



The Prevention of Gross Human Rights Violations under International Human Rights Law

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THE PREVENTION OF GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW



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SUMMARY: THE PREVENTION OF GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Chapter 1: Introduction

Over the past decades there has been a great deal of attention for concepts aiming to prevent gross human rights violations, such as conflict prevention and the responsibility to protect. Despite this shift in attention towards prevention, it has remained unclear what legal obligations states have to prevent gross human rights violations under international human rights law. For example, it is unclear what types of obligations states have at different points in time, when they are triggered, what concrete measures they may require and how they apply outside a state's territory. This study sets out to systematically assess the content and scope of obligations to prevent gross human rights violations. To be able to understand obligations to prevent in their interconnection, the focus is on three specific types of injury prohibited under international human rights law: torture, arbitrary death and genocide. Further distinctions are made between four temporal phases (long-term prevention, short-term prevention, preventing continuation, preventing recurrence) and territorial and extraterritorial obligations. A point of analysis throughout the study is how the capacity of states influences the content and scope of obligations to prevent gross human rights violations in territorial and extraterritorial settings.

Chapter 2: Obligations to Prevent Within State Territory

Obligations under international human rights law are directed primarily at regulating the relationship between a state and people on its territory. It is not surprising, therefore, that states have the most intricate web of obligations to prevent gross human rights violations within their own territory. To provide context and general background information, the three selected prohibitions (torture, arbitrary death and genocide) are first outlined by discussing their legal status, relevant treaty provisions, explicit or implied obligations to prevent and existing international mechanisms focused on prevention. Obligations to prevent the three prohibitions are then separately analyzed on the basis of the timeline (long-term prevention, short-term prevention, preventing continuation, preventing recurrence). It is demonstrated that states have obligations to prevent torture, arbitrary death and genocide in all four temporal phases.

Importantly, many of the obligations to prevent fit within certain categories that are similar for all three prohibitions, referred to as crosscutting obligations. States have: (i) Long-term obligations to introduce a proper legislative and administrative framework capable of deterring violations, (ii) Short-term obligations to take measures to prevent violations, (iii) Obligations to halt continuing violations by ceasing or intervening, and (iv) Obligations to prevent recurrence by investigating, prosecuting and punishing wrongdoers. Within these categories, there are various distinct requirements in the context of the different prohibitions, which illustrate the importance of the specific type of injury for the way obligations to prevent take shape. Indirect obligations in the acute phases of prevention (ii and iii) are

limited by diverse standards of reasonableness, which take into account the capacity of states to prevent offences by non-state actors in the particular circumstances.

Chapter 3: Extraterritorial Obligations to Prevent Based on Jurisdiction

Most human rights treaties contain a jurisdiction clause, which limits the applicability of the treaty to people within the state's jurisdiction. Courts and supervisory bodies have recognized that jurisdiction is not exclusively territorial. This means that states can incur human rights obligations towards people abroad, for example when they arrest people abroad or occupy territory abroad. The concept of jurisdiction is first analyzed through case law and other authoritative interpretations of human rights treaties relevant to this research. Jurisdiction generally functions as a threshold for extraterritorial applicability of a treaty. If the threshold is reached and the state exercises extraterritorial jurisdiction, there is a basis for extraterritorial obligations. To reach the threshold, a state needs to exercise certain forms of control over territory or people abroad. What level of control leads to extraterritorial applicability differs somewhat per treaty or even per provision, but can roughly be divided into effective control over territory and authority or control over individuals (the spatial model and the personal model).

Once the threshold is reached, the same rights and obligations as within state territory in principle apply. Yet, it may be impossible for states to ensure human rights in the same way as within state territory. The content and scope of extraterritorial human rights obligations has to be determined in a way that can ensure their realistic application in extraterritorial circumstances. Therefore, a set of legal, practical and power-related factors is formulated to be able take the state's capacity to ensure human rights in extraterritorial settings into account. Finally, these factors are used to translate the set of territorial obligations to prevent gross human rights violations as defined in Chapter 2, to extraterritorial obligations based on jurisdiction. States have: (i) Long-term obligations to prepare for extraterritorial operations through the state's own legislative and administrative framework. Long-term obligations to plan and equip extraterritorial operations in a way that allows them to function in accordance with a state's human rights obligations. Occupying powers may have long-term obligations to adjust the host-state's legislative and administrative system if it is not in line with requirements under international human rights law; (ii) Short-term obligations and obligations to prevent continuation by taking measures to prevent and halt violations/ offences in the course of extraterritorial operations; and (iii) Obligations to prevent recurrence by investigating, prosecuting and punishing violations by state officials and ensuring the prosecution of offences by non-state actors within their extraterritorial jurisdiction.

