Prevention is better than a cure: assessing the development of prevention obligations in International Human Rights Law

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ABSTRACT

The importance of prevention obligations on first glance seems obvious, 'as the old adage states, prevention is better than cure'.[1] For victims of human rights violation, this difference can mean life or death.[2] It is therefore especially important for human rights law to include measures which 'ensure that the violation does not occur in the first place.'[3] This may be a lofty goal and it would most likely universally be agreed that is not possible to prevent all violations of human rights. Yet the challenge provided by prevention obligations does not negate the need for such measures, the state cannot sit idly by whilst human rights are violated.[4] In fact, these obligations already exist in various international human rights instruments. Moreover, these obligations have been recognised and emphasized by supervisory bodies. [5] Yet, despite this widespread existence of prevention obligations,[6] there remains little scholarship on the obligation to prevent human rights violations.[7] Therefore, this thesis intends to analyse the development of obligations to prevent in international human rights law.

[1] Rhona K. M. Smith, 'Prevention and Human Rights' in Anja Mihr and Mark Gibney (eds), *The SAGE Handbook of Human Rights* (SAGE 2014) 859
[2] ibid
[3] Ibid 860
[4] Dinah Shelton and Ariel Gould, 'Part IV Normative Evolution, Ch.24 Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2021) 562, 577
[5] Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, Thirtieth session, Items 2 and 3 of the provisional agenda A/HRC/30/20
[6] Ibid 582
[7] Smith (n 1) 857

INTRODUCTION

1. Filling the Gap in Scholarship

The concept of prevention is not novel to international law nor the international community. Prevention has been used as an important concept in various areas of international law, most significantly under environmental law and international humanitarian law.[8] In particular after the humanitarian crises of the conflicts at the turn of the century[9] there has been a 'great deal of attention for concepts such as conflict prevention and the responsibility to protect' which focus on prevention of atrocities, including gross human rights violations.[10] Former Secretary-General Kofi Annan pledged that the United Nations must move 'from a culture of reaction to a culture of prevention',[11] demonstrating the focus on prevention within international law and international relations.

Yet discussion of prevention from the perspective of international human rights law, has remained limited. Despite vast amounts of literature discussing human rights obligations, 'surprisingly few of these texts mention preventive strategies.'[12] Academics rarely perceive 'prevention as a human rights issue, preferring instead to focus on promotion and protection.'[13] Prevention although inherent to these two goals is subsumed within them and thus fails to receive any focused attention. [14] This lack of systematic or structural research into the prevention obligations in international human rights law has left a gap in the literature.[15] Without this analysis, many key questions regarding the scope and content of prevention obligations remain unanswered[16] and the legal practice of prevention obligations remains unclear.[17] This is especially pertinent given the wide range of instruments and sources relevant to prevention obligations.

[8] Nienke van der Have, *The Prevention of Gross Human Rights Violations Under International Human Rights Law* (Asser Press 2018) 10
[9] Smith (n 1)
[10] van der Have (n 8) 2
[11] Report of the Secretary-General, 'Prevention of armed conflict', 7 June 2001 A/55/985–S/2001/574
[12] Smith (n 1)
[13] ibid
[14] ibid
[15] van der Have (n 8) 2
[16] ibid 10
[17] ibid

Despite this lack of focused scholarship, it is clear that prevention obligations do exist within international human rights law.[18] Furthermore, this existence has not gone completely unnoticed. The Office for the High Commissioner on Human Rights (OHCHR) has highlighted the importance of prevention in the promotion and protection of human rights' through a report published upon the request of the Human Rights Council (HRC).[19] This report stressed the 'importance of strengthening preventive strategies in many different areas of human rights.'[20] This thesis therefore intends to build upon this report and emphasise the importance of prevention obligations in international human rights law. This project recognises that although discussion of prevention obligations is 'still uncharted territory' it is unequivocal that '[t]he prevention of violations of human rights must become the dominant protection strategy of the twenty-first century.'[21] For this aim to be achieved, further clarity must be provided over the scope and content of prevention obligations.

2. Methodology

The overall purpose of this thesis is to assess the development of prevention obligations in international human rights law. This study, therefore, sets out to assess the state obligations under international human rights law. This will be achieved using a doctrinal approach. However, as this thesis also intends to discuss why prevention obligations have developed and why they are important, it will also use an analysis of the literature on the topic.

3. Roadmap

This introduction has presented the aim and methodology of this thesis. The next section will discuss the complexity of defining prevention obligations (chapter 1). Then the origins of prevention obligations will be discussed (chapter 2). Following this, a detailed analysis into prevention obligations for Violence Against Women (VAW) will be provided (chapter 3). The final chapter will conclude this thesis.

[18] Annual report of the UNHCHR (n 5) para 5
[19] ibid
[20] Report of the Secretary-General (n 11) para 95
[21] Smith (n 1)

CHAPTER ONE - CLARIFYING THE CONCEPT

1. What Are Prevention Obligations?

Prevention is a wide and disputed concept; thus, the first task is to clarify the meaning of prevention obligations as used in the remainder of this thesis. This task is challenging as international law contains 'no univocal definition of obligations to prevent'.[22] Therefore, there are many different conceptions of prevention obligations.

