and indirect obligations is more visible. In the short-term phase, direct obligations to prevent are given content primarily by long-term safeguards.<sup>77</sup> While the more open-ended obligation to take measures to prevent gross human rights violations is aimed at preventing offences by non-state actors. In the phase of preventing continuation, states have a direct obligation to cease a continuing violation and an indirect obligation to intervene in offences by non-state actors.<sup>78</sup> Notably, the distinction between direct and indirect obligations has a bearing upon the trigger of knowledge. As a state is assumed to oversee the conduct of its state officials, the standard of the trigger of knowledge is lower and therefore easier to attain in the context of direct obligations than indirect obligations.<sup>79</sup> Finally, as mentioned in Section 5.4.2, the distinction between direct and indirect obligations has a specific bearing on extraterritorial obligations to prevent gross human rights violations based on jurisdiction. Because states have a higher level of control over their state officials, practical and power-related factors do not usually affect the content and scope of their direct obligations, whereas they may influence indirect obligations.<sup>80</sup>

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<sup>74</sup> See Chapter 2.2 C.1 Torture; *Denmark, France, Norway, Sweden and the Netherlands v. Turkey*, EComHR judgment on admissibility of claims 9940-9944/82 (6 December 1983) para 30: “[A]ny action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system.”

<sup>75</sup> See Chapter 2.2 A Long-Term Prevention and D Preventing Recurrence.

<sup>76</sup> See Chapter 2.2 A Long-Term Prevention.

<sup>77</sup> See Chapter 2.2 B Short-Term Prevention; An interesting exception are the rules surrounding superior liability, which also play a role in the phases of short-term prevention and preventing continuation; *Ireland v. the United-Kingdom*, no. 5310/71, 18 January 1978, series A no 25, para 239: “[A]uthorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.”

<sup>78</sup> See Chapter 2.2 C Preventing Continuation.

<sup>79</sup> *Ireland v. the United-Kingdom* (n 77) para 159: The ECtHR stated that in the context of an administrative practice of torture it would be “inconceivable that the higher authorities of a state should be, or should be entitled to be, unaware of the existence of such a practice.”

<sup>80</sup> See Chapter 3.3 B Short-Term Prevention and C Preventing Continuation and 3.4 Conclusion.



## 5.4 Appraisal

The framework of injury, timeline and spatial layers introduced in this research was used to gain insight into the content and scope of obligations to prevent gross human rights violations under international human rights law. What emerged was an overview of territorial and extraterritorial obligations to prevent gross human rights violations that is at certain points unclear, incomplete and possibly ineffective when applied in practice.<sup>81</sup> This section will appraise the overview of obligations by discussing some of the remaining challenges and highlighting where there is room for development.

### 5.4.1 Challenges

Now that there is a more structured overview of obligations to prevent gross human rights violations under international human rights law, it is clear that certain challenges remain. This is perhaps unsurprising insofar as human rights obligations developed in an *ad hoc* and uncoordinated manner within the state-centric system of international law.<sup>82</sup> Furthermore, there are limits to what the law can do to influence state behavior.<sup>83</sup> Nevertheless, these challenges can explain why obligations to prevent gross human rights violations sometimes enable states to remain inactive when faced with gross human rights violations in practice. Three challenges will be discussed in particular. First of all, extraterritorial obligations are still relatively underdeveloped. The basis, content and scope of extraterritorial obligations based on jurisdiction and beyond jurisdiction are often still unclear and the patchwork of obligations beyond jurisdiction is incomplete. The second challenge is related to the first and the fact that obligations of multiple duty-bearing states may overlap and interact. It is still unclear how the existence of multiple duty-bearing states in any given situation affects the content and scope of obligations and their implementation. Third, it is questionable whether the measures required by obligations to prevent gross human rights violations are actually effective when applied in practice, or whether there may be other more effective approaches.

