

Chapter 1

Introduction

Contents

1.1	Context: Shift Towards Prevention	4
1.1.1	Conflict Prevention	4
1.1.2	Responsibility to Protect	6
1.1.3	International Human Rights Law	7
1.2	The Problem: The Content and Scope of Obligations to Prevent	10
1.3	Research Question and Design	13
1.3.1	Delineation.....	13
1.3.2	Temporal Phases.....	16
1.3.3	Territory, Jurisdiction and Beyond	18
1.3.4	Determining the Content and Scope of Obligations to Prevent.....	21
1.4	Structure.....	23
	References	24

Abstract There is a great deal of attention for concepts such as conflict prevention and the responsibility to protect, which aim to prevent gross human rights violations. Despite this shift in attention towards prevention, it has remained unclear what legal obligations states have to prevent gross human rights violations under international human rights law. For example, it is unclear what types of obligations states have at different points in time, when they are triggered, what concrete measures they may require and how they apply outside a state’s territory. This study sets out to systematically assess the content and scope of obligations to prevent gross human rights violations. The focus is on three specific types of injury prohibited under international human rights law: torture, arbitrary death and genocide. Further distinctions are made between four temporal phases (long-term prevention, short-term prevention, preventing continuation, preventing recurrence) and territorial and extraterritorial obligations.

Keywords Prevent • Gross human rights violations • Responsibility to Protect • Conflict Prevention • Obligation • Human rights law

Over the past decades, there has been growing attention for a more proactive and preventive approach towards gross human rights violations.¹ This trend can be illustrated with several concrete developments. In 2007, the International Court of Justice (ICJ) held Serbia responsible for its failure to try to prevent the Srebrenica genocide that occurred in Bosnia in 1995.² The judgment is remarkable for many reasons, most notably because it is the first time that a state was held responsible for a manifest failure to take measures to prevent genocide in another state. There have also been important developments that are not strictly legal, but have increased the focus at both the national and international level on the prevention of mass atrocities.³ For example, the concepts of conflict prevention and the responsibility to protect (RtoP) have gained much traction, both promoting a preventive approach towards violent internal state conflicts.⁴ Conflict prevention and the RtoP have received a great deal of attention in (legal) scholarship, linking the prevention of atrocities to different human rights obligations.⁵

Despite much scholarly attention for these concrete developments, a cloud of obscurity still surrounds the notion of *international legal obligations* to prevent gross human rights violations.⁶ Little in-depth and systematic research has been carried out concerning the questions what states are legally required to do under international human rights law and at what point in time these obligations are triggered.⁷ That states have certain legal obligations to prevent gross human rights violations within their territory is undisputed. For example, states have clear and express obligations to take measures to prevent torture, especially for situations of detention.⁸ Extraterritorial obligations to prevent gross human rights violations, on

¹ Schabas 2006.

² ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, 26 February 2007, ICJ Rep 2 (Genocide 2007) paras 438 and 450.

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

⁴ Commission on Preventing Deadly Conflict 1997; Moolakkattu 2007, paras 4 and 10–9: The term conflict prevention “denote[s] a number of conflict management-related activities”; International Commission on Intervention and State Sovereignty 2001; UN General Assembly 2005, paras 138–9; Winkelmann 2010, para 2: The term ‘responsibility to protect’ is used in a non-legal sense” and “fix[es] a clear set of rules, procedures, and criteria” relating to the prevention of and intervention in the occurrence of crimes against humanity, war crimes, ethnic cleansing and genocide.

⁵ Gattini 2007; Cuyckens and De Man 2011, p. 111; Gibney 2011; Strauss 2009; Welsh 2010; Zimmermann 2011.

⁶ Gattini 2014, p. 38; De Pooter 2009.

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

⁸ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT) Article 2(1): “Each State Party shall *take effective legislative, administrative, judicial or*

the other hand, are more ambiguous. It is by now accepted that states do, under certain circumstances, have extraterritorial obligations based on the human rights treaties to which they are a party.⁹ But when government officials act abroad, they usually do not have the same amount of power and resources as within their own territory. At the moment, it is still unclear how such capacity-related factors influence extraterritorial obligations to prevent.

Core questions remain unanswered with regard to the content and scope of obligations to prevent gross human rights violations.¹⁰ For example, what types of obligations to prevent are there? When are such obligations triggered?¹¹ What do they require in terms of concrete measures?¹² What is the content and scope of extraterritorial obligations to prevent and what role does the capacity of states play in that regard?¹³ And finally, what trends are relevant for the future development of obligations to prevent gross human rights violations? Without additional clarity on these and related questions, states can all too easily pass the buck and remain bystanders to gross human rights violations.¹⁴

This research project sets out to systematize and analyze the content and scope of obligations to prevent gross human right violations under international human rights law. For this purpose, a distinction will be made between different temporal phases. The distinction between temporal phases supports the articulation of categories of obligations and offers insight into the triggering role of knowledge for obligations to prevent. A second distinction is made between territorial and extraterritorial obligations. An important element in regard to the latter will be to offer criteria for threshold and capacity that ground extraterritorial obligations to

other measures to prevent acts of torture in any territory under its jurisdiction” [emphasis added] and Articles 10 and 11 on situations of detention.

⁹ Milanović 2011.

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

¹¹ *Genocide* 2007, above n. 2, para 431: “[A] State’s obligation to prevent [...] arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a serious risk”; International Law Commission 2001a, Article 14(3): A breach of obligations to prevent occurs at the moment of occurrence of the event; Gattini 2007, p. 702: Promotes “a more progressive reading of the time factor of the duty to prevent.”

¹² *Genocide* 2007, above n. 2, paras 427 and 429–31: In the context of genocide, prevention implies using all means which are “reasonably available” and “likely to have a deterrent effect”; International Law Commission 1999, chp. V, paras 49–453, chp. 10(c), paras 178–80, chp. 7(c) para 142: In most cases, a duty to prevent will be an obligation of conduct based on due-diligence.

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

¹⁴ Grünfeld and Huijboom 2007.

prevent. These steps will be elaborated in the course of this chapter, which will offer context and background information (Sect. 1.1), outline the problem (Sect. 1.2) and discuss the research question and design (Sects. 1.3 and 1.4) that will lay the groundwork for all of the following chapters.