The starting point to define prevention obligations is the ordinary and contextual meaning of the words, which suggest that prevention obligations are obligations under treaties and custom, which relate to the 'action of stopping something from happening or arising.'[23] This definition is built upon by Robert Ago who suggests that prevention obligations are those obligations 'aimed at preventing an "injurious event", meaning an act, damage or any other form of injury that has been qualified as prohibited or unwanted in international law.'[24] However, beyond this basic description it is difficult to find agreement over the requirements for the classification of prevention obligations.[25] Moreover, exactly what types of state obligations fall within the realm of "prevention" is highly contested.[26] The following sections will therefore discuss the different types of obligations that may be perceived as prevention obligations.

1.1 Direct Obligations vs Indirect Obligations

Obligations may be either directly or indirectly related to prevention. Direct obligations have 'prevention as their direct object', whereas indirect obligations 'have prevention as a side effect'.[27] Accordingly direct obligations generally use the word 'prevent' within the treaty provision, for example 'state parties to the relevant conventions are expressly obligated to

[22] van der Have (n 8) 10
[23] ibid
[24] ibid
[25] ibid 11
[26] Sean D. Murphy, 'Codifying the Obligations of States Relating to the Prevention of Atrocities' (2020) 52(27) Case Western Reserve Journal of International Law 27, 35
[27] Special Rapporteur Roberto Ago (1978) Seventh Report on State Responsibility. UN Doc. A/CN4/ 307 and Add 1-2 and Add2/Corr 1. Para 15

prevent genocide, torture, enforced disappearances, segregation and apartheid.'[28] On the other hand, indirect obligations do not contain the word 'prevention' or any synonymous term, but establish an obligation that may contribute to or be necessary for the prevention of the act.[29] Examples of obligations of this kind may be found in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).[30]

Scholars such as Sean. D. Murphy, are not concerned with the characterisation of indirect or direct obligations, suggesting that this classification has little significance.[31] However, this raises the concern that prevention could become an all-encompassing category. If indirect obligations that only somewhat contribute to prevention are included in the category of prevention obligations, then almost all obligations may be included as 'each tool for the protection of human rights is preventive by its very nature.'[32]

An example of this concern can be provided by the classification of the obligation to punish. In his study on prevention obligations in relation to crimes against humanity, Murphy identified the obligation to punish crimes against humanity as a prevention obligation.[33] The Inter-American Court has also considered the obligation to punish as a component of an obligation to prevent.[34] Murphy and the Inter-American Court both follow the logic that 'prevention and punishment are closely related and the latter is assumed to have some form of deterrent effect.'[35] Thus, the obligation to punish is subsumed within prevention.

Other international human rights sources treat prevention and punishment as two separate categories of obligations. For example, the ICJ concluded in an analysis of the Genocide Convention that the duty to punish, 'is connected to (but distinct from) the duty to prevent.'[36] In its reasoning the ICJ acknowledges that 'one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent'.[37] Nevertheless, it held that the obligation to prevent has normative value, which does not allow

[28] van der Have (n 8) 8
[29] Murphy (n 26) 34
[30] Ibid 35
[31] ibid
[32] Manfred Nowak, Introduction to the International Human Rights Regime (BRILL 2004) 285
[33] Murphy (n 26) 51
[34] Laurens Lavrysen, 'Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 7 Inter-Am & Eur Hum Rts J 94, 101
[35] van der Have (n 8) 17
[36] Murphy (n 26) 51
[37] ibid

it to be merged with or taken as a component of the duty to punish.[38] Punishment therefore may be seen as part of prevention because of the deterrent effect, however the duty to punish is a different category of obligations with the primary focus of tackling impunity. Prevention obligations have as their primary focus the prevention of the injurious act, whereas punishment focuses on preventing impunity after the act.[39] Therefore, this thesis although recognising the preventative value of measures designed to tackle impunity will focus on obligations which primarily aim to prevent injurious acts.

1.2 Implied vs Express Obligations

Similarly, obligations may address prevention 'either expressly or implicitly.'[40] Express provisions are essentially the same as direct obligations, in that the wording of the treaty provision expressly states a prevention obligation. For example, the Genocide Convention, which is considered to provide key early examples of prevention obligations in international human rights law, states in Article I

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.[41]

Implied obligations to prevent are prevention obligations which have been developed by courts and supervisory bodies.[42] Even where the text of a treaty does not expressly state an obligation to prevent, 'courts and supervisory bodies have found that due diligence obligations to prevent certain violations are sometimes implied.'[43] This method has been used by the Inter-American Court on Human Rights (IACtHR /Inter-American Court), the African Commission on Human and Peoples' Rights (African Commission) and the European Court on Human Rights (ECtHR / European Court). All of these bodies have implied the obligation to prevent violations of the relevant instrument, despite the provision on state obligations containing no express prevention obligation.[44] Beyond the regional systems, UN treaty bodies have also implied or addressed

[38] ibid
[39] Lavrysen (n 34) 106
[40] Murphy (n 26) 28
[41] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) (Genocide Convention) Article 1
[42] van der Have (n 8) 8
[43] ibid
[44] Murphy (n 26) 41

'obligations to prevent for example in their general comments and reports.'[45] Due to these developments, it may now be asserted that a framework containing provisions on the prevention of human rights violations exists.[46] This framework contains both express and implied prevention obligations.

