Prevention is Better than Cure:

The Obligation to Prevent Human Rights Violations

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Abstract

The obligation to prevent human rights violations has received little attention in the international human rights community, including in academic commentary. This article considers the sources of the obligation to prevent violations in international human rights law and explores some of the content of the obligation. This leads to a recognition that this obligation may challenge the way we often approach human rights violations and what States need to do to comply. While much of the attention to human rights violations tend to be retrospective – after they have occurred, the obligation to prevent violations requires that action be taken before individuals and groups of individuals become victims.

1. Introduction

Human rights as enshrined in international human rights law represent generally agreed standards for how individuals and groups of people should be treated, and breaches of these standards represent violations of the rights. To comply with such standards, States as obligations holders need to be proactive to prevent violations of them, and to respect and protect rights of individuals. The obligation to prevent human rights violations is referred to in several human rights treaties, in human rights jurisprudence, in declarations, and in other soft law instruments. Yet, the actual content of an obligation to prevent human rights violations has not received much systematic attention.[1] One of the reasons for this may be that prevention requires a multitude of actions from a variety of people from different fields and disciplines.[2]

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[1] The Netherlands International Law Review published a Special Issue on Preventive Obligations in 2021. This issue of the journal covers topics such as prevention of domestic violence; due diligence related to prevention of racism and discrimination, due diligence related to prevention of business human rights abuses; and due diligence related to international cooperation to ensure food justice in the context of land grabbing. See *Netherlands International Law Review*, vol. 68, issue 3, 2021.

[2] Paul Hunt "Using all the tools at our Disposal: Poverty Reduction and the Right to the Highest Attainable Standard of Health", *Development Outreach – Special Report*, World Bank Institute, (2006) at 19.

The preventive actions necessary to take are also context specific,[3] and it is therefore more difficult to establish exactly which measures need to be employed at any given time or in any given situation, to comply with the obligation to prevent.

While the argument that human rights violations should be prevented may not necessarily be controversial, the content of such an obligation may require that we question, and perhaps alter, some of the ways in which we routinely have approached human rights compliance, and the functioning of some of the mechanisms for such compliance may need rethinking.

The content of human rights obligations is both substantive and procedural. The substantive content relates to the content of individual rights as codified in international human rights law; while the procedural obligations concern processes and procedures established to hold States accountable for their human rights compliance. One of the ways in which the procedural human rights obligations are complied with is by engaging with the structures and mechanisms that hold States to account for their actions and omissions. These structures and mechanisms are often, but not exclusively, carried out through a State's or an international body's Court system or quasi-legal structures.

The focus and relative success of institutions such as the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights and the U.N. Human Rights Committees, are important for several reasons. First, these institutions provide essential routes for accountability, and enable victims of human rights violations to gain redress. Second, the interpretation of human rights law by these institutions are authoritative, and they provide knowledge and understanding of how human rights standards are complied with or violated. Third, States' engagement with these structures demonstrates their willingness to cooperate with the scrutiny structures established by international human rights treaties. Yet, despite the importance of the work of these judicial bodies, the almost unique focus on their activities in human rights circles, overshadows the importance of other efforts to implement human rights and comply with the standards without having decisions by judicial bodies.

Frequently, the approach by States (and at times human rights lawyers) is that without a judicial body stating that substantive obligations have been breached, no such breach will have taken place. When we know how difficult it is for many individuals and groups of people to access

[3] Olga Martin-Ortega *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?*, 31 NQHR, No. 4 2013, 44, 53

these judicial bodies, other avenues for complying with human rights standards should be sought.

In this article, one such avenue will be considered, namely, that of preventing breaches of human rights before it becomes necessary to bring in accountability structures. This has been a neglected aspect of human rights obligations, and this article will shed light on some of the intricacies of the obligation to prevent human rights violations. This should in no way be seen as a rejection of the crucial role judicial structures and mechanisms play. The need to hold States and other obligation holders accountable through judicial or quasi-judicial structures is an essential and foundational element in human rights law. However, it does not cover all aspects of human rights implementation.

Before embarking on the analysis of the content and complexities of the obligation to prevent human rights violations, it is necessary to address terminology briefly. When discussing this topic with colleagues, several people have equated prevention with protection. While this argument is understandable, there is a significant danger of confusion. If we see protection as a broader concept than the obligation to protect, there may be an overlap. However, the obligation to protect, as part of the tripartite obligation classification that is now commonly accepted (the obligation to respect, to protect, and to fulfil) is defined as a State's obligation to protect individuals from human rights infringements by third (private) parties. Therefore, if we equate the obligation to prevent with the obligation to protect, the result is a very narrow approach to prevention, and a far narrower concept than what an obligation to prevent indicates in current international human rights law.

This article is divided into several sections. Following the introduction, Section 2 gives a brief overview of the legal sources of the obligation to prevent human rights violations. It is argued that while the obligation is referred to in several treaties, soft law and jurisprudence, the concept of prevention is fundamental for compliance with human rights standards and is applicable to all human rights. Following this section, the article addresses the nature of the obligation to prevent and argues that it has both a reactive and proactive character (Section 3). Section 4 discusses some of the concepts that are necessary to (re)consider in light of the obligation to prevent, namely a rethink of the concept of 'victim'; how we understand foreseeability; and due diligence as an obligation for States. Section 5 covers the geographic reach of the obligation to prevent and argues that this obligation is applicable both within and outside the territorial borders of the State. This discussion is followed by an analysis of how the obligation

to prevent relates to the more common tripartite obligations classification of respect, protect, and fulfil (Section 6). The article concludes with Section 7 that deals with what measures States need to take to comply with this obligation.

It should be noted that while different actors may have an obligation to prevent human rights violations, the focus of the present article is State obligations to prevent such violations.

2. International Human Rights Law Sources on the Obligation to Prevent

There are several treaties and soft law instruments that make specific reference to an obligation to prevent human rights violations, and the jurisprudence of regional human rights courts and other monitoring mechanism have addressed prevention obligations in their work. This section will address some of these sources, followed by a discussion of a more general foundation for such an obligation, before considering whether the obligation may stem from general human rights principles.

2.1 Treaties

a) International Human Rights Treaties

The way in which human rights treaties address the obligation to prevent can be divided into three categories. First, a general obligation related to the full content of the treaty; second, treaties where the obligation to prevent has been specifically singled out for certain parts of the treaty; and third, treaties where the obligation to prevent has been framed in detailed measures for implementation and compliance.

Two treaties where the term 'obligation to prevent' is clearly articulated is the Convention on the Prevention and Punishment of the Crime of Genocide (1948)[4] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)[5]. In the former treaty, Article 1 provides that State parties shall 'prevent and punish' acts of Genocide. In the latter, Article 2 holds that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its

[4] U.N. GA *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 Dec.1948, UNTS, vol. 78, 277

[5] U.N. GA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 Dec. 1984, UNTS, vol. 1465, 85

jurisdiction."[6] Another example of treaties with a general obligation to prevent is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, (the Palermo Protocol 2000)[7]. The purposes of the Protocol is detailed *inter alia* "to prevent and combat trafficking in persons, paying particular attention to women and children",[8] and to that end, State Parties shall "establish comprehensive policies, programmes and other measures: a) to prevent and combat trafficking in persons." [9] These three instruments clearly contain an obligation to prevent.

An example of the second category of treaties where the obligation to prevent has been singled out to cover specific aspects of the treaty can be found in The Convention on the Elimination of Racial Discrimination (1965),[10] Article 3 provides that "State Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction".

The third category where the obligation to prevent is framed around the implementation and compliance aspects can be seen for instance in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2001).[11] Article 9 of this Protocol provides that "States Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol". The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000),[12] holds in its Article 4 (2) that "State Parties shall take all feasible measures to prevent […] recruitment and use [in hostilities of persons under the age of 18 years] including the adoption of legal measure necessary to prohibit and criminalise such practices." Likewise, Article 17 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of

[6] For a general discussion on prevention related to the Torture convention, see Isobel Renzulli *A Critical Reflection on the Conceptual and Legal Foundations of the Duty to Prevent Torture*, 20 The International Journal of Human Rights, 1244 (2016)
[7] U.N. GA, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000
[8] *Id.* Art. 2
[9] *Id.* Art. 9
[10] U.N. GA, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 Dec. 1965, UNTS, vol. 660, 195
[11] U.N.GA, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263
[12] U.N.GA, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000 A/RES?54/263

Others (1949),[13] paragraph 3 provides that State Parties particularly undertake "to take appropriate measures to ensure supervision of railways stations, airports, seaports and en route, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution."

b) Regional Human Rights Treaties

At the regional level, Article 7 (b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994),[14] requires that States "apply due diligence to prevent, investigate and impose penalties for violence against women." Similarly, the Council of Europe has adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence ('the Istanbul Convention'),[15] where the purpose of the convention is *inter alia* stated as "to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence".[16]

The African Union has also adopted treaties that confirm the obligation to prevent human rights violations. The Protocol to the African Charter on Human and Peoples' Rights on Rights of Women in Africa,[17] holds that the State Parties shall

- Adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
- Identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence.[18]

These examples show the different ways in which treaties provide for the obligation to prevent human rights violations.

2.2 International and regional jurisprudence

[13] U.N.GA, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317
[14] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994
[15] Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, 2011
[16] *Id.* Article 1 (1)(a)
[17] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003
[18] *Id.* Article IV (2) (b) and (c)

International and regional courts have referred to the obligation to prevent human rights violations in several cases. It will lead too far to go into detail on how these institutions have referred to, and understood, this obligation. However, it will be useful for the further analysis to reflect on a few examples from the jurisprudence of these Courts.