1.1 Context: Shift Towards Prevention

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

1.1.1 Conflict Prevention

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

¹⁵ International Commission on Intervention and State Sovereignty 2001; UN General Assembly 2005, para 138: The R2P offers a basis for the international community to step in if a state itself is ‘unwilling or unable’ to protect its population in the case of genocide, war crimes, ethnic cleansing and crimes against humanity; Ackerman 2003: A new mixed regime of law and policy in the area of *conflict prevention* has arisen after the cold war.

¹⁶ Moolakkattu 2007, paras 3, 5 and 28.

¹⁷ Secretary-General Boutros Boutros-Ghali 1992; Moolakkattu 2007, para 1.

¹⁸ Commission on Preventing Deadly Conflict 1997, executive summary xix and xxviii; Secretary-General Kofi Annan 2001, executive summary, bullet point 4 and paras 8–10 and 169.

¹⁹ Commission on Preventing Deadly Conflict 1997, executive summary xxviii.

²⁰ Commission on Preventing Deadly Conflict 1997, executive summary xix.

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

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

There is still much that can be done to make existing frameworks for the prevention of violent conflict more effective. Within the UN, a recent attempt at putting a culture of prevention into practice is the “Rights up Front” initiative.²⁹ This initiative was taken by the SG in reaction to a 2012 Internal Review Panel’s findings on UN failures in Sri Lanka.³⁰ The idea behind the initiative is that the protection of human rights always comes first in strategic or operational

²¹ G8 Foreign Ministers Meeting 2000; Commission on Preventing Deadly Conflict 1997, executive summary xi–xliv.

²² Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) preamble, Articles 1(1) and 3(3).

²³ Secretary-General Kofi Annan 1999; Secretary-General Kofi Annan 2001, executive summary.

²⁴ Secretary-General Kofi Annan 2001, executive summary and para 6.

²⁵ Aggestam 2003; Cuyckens and De Man 2011, pp. 115–7; see generally: Van Walraven and Van der Vlugt 1996.

²⁶ Assembly of Heads of State and Government of the OAU 1993; Protocol Relating to the Establishment of the Peace and Security Council of the African Union, opened for signature 9 July 2002 (entered into force 26 December 2003) <http://www.peaceau.org/uploads/psc-protocol-en.pdf>. Accessed 2 August 2017, Article 3b; AU Commission 2000; Moolakkattu 2007, para 19.

²⁷ Barrack 2011.

²⁸ Ibid.

²⁹ Secretary-General Ban Ki-Moon 2013; for more information, visit the website: <https://www.un.org/sg/en/content/ban-ki-moon/human-rights-front-initiative>. Accessed 2 August 2017.

³⁰ Secretary-General’s Internal Review Panel 2012, paras 75 onwards on United Nations Failure.

decisions.³¹ By and large, it is safe to say that conflict prevention has contributed greatly to an enhanced focus on prevention and human rights in conflict situations.

1.1.2 *Responsibility to Protect*

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

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

Following the adoption of the WSOD, the path began towards consolidating a shared understanding and putting the RtoP into practice.³⁷ An important impulse in

³¹ Rights up Front Summary: <http://www.un.org/News/dh/pdf/english/2016/Human-Rights-up-Front.pdf>. Accessed 2 August 2017.

³² Cuyckens and De Man 2011.

³³ Secretary-General Kofi Annan 2000.

³⁴ International Commission on Intervention and State Sovereignty 2001.

³⁵ International Commission on Intervention and State Sovereignty 2001; although the distinction between humanitarian intervention and the RtoP is not strict and their history is mostly shared, see: Hilpold 2014; Office on Genocide Prevention and the Responsibility to Protect 2014, pp. 2 and 4: The earlier action is taken, the cheaper it will be.

³⁶ UN General Assembly 2005, paras 138–9: where the ICISS left the door slightly open to the use of force without SC authorisation, the GA shut that door and declared the SC as the ultimate authority to decide on any form of military intervention; on the drafting history, see: Strauss 2009, pp. 293–9.

³⁷ Luck 2011.

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

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

1.1.3 *International Human Rights Law*

Quite a few express obligations to prevent violations of human rights exist in international human rights treaties. Express means that the word "prevent" is used in the treaty text in relation to a potential violation. For example, state parties to the

³⁸ Secretary-General Ban Ki-Moon 2009, summary, pp. 10, 15 and 22.

³⁹ Office on Genocide Prevention and the Responsibility to Protect 2014.

⁴⁰ Statute of the International Court of Justice, opened for signature 26 June 1945, TS 993 (entered into force 24 October 1945) (ICJ Statute) Article 38(1)b; Shaw 2008, p. 70; Salomon 2007, p. 89: Although the RtoP was not adopted in legally binding form, GA resolutions can spark or indicate processes of the development of new rules of customary international law; Strauss 2009, pp. 293–12: A review of the negotiation process of the WSOD and the subsequent practice of the GA and SC show little to no intention of laying down a new rule of international law; Bellamy and Reike 2010, p. 274: There is an important difference in the "legal quality" of the RtoP pillars described in the SG report. The first pillar of the RtoP, responsibilities of states towards their own population, is grounded in many pre-existing human rights treaties prohibiting arbitrary deaths, torture, genocide and international humanitarian law treaties prohibiting war crimes. The same cannot be said for the second and third pillars.

⁴¹ Bellamy 2010, pp. 161–2: This is largely due to the norm's indeterminacy.

⁴² Ibid., pp. 158 and 162–6.

⁴³ Rosenberg 2009, pp. 459 and 463.

relevant conventions are expressly obligated to prevent genocide, torture, enforced disappearances, segregation and apartheid.⁴⁴ Sometimes the obligation to prevent is very general and generic.⁴⁵ Other times, the obligation is more specific or specified in later provisions.⁴⁶ The type of injury that such express obligations to prevent seem to focus on, are violations in relation to a person's life, body or dignity.

Obligations to prevent have found their way into the interpretative discourse of many courts and supervisory bodies.⁴⁷ As mentioned above, an important case that has sparked much scholarly attention and attention from other courts and supervisory bodies for obligations to prevent is the 2007 ICJ *Genocide* case.⁴⁸ Even if an obligation to prevent is not stated expressly in the treaty text, courts and supervisory bodies have found that due diligence obligations to prevent certain violations are sometimes implied.⁴⁹ For example, in the *Velásquez Rodríguez v. Honduras* case

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

⁴⁵ See for example the Genocide Convention, above n. 44, Article 1.