1.3 General vs Specific Measures

A further confusion exists over what measures are required by prevention obligations. Obligations to prevent may be general or specific.[47] General prevention obligations are those that are framed broadly as the obligation to prevent or to take measures of prevention. An example of a general obligation may be found under the Genocide Convention which requires that 'every State shall undertake generally to prevent crimes against humanity.'[48] This may be considered an 'umbrella obligation of prevention'[49] due to its general nature. Whereas an example of a specific obligation is 'to provide operational prevention measures in case of a specific risk of a human rights violation.'[50] Specific obligations are named as such because they establish specific measures targeting specific risks.[51]

General measures may pose a greater difficulty to the analysis attempted here as their abstractness may make it difficult to determine the exact content and scope of these obligations. An obligation to prevent for the same right, worded similarly may have different characteristics in different systems. Furthermore, even where these obligations have been further articulated they may still lack clarity, for example, the Inter-American court understands the obligation to prevent as 'all those means of a legal, political, administrative and cultural nature that promote the protection of human rights".[52] This example demonstrates the many categories of measures which may be included within prevention. Thus, understanding the content and scope of these obligations requires further analysis into the practice and commentary of the relevant human rights bodies..

[45] van der Have (n 8) 9
[46] Murphy (n 26) 35
[47] van der Have (n 8) 8
[48] Murphy (n 26) 37
[49] ibid
[50] Lavrysen (n 34) 98
[51] ibid 96
[52] ibid 98

2. The Temporal Aspect

To understand what is meant by prevention, the factor of time must also be considered. Different scholars understand different types of prevention to cover different points in the timeframe of a potential violation. For example, in her work on the prevention of gross human rights violations under international human rights law, Nienke van der Have, divides prevention into four temporal phases: long-term prevention, short-term prevention, preventing continuation and preventing reoccurrence.[53]

Long-term prevention obligations begin as soon as the state is bound by treaty or customary law.[54] As defined by van der Have long-term prevention measures do not target a single violation, instead are meant to have a general deterrent effect.[55] Measures that fall into this category may include, human rights training and education and effective domestic legal frameworks.[56] This type of prevention has also been referred to using various different terms, including 'primary prevention',[57] 'systemic prevention',[58] 'general prevention'[59] and 'anticipative prevention'.[60] These terms are generally understood as interchangeable in their use and meaning.[61] However, feminist scholar Griffith advocates for the use of the term primary prevention as 'it denotes the focus on proximity to root causes, and therefore infers not just a broadening of duties – as 'general' might – but a more strategic approach, and more specified duties vis-à-vis prevention.'[62] Moreover, this type of obligation commonly extends the duty of the state to tackle the root causes of the human rights violation. For example, primary prevention in the sphere of VAW aims to address 'the underlying gendered drivers of violence.'[63]

[53] van der Have (n 8) 8
[54] ibid 17
[55] ibid
[56] ibid
[57] Salomėja Zaksaitė, 'Protection From Domestic Violence: An Essential Human Right or a "Fight" Against Masculinity?' (2016) 4 Kriminologijos Studijos 183, 188
[58] Rashida Manjoo, '3 Normative Developments on Violence Against Women in the United Nations System' in Rashida Manjoo and Jackie Jones (eds), *The Legal Protection of Women from Violence: Normative Gaps in International Law* (1st edn, Routledge 2018) 73, 85
[59] Helen R. Griffiths, 'A feminist theory of state responsibility for violence against women' (Doctoral thesis, Cardiff University 2019) 100
[60] Leyla-Denisa Obreja, 'Expanding Due Diligence: Human Rights Risk Assessments and Limits to State Interventions Aimed at Preventing Domestic Violence' (2020) 7(2) GroJIL 183, 189
[61] Griffiths (n 59) 100
[62] ibid
[63] ibid

Unlike long-term prevention the short-term prevention category requires a foreseeable risk of violation.[64] Short-term measures are focused on preventing a specific violation. [65] A typical example may include an interim measure preventing the removal of an alien or the obligation to provide restraining orders against a potential offender. Short-term measures have also been described as secondary prevention or escalation mitigation. [66] However, secondary prevention is not limited to short-term prevention, it also overlaps with preventing continuation (van der Have's third phase). Secondary prevention also requires knowledge of risk of violation, which would trigger an obligation 'to prevent its escalation or reoccurrence.'[67] This form of prevention is both proactive and reactive, it is proactive in that it should be used to respond to risk to prevent harm before it occurs, and it is reactive in that it may also be used to interrupt human rights abuse and prevent its continuance.[68]

The final phase identified by van der Have is the prevention of reoccurrence. This phase is also known as tertiary prevention.[69] This prevention only occurs after the first violation; however, it is a form of prevention because it acts to prevent repetition. An example of this form of prevention is the provision of perpetrator programmes for domestic abuse perpetrators and sex offenders. For Nienke van der Have this category also contains measures 'in the area of investigation, prosecution and punishment'.[70] These obligations are held under this category of preventing reoccurrence as they will have a deterrent effect. However, these obligations will fall outside this thesis' definition of prevention obligations, due to the concerns discussed in Section 1.1. Nevertheless, within non-reoccurrence measures exist which go 'beyond remedying the particular violation at hand.'[71] The Human Rights Committee addresses in 'its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question'.[72] The ECtHR also uses the finding of a violation in particular cases to address the improvement of prevention methods, especially where a structural problem has been identified.[73] These transformative

[64] van der Have (n 8) 17
[65] ibid
[66] Obreja (n 60) 190
[67] ibid
[68] ibid
[69] Zaksaitė (n 57) 188
[70] van der Have (n 8) 18
[71] ibid
[72] Human Rights Committee (2004) General Comment 31: Nature and the General Legal Obligation Imposed on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev1/Add13 para 8 and 17 (HRC General Comment 31)
[73] *Broniowski v. Poland* App no. 31443/96 (ECtHR, 22 June 2004)

measures appear to more easily fit with the idea that prevention obligations should be primarily focused on stopping violations from occurring.