The basis, content and scope of extraterritorial obligations to prevent gross human rights violations are still relatively underdeveloped. International human rights law was primarily intended to apply between a state and people residing on its territory, with international supervisory bodies and courts as additional guarantors. This structure does not cater well to a reality in which states are increasingly involved in each-others' affairs and there is growing recognition that gross human rights violations outside state territory cannot be overlooked. Chapter 3 showed how treaty obligations have developed towards wider applicability based

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<sup>81</sup> See Chapter 2.3 Conclusion, 3.4 Conclusion and 4.4 Conclusion.

<sup>82</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) a and b: International human rights law developed on the basis of concessions in the drafting processes of treaties or state practice and *opinio juris* and further interpretations by supervisory bodies and tribunals.

<sup>83</sup> Goodman, Ryan and Jinks, Derek, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) Duke Law J 621: Discerns three mechanisms of social influence and discusses how they influence state behavior: coercion, persuasion and acculturation.

on extraterritorial jurisdiction. However, there is still lack of clarity and disagreement in regard to many aspects of extraterritorial obligations based on jurisdiction, such as what level of control is required for states to exercise extraterritorial jurisdiction.<sup>84</sup> Furthermore, supervisory bodies and courts do not structurally take into account the many different factors that influence the content and scope of human rights obligations in extraterritorial settings. There are also factors whose influence on the content and scope of extraterritorial obligations is still unclear, such as the influence of a mandate as a legal factor in the acute phases of prevention.<sup>85</sup> Chapter 4 showed how third state obligations to prevent gross human rights violations beyond territory and jurisdiction are fragmented and seemingly incomplete.<sup>86</sup> For example, states have obligations to combat impunity for acts of torture based on universal jurisdiction, but not for the “odious scourge” of genocide.<sup>87</sup> These obligations and limits to their applicability have been laid down in treaties, which are the result of complicated dynamics of treaty drafting processes that can cause seemingly illogical differences.<sup>88</sup> Furthermore, there are effectively no third state obligations to prevent torture and arbitrary death in the acute phases of prevention, unless a situation constitutes (a serious threat of) genocide.<sup>89</sup> Even though there can be a broadly perceived need for third states to act in situations of gross human rights violations, this need often does not translate into legal obligations.

The fact that extraterritorial obligations are in many respects underdeveloped can be illustrated by reference to the example of refugees and migrants in distress on the high seas.<sup>90</sup> Thousands of people have died while trying to cross the Mediterranean Sea to reach European shores in recent years.<sup>91</sup> In striking contrast to the desperate need for protection of these people’s rights, it is often unclear in legal terms whether states have any human rights

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<sup>84</sup> See Chapter 3.1 Extraterritorial Jurisdiction, in particular 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations.

<sup>85</sup> See Chapter 3.3 B Short-Term Prevention: “The question whether and how an existing mandate affects the content and scope of a state’s human rights obligations in the more acute phases of prevention has so far remained obscure.”

<sup>86</sup> See Chapter 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction.

<sup>87</sup> Genocide Convention (n 11) preamble and art 6: The preamble describes genocide as an “odious scourge” and an international crime that is “contrary to the spirit and aims of the United Nations and condemned by the civilized world.” Article 6 on the punishment of genocide nevertheless contains a territorial limitation; Ben-Naftali, ‘The Obligation to Prevent and to Punish Genocide’ (n 49).

<sup>88</sup> See Chapter 4.1.2 Genocide Convention: Describes the “perceived shortcomings of Article 6 in light of the object and purpose of the Genocide Convention, correlation between its different provisions and developments that have taken place since the Convention came into being, such as the adoption of the CAT and IACPTT with more demanding regimes of prosecution and punishment in the mid-80’s.”

<sup>89</sup> See Chapter 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction.