The International Court of Justice considered the obligation to prevent genocide in detail in the *Bosnia and Herzegovina v. Serbia and Montenegro* case.[19] In this case, the Court emphasised the future aspect of the obligation in stating that the obligation to prevent genocide does not only come into being "when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of serious risk that genocide will be committed."[20] The Court furthermore held that the obligation to prevent is an 'obligation of conduct and not of result',[21] as the State cannot be under an obligation to succeed in all circumstances to prevent[22] human rights violations.

The European Court of Human Rights confirmed this emphasis on conduct in the case of *Öneryildiz v. Turkey*, which concerned breach of Article 2 of the European Convention on Human Rights (ECHR),[23] the right to life, after an explosion at a waste site in Turkey where thirty-nine people died. The Grand Chamber of the Court held that "the national authorities did not do all that could have been expected of them to prevent the death of the applicant's close relatives in the accident of 29 April 1993 at the Ünraniye municipal rubbish tip, which was operated under the authorities' control."[24] Furthermore, in this case, the Court reiterated that

> Article 2 does not solely concern the deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. […] The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at

[19] Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007, I.C.J. Rep. (February 26)
[20] *Id.* ¶ 431
[21] *Id.* ¶ 430
[22] *Id.*
[23] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5
[24] Ö*neryildiz v. Turkey*, 48939/99, European Court of Human Rights, Judgment 20 November 2004, ¶ 70

stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites".[25]

The Court further held that "The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life."[26] Hence, in this case the Court held that the State had been in breach of its obligation to prevent the loss of life in contravention to Article 2 of the ECHR.

The Inter-American Court on Human Rights (IACtHR) held in its judgment in the case of *Velásquez-Rodríguez v. Honduras*[27] that "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[28] In 2017 the same Court delivered an Advisory Opinion upon request from the Republic of Columbia on environment and human rights. The Court confirmed the obligation to prevent human rights violations, and held that to comply with obligations of prevention "international human rights law imposes certain procedural obligations on States in relation to environmental protection, such as access to information, public participation, and access to justice."[29] The IACtHR holds a similar view to that of the ICJ that the "obligation to prevent is an obligation of means or behaviour and non-compliance is not proved by the mere fact that a right has been violated."[30] Regarding the means or measures the State needs to take in order to comply with the obligation to prevent, the Court holds that "It is not possible to enumerate all the measures that could be adopted to comply with the obligation of prevention, because they will vary according to the right in question and according to conditions in each State party. However, certain minimum measures can be defined that States must take within their general obligation to take appropriate measures to prevent human rights violations as a result of damage to the environment",[31] and

[25] *Id.* ¶ 71
[26] *Id.* ¶ 89
[27] Velásquez Rodríguez Case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988
[28] *Id.* ¶ 172
[29] The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretations and Scope of Article 4(1) and 5(10) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion *OC-23/17* Inter-Am Ct H.R. (Nov. 15, 2017*)* ¶ 106.
[30] *Id.* ¶ 118
[31] *Id.* ¶ 144

lists the following as measures: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate when environmental damage has occurred.[32]

2.3 Soft law

In addition to these examples of treaties that contain explicit references to States' obligations to prevent human rights violations, and the jurisprudence from international and regional courts, soft law instruments in the form of declarations and authoritative interpretations by human rights monitoring bodies confirm the obligation to prevent.

The Vienna Declaration and Programme of Action[33] adopted at the World Conference of Human Rights in 1993, provides in its Preamble

> Recognizing […] that the international community should devise ways and means to remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting therefrom throughout the world.

The Declaration continues to call for prevention in several paragraphs, including paragraph 20 where it urges "all Governments to take immediate measures and to develop strong policies to prevent and combat all forms and manifestations of racism, xenophobia or related intolerance […]" Furthermore, The Declaration on the Elimination of Violence Against Women, adopted by the U.N. General Assembly in 1993 urges States to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons." [34]

This obligation is also referred to in several General Comments or General Recommendations adopted by various U.N. Human Rights Committees. For example, the Human Rights Committee has confirmed the obligation to prevent human rights violations in their General Comment no. 36 on Article 6 – the Right to Life (2019). For example, in Para 21 the Committee holds that

> States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals

[32] *Id.* ¶ 145
[33] U.N. GA, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23
[34] U.N. GA *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104

> and organized crime or militia groups, including armed or terrorist groups. […] States parties must further take adequate measures of protection, including continuous supervision, in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals and private security firms.

The General Comment also addresses the right to life in light of genocide, and refers to "the obligation to prevent and punish all deprivations of life, which constitute part of a crime of genocide".[35]

Of other General Comments that refer to the obligation to prevent human rights violations, the following can be mentioned: CEDAW General Recommendation no. 28 (2010),[36] on the core obligations of State parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979),[37] where it is Stated that "State Parties have a due diligence obligation to prevent, investigate, prosecute and punish, […] acts of gender violence".[38] The Committee Against Torture has in its General Comment no. 2 (2008)[39] held that "The obligation to prevent torture in Article 2 is wide-reaching"[40] and details that the obligation implies *inter alia* that the State obligation to prevent torture "also applies to all persons who act, de jure or de facto, in the name of, in conjunction with or at the behest of the State party".[41] The General Comment also confirms that "The protection of certain minority or marginalized individuals or populations especially at risk of torture is part of the obligation to prevent torture or ill-treatment."[42]

Finally, the Committee on the Rights of the Child covers the obligation to prevent human rights violations in their General Comment No. 13,[43] where it states that

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[35] *Id.* ¶ 39
[36] U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28
[37] U.N. GA, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180
[38] CEDAW General Recommendation 28 *on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, Para 19.
[39] U.N. Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2
[40] *Id.* Para 3
[41] *Id.* Para 7
[42] *Id.* Para 21
[43] U.N. Committee on the Rights of the Child (CRC), *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13

> References to "States parties" relate to the obligations of States parties to assume their responsibilities towards children not only at the national level, but also at the provincial and municipal levels. These special obligations are due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations. […] States parties, furthermore, shall ensure that all persons who, within the context of their work, are responsible for the prevention of, protection from, and reaction to violence and in the justice systems are addressing the needs and respecting the rights of children.[44]

From this brief presentation of treaties, jurisprudence, and soft-law that refer to an obligation to prevent, two observations can be made. First, the obligation to prevent human rights violations is contained in a number of sources of hard- and soft-law. Second, this obligation is considered to exist both where a treaty has explicitly included the wording, such as the Genocide convention; but also for treaties that do not contain such language., e.g. the European Convention on Human Rights. It can therefore be concluded that the obligation has legal foundations, and it is an overarching obligation to ensure States' compliance with their human rights commitments.

2.4 Sources of obligation beyond explicit provisions

Another question to be addressed is whether the obligation to prevent human rights violations has a foundation beyond that of explicit codification. As shown above, codification is by no means universal in international human rights instruments. Does this mean that the obligation to prevent human rights violations only apply to those treaties, and to those rights within treaties that have explicitly been identified; or, is the obligation to prevent human rights violation a broader, more general, obligation that apply across human rights law?

To address this question, it is necessary to go back to the first codifications of international human rights law and to interrogate the aims and objectives of the instruments that paved the way for the current rich collection of international human rights provisions. The aims and

[44] *Id.* Para 5

objectives are essential for the interpretation of the text of any treaty,[45] and the treaty texts relevant for this interpretation include the preamble and annexes.[46]

The first international codification of international human rights law took place with the adoption of the Charter of the United Nations in 1945.[47] The preamble holds that the United Nations are "determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". The text of the Charter itself confirms the importance of human rights and fundamental freedoms and holds that one of the four purposes of the organisation is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[48] The obligations related to the purpose as detailed in Article 1(3) were further elaborated in Articles 55 and 56 of the U.N. Charter. These provide that the member States of the U.N. "pledge themselves to take joint and separate action in co-operation with the Organization […]" to promote "universal respect for, and observance of, human rights and fundamental freedoms for all […]". The centrality of universal respect and observance of human rights in the Charter is a normative confirmation that this can be considered part of the object and purpose of the treaty. According to the Vienna Convention on the Law of Treaties, a State that has signed a treaty has an obligation to refrain from acts which would defeat such object and purpose,[49] and furthermore, when a State has ratified the treaty it is binding, and the State is under an obligation to comply with its provisions in good faith.[50] Currently, 193 States have ratified the U.N. Charter, and thus carry the full obligations that such ratification imply, including to promote and encourage respect for human rights

The next step in the development of international human rights was the drafting and adoption of the Universal Declaration of Human Rights (UDHR). Eide and Alfredsson hold that the UDHR represents a "moral platform requiring respect for the freedom and dignity of everyone, and a *future-oriented* project requiring continuous efforts at all levels to make human rights universally enjoyed in reality."[51] The future orientation of the UDHR is an overarching value for the international human rights project; it implies that we are all entitled to enjoy our human

[45] U.N. GA, *Vienna Convention on the Law of Treaties*, May 23,1969, UNTS, vol. 1155, p. 331 (VCLT) Article 31
[46] *Id.*
[47] U.N. GA, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI
[48] *Id.* Article 1 (3)
[49] See *supra* note 45 Article 18
[50] *Id.* Article 26
[51] Asbjørn Eide & Gudmundur Alfredson *The Universal Declaration of Human Rights: A Commentary*, Oslo, Universitetsforlaget, (1992) at 5 (emphasis added)

rights, and that States (and possibly other actors that may impact upon this enjoyment) are under an obligation to make 'continuous efforts' to ensure that this is happening. While not a treaty, and thus not legally binding at the time of its adoption, the UDHR is generally considered to be the instrument that defines the U.N. Charter's human rights provisions,[52] and as such, carries significant legal effect.