Finally, whilst helpful this categorisation cannot be totally exclusive; it is easy to contemplate measures that arguably fit into more than one category. For example, the obligation to provide protection orders for women at risk of domestic violence may be considered a short-term measure, prevention of continuance or prevention of repetition depending on when and why this measure is introduced. Thus, this categorisation is intended to demonstrate how prevention obligations may still be relevant after the first injurious act. Moreover, the classification also demonstrates how prevention can be categorised through the type of risk it targets: individual or general.

3. Summary

In summary, it is difficult to determine a common understanding of the meaning of prevention obligations. The definitions provided are limited in their potential to support classification of prevention obligations. Moreover, there is little consensus over what types of obligations of States thus fall within the realm of prevention. Therefore, it was necessary to address these concerns and clarify the types of obligations that this thesis will consider fall within the meaning of prevention obligations. The following chapter will address the origins of implied prevention obligations, to explain why and how prevention obligations have developed.

CHAPTER TWO – ORIGINS OF PREVENTION OBLIGATIONS

1. Introduction

This Chapter aims to explain the origins of due diligence and prevention obligations. The chapter will begin by discussing the principle of effectiveness. Next it will discuss the need for horizontal effect, it will then explain how this has developed in different human rights bodies. The importance of prevention within this development will be discussed. Finally, the chapter will finish by discussing the standard of due diligence which has been widely used in the development of prevention obligations.

2. Principle of Effectiveness

Improvement of human rights protection is the goal of all human rights instruments. For example, the preamble of the European Convention on Human Rights sets out the purpose of the convention as not only maintaining but further realising human rights.[74] The development of positive obligations has been used as a 'decisive weapon' in this pursuit.[75]

The aim of positive obligations is to guarantee individuals effective enjoyment of human rights.[76] The ECtHR has explicitly recognised this purpose on many occasions. In *Airey v Ireland* the Court held that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[77] Since *Airey* the Court has consistently reiterated this principle of effectiveness,[78] to the extent that the principle now 'permeates the whole Convention system'.[79]

The principle of effectiveness is not unique to the European Convention system. Originating from Article 2 jurisprudence, the principle of effectiveness has now been recognised as a

[74] Brice Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61 N Ir Legal Q 203, 204
[75] Jean-François Akandji-Kombe 'Positive obligations under the European Convention on Human Rights' (Human rights handbooks No. 7, Council of Europe 2007) 6
[76] ibid
[77] *Airey v Ireland* App no. 6289/73 (ECtHR, 9 October 1979) para 24
[78] Dickson (n 74) 205
[79] Jean-Paul Costa, 'The European Court of Human Rights: Consistency of Its Case-Law and Positive Obligations' (2008) 26 Neth Q Hum Rts 449, 453

general principle under Inter-American caselaw, crosscutting 'the protection due to all the rights recognized in the Convention'.[80] The African Commission also appears to be taking a similar approach, as it stated that 'there is no right in the African Charter that cannot be made effective'.[81] Moreover, it has been argued that although UN treaty bodies 'have not used exactly the same expression, their practice follows the same reasoning.'[82] Therefore, the principle of effectiveness has developed in all the main human rights sources discussed.

3. Challenge Posed by Non-State Actors

Under the principle of effectiveness, protection for human rights should be comprehensive, meaning that 'it should cover all possible threats, regardless of whether their source is the State or private parties.'[83] Human rights instruments were created on 'the belief that the greatest threats to an individual resulted from actions of the State and its authorities.'[84] This belief may be attributed to the timeframe of their creation. The ECHR, ICCPR and ICESR were all created and negotiated in the aftermath of the second world war.[85] Moreover, the African Charter was created after the 'grave and massive violations of human rights' by military and political leaders such as Idi Amin of Uganda, Macias Nguema of Equatorial Guinea, and Jean Bedel Bokassa of the Central African Republic.[86] This view of states as the greatest threat to human rights has been instrumental in shaping the scope of human rights obligations. It is generally understood that human rights law applies vertically, that is that 'human rights treaties address state parties as the primary duty-bearers and most existing frameworks of accountability for human rights violations are focused on states as the potential wrong-doers.'[87]

This state-centric focus of international human rights law has been criticised as outdated. Modern developments, such as globalisation have changed the distribution of power and