⁴⁶ See for example the framework of obligations to prevent in the CAT, above n. 8, which is further explained in 2.1 Introduction to the Prohibitions and Obligations to Prevent.

⁴⁷ A few examples are: IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, 29 July 1988, Series C No. 4 (*Velásquez Rodríguez*), paras 166 and 188: The IACtHR determined that the general obligation under the Convention to ensure the rights therein, also includes an obligation to prevent violations; ECtHR, *Osman v. the United Kingdom*, Merits, 28 October 1998, no. 23452/94, para 116: The ECtHR interpreted the right to life as sometimes warranting a state to take preventive operational measures; ECtHR, *Opuz v. Turkey*, Merits, 9 June 2009, no. 33401/02, paras 169–70 and 176: The ECtHR interpreted the prohibitions of torture as sometimes warranting a state to take protective measures for the purpose of deterrence; *Genocide* 2007, above n. 2, para 438: The ICJ interpreted Article 1 of the Convention as giving rise to a separate obligation to prevent genocide.

⁴⁸ *Genocide* 2007, above n. 2, para 438: Article 1 of the Genocide Convention contains an obligation to “prevent and punish” genocide. The ICJ not only explained that the obligation to prevent is a separate obligation, it also interpreted it as broad in scope; see for cross reference: Netherlands, The Hague District Court, *Mothers of Srebrenica against the State*, Merits Highest Instance, 16 July 2014, C/09/295247/ HA ZA 07-2973 (*Mothers of Srebrenica*), paras 4.9 and 4.178; Ruvebana 2014.

⁴⁹ Human Rights Committee 2004, para 8: States may be obligated to make preventive efforts with regard to risks of violations of certain rights by other individuals within their jurisdiction, such as the right to life or the prohibition of torture. The HRC also interprets Article 2 of the ICCPR as encompassing a general legal obligation of the Article 2 obligation imposed on state parties as including an obligation to prevent recurrence of violations; *Velásquez Rodríguez*, above n. 47, para 166: Describing a general obligation to “organize the governmental apparatus [...] so that [it is] capable of juridically ensuring the free and full enjoyment of human rights”, which also entails an obligation to prevent.

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

Also in non-judicial interpretation or application practices, there has been attention for prevention in relation to human rights violations. Treaty bodies or special rapporteurs are well placed to monitor situations and give early warning of potential violations.⁵³ Human rights treaty bodies address obligations to prevent for example in their general comments and reports.⁵⁴ Special rapporteurs likewise sometimes call attention for obligations to prevent violations.⁵⁵ Finally, the International Law Commission (ILC) has since 2014 been working on the formulation of Draft Articles for an International Convention on the Prevention and Punishment of Crimes Against Humanity, with prevention as a central focus.⁵⁶ These developments have not gone unnoticed and in 2015, the Office for the High Commissioner on Human Rights (OHCHR) upon the request of the Human Rights Council (HRC) published a report on the role of prevention in the promotion and protection of human rights.⁵⁷ This increase in attention for obligations to prevent fits within the broader moral and societal shift towards recognizing the importance of prevention in relation to gross human rights violations.

⁵⁰ *Velásquez Rodríguez*, above n. 47, paras 166 and 188: “These rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in the violation of that right.” This case concerned offences by private individuals.

⁵¹ Koivurova 2007.

⁵² *Osman*, above n. 47, para 111: The obligation to respect the right to life may also “imply [...] a positive obligation on the authorities to take preventive operational measures.”

⁵³ Shaw 2003, p. 312: In the conclusion of a chapter on treaty bodies he states that the development of preventive procedures and systems of early warning by the treaty bodies is to be ‘particularly noted.’

⁵⁴ See for example: Subcommittee on Prevention of Torture 2010, para 8; Committee on the Elimination of Discrimination Against Women and Committee on the Rights of the Child 2014.

⁵⁵ Office of the High Commissioner for Human Rights 2015.

⁵⁶ Whitney R. Harris World Law Institute 2010: The Washington University School of Law took a Crimes Against Humanity Initiative, which led to a proposed convention drafted by a Steering Committee; International Law Commission 2014, chp. 14(a), para 1: “At its 3227th meeting, on 18 July 2014, the Commission decided to include the topic “Crimes against humanity” in its programme of work and to appoint Mr. Sean D. Murphy as Special Rapporteur.” Crimes against humanity has been included by the ILC under the topic of criminal law, because the definition of the crime originates in criminal law; Special Rapporteur Sean D. Murphy 2015, chp. 5(a) Obligation to prevent crimes against humanity.

⁵⁷ Office of the High Commissioner for Human Rights 2014; Office of the High Commissioner for Human Rights 2015: Among other things, the report seeks to “provide further content to the concept of prevention of human rights violations.”

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

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

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

The action of stopping something from happening or arising.⁶¹

The word “obligation” in the context of international law is related to the sources as expressed in Article 38 of the ICJ Statute.⁶² The primary sources of obligations under international law are treaties and custom. Roberto Ago has offered a useful description of the meaning of the terms taken together, stating that obligations (based on treaties or custom) to prevent (stopping something from happening) are aimed at preventing an “injurious event”, meaning an act, damage or any other form of injury that has been qualified as prohibited or unwanted in international law.⁶³ Other than

⁵⁸ *Genocide* 2007, above n. 2; De Pooter 2009; a few positive exceptions in recent studies are: Ruwebana 2014; Office of the High Commissioner for Human Rights 2014.

⁵⁹ Bellamy 2008, p. 143: The hallmark of successful prevention efforts is that the results are largely invisible, which makes it hard to garner (financial) support for prevention efforts.

⁶⁰ A review of several handbooks of international law showed that the term prevention is used in very diverse ways. See for example: Aust 2010, pp. 306–7: Mentions the concept of prevention in the context of the precautionary principle as a basis for risk prevention in environmental law; Brownlie 2008, p. 745: Mentions the concept of prevention in the context of humanitarian intervention; Cassese 2001, pp. 264–5: Notes that there is a “general obligation of international cooperation for [the] prevention and punishment” of at least “the most odious international crimes such as, in particular, genocide and crimes against humanity”; Schachter 1991, pp. 368 onwards: Schachter identifies prevention as the centerpiece of environmental law and describes how it is qualified differently in different documents addressing different issue area.