These two initial instruments were followed by the two International Covenants on Human Rights,[53] and a significant number of individual subject specific human rights treaties, both on international and regional levels. These treaties have gathered a high number of ratifications from U.N. member States.[54] Consequently, international human rights treaties and customary international human rights law now represent a global consensus on standards that should be respected and upheld. This is reflected in the common preamble for the two Covenants, which emphasise the foundation of the U.N. Charter and the UDHR, which recognise that "the ideal of free human beings enjoying civil and political freedoms and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights." The importance of this passage from the preambles is clear from the perspective of an obligation to prevent. First, the reference to 'the ideal' implies that the Covenants read in conjunction with the U.N. Charter and the UDHR represents a standard for how individuals can expect to be treated. Second, the reference to the creation of conditions for the enjoyment of human rights clearly refers to obligations for States to provide for such conditions, some of which will be complied with through the prevention of human rights violations.

Consequently, this vast body of legal sources represents a common standard for how individuals and groups of people should be treated by States across the world. This common standard carries obligations for States in terms of their behaviour towards their own population, and other States populations when they are impacted by the first State's behaviour.[55] Such common standards cannot be achieved without careful consideration of how States' behaviour

[52] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law* 25 Ga J Int'l & Comp L (1995) 287, 353

[53] U.N. General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (ICESCR); U.N. General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, (ICCPR)

[54] As of August 2023, the ICESCR have 171 ratifications; the ICCPR 173; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment 173; Convention on the Elimination of Discrimination against Women 189; Convention on the Rights of the Child 196; Convention on the Rights of Persons with Disabilities 186; and Convention on the Elimination of Racial Discrimination 182

[55] The question of extraterritorial application of the obligation to prevent will be discussed in Section 5 below

affects human rights enjoyment. Even without specific reference to an obligation to prevent human rights violations, the international human rights project, to be successful, requires that the obligation holders prevent human rights violations, and that they take active measures to that effect. To accept human rights obligations, but not an obligation to prevent violations of these rights, would render human rights protection for individuals and groups of people without meaning, and remove the ethos behind international human rights law. This argument is supported by the *pro homine* approach to interpretation, which requires that human rights norms are interpreted in the way "most favorable to the individual human being and protective of human dignity".[56] This approach has been confirmed by the Inter-American Court in the *"Mapiripán Massacre" v. Colombia case* where the Court held that "when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being."[57] Consequently, the object and purpose of international human rights treaties, including the U.N. Charter is to ensure the universal protection of human rights, the dignity and worth of the human person, and they set a 'common standard of achievement'[58] for such protection, one element of which is to prevent human rights violations.

3. The nature of the obligation to prevent

This legal foundation for an obligation to prevent human rights violations does not address its nature. This section of the article will consider the positive/negative character of the obligation, the indirect and direct approach to prevention, and whether this is an obligation of conduct and/or result.

3.1 Positive vs. negative obligation to prevent

It is generally recognised that human rights compliance carries both negative and positive obligations for States. States have to refrain from interfering in human rights enjoyment (negative obligations), but also take positive steps to protect and ensure human rights

[56] H. Victor Condä, A Handbook of International Human Rights Terminology (2nd edn, Nebraska UP 2004) 208, as cited in Steven Wheatley The idea of international human rights law (First ed.). NewYork, NY: Oxford University Press. (2019), at 109.
[57] Inter-American Court of Human Rights, *Case of the 'Mapiripán Massacre' v. Colombia,* Judgment of 15 September 2005 (Merits, Reparations, and Costs), ¶ 106
[58] U.N. General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Preamble

enjoyment by individuals and groups of individuals (positive obligations). There are no societies where a mere lack of interference results in full enjoyment of human rights, and the provisions in international human rights treaties confirm this. For instance, ICCPR provides in Article 2(1) that "Each State Party to the present Covenant undertakes *to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". Similarly, the ICESCR requires States Parties to "*take steps, individually and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[59] The inclusion of terms such as 'to ensure' and 'to take steps' has been interpreted to imply positive obligations to take action to improve individuals' human rights situation.[60] Similar provisions can also be found in regional human rights instruments, where the terms 'secure to everyone',[61] 'respect … and ensure',[62] and "recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".[63] Consequently, human rights instruments recognise the positive obligations on the State Parties to take action to enable individuals to enjoy human rights.

This recognition of both positive and negative nature of obligations is essential for the obligation to prevent human rights violations. Following this dichotomy, States must refrain from actions that are likely to lead to human rights violations, as well as taking positive actions to ensure that human rights violations are avoided. To illustrate, if a State plans to reduce or abolish social security payments to individuals unable to work and earn their own income, and these plans are likely to lead to the individuals not being able to access sufficient food, these plans would represent a preventable interference in the right to food for the individuals concerned. In terms of the positive obligations related to prevention, another example can be

[59] ICESCR, Article 2(1) (emphasis added)
[60] U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para IACHR1, of the Covenant)*, 14 December 1990, E/1991/23, para. 2
[61] ECHR, Article 1
[62] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 1; The Arab Charter on Human Rights provides that State parties shall 'ensure' the rights in the Charter (Article 3) League of Arab States, *Arab Charter on Human Rights*, 2004
[63] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Article 1.

seen in the *Öneryildiz v Turkey* case referred to above.[64] Here the Turkish authorities omitted to take action to prevent events that foreseeably led to loss of life.

3.2 Indirect and direct approach to prevention

The second aspect of the nature of the obligation to prevent relates to when, or at what stage, States should ensure that they prevent human rights violations. As referred to above, the ICJ has held that the obligation to prevent will "arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[65] Generalising this to human rights law more broadly, the obligation is triggered the moment the State knows, or should have known of the risk.[66] However, the determination of the manner in which to comply with the obligation will differ depending on the context in which potential risk occurs.

In 2015, The OHCHR published a report which divides the obligation to prevent into two separate categories: direct and indirect prevention. They define these categories in the following manner:

- Direct prevention aims to eliminate risk factors and establish a legal, administrative and policy framework which seeks to prevent violations. It is also contingent on establishing a culture of respect for human rights, good governance and the rule of law, and an enabling environment for a vibrant civil society and free press.[67]
- Indirect prevention of human rights violations, or non-recurrence, takes place after a violation has occurred. It aims to prevent recurrence by identifying and addressing causes of violations of all human rights, through investigation and prosecution, ensuring the right of victims and societies to know the truth about violations, and the right of victims to an effective remedy, in accordance with international law.[68]

For both of these categories, the attention is on the positive obligations of States, namely, what actions or measures they need to take to comply with their international human rights law obligations.

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[64] Ö*neryildiz v. Turkey,* fn 24
[65] ICJ, *supra* note 19 and accompanying text
[66] For a discussion on foreseeability of risk, see section 4.2 below.
[67] U.N. Office for the High Commissioner for Human Rights *The Role of Prevention in the Promotion and Protection of Human Rights*. U.N. Doc A/HRC/30/20 (16 July 2015), para 9 (footnotes omitted)
[68] *Id.* para 10 (footnotes omitted)

Indirect prevention

Much of the attention to individuals' enjoyment of their human rights has focused on whether they have recourse to remedy in case of alleged breaches of the provisions in international human rights treaties. This is an essential element of human rights, and indeed access to remedies is a human right in itself.[69] Making remedies available when human rights have been violated serve at least two purposes: first, reparation for the victim of the violations; and second, a clarification (through the remedy process) as to what represents a violation of a particular right, with a view to preventing the same violation from reoccurring.

Indirect prevention of human rights violations may seem to be an oxymoron. Instinctively, we would understand the term 'prevent' to mean to stop something from happening or someone from doing something. Yet, much of the literature referring to the obligation or the duty to prevent with respect to human rights law is addressed from the perspective of a reaction to already committed human rights violations. Grans holds that there are three stages of prevention: primary, secondary and tertiary prevention.[70] "Primary prevention aims to forestall violence before it occurs, secondary prevention aims to detect violence in time or to terminate it at the earliest possible point, and tertiary prevention aims to prevent renewed outbreak of violence or to lessen its impact".[71] Thus the tertiary prevention refers indirect prevention.

This understanding of prevention may partly be explained by the prominent role human rights courts and other institutions hearing individual complaints play in developing human rights law. Stepping back to a conversation with the late Professor Torkel Opsahl (one of the early members of the European Commission on Human Rights as well as the U.N. Human Rights Committee), he held that one of the key functions of these bodies – through hearing individual complaints – was to prevent the same human rights violations from occurring in the future. A similar approach has been confirmed by several human rights bodies that consider individual complaints. Several U.N. committees have confirmed, in their decisions on individual complaints, that part of the outcome should be to prevent the same violations from happening in the future. For instance, the CESCR holds in a number of their cases that the State Party in

[69] See for instance ICCPR, Article 2 (3)
[70] Lisa Grans, *The Istanbul Convention and the Positive Obligation to Prevent Violence* 18, H.R.L.Rev. 133 (2018)
[71] *Id.* at 141

question "has an obligation to prevent similar violations in the future".[72] This expression is also commonly used by other treaty bodies in their decisions on individual communications.[73] In this understanding of the obligation to prevent, the attention is on an individual whose human right(s) have been violated, and the broader implications for this finding. Consequently, through this approach, a violation had to have occurred before the preventive action could be taken, and the preventive action would relate to other potential victims in the future.

Learning from human rights violations in the past, and ensuring that such violations do not reoccur in the future, is a legitimate foundation for preventive action. To understand how specific rights are violated is essential in order to take action to prevent repetition. However, the blanket statement from many of the courts and treaty bodies that States should ensure that such violations do not reoccur in the future gives little specific guidance of what kind of prevention is necessary and the implications for approaches to human rights policies that will result from them. Hence the content of the obligation remains unclear.