[80] Lavrysen (n 34) 97
[81] Shelton and Gould (n 4) 576; Social and Economic Rights Action Center (SERAC) v Nigeria App no. 155/96 (ACHPR 27 October 2001) para 68
[82] Louise Doswald-Beck, Human Rights in Times of Conflict and Terrorism (OUP 2011) 33
[83] Monika Florczak-Wątor, 'The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State' (2017) 17(2) ICLR 39, 45
[84] ibid 40
[85] ibid
[86] B. Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' 1984 6(2) Human Rights Quarterly 141
[87] van der Have (n 8) 16

influence.[88] It has now been recognised that it is not the State but private parties that pose the biggest threat to the enjoyment of human rights.[89] Almost all human rights can be violated by private actors,[90] including rights such as the prohibition of torture, which was originally framed as an abuse committed by the state. Moreover, almost all types of non-state actors are involved in human rights infringements, not just non-state actors who are more synonymous to the state, and carry out public functions.[91] Individuals are also capable of infringing the rights of others, for example 'nowadays, in a democratic State ruled by law, it is usually private parties that kill individuals, interfere with their private and family life, limit their freedom to express opinions, and disrupt peaceful assemblies.'[92]

Therefore, there has been an expectation that human rights law would adapt to respond to this new source of threat.[93] Adaption would require human rights law to change from its sole vertical application, to include 'horizontal' application of human rights, between non-state actors.[94]

4. Indirect Horizontal Effect

Human rights supervisory bodies have consistently emphasised that human rights obligations do not have direct horizontal effect between non-state actors.[95] This follows from the fact that 'only states can become party to human rights treaties and therefore be legally bound by their obligations'.[96] For that reason, focus has been directed to indirect horizontal application.

Indirect horizontal application of human rights law does not attempt to apply human rights obligations to non-state actors but instead links harm arising from private actions to an act or omission of the state which engages the states' responsibility through failing to protect.[97] This essentially 'results in a diagonal application of human rights'.[98] This approach allows for

[88] Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' [2018] European Journal of Comparative Law and Governance 5, 7
[89] Florczak-Wątor (n 83) 41
[90] ibid 44
[91] Lane (n 88) 6
[92] Florczak-Wątor (n 83) 41
[93] ibid
[94] Lane (n 88) 15
[95] ibid 17
[96] ibid 15
[97] Florczak-Wątor (n 83) 44
[98] Lane (n 88) 26

state responsibility, 'even if the human rights violations results from the acts of a private or unknown person' through failure to comply with its positive obligations. [99]

This is important not only to protect individuals in cases where the abuse was committed by a private actor but also in cases where responsibility for the actual act cannot be established. The obligation to protect allows supervisory bodies to bypass the issue of attribution and establish responsibility on the separate grounds of due diligence.[100] This perhaps explains why the Inter-American Court has been a front runner in the development of due diligence obligations, as it has been faced with a number of cases concerning disappearances, extrajudicial killings and forced displacements where attribution cannot be determined.[101]

5. Obligation to protect – prevention of abuse by third parties

Obligations to prevent arise under this category of obligations to protect. Human rights supervisory bodies have clearly set out the obligations required by the state to fulfil its obligation to protect. It has been held that 'States may breach their international human rights law obligations where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.'[102] This has been recognised by many of the key authorities on state obligations under human rights law.

5.1 UN Treaty Bodies

The Human Rights Committee (HRC) and the Committee on Economic Social and Cultural Rights (CESCR) have established the obligation to prevent under the obligation to protect. The HRC has used its general comment function to clarify the definition and scope of obligations within the ICCPR. In General Comment No 31, the HRC sets out the obligation of state parties to protect and explains how state responsibility may arise under this 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

[99] Lavrysen (n 34) 96
[100] Maria Monnheimer, Due Diligence Obligations in International Human Rights Law (CUP, 2021)24
[101] Shelton and Gould (n 4) 579
[102] Annual report of the UNHCHR (n 5) para 4

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.[103]

The CESCR has elaborated a similar understanding to the HRC of the obligation to protect. Under the obligation to protect, the CESCR established that States must 'tak[e] steps to prevent, investigate, punish and redress abuse through effective laws and policies and adjudication.'[104]

Moreover, this development has not been limited to these two treaty bodies. All UN treaty bodies have recognized 'the obligation to take reasonable measures to prevent abuses by private persons and to properly follow up on such abuses.'[105]

5.2 African Commission on Human and People's Rights

The African Commission has also recognised the obligation to protect. In interpreting Article 1 of the African Charter on Human and People's Rights (African Charter) on state obligations, the Commission held that one of the many obligations this provision creates is 'the duty to protect the rights and freedoms under the Charter.'[106] The Commission held that the purpose of this duty is 'to guarantee that private individuals do not violate these rights'[107] and protect 'citizens or individuals under their jurisdiction from the harmful acts of others'.[108]

The Commission held that this obligation to protect requires 'the State to adopt and implement laws and other measures to prevent violations including by non-state actors, or to provide for redress when the rights and freedoms have been violated.'[109] This obligation to prevent has been consistently reiterated by the Commission.[110]

[103] HRC General Comment 31 (n 72) para 8 and 17
[104] Lane (n 88) 46; CESCR, 'General comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (2016) e/c.12/gc/23, para. 59
[105] Doswald-Beck (n 82) 37
[106] Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Federal Republic of Ethiopia App no. 341/2007 (ACHPR, 14 October 2021) para 124
[107] Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon App no. 272/03 (ACHPR, 25 November 2009) para 88
[108] Zimbabwe Human Rights NGO Forum v. Zimbabwe App No. 245/02 (ACHPR, 15 May 2006) para 143
[109] EWLA v. Federal Republic of Ethiopia (n 106) para 124
[110] Zimbabwe Human Rights NGO Forum v. Zimbabwe (n 108); EWLA v. Federal Republic of Ethiopia (n 106) para 122; Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, App no. 272/03 (ACHPR, 27 May 2009) para 148; INTERIGHTS v Cameroon (n 107) para 89-91