<sup>90</sup> Fischer-Lescano, Andreas, Löhr, Tillmann and Tohidipur, Timo, ‘Border Controls at Sea: Requirements Under International Human Rights and Refugee Law’ (2009) 21 Int J Refugee Law 256; Giuffrè, Mariagiulia, ‘Watered-down Rights on the High Seas: Hirsi Jamaa and Others v Italy (2012) (2012) 61(3) Int’l & Comp LQ 728.

<sup>91</sup> For a regularly updated map of the numbers of refugees crossing the Mediterranean, see:

<<http://data.unhcr.org/mediterranean/regional.php>>; ‘Mediterranean Death Toll Has Reached at Least 1000 This Week, Says IOM’ (31 May 2016) The Guardian, available at:

<<https://www.theguardian.com/world/2016/may/31/mediterranean-death-toll-880-last-week-unhcr-migration>>:

In the first 5 months, more than 2500 people lost their lives while trying to cross the Mediterranean Sea. This marks a sharp increase compared to 2015.

obligations towards refugees and migrants when they are on the high seas.<sup>92</sup> Once a state exercises jurisdiction over refugees and migrants on the high seas, it has extraterritorial obligations towards them to ensure their rights at sea, for example to save them from drowning, offering medical attention and not to sending them back to a state where they run the risk of being tortured or killed and the associated access to legal proceedings.<sup>93</sup> However, the question when jurisdiction arises is controversial.<sup>94</sup> Does it arise when a ship makes a distress call?<sup>95</sup> When a ship in distress is in view and in physical reach? Or does it arise only when a state intercepts the refugees and migrants? These unanswered questions offer leeway for states to remain inactive when it becomes aware of a ship in distress. The obligations a state accrues once it exercises jurisdiction may even act as a disincentive to rescue refugees and migrants on the high seas. Importantly, states do not have a short-term obligation to prevent arbitrary deaths beyond territory and jurisdiction.<sup>96</sup> A few rescue operations have nevertheless been set up based on a perceived moral duty to save refugees and migrants in distress on the high seas.<sup>97</sup> However, obligations to prevent gross human rights violations

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<sup>92</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 98(b): “[T]o proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.” States do have an obligation to help persons in distress under the law of the sea, but only if such action may “reasonably be expected”, which implies in any case a certain proximity with a ship flying the state’s flag to a boat of migrants and refugees in distress; Fischer-Lescano, Löhner and Tohidipur, ‘Border Controls at Sea: Requirements Under International Human Rights and Refugee Law’ (n 90) 36: “The ‘place of safety’ for refugees in distress at sea may not be established without taking due account of refugee and human rights provisions.”

<sup>93</sup> *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012: The court decided that “push back” practices of refugees and migrants on the high seas by the Italian Revenue Police was in violation of the ECHR; Giuffrè, ‘Watered-down Rights on the High Seas: Hirsi Jamaa and Others v Italy’ (n 90) 729: “The Hirsi judgment attains great [...] prominence since it is the first case in which the Court unanimously finds a European State in violation of human rights of migrants and refugees intercepted on the high seas and returned to a third country in the absence of any procedural safeguards”; Fischer-Lescano, Löhner and Tohidipur, ‘Border Controls at Sea: Requirements Under International Human Rights and Refugee Law’ (n 90) 264-5 and 271-7: State parties to the CAT, ICCPR and ECHR all have obligations of *non-refoulement* once refugees enter their territorial waters or are intercepted and therefore within the state’s extraterritorial jurisdiction on the high seas.

<sup>94</sup> See chapter 3.1.2 Jurisdiction as a Threshold and Basis for Extraterritorial Obligations: “One of the most pressing and controversial issues still surrounding the threshold function of jurisdiction under human rights treaties is the unclarity in regard to what exactly constitutes authority and control over individuals. After all, this is the minimum amount of control that a state has to exercise abroad to reach the threshold of jurisdiction and accrue extraterritorial human rights obligations.”