The lack of precision also results in uncertainty as to the distinction between an obligation of conduct and an obligation of result. The International Court of Justice has held that the obligation to prevent is an "obligation of conduct and not of result",[74] as the State cannot be under an obligation to succeed in all circumstances to prevent[75] human rights violations. If the obligation to prevent is an obligation of conduct, the content of that conduct needs to be specified, or in other words, what are States under an obligation to do to comply. A statement to the effect of 'do not do it again' leaves little guidance as to how States can ensure that their conduct complies. How this may be addressed will be discussed in later sections of this article.

Direct prevention

From a direct prevention perspective, [76] the obligation to prevent takes a different approach. The focus is to make efforts to avoid human rights violations in the future, without waiting for

[72] U.N. CESCR, *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* concerning communication No. 22/2017, U.N. Doc. E/C.12/65/D/22/2017, Views adopted 7 March 2019.
[73] There are numerous examples of such terms being used, including the Human Rights Committee, Communication nos. 1017/2001 & 1066/2002, U.N. Doc. CCPR/C/90/D/1017/2001&1066/2002,(adopted 20/07/2007) para. 10; The Committee Against Torture, Communication no. 233.2003, U.N. Doc. CAT/C/34/D/233/2003, (adopted 20/05/2005) para. 15; Committee on the Rights of the Child, Communication no. 11/2017, U.N. Doc. CRC/C/79/D/11/2017 (adopted 27/09/2018), para. 13.
[74] ICJ, *supra* note 19 above, ¶ 430
[75] *Id.*
[76] U.N. OHCHR, *supra* note 67

violations to occur before acting. Renzulli holds that "prevention is not about what has happened but, to state the obvious, is about anticipating and regulating situations where" human rights violations may occur.[77] Such anticipation will require an understanding of conditions under which human rights violations are likely to occur, and to avoid such conditions through a variety of actions (and omissions). The anticipation may relate to one specific violation for one specific individual, for example, through protecting a person who is likely to experience violence from a third party[78]. However, it may also relate to a larger group of people who, for instance as a result of severe pollution may have their right to life threatened or violated;[79] or a wider concern for segments in the society that may be adversely affected by certain policies, such as widespread food insecurity as a result of inadequate social security. In such situations it will not be necessary, or indeed pertinent, to wait until violations have occurred, and have been declared as such by a regional court or a U.N. treaty body, before action is taken to ensure the relevant group of people do not suffer rights deprivation. This approach to the obligation to prevent has also been taken by several commentators in different specific areas of human rights law.[80] The focus of this approach is to first identify what constitutes a violation, and then to use this knowledge to take measures for instance through policies, programmes, or administrative practices to ensure that violations do not take place. One way of identifying potential human rights violations from planned or projected policies or actions would be to use the rich experience from the U.N. human rights treaty bodies. In particular, the large number of General Comments from these bodies identify the normative content of rights and the corresponding violations in case of breach of obligations. These sources can be applied as guidance to national policy makers to prevent negative human rights effects.

Direct prevention requires procedures and policies that would identify potential human rights problems in advance of their occurrence. The State must actively seek knowledge of what the effects of plans and procedures would be. The European Court of Human Rights held that Turkey 'should know or have known' of immediate threats to people living in close proximity to a landfill.[81] Such a requirement that the State should know or should have known puts the

[77] Renzulli, *supra* note 6 at 1245
[78] This was the case for instance in ECtHR *Osman v United Kingdom,* App. No. 23452/94, Judgment 28/10/1998, discussed in Section 4 below.
[79] *Öneryildiz v. Turkey, supra* note 23 at ¶ 109
[80] See *inter alia*, ICJ *supra* note 19*;* IACtHR, *supra,* note 28; Corina Heri *Climate Change before the European Court of Human Rights: capturing Risk, Ill-Treatment and Vulnerability*, 33 EJIL 925, 932(2022); Ian Turner *Human Rights, Positive Obligations, and Measures to Prevent Human Trafficking in the United Kingdom,* 1 Journal of Human Trafficking; 296, 317 (2015)
[81] *Öneryildiz v. Turkey, supra* note 24 at ¶ 101

onus on the State to actively seek information about potential future damage, even if damage has not occurred so far.[82]

To summarise, both direct and indirect prevention will require that States adopt policy measures (broadly understood) to ensure that violations do not occur in the (near or more distant) future. Such policy measures need to consider the potential positive and negative effects on human rights enjoyment. In case of potential negative effects, it will be necessary for the State to mitigate the planned policies to ensure that such negative human rights outcomes are prevented. The available measures for prevention will be addressed in section 7 below.

3.3 Obligations of conduct and result

A further question regarding the nature of the obligation to prevent human rights violations relates to whether the obligation is one of conduct or one of result, or perhaps both.[83] As has already been mentioned, the International Court of Justice clearly held in the *Genocide case* that the obligation to prevent was one of conduct, when stating

> it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.[84]

This is a logical opinion by the Court as a guaranteed outcome, particularly related to preventing genocide committed by another State, can be very hard to achieve. The Court accepts that it is the conduct of the State that matters, and not necessarily whether or not they are able to achieve the goal of preventing genocide. This is also the opinion of the IACtHR. As quoted in Section 2 above, the Court held in its advisory opinion on environment and human

[82] For further discussion on foreseeability, see section 4.1 below
[83] U.N. CESCR, *General Comment no. 3 The Nature of State Parties' Obligations (Article 2(1))*, (1990), para. 1
[84] ICJ, *supra* note 19 ¶ 430

rights that the "obligation to prevent is an obligation of means or behaviour".[85] This approach could be generalised to other human rights areas where States should 'employ all means reasonably available to them' to prevent human rights violations.

However, as reflected in the section on direct and indirect approaches to prevention, the European Court of Human Rights as well as the U.N. Treaty bodies regularly say in their decisions on individual complaints that the State Party "has an obligation to prevent similar violations in the future". Does this wording indicate an obligation of conduct or an obligation of result? It appears that this question has not been addressed by any of the treaty bodies, nor in the literature. However, this wording may indicate both an obligation of conduct as well as result. Having found that a State has been in breach of their human rights obligations because of its practices, the treaty body or Court has given their opinions of the kind of State behaviour that amounts to violations. Therefore, the State should be able to avoid the same behaviour in the future and prevent human rights violations of the same kind. This could be considered an obligation of result. Yet, this assumes that the obligation then becomes one of not taking the exact same actions or omissions as those that led to the first human rights violations. This is a very narrow approach to the decisions of the treaty bodies. The implementation of human rights and the compliance with human rights obligations involve clearly complex legal and policy measures, and how the compliance is reached will depend on circumstances and be context specific.[86] Therefore, the obligation to prevent even in situations where decisions by courts or human rights committees give the specific requirement of not repeating the same violations, will involve a requirement of conduct aimed at avoiding negative human rights effects. Thus, depending on the context, the obligation to prevent is one of conduct, but can also in certain circumstances be seen as an obligation of result.

This section has discussed some of the characteristics of the obligation to prevent. The next section will address some of the elements that are necessary to trigger the obligation, and requirements for its functioning.

4 Operationalisation of the obligation to prevent

As the obligation to prevent addresses potential human rights violations in the future experienced by victims that may not be possible to identify individually, there are several

[85] IACtHR, *supra* note 29 ¶ 188 and accompanying text
[86] Ortega-Martins, *supra* note 3, 53

aspects of how we traditionally approach human rights law that will need some reconsideration. This section will address some of these, namely identification of victims, foreseeability, and due diligence.

4.1 Identification of victims

The obligation to prevent human rights violations has a clear 'future in time' perspective. This may be in the near future and clearly relates to current individuals' human rights enjoyment, or it may be far longer term, and relate to future generations.[87] With a future-focus on human rights compliance, a key question to address is who can be considered a 'victim' and how do we identify such victims of potential human rights violations in the future. This may require some significant rethinking of how we approach victim-identification.

Traditionally in international human rights law, there is an assumption that the victim or victims can be identified as specific individuals. The requirement of being a victim as a condition of standing before a Court or U.N. treaty body is built into most of the international and regional human rights instruments that accept individual complaints or petitions. For instance, the Optional Protocol to the International Covenant on Civil and Political Rights provides that

> A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications *from individuals subject to its jurisdiction who claim to be victims of a violation* by that State Party of any of the rights set forth in the Covenant.[88]

In the procedures of these Courts and U.N. treaty bodies, the focus on the situation of an identifiable individual whose human rights has been violated is understandable. However, as indicated above (Section 3.2) this points to a fundamental problem in human rights law regarding the strong emphasis that the practice of the Courts and treaty bodies has received. Or rather, while these bodies' jurisprudence is essential for our understanding of human rights

[87] *Maastricht Principles on the Human Rights of Future Generations*, adopted by a group of experts meeting at Maastricht University, 3 February 2023. Available at: https://www.ciel.org/wp-content/uploads/2023/06/Maastricht-Principles-Light_Jun12.pdf

[88] Optional Protocol to the International Covenant on Civil and Political Rights, (1966) U.N. Doc General Assembly Resolution 2200A (XXI), Article 1 (emphasis added). See also Article 2 of the Optional Protocol to the Convention on the Elimination on Discrimination Against Women (1999), U.N. Doc. A/RES/54/4; Article 1 of the Optional Protocol to the Convention on Rights of Persons with Disabilities (2006), U.N. Doc. A/RES/61/106; Article 5 of the Optional Protocol to the Convention on the Rights of the Child, (2011) UN. Doc A/RES/66/138; Article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) U.N. Doc A/RES/63/117; European Convention on Human Rights (1950) Article 34; and the American Convention on Human Rights (1969) Article 46.

law and its development and indeed for reparation or compensation for individual(s) involved, such dominating attention has almost excluded other aspects of how human rights law can protect individuals. The need to prevent human rights violations goes to the *raison d'être* of the International Bill of Human Rights[89] and the additional thematic conventions adopted over the past decades. If we focus on identifiable victims, this may cause a contradiction related to prevention: the ethos behind the obligation to prevent is to avoid that individuals become victims of human rights violations in the first place. If human rights obligations are only triggered when someone can be identified as a victim, the prevention element is close to obsolete. This contradiction can clearly be seen in the *Daniel Billy v Australia* case. This case was brought by residents of islands in the Torres Strait north of Australia. The islands are subject to rising sea levels and the petitioners argued that Australia had failed to "adopt adaptation measures (infrastructure to protect the authors' lives, way of life, homes and culture against the impacts of climate change, especially sea level rises)".[90] In its decision, the Human Rights Committee stated that

> while the authors evoke feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated *that they have faced or presently face adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life*, including their right to a life with dignity.[91]

From this passage it is clear that the Committee focuses on the situation for the individuals that have brought the complaint, and are not considering the situation for the other inhabitants on the islands that may face the same perils, but may be more vulnerable to the predicted changes. In this case, the Committee applied the requirement of identifying individual harm to the petitioners very narrowly.