⁶¹ Oxford Dictionaries Pro 2010.

⁶² ICJ Statute, above n. 40, Article 38(1)a and b.

⁶³ Special Rapporteur Roberto Ago 1978, chp. 3(8), para 15: Ago further distinguished between obligations which have prevention as their direct object and obligations which have prevention as a side effect.

this very basic description, it is hard to find unifying factors among obligations to prevent in international law. Andrea Gattini writes that “there is uncertainty and disagreement on almost every aspect of an obligation to prevent, concerning the scope of the obligation *ratione personae, loci, materiae, and temporis*.”⁶⁴

Uncertainty surrounding the content and scope of obligations to prevent has become apparent for example in connection with the question at which moment in time they are breached. Article 14 of the Articles on States Responsibility proclaims that a breach of obligations to prevent takes place at the moment the injurious event occurs and for as long as it continues.⁶⁵ It thereby made the occurrence of an injurious event a necessary condition for a breach of an obligation to prevent. At the same time, the ILC also claimed in the Commentary of the Articles that, in most cases, a duty to prevent is an obligation of conduct based on due-diligence.⁶⁶ This claim stands in strange comparison to its decision that a breach occurs at the moment that the injurious event occurs, because obligations of conduct are not aimed at a certain result, in this case non-occurrence of an injurious event.⁶⁷ One would expect an obligation of conduct to be breached once the required conduct stays out, regardless of the consequences.⁶⁸ Furthermore, there are in fact many examples of obligations to prevent that are obligations of result and can be breached without the occurrence of the injurious event which they aim to prevent, such as the obligation to enact legislation or investigate violations.⁶⁹ The ILC’s approach therefore gives too simplistic a view of obligations to prevent and their timeframe.

It is submitted that treating obligations to prevent as a non-context-specific and undifferentiated group hampers attempts to further clarify their content and scope.⁷⁰

⁶⁴ Gattini 2014, p. 38.

⁶⁵ International Law Commission 2001a, Article 14(3).

⁶⁶ International Law Commission 2001a, Commentary to Article 14(3), para 14: “Obligations of prevention are usually construed as best efforts obligations [...] without warranting that the event will not occur”; International Law Commission 1999, chp. 10(c), paras 178–80, chp. 7(c), para 142: The reports covering the drafting history of the Articles contain a more nuanced view, stating that obligations to prevent can be of both conduct and result.

⁶⁷ International Law Commission 2001a, Commentary to Article 12, paras 11 and 12.

⁶⁸ Gattini 2007, p. 702; Gattini 2014, p. 37: “Undoubtedly this rule becomes unpalatable under certain circumstances. This is the reason why, in most criminal codes, the concept of crimes of abstract danger (*Gefährungsdelikte*) has been introduced, in order to punish dangerous conduct, regardless of the occurrence of the damaging event.”

⁶⁹ For example: CAT, above n. 8, Articles 2 jo 4: The obligation to ensure that torture is an offence under criminal law, as a part of the broader obligation to introduce effective legislative safeguards to prevent torture; *Trail Smelter Case (United States v Canada)* arbitration resulting in special agreement, 16 April 1938 and 11 March 1941, 3 RIAA 1905–1982; UN General Assembly 1992, Principle 2; Soljan 1998, pp. 211 onwards; Bratspies 2010, p. 112: An important customary obligation in environmental law is the prevention of significant transboundary harm. It is a compound obligation, consisting of a set of quite specific subsidiary obligations of result such as carrying out an impact assessment and notifying and consulting with potentially affected states.

⁷⁰ The ILC took such a general undifferentiated approach from the viewpoint of its task to codify general rules for international state responsibility. But attempts to understand obligations to prevent as an undifferentiated group can also be found in other places, see for example: Gattini 2014.

That obligations to prevent are aimed at preventing an injurious event, means that it is hard to understand them outside of the context of a specific regime of international law or specific type of injury. In the context of environmental law, for instance, obligations to prevent are aimed at preventing environmental damage and have developed in a very different way from obligations to prevent in the context of human rights law. For example, states have drafted framework treaties that set forth specific targets for the reduction of the emission of greenhouse gases through subsequent amendments to mitigate the threats posed by global warming.⁷¹ Such preventive framework treaties do not exist in the area of human rights law.⁷² Furthermore, the type of injury obligations seek to prevent also influences the identification of risks and mitigating factors and therefore the chosen measures and timeframe of obligations to prevent.⁷³ All is to say that the type of injury strongly influences the way obligations to prevent are shaped.⁷⁴

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

⁷¹ United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005).

⁷² Nowak 2004, p. 285: Although it could be argued that “each tool for the protection of human rights is preventive by its very nature.”

⁷³ Office of the High Commissioner for Human Rights 2014, paras 5 and 8–10.

⁷⁴ International Law Commission 2001a, Article 31: “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State, sustained as a result of the wrongful act.” The terms injury and damage will be used interchangeably.

⁷⁵ See 1.3.1 Delineation: The types of injury chosen for this study are torture, arbitrary death and genocide.

⁷⁶ See 1.3.2 Temporal Phases: long-term obligations to prevent, short-term obligations to prevent, obligations to prevent the continuation of a violation, obligations to prevent recurrence.

⁷⁷ See 1.3.3 Territory, Jurisdiction and Beyond.

⁷⁸ International Law Commission 2001a, Commentary to Article 12, paras 11 and 12: Obligations of conduct require a certain form of conduct, whereas obligations of result require that a certain result is effectuated regardless of the means used; Commentary to Article 41, para 3: A positive obligation requires action, whereas a negative obligation requires abstinence; Shue 1996, p. 52:

this study is to offer alternative categories that better serve the context of obligations to prevent gross human rights violations.

1.3 Research Question and Design

The main research question is:

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

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

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

1.3.1 *Delineation*

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

Most human rights do not give rise to one single correlative duty, but rather to the intertwined duties to respect, protect and fulfill. The obligation to respect entails that a state must refrain from interfering with the enjoyment of human rights. The obligation to protect entails that a state must protect individuals or groups against human rights abuses. The obligation to fulfill entails that a state must facilitate the enjoyment of human rights.