<sup>95</sup> Trevisanut, Seline, ‘Search and Rescue Operations at Sea: Who is in Charge? Who is Responsible?’ (28 May 2013) SHARES blog, available at: <<http://www.sharesproject.nl/search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible/>>: States that the argument could be made that “the distress call creates a ‘relation’ between the state, which receives it, and the persons who send it. [...] The argument could go further and support the existence of an exclusive *de facto* control that the state, which received the call, exercises on the lives of those people.”

<sup>96</sup> See Chapter 4.1 Extraterritorial Applicability of Treaty Provisions Beyond Jurisdiction and 4.2 Extraterritorial Obligations to Prevent Torture and Genocide Beyond Jurisdiction: Third States only have a short-term obligation to prevent genocide abroad.

<sup>97</sup> Carrera, Sergio and Den Hertog, Leonhard, ‘Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean’ (CEPS Liberty and Security in Europe January 2015) 79, available at: <[http://aei.pitt.edu/60717/1/LSE\\_79.pdf](http://aei.pitt.edu/60717/1/LSE_79.pdf)> 3 onwards: Examples are the Italian-led Mare Nostrum operation that ended in 2014 and was followed by Operation Triton conducted by the European Union border security agency Frontex; Stephens, Tim, ‘Search and Rescue Operations at Sea: Who is in Charge? Who is Responsible?’ –

under international human rights law have so far enabled states to leave the fate of refugees and migrants on the high seas mostly up to chance and subject to political will.<sup>98</sup>

The second challenge is related to the fact that obligations to prevent gross human rights violations, which in the context of this study have been separated into three different spatial layers, can in fact overlap and interact.<sup>99</sup> This means that multiple states may have obligations in relation to the same situation of gross human rights violations. So far, there is very little clarity in regard to the allocation of obligations among multiple duty-bearing states. This lack of clarity is sometimes related to the basis of obligations. For example, it is unclear when third states have an obligation to prevent genocide based on the capacity to influence effectively the (potential) perpetrators.<sup>100</sup> The lack of clarity is also sometimes related to the fact that the consequences of the involvement of multiple duty-bearing states are unknown. For example, when multiple third states have an obligation to prevent genocide, it is unclear whether they should coordinate or cooperate.<sup>101</sup> The involvement of multiple duty-bearing states can furthermore influence each state's capacity to ensure human rights and thereby the content and scope of their obligations. The uncertainty that results from overlapping obligations may allow states to remain inactive by pointing to other actors and passing the buck, which could result in preventable cases of gross human rights violations.<sup>102</sup> This is

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Commentary' (28 May 2013) SHARES blog, available at: <<http://www.sharesproject.nl/search-and-rescue-operations-at-sea-who-is-in-charge-who-is-responsible-commentary/>>: It is unclear which state(s) exercise(s) jurisdiction in multilateral search and rescue operations; 'Mediterranean Migrant Deaths: EU has 'Moral Duty' to Act' (20 April 2015) BBC News, available at: <<http://www.bbc.com/news/world-europe-32377768>>.

<sup>98</sup> There are basically two options to include refugees and migrants on the high seas in the system of obligations to prevent gross human rights violations: (i) Lowering the threshold of jurisdiction to include situations where states are aware or should have been aware of a ship in distress and have the capacity to prevent the materialization of the risk that boat-migrants may drown on the basis of its proximity and available resources; and (ii) Creating a specialized set of obligations beyond jurisdiction to deal with the situation of boat-migrants. The second option is more likely than the first, based on existing case law. However, it will require the cooperation of European states to reach an agreement based on solidarity and burden-sharing.