There have been situations where the Courts/Committees have taken a somewhat broader view of who the victims are. This is important when addressing prevention of human rights violations in the future, where it may not be possible to identify the exact individuals that will be victims. However, it may still be possible to identify groups that may be more vulnerable

[89] The International Bill of Human Rights refers to the Universal Declaration of Human Rights, together with the ICESCR and the ICCPR.
[90] U.N. Human Rights Committee, *Daniel Billy v Australia*, application no. *3624*/2019, advance unedited version, 21 July 2022, U.N. Doc. CCPR/C/135/D/3624/2019, ¶ 3.1
[91] *Id.* ¶ 8.6 (emphasis added)

to suffering human rights violations in the future than others, but the demand that it is necessary to identify a particular person or a small group of persons may not be possible to comply with. The European Court of Human Rights has engaged with the obligation to prevent on several occasions. In *Osman v. The UK*, which concerned the failure of the State to protect an individual from being killed by another individual, the Court held that for a State to have breached its obligation to prevent, it must be established that "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonable, might have been expected to avoid that risk."[92] Here the Court clearly sets a very tight test for what is needed to hold a State accountable for failure to prevent human rights violations. The State needs to be able to identify a specific potential victim of a real and immediate risk. This is a very high threshold to reach.

However, there are other cases where the Court has held that the State 'knew or ought to have known' that a violation of provisions in the European Convention on Human Rights may occur. In the *Öneryildiz v. Turkey* case, the Court held that the

> authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such *preventive operational measures as were necessary and sufficient* to protect those individuals.[93]

As is clear from this quote, the Court expands the identification of victims to 'a number of persons' living near the rubbish tip, and hence in danger of having their right to life violated. These are not victims that are necessarily identifiable by name, but rather individuals that are facing a threat, and where the authorities have not done what they could to prevent subsequent events leading to loss of life. The Court held, *inter alia,* that the authorities failed to implement urgent measures which had been proposed by the Prime Minister's Environmental Office.[94] Hence, the Court recognised that the State will have obligations to prevent human rights violations even if they are not able to identify directly which individuals may be in danger from

[92] ECtHR *Osman v United Kingdom,* App. No. 23452/94, Judgment 28/10/1998, ¶ 116
[93] *Öneryildiz v. Turkey*, *supra* 24 ¶101(emphasis added)
[94] *Id.* ¶ 102

suffering such violations. In this case, it would be anyone who lived in close proximity to the rubbish tip in question.

Similarly, in *Dudgeon v. UK*, the Court found that the existence of laws in Northern Ireland that made certain homosexual practices criminal acts even if practised by consenting adults, was a breach of Article 8 of the Convention (right to respect for private and family life).[95] This conclusion was drawn on the basis that the mere existence of this law represented a breach of the applicant's private life. The Court held that

> In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life […]: either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

Consequently, the Court found that the mere existence of this law would represent a breach of the right to private life for homosexuals in Northern Ireland at the time. This was a breach of the rights for a large number of people, not only the identified individual, Mr. Dudgeon. Therefore, the State should prevent violation of the rights of unidentified individuals by amending the criminal law of Northern Ireland.

The obligations for States to prevent human rights violations thus will require a different approach to the concept of victims. To avoid violations in the future, it is necessary to consider 'victims' as a broader concept, and something that is applied to groups or sections in society. The question that should be asked is who will be vulnerable to negative outcomes of specific legislation or policy choices? The fact that specific individuals cannot be identified should not be taken as not presenting a potential human rights problem. Consequently, the obligation to prevent human rights violations requires that we approach the concept of victims differently.

4.2 Foreseeability

The next aspect to consider for the operationalisation of the obligation to prevent human rights violations is how to predict the human rights effects of legislation, regulation, programmes, and administrative practices. This raises the question of the foreseeable consequences of such

[95] *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981, ¶ 63

measures. More specifically, it is necessary to address what States should or ought to be able to foresee with respect to negative human rights effects of their own actions or omissions, as a necessary requirement for prevention of human rights violations.

The question of foreseeability and unforeseeability has been discussed extensively in international law generally and in international human rights law more specifically. In the commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, the International Law Commission addressed the concept in their commentary to Article 23. They stated that "to have been 'unforeseen' the event must have been neither foreseen nor of an easily foreseeable kind."[96] Thus, a State cannot rely on the fact that they did not foresee a consequence of its actions; it must also satisfy the requirement that the effect would not have been 'easily foreseeable'. The commentary of the International Law Commission is written in the context of State using 'unforeseeability' as a defence against breaches of international obligations. Yet, it serves a purpose in our discussion: States cannot be expected to prevent human rights problems if that effect was difficult to foresee – having taken adequate measures to prevent.[97] This argument builds on jurisprudence *inter alia* from the International Court of Justice and the regional human rights courts where the term 'know' or 'should have known' are used more frequently than foreseeability. For instance, in the *Corfu Channel* Case, the ICJ held that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[98] Similarly, the European Court of Human Rights held clearly in the *Önerylidiz v. Turkey* case[99] that "the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ünraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals […]"[100]

The approach to situations where States know or should have known that there is a danger of a breach of obligation, in our context a violation of human rights, is a clear indication that effects need to be foreseeable to trigger responsibility. However, it is important to note that the words used are 'know or should have known', which indicate that States should make an effort

[96] International Law Commission, *Report of the Fifty-Third Session, Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, Int'l Law Comm'n, 53rd Session, U.N. Doc. A/56/10 (2001), Art. 23, cm. 2
[97] For further discussion, see sub-section on due diligence 4.3, and section 7 below.
[98] C*orfu Channel Case (United Kingdom v. Albania); Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, 22
[99] See *supra* note 24
[100] *Id.* ¶ 101

to foresee the effects of their actions or omissions. In the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, it is held that the scope of jurisdiction includes "situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory".[101] In the Maastricht Principles on the Human Rights of Future Generations,[102] the word 'reasonable' has been added to foreseeability. For instance, in Principle 16 on the obligation to respect human rights of future generations, it is held that "States must refrain from conduct they foresee, or ought reasonably to foresee, will create or contribute to, a substantial risk of violations of the human rights of future generations. ".[103]

As the question of prevention requires that States foresee potential effects of their actions and omissions, there is a clear necessity to plan, to predict, and to foresee potential problems, through *inter alia* human rights assessments of planned policies and other administrative and legislative initiatives. The question of foreseeability relates both to actions and omissions by States. Just like actions taken by States may interfere in the enjoyment of human rights, so may omissions, and it is essential that States consider the consequences of not acting. For instance, in the recent case of *Daniel Billy v Australia*, where the petitioners complained about violations of the right to life (article 6 of the ICCPR) the U.N. Human Rights Committee referred to their General Comment no. 36 (2018) on the right to life, where in paragraph 3 they confirm that this right "includes the right of individuals to enjoy life with dignity and to be free from acts or omissions that would cause their unnatural or premature death", and that State obligations "extend to reasonably foreseeable threats and life-threatening situations that can result in loss of life".[104] In this case, the Committee did not find a violation of Article 6, due much to the fact that the State had taken mitigating actions to establish infrastructure to prevent the severe effects of climate change on the petitioners.[105] Considering the rationale for this decision, it is reasonable to assume that a violation would have been found if the State had omitted to take any action to prevent the negative human rights effects.

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[101] *The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural rights* (hereinafter 'Maastricht Principles') adopted by a group of expert in Maastricht in September 2011. The Principles can be accessed at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

[102] *Maastricht Principles on the Human Rights of Future Generations*, adopted by a group of experts meeting at Maastricht University, 3 February 2023. Available at: https://www.ciel.org/wp-content/uploads/2023/06/Maastricht-Principles-Light_Jun12.pdf

[103] *Id.* Principle 16

[104] HRC, *Daniel Billy v Australia*, *supra* note 90 ¶ 8.3,

[105] *Id.* ¶ 8.7

The importance of foreseeable effects needs to be considered in light of the potential risk of human rights violations. If the potential risk is high, there will be more need for preventive measures to avoid the human rights violations.[106] To consider the potential risks of actions and omissions by States, these States need to implement policies, programmes and administrative practices that are designed and considered from a potential human rights violation perspective. Furthermore, the ability to foresee consequences of planned actions, policies or regulations may differ from situation to situation as well as from State to State. The inclusion of 'reasonable' before 'foreseeable' both in jurisprudence and in the Maastricht Principles on Human Rights for Future Generations, as reflected above, recognizes that it may not always be easy to foresee human rights effects. This may be caused by complex causal chains; lack of capacity to assess potential effects; or particularly in situations that involve acts or omissions in an extraterritorial setting. In such situations, predicting future effects may prove difficult. It should, however, be noted that the addition of 'reasonable' is not meant to provide an opportunity for States to avoid the obligation to prevent human rights violations, but rather that in situations where States were clearly unable to predict a specific outcome, this will not be held against the State.