5.3 Inter-American Commission/Court of Human Rights

The IACtHR introduced an obligation to prevent in its first contentious case. In *Velásquez Rodríguez v. Honduras,* the IACtHR established the principle that states can be held responsible for actions that are not directly attributable to them where there is a 'lack of due diligence to prevent the violation or to respond to it as required by the Convention.'[111]

However, instead of establishing this obligation under the duty to protect, the IACtHR has recognised prevention obligations under the obligation to ensure. The Court has held that the obligation to ensure obliges state parties to 'organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[112] Incorporated within this obligation to ensure 'are state duties to prevent rights violations and, when unable to prevent them, to investigate, punish the perpetrators, and provide the appropriate compensation to victims.' [113]

5.4 European Convention on Human Rights

The ECtHR has not explicitly recognised an obligation to protect. According to Akandji-Kombe, rather than adopting the tripartite typology of state obligations (respect, protect, fulfil) recognised by other instruments, 'the European Court of Human Rights has for its part opted for a simpler, two-pronged approach, dividing states' obligations into two categories: (a) negative obligations and (b) positive obligations.'[114] Nevertheless, Akandji-Kombe concedes that although different, these approaches have much in common.[115] For example, it may be said that 'the positive obligations stem from the duty to protect persons placed under the jurisdiction of the state.'[116]

Moreover, positive obligations under the ECHR take a similar approach to the duty to protect in achieving indirect horizontal effect. Under the Convention a state may be held responsible for violations committed by individuals' infringement of a provision of the convention, where

[111] Griffiths (n 59) 191; Velásquez Rodríguez v. Honduras Series C No. 4 (IACHR, 29 July 1988) para 172
[112] Shelton and Gould (n 4) 573; ibid para 166
[113] ibid; ibid
[114] Akandji-Kombe (n 75) 5
[115] ibid
[116] ibid 14

'the state has been unable legally or materially to prevent the violation of the right by individuals, and otherwise because it has not made it possible for the perpetrators to be punished, that it risks being held responsible by the European Court.'[117] Therefore, positive obligations lead to state responsibility for the infringements committed by NSAs in much the same way as other international human rights systems.

However, the approach of the ECtHR does contain some unique features. The ECtHR uses 'a combination of the standard-setting provisions of the European text and Article 1' as the legal basis for positive obligations. Therefore, the positive obligations established, including the obligations to prevent are tied to specific provisions in the Convention. For example, in relation to the right to life (Article 2) and the prohibition of ill-treatment (Article 3) the court has implied obligations to take preventative measures.[118]

6. Obligation to protect – prevention of abuse by the state?

An important issue to discuss is whether the obligation to protect only applies for actions of non-state actors. General Comment No 31 explicitly includes reference to causation 'by such acts by private persons or entities' in its description of the obligation to protect.[119] However, according to some academics the obligation to protect has been expanded to cover state actors. The scholar Lottie Lane argues that the obligation to protect 'has been interpreted to require States to take immediate steps to ensure that violations by the State, its agents, and non-State actors are prevented.'[120] In making this statement Lottie Lane assumes that violations by the State or State actors may fall under the obligation to protect. Moreover, Jean-François Akandji-Kombe, in analysing positive obligations under the European Convention of Human Rights, has made the same assertion, stating that 'the state also has the obligation to protect in the context of its own relations with persons under its jurisdiction.'[121]

The inclusion of state actors within the obligation to protect seems unnecessary. Where the action that infringes on an individual's right may be attributed to the state, this may more easily be framed as a violation of the states' negative obligation not to infringe upon rights. Thus as Akandji-Kombe, admits 'there is rightly room for doubt as to whether, from the

[117] ibid
[118] Murphy (n 26) 40
[119] HRC General Comment 31 (n 72) para 8
[120] Lane (n 88) 29
[121] Akandji-Kombe (n 75) 15

strictly judicial point of view, it is necessary to resort to the theory of positive obligations in order to establish the responsibility of the states parties in such situations.'[122] If state responsibility may be established through non-compliance with negative obligations, it seems superfluous to assess whether 'another person exercising that same authority, the legislative or the executive power, for example, failed to act to prevent the infringement… since no such inquiry is needed to establish non-compliance'.[123]

However, if we look at goals beyond establishing state responsibility for infringements, inclusion of state actors under the obligation to protect may be justified. In *Assanidzé v. Georgia* the European Court of Human Rights explained how including state actors within prevention obligations proposes that

> authorities must prevent or remedy any breach at subordinate levels. The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected.[124]

This is an important obligation as some scholars have questioned the appropriateness of the state taking on the role of human rights protector, given that the state often continues to be a 'prolific perpetrator of human rights' especially in areas such as VAW.[125] Thus it is important that prevention obligations also apply to state actors, as this may provide accountability of the state at the highest levels. For example, after a serving UK police member was convicted of kidnap, rape and murder the Metropolitan police commissioner Cressida Dick, was quoted saying "I have 44,000 people working in the Met. Sadly, some of them are abused at home, for example, and sadly, on occasion, I have a bad 'un,"[126] This response of shaking off responsibility is not acceptable, especially given the officer had a history of sexual harassment.[127] Inquiries have since been introduced into 'what failures enabled his continued employment as a police officer'.[128] This example of an officer of the state using his power to