<sup>99</sup> See Chapter 1.3.3 Territory, Jurisdiction and Beyond; 2.2 B Short-Term Prevention: Discusses the *Ilaşcu* case, concerning the Transnistrian region over which Moldova had lost authority, but was still considered to have territorial jurisdiction and positive obligations; Chapter 3.1.1 A ECHR, ACHR and ACHPR: Discusses how the general international law context can be important to establish extraterritorial jurisdiction, such as whether a state has assumed certain responsibilities under an international mandate and whether it has command over its state officials acting abroad; Chapter 4.2 B Short-Term Prevention: Explains that multiple third states may be obligated to prevent genocide; Chapter 4.3.1 Economic, Social and Cultural Rights: Discusses Principle 30 of the Maastricht Principles, which introduces an obligation to devise a system of burden-sharing for third state obligations to assist and cooperate in the area of ESC rights; *Ilaşcu and Others v. Moldova and Russia* (n 51); *Genocide* case (n 16) para 430; Maastricht Principles and Commentary (n 46) Principle 30.

<sup>100</sup> See Chapter 4.1.2 Genocide Convention.

<sup>101</sup> See Chapter 4.2 B Short-Term Prevention: Argues that it is unsatisfactory to see the obligations of multiple third states that are obligated to prevent genocide as completely separate, because coordinated action would be more effective in achieving the aim of preventing genocide.

<sup>102</sup> Nollkaemper, André and Jacobs, Dov, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) *Mich J Int'l L* 359, 392: Referring to the Srebrenica genocide as an example of buck-passing, where the UN and the Netherlands denied responsibility and placed blame on each other; See also: Nollkaemper, André, 'Multilevel Accountability in International Law: A Case Study of the Aftermath of Srebrenica' in Shany, Yuval and Broude, Tomer (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (Hart Publishing, 2008) 345.

demonstrated for example by the recent reports on the failure of the UN Mission in the Republic of South Sudan (UNMISS) to prevent gross human rights violations against the civilian population, among other things due to a risk-averse culture and lack of coordination between the UN and contingents of the different troop-contributing states.<sup>103</sup>

This second challenge can be illustrated by reference to the genocide in Srebrenica. In the buildup to the genocide in Srebrenica, it was unclear which states were obligated to prevent genocide and what this entailed.<sup>104</sup> Even now that it has become clear that at least several states had obligations to prevent in relation to the genocide, the legal and practical consequences of the involvement of multiple duty-bearing states remain unclear.<sup>105</sup> For example, it was revealed through recently declassified documents that high United States (US) officials were aware that Srebrenica would be attacked and that withdrawing the US and North Atlantic Treaty Organization (NATO) led mission could be a precursor to brutal ethnic cleansing.<sup>106</sup> Still, the US Principals Committee, an advisory organ for the US department of foreign affairs, advised to quietly suspend NATO airstrikes against the Serbs. This decision was discussed with France and the United Kingdom (UK), but was not communicated to the Netherlands.<sup>107</sup> It shows that US was aware of the serious risk of genocide and arguably had the capacity to influence effectively in relation to the perpetrators, but chose not to act. As such, the lack of clarity surrounding the basis and content of the obligation to prevent genocide in relation to the matter of coordination allowed the US to intransparently decide to withdraw airsupport at a crucial moment.<sup>108</sup> It has also remained unclear how this decision influenced the capacity to ensure human rights and content and scope of obligations to prevent of other states. Both Serbia by the International Court of Justice (ICJ) and the Netherlands by a domestic court have been held responsible for their respective failures to prevent in relation to the genocide, but neither of the courts considered the content and scope

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<sup>103</sup> Wintour, Patrick, 'UN Failed to Protect Civilians in South Sudan, Report Finds' (1 November 2016) *The Guardian*, available at: <<https://www.theguardian.com/world/2016/nov/01/un-failed-to-protect-civilians-in-south-sudan-report-finds>>: "The report also finds that UNMISS peacekeepers "did not operate under a unified command, resulting in multiple and sometimes conflicting orders to the four troop contingents from China, Ethiopia, Nepal and India, and ultimately underusing the more than 1,800 infantry troops at [headquarters]"."