4.3 Due diligence

The nature of the obligation to prevent human rights violations requires foresight (as addressed in the previous section), and information about potential human rights effects of actions or omissions, and planning. There is therefore a need to consider the potential risk of legislation, policies, programmes, administrative practices, and regulations. In human rights jurisprudence and academic commentary, the way in which States carry out such risk assessments is often referred to as 'human rights due diligence'.[107]

Currently, the concept of due diligence is commonly used in business contexts, and is a process whereby enterprises seek to identify commercial risks.[108] However, the history of the use of due diligence in international law shows that early application of the concept "emphasised

[106] Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*" 34, Hum.Rts.Q, 1084 at 1117 (2012)
[107] Robert McCorquodale, Lise Smit, Stuart Neely & Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 2 BHRJ 195 (2017)
[108] Jonathan Bonnitcha and Robert McCorquodale *The Concept of 'Due Diligence' in the U.N. Guiding Principles on Business and Human Rights,* 28 European Journal of Human Rights, 899 at 901(2017)

certain measures states were expected to undertake in order to protect the interests of other states."[109] It was also considered a "legal benchmark for assessing which measures a state is required to take in order to comply with obligations of conduct […] in the fulfilment of the required goal."[110] In the corporate setting, due diligence has become a concept used in a variety of corporate concerns, and has, according to Martin-Ortega "become a cornerstone of the developing international framework to regulate corporate behaviour relating to human rights."[111] She further holds that due diligence is a procedural practice, the main purpose of which is to "confirm facts, data and representations involved in a commercial transaction in order to determine the value, price and risk of such transactions, including the risk of future litigation."[112] Consequently, due diligence is the common term for a process that aims to predict significant effects of planned actions in order to determine risk and hence make informed decisions as to whether to go ahead with plans, to mitigate potential foreseen problems, or to cancel plans.

Recently, the process of due diligence has been seen as a method by which business enterprises may avoid negative human rights effects as a result of their activities, and corporations may often include due diligence procedures in their Corporate Social Responsibility activities.[113] When applied in this manner, it is a voluntary procedure determined by corporations (or other private parties) themselves. However, it is increasingly common that due diligence procedures to avoid human rights violations are required by legislation, international treaties, or soft law. National governments may legislate for such procedures for companies within their own jurisdiction.[114] It is now commonly accepted that part of a State's human rights obligations is to protect individuals from human rights violations committed by private parties (including business enterprises), and this protection often takes the form of legislation to regulate the actions and omissions of private parties. Such regulation may require due diligence to avoid

[109] Giulio Bartolini "The Historical Roots of the Due Diligence Standard" *Due Diligence in the International Legal Order* (Anne Peters, Heike Krieger and Leonhard Kreuzer eds. OUP, 2021) at 23
[110] *Id.*
[111] Martin-Ortega, *supra* note 3, at 49
[112] *Id.* At 51
[113] See in particular The Third Revised Draft of the *Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, July, 2021, Article 6 Prevention. (Business and Human Rights Treaty) Available at: Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights | OHCHR
[114] See for instance recent Norwegian legislation. Stortingsproposisjon 150 L (2020-2021) 'Lov om virksomheters åpenhet of arbeid med grunnleggende menneskerettigheter of anstendige arbeidsforhold (åpenhetsloven). (Act on companies' transparency and work with fundamental human rights and decent working conditions – (transparency act). Translated by author. Available at: Prop. 150 L (2020–2021) (regjeringen.no)

harm. In this way, the due diligence obligation is put upon the private parties themselves, and they may be held accountable if the due diligence is not carried out.[115]

This is the most common approach to due diligence in human rights law currently. However, as already mentioned, due diligence also represents an obligation for the State[116]. The U.N. Committee on the Elimination of Discrimination Against Women and the U.N. Committee on the Rights of the Child have in a joint General Recommendation/General Comment stated that

> Due diligence should be understood as an obligation of States parties to the Conventions to prevent violence or violations of human rights, protect victims and witnesses from violations, investigate and punish those responsible, including private actors, and provide access to redress for human rights violations.[117]

This quote confirms the dual importance of due diligence: It represents an obligation for the State in relationship to the conduct of private actors, while at the same time also an obligation to prevent violations of human rights from the State's own actions or omissions. Due diligence consequently represents an obligation of conduct to take appropriate measures to avoid human rights violations as a result of States' actions or omissions irrespective of these being undertaken by the State (or its agents) or private actors.[118] The U.N. Human Rights Committee has, in its General Comment on the nature of State obligations, confirmed the link between due diligence and prevention, and clearly sees due diligence as a State obligation

> There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[119]

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[115] Business and Human Rights Treaty, *supra* note 113, Article 7
[116] Maria Monnheimer *Due Diligence Obligations in International Human Rights Law*, CUP, at 3 (2021)
[117] U.N. Committee on the Elimination of Discrimination against Women and U.N. Committee on the Rights of the Child *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices* U.N.Doc CEDAW/C/GC/31 – CRC/C/GC/18 14 Nov 2014

[118] Monnheimer, *supra* note 114, at 3
[119] U.N. Human Rights Committee, General Comment no. 31 *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 March 2004, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 8

As mentioned in Section 2 above, at the regional level, due diligence as an obligation upon the State itself is also confirmed, *inter alia* in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.[120]

The obligation to carry out due diligence requires actions to ensure that negative human rights outcomes do not result from the State's policies and administrative practices. Such actions can be general, or situation specific. While due diligence as carried out in the commercial sector to avoid risk for business enterprises can be considered a procedure that is carried out to take a decision, for instance whether to invest in a certain joint venture or not, this is different in terms of human rights due diligence. The commercial due diligence is aimed at addressing risk for the corporation; human rights due diligence is carried out to ensure that third parties are not harmed by the State or by private actors.[121] As conditions may change, human rights due diligence is not undertaken only once, rather, it is an ongoing process whereby the State and/or the relevant private actor(s) continue to assess their actions and omissions from a human rights effects' perspective. The aim of this due diligence is to prevent human rights violations.[122]

In their contribution on human rights due diligence, McCorquodale et al confirm this approach by listing three particular characteristics for human rights due diligence. First, this kind of due diligence is about human rights impacts, and not primarily about business risk.[123] Second, referring to the UNGP, Principle 13, they argue that every business is expected to consider the human rights impacts "not only of its own operations but also of third parties with whom it is directly linked in its business relationship".[124] This point can be seen to be relevant also for States in their human rights due diligence in that they should also consider the human rights impacts not only of their own activities but also those of private parties over whom they have authority. Finally, the due diligence process must be carried out continuously, as human rights risks may change over time.[125] Additionally, human rights due diligence must address the specific circumstances of the case.[126]

Consequently, due diligence procedures are essential for the compliance with the obligation to prevent human rights violations. In the final section of this article (section 7), the kind of measures that may be taken to prevent human rights abuses, will be addressed. However,

[120] See *supra* note 14 and accompanying text
[121] McCorquodale et.al., *supra* note 107 at 199
[122] *Id.* p. 200
[123] *Id.* p. 199
[124] *Id.* p. 200
[125] *Id.*
[126] Martin-Ortega, *supra* note 3 at 53

already here, we can see that due diligence procedures (and the content of those) are key tools for compliance.

5. Territorial and extraterritorial nature of the obligation to prevent

Just like other human rights obligations, the obligation to prevent violations applies both territorially and extraterritorially.[127] This means that States shall consider the human rights impacts of their interactions with other States, whether on a bi- or multilateral basis. This will involve human rights considerations of States' activities as diverse as international trade, development cooperation, military cooperation, environmental impact, as such activities (and others) may have significant effect on human rights enjoyment of individuals in foreign states. It will also apply to States' obligations to regulate the conduct of private parties, including business enterprises operating abroad, over whom they exercise authority.[128]

As has been discussed above, the obligation to prevent human rights violations is largely one of conduct, and requires the State to consider the human rights effects of their activities or their omissions and their regulations of entities over which they exert control, whether these activities take place within or outside the border of the home State.[129] This approach has been confirmed by the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.[130] In Principle 9 on the Scope of Jurisdiction, it is held that a State has obligations to respect, protect and fulfil economic, social and cultural rights in "situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory".[131] This reference to foreseeability indicates that States will only be considered able to prevent human rights violations if they can be predicted by reasonable forward looking planning and

[127] Some of the literature on extraterritorial human rights obligations include *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Mark Gibney et.al. eds. Routledge International Handbooks. Taylor & Francis 2022); Markko Milanovic, M. *Extraterritorial application of human rights treaties: law, principles, and policy*. OUP (2011); *Extraterritorial Application of Human Rights Treaties*, (Fons Coomans and Meno Kamminga eds. Intersentia 2004); (2011), *Universal Human Rights and Extraterritorial Obligations* (Mark Gibney and Sigrun Skogly eds. University of Pennsylvania Press 2011). See also Opeoluwa A. Badaru *Due Diligence and International Cooperation to Ensure Food Justice in the Context of Land Grabbing*, 68, NILR, 433, 446

[128] U.N. Commission on Human Rights *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk. U.N. Commission of Human Rights, E/CN.4/2006/61, para. 34

[129] *Id.*

[130] Maastricht Principles, *supra* note 101

[131] *Id.* Principle 9 (b)

assessment. This specification of when States have jurisdiction in situations of foreseeable effects, is further developed in Principle 13 which provides for an obligation to avoid causing harm

> States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.