A clear example of the influence of legal factors is that, other than occupying powers, states cannot introduce new laws or adjust the legal framework of a host state. States therefore have to prepare for extraterritorial operations through their own legislative and administrative frameworks, for example by introducing safeguards against violations in the course of such operations and offering specific training to state officials. Practical and power-related factors

are more directly relevant in the acute phases of prevention. Because it is much easier for states to oversee and control the actions of its state officials abroad than of non-state actors, direct obligations to prevent violations by state officials in the phases of short-term prevention and preventing continuation are hardly affected by practical and power-related factors; whereas indirect obligations may sometimes be more easily limited abroad than within state territory, for example due to an unstable security situation. Finally, a legal factor to be taken into account in the phase of preventing recurrence is that states may not always be able to establish adjudicative criminal jurisdiction over non-state actors who commit offences within their extraterritorial jurisdiction. In such cases, states must seek alternative routes of prosecution.

Chapter 4: Extraterritorial Obligations to Prevent Beyond Jurisdiction

Third states can sometimes incur human rights obligations towards people beyond territory and jurisdiction, meaning that the people whose rights are (potentially) affected do not have to be within the third state's territorial or extraterritorial jurisdiction. Several of the obligations that are part of the categories of obligations to prevent gross human rights violations distinguished in Chapter 2 are in fact not limited in their application by territory or jurisdiction and can also be incurred by third states. First, the obligations to prevent gross human rights violations that can be incurred by third states and their basis are outlined. The content and scope of these obligations are then analyzed based on the timeline. Third states have: (i) Long-term obligations to include bases in their legal framework to exercise criminal jurisdiction over acts of torture that took place outside the state's jurisdiction based on the principles of nationality or universal jurisdiction; (ii) Short-term obligations and obligations to prevent continuation to prevent genocide by employing all means reasonably available based on the capacity to influence effectively; and (iii) Obligations to prevent recurrence to investigate, prosecute and punish acts of torture that took place outside a state's jurisdiction based on the principles of nationality and universal jurisdiction.

Compared to the set of obligations to prevent gross human rights violations within state territory or based on extraterritorial jurisdiction, third state obligations appear fragmented and unevenly spread out over the different temporal phases. At the same time, there are developments in international law that indicate a shift towards recognizing the important role that third states can play in the prevention of gross human rights violations. Several areas are explored in which third state obligations are developing, such as obligations to assist and cooperate for the full realization of economic, social and cultural rights, obligations to prevent and remedy human rights abuses by corporations acting abroad, an obligation for states to cooperate to bring serious violations of peremptory norms to an end as part of the Articles on State Responsibility and finally a moral responsibility to assist and intervene in the context of the Responsibility to Protect. Together, these developments show that there is great potential to strengthen the patchwork of third state obligations to prevent gross human rights violations in all temporal phases.

Chapter 5: Conclusion

As a result of the systematic assessment based on injury, the timeline and three spatial layers, insight is gained into the content and scope of obligations to prevent gross human rights violations under international human rights law. The overview of obligations to prevent gross human rights violations in territorial and extraterritorial settings is outlined and discussed. This is followed by an analysis of the role played by the capacity of states to ensure human rights in the different spatial layers. The obligations to prevent gross human rights violations are then further analyzed by applying existing typologies of obligations within the framework created to study obligations to prevent. Finally, an assessment is made of the remaining challenges. First of all, extraterritorial obligations to prevent are relatively underdeveloped. Second, it is currently unclear what the consequences are when there are multiple duty-bearing states. Third, the effectiveness of the required measures to prevent in practice is sometimes questionable. There is therefore much room for development, but the increased attention for prevention and extraterritorial human rights obligations offers hope that these issues will attract more research and critical thought. This study offers an overview of the state of the law that can help provide clarity to (academic) debates about prevention and can be used as a basis for further efforts in the area of research and implementation.

SAMENVATTING: DE PREVENTIE VAN GROVE MENSENRECHTENSCHENDINGEN ONDER HET INTERNATIONALE MENSENRECHT

Hoofdstuk 1: Inleiding

In de laatste decennia is er veel aandacht geweest voor concepten die tot doel hebben om grove mensenrechtenschendingen te voorkomen, zoals conflictpreventie of de responsibility to protect-doctrine. Ondanks deze verschuiving in aandacht richting preventie is onduidelijk gebleven welke juridische verplichtingen staten hebben om grove mensenrechtenschendingen te voorkomen onder het internationale mensenrecht. Het is bijvoorbeeld onduidelijk welke verplichtingen staten hebben op verschillende momenten in tijd, wanneer die verplichtingen worden geactiveerd, wat ze vereisen qua concrete maatregelen en hoe ze van toepassing zijn buiten het territorium van de staat. Dit onderzoek heeft tot doel een systematische analyse uit te voeren van de inhoud en reikwijdte van verplichtingen om grove mensenrechtenschendingen te voorkomen. Om de verplichtingen ter voorkoming in hun onderlinge samenhang te kunnen begrijpen ligt de focus op drie soorten letsels die verboden zijn onder het internationale mensenrecht: foltering, arbitraire doding en genocide. Er wordt verder onderscheid aangebracht tussen vier tijdfasen (langetermijn-preventie, kortetermijn-preventie, preventie van het voortduren van een schending, preventie van toekomstige schendingen) en territoriale en extraterritoriale verplichtingen. Een punt van analyse dat terugkomt in alle hoofdstukken is hoe het vermogen van staten de inhoud en reikwijdte van