<sup>104</sup> Ben-Naftali, 'The Obligation to Prevent and to Punish Genocide' (n 49) 33: "At the time the Genocide Convention was concluded, the 'obligation to prevent' in Article I was a morally pregnant but a normatively empty concept"; See Chapter 4.1.2 Genocide Convention; Chapter 4.2 B Short-Term Prevention: There is still considerable uncertainty surrounding the question when a state has a capacity to influence effectively.

<sup>105</sup> Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (n 102) 392; See Chapter 4.1.2 Genocide Convention; Chapter 4.2 B Short-Term Prevention: It is unclear whether the third state obligation to prevent genocide also requires states to coordinate or cooperate.

<sup>106</sup> Memo, Anthony Lake to President Clinton, SUBJ: Policy for Bosnia Use of US Ground Forces to Support NATO Assistance for Redeployment of UNPROFOR within Bosnia (29 May 1995) available at:

<<http://www.foia.cia.gov/document/523c39e5993294098d51764a>> page 3 warns that withdrawal from the Eastern enclaves had "the associated potential for a humanitarian nightmare for the civilians in the safe areas currently under the promise of UN protection." Page 1 in the para "Prospects of additional airstrikes" point (3): He also writes that "privately we will accept a pause, but make no public statement to that effect."

<sup>107</sup> Memo, Anthony Lake to President Clinton (n 106) page 1 in the para "Prospects of additional airstrikes" point (3): "[P]rivately we will accept a pause, but make no public statement to that effect."

<sup>108</sup> Hartmann, Florence and Vulliamy, Ed, 'How Britain and the US Decided to Abandon Srebrenica to its Fate' (4 July 2015) *The Guardian*, available at: <<https://www.theguardian.com/world/2015/jul/04/how-britain-and-us-abandoned-srebrenica-massacre-1995>>.

of their obligations in relation to the acts and omissions of other (potential) duty-bearing states.<sup>109</sup>

Finally, it is questionable whether legal obligations that are considered to have a preventive effect actually do have that effect in practice, or whether they could have been more effective had they been shaped differently. For example, the introduction of laws prescribing punishment for certain behavior is presumed to have a general deterrent effect, but for many rules this has never been empirically proven.<sup>110</sup> In Chapter 2, some of the risk factors of gross human rights violations and measures that could be expected to address those risk factors were discussed and contrasted with states' legal obligations to prevent the three selected prohibitions.<sup>111</sup> It illustrated that such risk factors and measures are only to some degree reflected in state obligations to prevent and there often appears to be a (partial) disconnect. To some extent, this reflects the fact that there is only so much that the law can require and that states can be expected to do to prevent gross human rights violations. However, it is also a result of the way in which human rights obligations were formulated. As mentioned above, human rights obligations have often been developed in an *ad hoc* and uncoordinated manner.<sup>112</sup> This did not usually involve (empirical) research into the effectiveness of certain measures of prevention. As a result, obligations to prevent gross human rights violations do not always correspond well with the indicators that such violations may be committed, meaning the measures required by these obligations may be incomplete or ineffective in practice. In the context of genocide, there are for example no long-term obligations to address inter-group tensions, which is an important long-term indicator that genocide may be committed.<sup>113</sup>

#### 5.4.2 Room for Development

The challenges discussed above demonstrate that there is still ample room for development for obligations to prevent gross human rights violations. Over the past years, there has been more attention for the challenges to human rights obligations with a primarily territorial focus

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<sup>109</sup> *Mothers of Srebrenica against the State* case (n 35) para 4.264: The court only considered that “Dutchbat had the obligation to report the war crimes it had directly and indirectly witnessed up to that point as well as from that moment onwards to the UN chain of command”; *Genocide* case (n 16) para 430: The ICJ underlined that it is irrelevant to an individual state's obligation to prevent genocide, whether it alone could or could not have succeeded in preventing genocide. It did acknowledge that “the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result”; Chapter 4.2 B.1 Genocide.

<sup>110</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.