In the commentary to the Maastricht Principles, the authors emphasise the importance of bringing in the concept of foreseeability related to prevention of harm in that it removes the "standard of liability from strict liability",[132] and consequently, gives an incentive to States to conduct assessments of the potential impact of their actions or omissions because their "international responsibility will be assessed on the basis of what their authorities knew or ought to have known".[133]

Referring to the work of the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, the Commentary to the Maastricht Principles emphasises that the ILC sees the obligation to prevent harm to go further than considering activities that are already recognised as posing such harm, and to also include "taking appropriate measures to identify activities which involve such risk, and this obligation is of a continuing character".[134] Principle 14 of the Maastricht Principles represents the same principle and shows how States can take measures to "give effect to their obligation to desist from conduct that creates real risks on economic, social and cultural rights".[135] Even though the Maastricht Principles relate specifically to economic, social and cultural rights, there is nothing inherent in these rights that would make a generalisation to all human rights unreasonable. While the Maastricht Principles on Extraterritorial Obligations are not legally binding, being adopted by a group of international experts, they draw "from international law" and as such "aim to clarify the content of extraterritorial State obligations to realize economic,

[132] De Schutter, *supra* note 104 at 1113
[133] *Id.*
[134] International Law Commission *Report of the International Law Commission on the work of its fifty-third session*, Commentary on Article 3 of the draft Convention on Hazardous Waste, para (5) of commentary
[135] De Schutter, *supra* note 106 at 1116

social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights."[136]

The recognition of extraterritorial obligations is growing in international human rights law, and while an analysis of the status of such obligations is beyond the remit of this article, legal developments recognise that such obligations also include an obligation to prevent human rights violations in extraterritorial settings.

Such developments can currently be seen in the draft treaty on business and human rights, where States' exterritorial obligations related to the regulation of private parties is prominently positioned. Now in its third draft, the treaty text contains a significant article labelled 'prevention', where, *inter alia,* it is stated that

> States Parties shall regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character.[137]

This article should be read in conjunction with Article 2 of the draft treaty, which provides a Statement of Purpose, including the purpose to "Prevent and mitigate the occurrence of human rights abuses in the context of business activities […]"[138]

Extraterritorial obligations to prevent human rights violations may be more complex to comply with but they are equally, or arguably, more important in a globalised and interdependent world. Many of the serious problems facing the world currently, such as climate change, the energy crisis, and food shortages are serious examples of how actions and omissions by States contribute to human rights deterioration far beyond their own borders. To take one example, in the above mentioned case before the U.N. Human Rights Committee, *Daniel Billy v Australia,* the complainants argued that Australia had "failed to mitigate the impact of climate change",[139] showing that the country's greenhouse gas emissions increased by 30.72% between 1990 and 2016.[140] The warming of the atmosphere results in rising sea levels, threatening the rights to life, health, food and others for the inhabitants of the Torres Strait Islands north of Australia. While Australia has not done enough to reduce their CO2 emissions, the human

[136] Maastricht Principles, Preamble, supra note 101
[137] Business and Human Rights Treaty, *supra* note 113, Art. 6
[138] *Id.* Article 2.1 (c)
[139] *Daniel Billy v. Australia*, *supra* note 90, ¶ 2.8
[140] *Id*.

rights impact of climate change cannot be mitigated by Australia alone. Sea level rise is the responsibility of all CO2 emitting countries, and the heaviest polluters more so than others. Consequently, countries like the US, the UK, China and India (and many others) have also failed to prevent human rights violations of the people of the Torres Strait Islands. This does not mean that Australia should not do as much as possible to reduce their emissions, but the obligation to act rests with the other polluting States as well.

Thus, the complexity of our interdependent and globalised world means that the obligation to prevent human rights violations does not have state border limitations. The effect of activities that impact upon human rights enjoyment for individuals in other countries also requires attention from State authorities when they take decisions. This is not a new phenomenon in international law, but rather is a well recognised principle in inter-state relations. What is perhaps different is that rather than effects on another state, the concern is the effect on individuals within that other State (or States). Yet, the principle remains the same, there is an obligation to consider the effect of actions/omissions within a foreign or several foreign states, and if that effect is expected to be negative, mitigation needs to be carried out.

6. Relationship to the tripartite obligation classification

Having addressed some of the characteristics of the obligation to prevent human rights violations, the question arises as to how this prevent obligation relates to the established tripartite obligation classification of *respect, protect*, and *fulfil*. The obligation to prevent human rights violations is often considered to be part of the obligation to protect, where states are under an obligation to regulate the conduct of third (private) parties so that these third parties do not infringe on the human rights enjoyment of individuals. Such regulation of conduct is aimed at preventing third parties' infringement. Consequently, the way in which the obligation to protect is commonly understood, it has a strong preventive element. The prevention in this regard is undertaken often through legislation whereby third parties' activities are regulated (or should be regulated) to comply with a State's human rights obligations.

While there is an accepted preventive element in the obligation to protect in the tripartite classification, this has not been explicitly recognised in the case for the obligation to respect, and the obligation to fulfil human rights. The obligation to respect requires states from refraining from actions or omissions that may interfere with individuals' human rights

enjoyment. The obligation to prevent is relevant in this context in that states need to avoid actions or omissions that will interfere with human rights in the future. This will require states to undertake evaluation of proposed policies, programmes or legislation that may have a negative effect on human rights. In General Comment no. 12 on the Right to Adequate Food, the Committee on Economic, Social and Cultural Rights shows how prevention is relevant at this level of obligations. The Committee holds that "The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access."[141] Another example can be found in the United Kingdom, where the government (at the time of writing) is introducing a Police, Crime, Sentencing and Courts Bill, which has been heavily criticised for restricting the right to demonstrate or protest.[142] The government seeks to limit the disruption caused by protesters, while its critics hold that the bill may lead to increased powers for the police to impose restrictions on peaceful processions, assembly, and protest, and to respond to 'unauthorised encampments'.[143] Organisations such as Justice and Liberty have voiced their concerns about the effects on human rights if the bill becomes law.[144] In terms of the obligation to prevent related to the obligation to respect in this example, the government has clear prior warning that the changes to legislation may threaten human rights. Therefore, there is opportunity to alter the proposals in a manner that addresses this outcome of the new legislation. Consequently, the government should ensure that the new bill does not limit the human right to peaceful assembly (ICCPR, Article 21) and freedom of expression (ICCPR, Article 19). Failure to do so may result in an infringement of rights which would constitute a failure to comply with the obligation to *respect*, as well as the obligation to prevent.

In terms of the obligation to fulfil, this is the most positive level of obligations, and requires states to take active initiatives through policies, programmes, legislation, administrative and budgetary measures to work towards full realisation of human rights enjoyment. There are clear preventive aspects to the obligation to fulfil. This level of obligation is often divided into two separate aspects: facilitate and provide. For instance, to facilitate human rights enjoyment, complying with the provisions in the ICESCR Article 11.2, which relate to the "fundamental

[141] U.N. CESCR, General Comment no. 12, *The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5
[142] BBC "What is the Police, Crime, Sentencing and Courts Bill and how would it change protests?", 2 March 2022, available at: What is the Police, Crime, Sentencing and Courts Bill and how would it change protests? - BBC News (last visited 18 August 2023)
[143] Justice 'Police, Crime, Sentencing and Courts Bill', Available at: Police, Crime, Sentencing and Courts Bill - JUSTICE, (last visited 18 August 2023)
[144] Liberty's Briefing on the Police, Crime, Sentencing and Courts Bill for Second Reading in the House of Commons, March 2021, p. 1; Available at Libertys-Briefing-on-the-Police-Crime-Sentencing-and-Courts-Bill-HoC-2nd-reading-March-2021-1.pdf (libertyhumanrights.org.uk) (last visited 18 August 2023)

right of everyone to be free from hunger", State Parties shall take measures to "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems […]" would represent specific measures to prevent violations of the right to food and to be free from hunger.

The other aspect of 'fulfil' – the obligation to provide - carries a significant preventive element. For instance, there are situations where individuals or groups of individuals face significant human rights problems unless they receive support. Such support may be provided through, for instance, forms of social security, in compliance with Article 9 of ICESCR. In their General Comment on Article 9, the Committee on Economic, Social and Cultural Rights confirm that this right requires as one of the core obligations that the State parties:

> […] ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. [145]

The General Comment further provides that the failure to meet the core obligations is considered a violation of the right to social security. Hence, the State would be under an obligation to prevent individuals and groups of individuals from the failure to enjoy the minimum essential level of benefits as provided in this quote. Therefore, the positive obligation to provide social security would be an expression of the obligation to ensure that human rights violations are prevented.

This brief consideration of the tripartite classification of obligations shows that the obligation to prevent human rights violations is relevant for all three levels in the classification. The preventive measures available to states can be used to avoid negative human rights effects on the basis of interference through policies, programmes or legislation; it is essential in the states' regulation of third parties' activities; and it is a key element in policies and programmes that are necessary for the fulfilment of human rights.

7. Measures available for prevention

[145] U.N. CESCR (2008) *General Comment no. 19 The Right to Social Security,* U.N. Doc. E/C12.GC/19, para 59

This final section of the article will address some of the measures available for States to comply with their obligation to prevent human rights violations. Due to the variety of possible measures, it is not possible to be exhaustive in this discussion. Nevertheless, as has already been alluded to, much of the available measures will relate to policies, programmes, and administrative practices.[146] This, however, does not exclude judicial measures, such as legislation and regulation. Hunt argues that there are broadly two ways of "vindicating human rights" one is through the "courts, tribunals and other judicial or quasi-judicial processes (the 'judicial' approach)"; while the other approach is "by bringing human rights to bear upon policy-making processes so that policies and programs are put in place that promote and protect human rights (the 'policy' approach)".[147] While Hunt does not position this specifically in the context of the obligation to prevent, his distinction is highly relevant for the current discussion.