[122] ibid
[123] ibid
[124] ibid
[125] Griffiths (n 59) 274
[126] Alexandra Topping, 'Cressida Dick says there is occasional 'bad 'un' in Metropolitan police' (the Guardian, 8 Jue 2021) < https://www.theguardian.com/uk-news/2021/jun/08/cressida-dick-admits-there-are-bad-uns-in-the-metropolitan-police > accessed 16/06/2022
[127] Vikram Dodd, 'Met police misogyny: the rot runs even deeper than thought' (the Guardian, 1 February 2022) <https://www.theguardian.com/society/2022/feb/01/revealing-the-rot-police-misogyny-runs-deeper-still> accessed 16/06/2022
[128] Joe Ryan, 'Reports of misogyny and sexual harassment in the Metropolitan Police' (House of Commons Library, 1 March 2022) <https://researchbriefings.files.parliament.uk/documents/CDP-2022-0046/CDP-2022-0046.pdf > accessed 16/06/2022

commit human rights violations, even after he had been identified as someone who was a potential risk, demonstrates the importance of including state actors within the articulation of the duty to protect.

7. Importance of Prevention

The obligation to protect is not limited to only prevention obligations. If prevention measures are unsuccessful and human rights abuse occurs, a state also has obligations to investigate, punish the perpetrators of the violation and redress the victims. However, the obligation to protect ideally results in prevention.

The principle of effectiveness requires that state obligations 'be interpreted in the sense which best protects the person.'[129] The other obligations under the obligation to protect 'operate ex post facto.'[130] For example, the obligation to investigate presumes that there is a human rights infringement to investigate, the obligation to punish assumes that there is a violation of human rights that needs to be punished and the obligation to redress, presumes that there is a victim of a human rights violation to redress. Prevention on the other hand, is aimed at stopping the human rights violation before victimisation occurs. From the perspective of individuals and protection from harm this is obviously the preferred approach. Intervention before or after the violation in some cases can mean life or death.[131] Therefore, it is 'perhaps stating the obvious to note that it would be better to ensure that the violation does not occur in the first place.'[132]

Additionally, prevention should be preferred due to the inadequacies of other obligations. The obligation to provide a remedy is difficult to fulfil in a meaningful and appropriate way for human rights violations. The harms that occur through human rights violations are generally not susceptible to remedy: 'How does one compensate for a lack of education, a missing limb, years of false imprisonment, inadequate nutrition or a lack of opportunities for political participation?'[133] Moreover, reparation which focuses on 'reinstating the victim to the

[129] Akandji-Kombe (n 75) 5
[130] Smith (n 1)
[131] ibid
[132] ibid
[133] ibid

position' they were in before the violation is flawed because it fails to acknowledge the root causes of violations and thus is prone to repetition.[134]

Nevertheless, it is not possible to prevent all violations of human rights due to unpredictable behaviour, the need to balance other rights and many other factors. Therefore, the other obligations are in place to address harm in situations where the violation could not be prevented. Moreover, another consequence of this recognition that not all harm can be prevented is the adoption of the due diligence standard.

8. The Standard of Due diligence

Due diligence is an important feature of the state obligation to protect.[135] UN treaty bodies, UN independent experts, and regional Court systems are increasingly 'using this concept of due diligence as their measure of review'.[136] Due diligence is seen as a measure to assess 'what constitutes effective fulfilment of a State's obligations.'[137] Due diligence thus provides for a standard of liability for the obligation to prevent. The principle 'has proven crucial in delineating the conditions under which a state may be obliged to prevent or respond'.[138]

Due diligence lowers the threshold from strict liability as understood under obligations of result, to an obligation to take measures which are reasonable or appropriate under the circumstances.[139] Thus, due diligence implies a duty of conduct rather than of result.[140] This means that the 'occurrence of a human rights violation does not per se mean that a state has failed to meet its due diligence obligation'.[141] This is because the duty is not 'an "absolute" obligation to prevent or punish harmful activities carried out by private individuals'. [142]

[134] Nicholas Wasonga Orago and Maria Nassali, '4 The African Human Rights System: Challenges and Potential in Addressing Violence Against Women in Africa' in Rashida Manjoo and Jackie Jones (eds), *The Legal Protection of Women from Violence: Normative Gaps in International Law* (1st edn, Routledge 2018) 107, 109
[135] Lane (n 88) 30
[136] COHRE v. Sudan (n 110) para 148
[137] Nathalie Meurens and Others, 'Tackling violence against women and domestic violence in Europe: The added value of the Istanbul Convention and remaining challenges' (European Parliament 2020) 101
[138] Elizabeth A.H. Abi-Mershed, 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American System' 127, 128
[139] Ellen Campbell et al, 'Due Diligence Obligations Of International Organizations Under International Law' (2018) 50 International Law and Politics 541, 571
[140] ibid 562
[141] ibid 570
[142] ibid

Instead, it may be seen as an obligation to employ "best efforts" to prevent or punish violations.[143]