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

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

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

⁸⁰ These prohibitions and corresponding rights have all been included in a range of human rights treaties, have customary law status and the prohibitions of torture and genocide are *jus cogens*. This will be discussed in more detail in the following chapter. See generally: Human Rights Committee 1982, para 3; Committee Against Torture 2008, para 1; ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, 3 February 2006, ICJ Rep 6, para 64; International Law Commission 2001a, Commentary to Article 40, paras 7 and 8: In the context of a Chapter III on Serious Breaches of Obligations Under Peremptory Norms of General International Law, the ILC clarifies that the word "gross" means that a "certain order of magnitude of violation is necessary." This study takes a different and broader approach, where any violation of the three selected prohibitions is considered a gross violation.

⁸¹ See 1.1.3 International Human Rights Law.

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

⁸³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 136, para 106; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), common Article 3: Contains a prohibition of "violence to life and person, in particular murder of all kinds" of civilians and persons *hors de combat*; the prohibition of arbitrary death entails different obligations in the two regimes. To determine whether the right to life has been violated under humanitarian law, it matters whether someone is a combatant or a civilian. This distinction plays no role under human rights law.

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

Finally, this research will focus on states as the primary duty-bearers of obligations to prevent gross human rights violations. There has been criticism that an exclusively state-centric focus does not do justice to the limited power states have over the large amount of other actors that impact the enjoyment of human rights.⁸⁷ For example, many scholars have argued that International Organizations (IOs) are separately bound by human rights obligations, either because they have legal personality and are bound by customary rules contained in human rights treaties (even though they are not formally a party), or based on the IO's status as a collection of states which are all individually bound.⁸⁸ However, it is still under debate exactly what obligations IOs have.⁸⁹ Furthermore, options to hold IOs accountable for violations are still very limited, because they are immune from prosecution by domestic courts and there are hardly any separate (judicial) mechanisms of oversight.⁹⁰ Apart from IOs, there has been a strong push to include

⁸⁴ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2015, paras 62–4; Ben-Naftali and Shany 2003, pp. 103–5.

⁸⁵ Whether obligations discussed in this research are defeated by humanitarian law as *lex specialis* in particular situations is left up to the doctrinal discussion on that topic: Crawford 2012; Dennis 2005; Matthews 2013.

⁸⁶ Kamminga 2012, para 1: Prescriptive jurisdiction refers to a state's "authority to lay down legal rules"; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, opened for signature 18 October 1907, International Peace Conference, The Hague, Official Records (entered into force 26 January 1910), Articles 42–3.

⁸⁷ Vandenhoe and Van Genugten 2015.

⁸⁸ Glanville 2012, pp. 21–3; Toope 2000, p. 187: The provisions of the Genocide Convention oblige the UN to act to prevent genocide. "Beyond this, however, there is an erga omnes obligation owed by the United Nations to the international community to prevent gross violations of human rights. (...) It extends to the United Nations as a collection of states, all subject to this obligation to prevent crimes against humanity. The result of this is that the United Nations is legally and morally obliged to address genocide"; Jorgensen 2012, pp. 430–3: "Like states, international organizations with the capacity to influence are under a duty to act the instant they learn, or should have learned, of the serious risk that genocide will be committed."

⁸⁹ See for example: Van Genugten 2015, pp. 44 onwards for a discussion of the human rights obligations of the World Bank Group and the IMF.

⁹⁰ Jorgensen 2012, pp. 430–3: In recent decades, there has been a shift of focus from purely moral forms of IO responsibility to formal liability. Jorgensen mentions the *Mothers of Srebrenica* case aimed at UN (even though the UN was held to have immunity from domestic prosecution), the

transnational corporations in the human rights law framework.⁹¹ In 2014, the HRC decided to establish an open ended working group to elaborate a binding treaty on business and human rights.⁹² As it currently stands, however, states still have the most central role in ensuring human rights. Human rights treaties address state parties as the primary duty-bearers and most existing frameworks of accountability for human rights violations are focused on states as the potential wrong-doers.⁹³ Therefore, it makes sense to focus first on the obligations of states. Follow-up research could be envisaged into relevant questions related to obligations of other actors and the influence this may have on the scope of state obligations.

1.3.2 Temporal Phases

The analysis of obligations will rest on a timeline with four temporal phases. There seems to be agreement among scholars working on obligations to prevent under human rights law, conflict prevention and the RtoP that it is useful to divide or group measures based on the factor of time.⁹⁴ For example, the original ICISS report on the RtoP divides measures into the responsibility to prevent, react and rebuild.⁹⁵ Within the responsibility to prevent, it further distinguishes between root cause prevention and direct prevention.⁹⁶ In conflict prevention theory, a conflict cycle is used to identify different stages and strategies for the prevention and management of conflict.⁹⁷ The OHCHR report on the role of prevention in the promotion and protection of human rights distinguishes between direct prevention/mitigation and indirect prevention/non-recurrence.⁹⁸ In this research, the timeline is built around the cycle of occurrence of a gross human rights violation. Initially based on a preliminary review and confirmed by later use, it is submitted that treaty obligations and accompanying case law involving obligations to prevent gross human rights violations can best be categorized according to the following four phases:

- (i) The first phase commences before any indication or knowledge of a possible violation exists (*long-term prevention*).⁹⁹ Long-term obligations to prevent

Draft Articles on the Responsibility of International Organizations, the Independent inquiry into UN's failings with respect to Rwanda and the SG report on fall of Srebrenica.

⁹¹ See 4.3.2 Corporations Acting Abroad; Cernic 2015.

⁹² Human Rights Committee 2014.

⁹³ Vandenhoe and Van Genugten 2015.

⁹⁴ International Commission on Intervention and State Sovereignty 2001; Cuyckens and De Man 2011, p. 115; Office of the High Commissioner for Human Rights 2014, paras 9 and 10; Ruvebana 2014.

⁹⁵ International Commission on Intervention and State Sovereignty 2001, pp. 19, 29 and 39.

⁹⁶ International Commission on Intervention and State Sovereignty 2001, pp. 22–23.

⁹⁷ Cuyckens and De Man 2011, p. 115.