The judicial approach is clearly relevant if we focus on the indirect prevention as discussed in Section 3 above. If States are to be held accountable for their compliance with human rights obligations (including the obligation to prevent), the judicial system plays an important part. They will be in a position to ascertain whether compliance has taken place, and indeed what actions or omissions may have caused or contributed to any lack of compliance. These decisions by courts and other judicial mechanisms are important to avoid repetition of violations, and to understand how to prevent similar or the same violations to occur in the future.

However, what Hunt calls the 'policy approach' is especially useful to prevent human rights violations in the first place. This is particularly relevant to direct prevention. As we saw in the section on the sources for the legal obligation to prevent human rights violations,[148] many treaties contain provisions that call for policy and programmes to be used for such prevention. Some of these are fairly general, for example, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2001) provides that the State Parties shall "adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol."[149] We see here that the Protocol lists what kind of measures States Parties shall adopt for the purpose of preventing human rights violations. Thus, the measures are

[146] Robert McCorquodale and Justine Nolan *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 68 NILR, No. 3 2021, 455, 457
[147] Hunt, *supra* note 2 at 18
[148] See section 2 above
[149] Optional Protocol on the Sale of Children *supra* note 11 Article 9

means to an end, the end being the compliance with the obligation to prevent. Similarly, in the Advisory Opinion from the Inter-American Court on Human Rights, it is held that measures that States need to take to prevent environmental damage that can affect human rights enjoyment must include (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate when environmental damage has occurred.[150]

This approach could be considered in line with the requirement in some human rights treaties that States shall use 'the maximum of available resources' to realise the enjoyment of the rights.[151] Resources should not necessarily be limited to financial resources, but can also relate to the application of other means, such as human, natural, cultural or scientific resources.[152] Put in the context of an obligation to prevent, the requirement of using maximum available resources is one of the measures available to ensure the fulfilment of human rights. Consequently, the allocation and use of resources for policy measures should be assessed from the perspective of preventing human rights violations.

Other provisions are far more specific in what they require of the State Parties. For instance, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, holds that the parties shall "take appropriate measures to ensure supervision of railways, stations, airports, seaports and en route, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution."[153] This provision lists very specific measures that the ratifying States have to comply with in terms of preventive action.

Whether or not human rights treaties contain specific requirements, the obligation to prevent will necessarily involve States taking proactive measures to ensure that breaches of human rights do not happen. Such proactive measures can be considered due diligence obligations upon States. The Special Rapporteur on Violence against Women, Yakin Ertürk, puts it in these terms

> Due diligence obligations must be implemented in good faith with a view to preventing and responding to violence against women. This will necessarily entail taking positive

[150] IACtHR, *supra* note 29, ¶145
[151] See *inter alia*, The ICESCR, Article 2(1) and Convention on the Rights of the Child, Article 4.
[152] Sigrun Skogly *The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as well as Quantity?* 12 H.R.L.Rev. 393, Section 3 (2012)
[153] Article 17 (3)

> steps and measures by States in order to ensure that women's human rights are protected, respected, promoted and fulfilled.[154]

Such positive measures involve taking active steps for the prevention of violations. Legislation is clearly important, as statutory regulation sets standards that can be applied in court. However, there has been some discussion as to whether legislation is necessarily the right approach, or rather the sufficient approach in all circumstances. Addressing the prevention of torture, Renzulli reflects that so much attention has been focused on the *prohibition* of torture, and argues that this focus has had the effect of conflating prohibition and prevention.[155] She holds that General Comment no. 2 from the Committee Against Torture 'rather than elaborating on the duty to prevent, reiterates the importance of the definitional elements of torture for the purpose of criminalising such acts under domestic legislation.'[156] In relationship to the Istanbul Convention referred to earlier,[157] Grans holds that States "should not just prohibit, punish and remedy violence in individual cases, but prevent it through systemic measures", and that this focus permeates the whole Convention.[158]

In line with this argument, some instruments clearly see prevention and prohibition as two separate elements of obligations. For instance, as earlier quoted, in CERD Article 3, the convention provides that States Parties shall "prevent, prohibit and eradicate all practices …" While criminalising or prohibiting certain activities may serve as a deterrent, and hence have a preventive effect,[159] commentators have warned against too much conflation of prevention with prohibition. Renzulli holds that "the definition of the duty to prevent torture has remained the poor relative of the definition of torture prohibition."[160] The distinction between prohibition and prevention of torture has been emphasised by the Sub-committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, when they state that

> Whilst the *obligation to prevent* torture and ill-treatment buttresses the prohibition of torture, it also *remains an obligation in its own right* and a failure to take appropriate preventive measures which were within its power could engage the international

[154] U.N. Report of the Special Rapporteur on violence against women *supra* note 128, para. 36
[155] Renzulli, *supra* note 6 at 1248
[156] *Id*.
[157] Istanbul Convention, *supra* note 15 above
[158] Grans, *supra* note 70 at 144
[159] William A Schabas "*Prevention of Crimes Against Humanity*", 26 Journal of International Criminal Justice, 705 at 708 (2018)
[160] Renzulli, *supra* note 6 at 1245

responsibility of the State, should torture occur in circumstances where the State would not otherwise have been responsible.[161]

In other international instruments, the obligation to prevent has been seen to carry explicit programmatic and policy oriented requirements. The Optional Protocol on the Sale of Children to the CRC,[162] and the Convention against Trafficking in Persons are examples of this. The Convention does not see the criminalisation of trafficking as sufficient to prevent the practice. These comments on the prohibitive approach reflect a concern that States will consider that they have done enough if they have legislated against certain behaviour. However, legislation is not enough to ensure that human rights violations are prevented, and the policy approach is therefore necessary. The policy approach would include governmental policies (domestic or foreign), programmes and administrative practices. One example of such policy focus, could be the work that has been done on 'human rights budgeting'.[163]

Hunt holds that the policy approach "demands close cooperation amongst a range of disciplines and policy experts,"[164] is more complex than the judicial approach, and may involve different ways of working together and to be proactive. It may also require human rights training for many people working in the civil service and local authorities. The Report on Human Rights Prevention by the OHCHR holds that the direct prevention "is […] contingent on establishing a culture of respect for human rights, good governance and the rule of law, and an enabling environment for a vibrant civil society and free press.[165]

In a broader and international/extraterritorial context, it will also involve different considerations in terms of foreign policy, international trade, environmental policies, development cooperation, to name but a few areas. Yet, the benefits of such approaches will be obvious in ensuring that administrative and policy areas do not contribute to human rights violations.

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[161] U.N. Sub-committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatments of Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* U.N. Doc. CAT/OP/12/6, 30 December 2010; para. 1 (emphasis added)

[162] Optional Protocol on the Sale of Children, *supra* note 11, Art. 9

[163] Nolan, Aoife., O'Connell, Rory, and Harvey, Colin J. Human Rights and Public Finance : Budgets and the Promotion of Economic and Social Rights. Oxford: Hart (2013)

[164] Hunt, *supra* note 2 at 19

[165] U.N. OHCHR, *supra* note 67 para 9 (footnotes omitted)

A final point made by Hunt regarding the policy approach is that it is necessary to provide "vigilant monitoring and accountability".[166] However, this monitoring and accountability does not necessarily have to be judicial. There are procedures that can be used to monitor whether the policies and programmes contribute to human rights compliance without involving Courts. This can be done by establishing effective Human Rights Impact Assessments (HRIAs) or other forms of administrative accountability structures. The involvement of human rights ombudspersons or national human rights institutions may also be beneficial in ascertaining that the policies and programmes achieve the intended goals. Using such institutions or mechanisms may be faster and cheaper than bringing cases to Court. While the use of the judicial approach should in no way be dismissed for the purpose of establishing whether the State has been successful in its attempt to prevent human rights violations, these different processes should be seen as complementary to each other.

In terms of the obligation to prevent human rights violations in an extraterritorial setting, the Maastricht Principles incorporate explicit references to prevention in Principle 14, which deals with impact assessment and prevention:

> States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.[167]

On the international scene, there are several accountability structures that can be used in similar manners. On the global level, the various U.N. Committees that oversee the compliance by States with their human rights commitments, as well as the Universal Periodic Review (UPR) where all States are being scrutinised, could be used far more proactively than what is currently the case. These Committees, and the UPR, tend to review what states have done and this is important. However, if they focused more on what States should do to prevent breaches of or threats to human rights in the future, their work may have more proactive impact in the long run.

[166] Hunt, *supra* note 2 at 19
[167] Maastricht Principles, *supra* note 101

8. **Conclusion**

The obligation to prevent human rights violations, despite its logical centrality in the protection of human rights of individuals, has not received much attention in academia nor in the work of international human rights institutions. This article has aimed at raising some of the considerations that need to be made if this obligation is to have a real effect on human rights enjoyment and be complied with. As has been shown, there are several sources for this obligation in current international human rights law, and it has been confirmed by international and regional human rights courts, as well as the treaty bodies of the United Nations. Also, as discussed above, the implementation of the obligation to prevent, will necessitate rethinking aspects of human rights law, such as victim identification, the active engagement with foreseeability of human rights effects as a stemming from States' actions or omissions, and how to plan and implement human rights conducive policies and programmes.

This article is an attempt to shed light on this important obligation. Much more research should be carried out to further develop the understanding of the obligation, and not least to tackle the complex issues of compliance in practice through empirical studies. With conscious planning and implementation of policies and programmes that are human rights focused, many human rights problems will be prevented. This will require a commitment to bring the legally guaranteed human rights into the broader policy and administrative context of States' activities, both domestically and internationally.