<sup>111</sup> See Chapter 2.2 Obligations to Prevent Torture, Arbitrary Death and Genocide within State Territory.

<sup>112</sup> ICJ Statute (n 82) art 38(1) a and b.

<sup>113</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' United Nations (2014) available at: [http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crime\\_s\\_en.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crime_s_en.pdf) 9 and 18-9.

in an increasingly interconnected world.<sup>114</sup> Extraterritorial human rights obligations are accordingly in a phase of strong development. Courts and supervisory bodies widely agree that most human rights obligations can also apply outside a state's territory. This development has received much attention in scholarship and many of the implications still need to be teased out. Especially the process of determining the content and scope of extraterritorial obligations based on jurisdiction deserves more structural attention by courts, supervisory bodies and scholars. This study has formulated several factors that influence the content and scope of extraterritorial obligations to prevent gross human rights violations, but determining the content and scope of extraterritorial obligations in general needs more thought. More research could for example be done into different types of extraterritorial settings and how the content and scope of human rights obligations is affected in these settings. There is an impetus towards recognizing the importance of third state action to prevent gross human rights violations in certain cases.<sup>115</sup> As explained in Section 5.4.3, the set of obligations to prevent gross human rights violations and concepts like conflict prevention and the RtoP have been moving towards each other. On the one hand, documents on conflict prevention and the RtoP stress the primary importance of the home state and the key role that protecting human rights has for national resilience and ultimately preventing large-scale atrocities.<sup>116</sup> International support or intervention is ever only seen as a secondary means of prevention. On the other hand, legal practice on the prevention of gross human rights violations has slowly developed from regulating the government's relationship with individuals on its territory, to influencing its relationship with people worldwide. There are developments in many areas of international law involving third states, such as widening forms of adjudicative jurisdiction and developing obligations of assistance and state cooperation.<sup>117</sup> Related to this are the effects of the involvement of multiple duty-bearing states and clarifying matters of allocation and cooperation.<sup>118</sup> In time, the increasing interconnectedness of states will unquestionably become more reflected in the overview of obligations to prevent gross human rights violations.

Because of the moral and societal shift in attention towards prevention, there is an increasing wealth of information on risk factors and measures to prevent different types of injury associated with gross human rights violations. A few examples mentioned in the context of this study are the Framework of Analysis for Atrocity Crimes and the Principles on the

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<sup>114</sup> Gibney, Mark and Skogly, Sigrun (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, Philadelphia 2010); Gondek, Michal, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); Vandenhole, Wouter, *Challenging Territoriality in Human Rights Law – Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015).

<sup>115</sup> See Chapter 4.3 Shift Towards Third State Obligations.

<sup>116</sup> Secretary-General Ban Ki-Moon, 'Responsibility to Protect: State Responsibility and Prevention' (9 July 2013) UN Doc A/67/926-S/2013/399, 12; OGPRtoP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 113) 3.

<sup>117</sup> See Section 5.1.3 Beyond Territory and Jurisdiction.

<sup>118</sup> See Chapter 1.3.3 Territory, Jurisdiction and Beyond; Chapter 2.2 B Short-Term Prevention; Chapter 3.1.1 A ECHR, ACHR and ACHPR; Chapter 4.2 B Short-Term Prevention; Chapter 4.3.1 Economic, Social and Cultural Rights; Maastricht Principles and Commentary (n 46) Principle 30.

Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and accompanying manual.<sup>119</sup> Information from these sources can be used to compare measures that are considered effective deterrents based on the risk factors associated with gross human rights violations with measures currently required by obligations to prevent gross human rights violations. Furthermore, the interpretation of existing obligations or formulation of new obligations to prevent can draw on well-developed parts of the set of obligations to prevent gross human rights violations. For example, in the context of the prohibition of torture there are many explicit long-term obligations to prevent.<sup>120</sup> States can be alerted to failures in their compliance with long-term obligations through state reporting procedures or preventive supervisory mechanisms such as the European Committee for the Prevention of Torture (ECPT) or the CAT Subcommittee for the Prevention of Torture.<sup>121</sup> Most other prohibitions lack an explicit set of long-term obligations, which makes the long-term phase harder to supervise. The long-term prevention of torture could serve as an example for obligations to prevent other types of gross human rights violations, of course taking into account the different risk factors and types of measures that would be useful deterrents. A good example is the work of the International Law Commission's Special Rapporteur on a Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, which draws inspiration from the set of obligations to prevent torture in the long-term and preventing recurrence phases and from the obligation to prevent genocide in the short-term phase.<sup>122</sup> Another positive development in this regard is that international courts or

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<sup>119</sup> OGPRTOP, 'Framework of Analysis for Atrocity Crimes - A Tool for Prevention' (n 113); Subcommittee on Prevention of Torture, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (30 December 2010) UN Doc CAT/OP/12/6-A/HRC/18/24; ECOSOC, Standard Minimum Rules for the Treatment of Prisoners (n 10); Istanbul Protocol (n 10); Economic and Social Council Resolution 1989/65, 'Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (24 May 1989) UN Doc E/1989/89, at 52; UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12; Code of Conduct for Law Enforcement Officials (n 10); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 10).

<sup>120</sup> See Chapter 2.2 A Long-Term Prevention.

<sup>121</sup> See Chapter 2.1.1 Torture; CAT (n 10) art 19; IACPPT (n 10) art 17; Human Rights Committee, 'General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7)' (10 March 1992) UN Doc CCPR/C/GC/20, para 8: "[S]tate parties should inform the Committee of "legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment."; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS 126 (ECPT); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (CAT Optional Protocol).

<sup>122</sup> Special Rapporteur Sean D. Murphy, 'First Report on Crimes Against Humanity' (n 47) chp.5(a) Obligation to prevent crimes against humanity: Draft Article 1 contains a general obligation to prevent, similar to the Genocide Convention, but also specifies that states will take "effective legislative, administrative, judicial or other measures to prevent", similar to the CAT; Special Rapporteur Sean D. Murphy, 'Second Report on Crimes Against Humanity' (n 50) chp. 4 and 5: Draft Article 9 outlines the obligation of *aut dedere aut judicare* based on the interpretation of that obligation under the CAT.



supervisory bodies sometimes indicate what measures a state would have to take to prevent recurrence of a violation.<sup>123</sup> These measures feed back into the phase of long-term prevention, which can turn the timeline into a cycle of improvement instead of a linear process that is repeated with every violation.

The aim of this study was to clarify the content and scope of both territorial and extraterritorial obligations to prevent gross human rights violations under international human rights law. The resulting overview can help provide clarity to (academic) debates about prevention and can be used as a basis for further efforts in the area of research and implementation. It can serve as a source of information on the status of the law in this area for policy makers, legal professionals and researchers alike. The overview can also act as a basis for critical examination of the role of law in prevention efforts, the future development of (extraterritorial) human rights obligations and the formulation of policies that can complement the law where additional prevention efforts are considered necessary.

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<sup>123</sup> Especially the IACtHR is known for its elaborate and inventive rulings in this regard: *Carpio-Nicolle et al. v. Guatemala* (Merits, Reparations and Costs) Judgment of November 22, 2004, I/A Court HR Series C No. 117, para 135: The court ordered that “sufficient human, financial, logistic and scientific resources” needed to be allocated to the units charged with prevention and investigation of extrajudicial killings; *Gutiérrez-Soler v. Colombia* (Merits, Reparations and Costs) Judgment of September 12, I/A Court HR 2005 Series C No. 132, para 107-11: The Court ordered, among other things, that the state start a police training course, disseminate and implement the standards of the Istanbul protocol, a training program for physicians, prosecutors and judges, physical evaluation of state staff in detention centers and strengthening “existing controls with respect to persons arrested in Colombia.”