⁹⁸ Office of the High Commissioner for Human Rights 2014, paras 9 and 10.

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

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

- (ii) The second phase commences when a certain degree of knowledge of a risk has been reached, but the injurious event has not yet started occurring (*short-term prevention*).¹⁰¹ Obligations in this phase arise when it has become foreseeable or ought to be foreseeable for a state that a particular violation will take place. They are targeted at preventing a specific violation and can involve physical protection and operational measures.
- (iii) The third phase commences after the injurious event has started and as long as it continues to occur (*preventing continuation*).¹⁰² Therefore, a prerequisite for this phase to exist is that the violation is of a continuing character.¹⁰³ Obligations in this phase are targeted at halting the on-going violation and mitigating the effects as far as possible. Measures can range from investigation, operational measures to prosecution and punishment. The phases of short-term prevention and preventing continuation are the more acute phases of prevention, which deal with the risk or occurrence of a particular violation.
- (iv) The fourth phase commences after the violation has ended (*preventing recurrence*).¹⁰⁴ Obligations in this phase are aimed at taking remedial measures and ensuring the violation does not recur. The types of measures lie in the area of investigation, prosecution and punishment, but also taking systematic measures to ensure future abidance. For example, sometimes

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

¹⁰¹ *Genocide* 2007, above n. 2, para 430.

¹⁰² International Law Commission 2001a, Commentary to Article 14, para 14: States are under an obligation of cessation of a wrongful act if the injurious event is of a continuing character; Ackerman 2003, p. 9: In conflict prevention this phase is referred to as preventing escalation or containment and measures are usually based on situation-specific agreements concluded after the initial injurious event; International Commission on Intervention and State Sovereignty 2001, p. 29: Under the R2P this phase corresponds to the element of reaction.

¹⁰³ International Law Commission 2001a, Commentary to Article 14, para 14.

¹⁰⁴ International Law Commission 2001a, Article 30(b) assurances of non-repetition may be afforded “if circumstances so require”; Moolakkattu 2007, para 12: In conflict prevention policies, this corresponds to peacebuilding on the basis of situation-specific agreements; International Commission on Intervention and State Sovereignty 2001, p. 39: Under the R2P this corresponds to the element of rebuilding, which is expressly aimed at preventing recurrence; Human Rights Committee 2004, para 8: The HRCee interprets Article 2 as encompassing a general legal obligation to prevent the recurrence of violations; In the language of human rights law, prevention and punishment are closely related and the latter is assumed to have some form of deterrent effect. See generally: Scharf 1996.

courts or supervisory bodies prescribe measures to prevent recurrence that go beyond remedying the particular violation at hand.¹⁰⁵

The introduction of temporal phases is useful for the following reasons: (i) The timeline is a tool to reveal a clear picture of a state's obligations to prevent as a certain (pattern of) violation(s) unfolds; (ii) Obligations to prevent in these phases are mostly based on different legal foundations;¹⁰⁶ and (iii) The separation can give insight into the triggering role of knowledge to incur certain obligations to prevent gross human rights violations.¹⁰⁷ The timeline is a tool employed to offer an informative overview, but cannot be used as a legal blueprint describing the exact moment at which a state incurs certain obligations. For example, the measures states are obligated to take in the long-term and short-term phases, remain applicable as relevant in other phases. Differing triggers of knowledge and measures typically required will be addressed within the four different phases.¹⁰⁸

1.3.3 Territory, Jurisdiction and Beyond

The research takes place against the background of an evolving system of international law. There is growing agreement that state boundaries cannot contain the effects of human rights violations and state sovereignty is characterized as responsibility.¹⁰⁹ The research will build upon a modern-day understanding of sovereignty as primarily bestowing obligations upon a state towards individuals within its

¹⁰⁵ Human Rights Committee 2004, paras 8 and 17: “[I]t has been a frequent practice of the Committee (...) to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question”; ECtHR, *Broniowski v. Poland*, GC Judgment on Merits, 22 June 2004, no. 31443/96: Example of judicial practice instructing a state to address a structural problem to prevent future violations; International Law Commission 2001a, Article 30 and Commentary to Article 30, para 6; Office of the High Commissioner for Human Rights 2014, para 10.

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

¹⁰⁷ Short-term obligations to prevent, for example, usually have a knowledge-requirement. This can be an objectivized or factual standard: *Genocide* 2007, above n. 2, para 430: Example of an objectivized standard: “*learns of, or should normally have learned of*”; International Law Commission 2001b, Commentary to Article 1, para 14: “The notion of risk is thus to be taken *objectively*, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.”

¹⁰⁸ Hakimi 2010: Hakimi describes different responsibilities of bystander states and analyzes which triggers are common to these responsibilities. To a certain extent, this study will do the same, attempting to respect the line between law and claiming the existence of cross-cutting triggers which, in reality, do not exist.

¹⁰⁹ International Commission on Intervention and State Sovereignty 2001, pp. 12–14: In the context of the RtoP, the character of sovereignty as responsibility was emphasized, instead of control. The human rights law system offers standards of conduct for states.

territory and, occasionally, obligations towards individuals outside its territory.¹¹⁰ Extraterritorial obligations will be dealt with in two layers. First of all, states may accrue extraterritorial obligations on the basis of jurisdiction.¹¹¹ Second, a state may have extraterritorial obligations beyond its jurisdiction.¹¹² Ultimately, this leads to research in three layers, which will be dealt with in separate chapters: obligations to prevent territorially, extraterritorially based on jurisdiction and extraterritorially beyond jurisdiction. The prevention of torture, arbitrary deaths and genocide will imply a different subset of obligations in the first two versus the third layer.¹¹³

The point of departure will be an outline and analysis of obligations to prevent torture, arbitrary deaths and genocide within a state's own territory. The state has the most intricate web of obligations to prevent within its own territory, where it usually has full jurisdictional control. The categories of obligations uncovered in the territorial layer will offer a foundation for the other chapters. Although there is a move away from a strictly territorial applicability of human rights, most human rights treaties do not depart from the controlling notion of jurisdiction.¹¹⁴ Therefore, the next step will be to translate territorial obligations to prevent torture, arbitrary deaths and genocide to an extraterritorial setting based on jurisdiction. Extraterritorial obligations based on jurisdiction are acquired by carrying out some level and form of control over territory or individuals abroad.¹¹⁵ Examples are the obligation of an occupying power to prevent violations in occupied territory or the obligation to prevent violations of the rights of arrested or imprisoned individuals under a state's extraterritorial authority and control.¹¹⁶ Obligations to prevent often differ in content and scope from those within state territory, because government officials acting abroad usually do not have the same level of power or resources.¹¹⁷ Third, the

¹¹⁰ Higgins 2010, pp. 282–87; Peters 2009, pp. 514–26.

¹¹¹ ECtHR, *Al-Skeini and Others v. the United Kingdom*, GC Judgment on Merits, 7 July 2011, no. 55721/07 (*Al-Skeini*), paras 130–40: Contracting states of the European Convention on Human Rights (ECHR) are obligated to secure the full range rights in cases where they exercise effective control over a territory and the rights relevant to a situation in cases of authority and control over an individual abroad.

¹¹² *Genocide* 2007, above n. 2, para 430 last sentence.

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

¹¹⁴ Wenzel 2008, paras 5–7: Jurisdictional limitations are inserted in human rights treaties since states are not considered to be able to “secure human rights for persons all over the world.” Nevertheless, human rights (instruments) have been applied extraterritorially both based on jurisdiction and beyond jurisdiction; Milanović 2011, chp. IV.

¹¹⁵ *Al-Skeini*, above n. 111, paras 130–40.

¹¹⁶ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits, 19 December 2005, ICJ Rep 34, para 179; *Al-Skeini*, above n. 111, para 137.

¹¹⁷ *Al-Skeini*, above n. 111, para 137: In cases of authority and control over an individual abroad, member states are obligated to secure the rights and freedoms “that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored”.”

research will outline and analyze extraterritorial obligations to prevent torture, arbitrary deaths and genocide beyond a state's jurisdiction and discuss what trends are relevant for the future development of this layer of obligations to prevent gross human rights violations. In the *Genocide* case, instead of the concepts of territory and jurisdiction as the traditional bases for obligations under human rights law, the ICJ used "the capacity to influence effectively" to ground the extraterritorial obligation to prevent genocide.¹¹⁸ It will be explored if other gross human rights violations have to be prevented from occurring without the necessity of a jurisdictional link. There are developments that seem to suggest there is momentum in that direction.¹¹⁹

The various obligations that have been separated in these three layers can in fact overlap and interact, since multiple states may have the same or similar obligations in relation to one particular situation of gross human rights violations.¹²⁰ When this is the case, it can influence what each state is able and/or required to do.¹²¹ Several principles can help sort out such interactions. For example, the ECtHR has on multiple occasions established that, when a territorial state loses authority over parts of its territory or people, for example because a foreign state exercises extraterritorial jurisdiction there, it still has positive obligations to try and regain control and ensure respect for human rights in those areas.¹²² When multiple states exercise extraterritorial jurisdiction over the same territory or people abroad, for example in

¹¹⁸ *Genocide* 2007, above n. 2, para 430; Gattini 2007, p. 700; Glanville 2012, p. 18: The obligation to prevent genocide is "borne by every state to a greater or lesser degree" [emphasis added].

¹¹⁹ Zimmermann 2011: Discusses treaty based sources of obligations to prevent crimes against humanity and war crimes; Cassese 2001, pp. 264–5: Notes that there is a "general obligation of international cooperation for [the] prevention and punishment" of at least "the most odious international crimes such as, in particular, genocide and crimes against humanity"; International Law Commission 2001a, Article 41: Article 41 of the Articles on State Responsibility does contain a progressively developing collective obligation to "cooperate to bring to an end", or in other words prevent the continuation of, grave breaches of peremptory norms, which implies such obligations may also exist in other cases than genocide.

¹²⁰ An example is the Srebrenica genocide. Genocide Convention, above n. 44, Article 1: Bosnia had an obligation to prevent and not commit genocide as the territorial state; *Mothers of Srebrenica*, above n. 48, para 5.1: The Netherlands had obligations to prevent based on the presence of state officials on Bosnian territory; *Genocide* 2007, above n. 2, para 438: Serbia was under an obligation to prevent, based on its capacity to effectively influence the situation.

¹²¹ See for example: ECtHR, *Ilaşcu and Others v. Moldova and Russia*, GC Judgment on Merits, 8 July 2004, no. 48787/99, paras 331, 441, 448, 453: Both Moldova and Russia were ruled to have jurisdiction over the Transdniestrian region and held responsible for their respective failures to prevent the ill-treatment of the applicant.

¹²² *Ibid.*, paras 333–5: "[T]he applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but [...] its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention." "The State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention." The scope of these positive obligations is related to "the material opportunities available to the State Party to change the outcome of events"; confirmed in: ECtHR, *Ivancov a.o. v Moldova and Russia*, Merits, 15 November 2011, no. 23687/05, paras 105–

the context of multinational operations, agreements addressing structures of operational control and the division of labor between the participating states can help indicate which state is obligated to ensure human rights in which area/towards which individuals.¹²³ In regard to extraterritorial obligations beyond jurisdiction, there are not yet any clear principles to help sort out interactions between multiple duty-bearing states.¹²⁴ Although the influence of overlapping obligations on the scope of individual state obligations will be discussed where it has come up in relation to the prevention of gross human rights violations, it is an issue of broader relevance for human rights obligations generally and is not one of the main objects of this study.

1.3.4 Determining the Content and Scope of Obligations to Prevent

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

8; ECtHR, *Catan and Others v. the Republic of Moldova and Russia*, GC Judgment on Merits, 19 October 2012, nos. 43370/04, 8252/05 and 18454/06, para 109.

¹²³ *Al-Skeini*, above n. 111, para 147: The ECtHR took the structures of command and the fact that the United Kingdom assumed responsibility for security in the region into account when establishing the United Kingdom’s jurisdiction over the applicants; ECtHR, *Jaloud v. the Netherlands*, GC Judgment on Merits, 20 November 2014, no. 47708/08, paras 144–9: The Netherlands was acting under a Security Council mandate and had assumed responsibility for the security in South-Eastern Iraq and “retained full command over its contingent there.”

¹²⁴ De Schutter et al. 2012, Principle 30 and Commentary to Principle 31, para 8: It has been suggested in the context of economic, social and cultural rights that states have a procedural obligation to devise a system of allocation for obligations to assist and cooperate.

¹²⁵ ICJ Statute, above n. 40, Article 38(1)a, b and c.

¹²⁶ Milanović 2011, p. 3.

The texts of treaty provisions are short and phrased in very general, open-ended terms and meaning is attributed to these provisions through interpretation. The rules on treaty interpretation prescribe that treaties should be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, unless this leads to ambiguous or unreasonable outcomes.¹²⁷ Unfortunately, the texts of treaties and their *travaux préparatoires* do not often elaborate much on the content and scope of obligations to prevent and the practice of states is hard to access and review.¹²⁸ Throughout the research, much weight is attached to case law of courts and supervisory bodies, because it is often the most accessible, prolific and authoritative source of information to determine the law in this area.¹²⁹ In general, only the case law of the body or court that is authorized to interpret a specific treaty and pertaining to a specific prohibition will be used to make pronouncements on the content and scope of obligations to prevent. However, decisions may sometimes be of undeniable analogous relevance for other treaties or prohibitions and can represent general trends in interpretation practices. For example, there is a broad practice of cross-referencing among human rights supervisory bodies and courts.¹³⁰

In areas where the treaty texts and related documents or case law do not offer sufficient guidance to determine the law, the study will take position based on independent critical analysis, supported by the teachings of the most highly qualified publicists.¹³¹ For example, the reasoning in cases addressing extraterritorial obligations based on jurisdiction is often ambiguous and sometimes even straight-out contradictory.¹³² Therefore, in Chap. 3 on extraterritorial jurisdiction, a theoretical framework resting on threshold and capacity is developed, to help

¹²⁷ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Articles 31–2.

¹²⁸ *Travaux préparatoires* are also less important for the interpretation of human rights treaties, because they are living instruments subjected to autonomous interpretation in light of current living conditions. See among others: IACtHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, 31 August 2001, Series C No. 79, para 146; ECtHR, *Rantsev v. Cyprus and Russia*, Merits, 7 January 2010, no. 25965/04 (extracts), paras 272–82.

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

¹³⁰ See for example: IACtHR, *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, 31 January 2006, Series C No. 140, para 124: Citing a paragraph from a judgment of the ECtHR; AComHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Merits, 15 May 2006, No. 245/02, para 145: refers to the IACtHR; AComHPR, *Article 19 v. The State of Eritrea*, Merits, 30 May 2007, No. 275/2003, paras 97 and 99: refer to the ECtHR; HRCee, *Pillai v. Canada*, Merits, 25 March 2011, Comm. 1763/2008, No. CCPR/C/101/D/1763/2008, A/66/40, Vol. II, Part I (2011), Annex VI at 473, para 11.4: The HRCee diverted from its own previous case law and brought the ICCPR standard of knowledge for non-refoulement in line with that of the CAT.

¹³¹ ICJ Statute, above n. 40, Article 38(1)d.

¹³² See 3.1; For example, a case that received much criticism and of which many points were watered down/ overturned in later case law is: ECtHR, *Banković and Others v. Belgium and Others*, GC Judgment on Merits, 12 December 2001, no. 52207/99.

analyze the content and scope of obligations in that particular layer.¹³³ Furthermore, the four temporal phases and categories of obligations to prevent uncovered in the territorial layer are used as a tool to analyze obligations. Chapter 4 will also elaborate on several developing obligations and related theories relevant to obligations to prevent gross human rights violations beyond jurisdiction.

Finally, a few normative assumptions underlying the research need to be made explicit, to allow readers to better understand its strengths and limitations.¹³⁴ First of all, the research is based on the assumption that international human rights law can play a positive role in the prevention of gross human rights violations because it offers a universal legal framework. This is not to say that human rights law is per definition a good thing. Human rights law can both challenge and sustain power that is used to violate human rights and is an inherently ambivalent system. As such, it can also be used to negatively influence (potentially) violent situations. States may avoid using certain human rights terms to label situations, like genocide, so as to try and avoid the obligations associated with that term.¹³⁵ Using human rights in peace negotiations has even been argued to sometimes prolong conflicts by its strong focus on aspects like fact-finding and accountability over reconciliation, for example in the case of Bosnia and Herzegovina.¹³⁶ Nevertheless, states have almost universally agreed through human rights treaties on the importance of certain core values and people across the world can use human rights law to communicate about these values. As such, I believe human rights law offers a valuable tool that is worth fully understanding and exploiting. Therefore, this research is based on the belief that clarifying obligations to prevent gross human rights violations will at the very least add clarity to the debate in that area and can at best induce efforts of implementation and enforcement.

1.4 Structure

In the following chapters, the first step will be to assess territorial obligations to prevent torture, arbitrary death and genocide according to the four temporal phases (Chap. 2). This will give insight into the content and scope of obligations within state territory, the triggering role of knowledge to incur and limiting role of capacity to the scope of certain obligations. Based on the many similarities between the obligations to prevent required in the context of all three prohibitions, the chapter brings to light certain crosscutting categories of obligations to prevent gross human

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

¹³⁴ See generally: Maxwell 2012, paras 97 and 99.

¹³⁵ Jacobs 2010.

¹³⁶ Anonymous 1996; the notion of law as a language or argumentative practice stems mostly from the work of Koskeniemi 2006, p. 563; Parlevliet 2015.

rights violations. There are also interesting differences to be noted in the measures required in the context of the different prohibitions, which underlines the importance of the specific type of injury for the way obligations to prevent are modeled. The categories of obligations to prevent, combined with a theoretical framework of threshold and capacity, will then be used to analyze the content and scope of extraterritorial obligations based on jurisdiction (Chap. 3). The resulting overview will give insight into different ways that an extraterritorial setting influences the content and scope of obligations and the important role played by a state's capacity to ensure human rights in that regard. To complete the overview, the content and scope of extraterritorial obligations beyond jurisdiction will be discussed and what trends are relevant for their future development (Chap. 4). Apart from the obligation to prevent genocide, there are very few existing extraterritorial obligations to prevent torture and arbitrary deaths beyond jurisdiction. There is, however, increasing attention for developing obligations that require states to prevent and bring to an end gross human rights violations abroad, based on forms of influence beyond jurisdiction.

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