The phrase best efforts and the obligation of conduct itself may seem unsatisfactory compared to the perhaps more demanding obligation of result.[144] However, it is necessary for obligations relating to private actors as states cannot exercise complete control over the actions of private actors, which may make prevention impossible.[145] Thus, it is recognised that state responsibility for private acts must have certain limitations.[146] The reasoning for this has been eloquently articulated by Dinah Shelton and Ariel Gould, who argued that

> The state cannot ensure that no homicides or assaults will occur, or that other violations of guaranteed rights will always be prevented. Yet, at the other extreme, the state cannot stand by idly while death squads roam the country, killing with impunity. Somewhere between these extremes lies the standard for judging whether a state has fulfilled its affirmative obligations[147]

Due diligence is not a superficial obligation; it still demands effective measures to be undertaken by the state. Due diligence 'requires action reasonably calculated to realize the enjoyment of a particular right'.[148] Reasonableness can be understood to imply that measures must be designed to be effective in achieving their preventative goal. This requirement for effectiveness is key under the Istanbul Convention and ECtHR. [149] The due diligence standard thus demands 'that, if an adopted measure fails, other more effective measures must be sought.'[150] For example, in the situation of VAW, if civil law measures fail to protect women then criminal sanctions should be introduced.[151]

However, the specific actions required to comply with the standard of due diligence is not always clear. This lack of clarity may be explained by two key corresponding factors of prevention obligations: the vague wording often used, and the flexibility required. Due

[143] Monnheimer (n 100) 4
[144] Lane (n 88) 30
[145] ibid
[146] Karin Henriksson, State Responsibility for Acts of Violence Against Women By Private Actors – An Analysis of the Jurisprudence of the Inter-American System of Human Rights (Masters thesis, Uppsala University 2016) 17
[147] Shelton and Gould (n 4) 577
[148] Lane (n 88) 30
[149] Lisa Grans, 'The Istanbul Convention and the Positive Obligation to Prevent Violence' [2018] 18 Human Rights Law Review 133, 151
[150] ibid
[151] ibid

diligence obligations often use vague phrasing such as 'all appropriate means'[152] and 'appropriate legislation, policies and measures'.[153] This broad phrasing allows state parties 'a great deal of flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework' and to adapt to the risk faced.[154] Flexibility also leads to a lack of clarity. Although there has been a common understanding of the need for preventive measures, the instruments recognise that the nature of risks and appropriate responses may vary widely. Thus, the concrete interpretation of prevention obligations often remains 'highly dependent on the specific circumstances of each situation.'[155] This variation does not only occur between types of human rights but between every factual scenario.[156] This has been articulated by human rights bodies as the need for due diligence to 'be applied on a case by case basis'.[157] The consequence of this flexibility is that prevention obligations tend to be generally formulated and thus provide unclear guidelines on what measures are required for compliance.

Nevertheless, not all instruments contain the same level of abstractness for prevention obligations. In the area of Violence against Women, the regional courts have established many principles setting out the minimum standards required for the due diligence obligation to prevent VAW[158] and the three regional treaties and CEDAW output have established some rather detailed requirements for prevention. The following chapter will therefore discuss prevention obligations that have developed to combat VAW.

9. Chapter Summary

This chapter has shown how obligations to prevent have developed to fill a gap in protection under human rights law. The obligation to protect arose to allow state responsibility for

[152] Example: Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) ("Convention of Belem do Para") Article 7
[153] Joint Convention on the Elimination of All Forms of Discrimination against Women General Recommendation No. 31/ Convention on the Rights of the Child General Comment No. 18 on harmful practices (CEDAW/C/GC/31-CRC/C/GC/18) para 31
[154] 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' (2010) CEDAW/C/GC/28 para 23
[155] Concurring Opinion, Kurt v. Austria App no. 62903/15 (ECtHR, 15 June 2021) para 4
[156] Henriksson (n 146) 20
[157] INTERIGHTS v Cameroon (n 107) para 92
[158] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 October 2014) (Istanbul Convention) Preamble

human rights violations committed by non-state actors. However, as the chapter has shown this obligation is now understood to cover actions of both state and non-state actors. The obligation to protect establishes an obligation of due diligence to prevent as well as punish, investigate or redress. However, this chapter highlighted how effective protection should ideally require prevention of interference with human rights. Nonetheless prevention cannot be guaranteed, thus the standard of due diligence is adopted.

CHAPTER THREE – VIOLENCE AGAINST WOMEN

1. Addressing the Problem of Violence Against Women

Violence against women and girls has now been recognised as 'the scandal of our times'.[159] It is a worldwide problem,[160] which takes on many forms and has many potential perpetrators including the state.[161] This problem has not gone unnoticed, and thus 'violence against women has been recognised as important and worth normative attention the world over.'[162] In recent decades, this interest in international human rights law has been reflected in the development of various instruments addressing VAW at both the international and regional level.[163]

At the international level, the CEDAW Committee has recognised VAW as a form of discrimination in General Comment no 19 and has 'facilitated bringing individual cases of violence against women to the CEDAW Committee through the Optional Protocol.'[164] Furthermore, the UN general assembly introduced a Declaration on the Elimination of Violence against Women (DEVAW).[165] Developments have also occurred at the regional level with ground-breaking decisions in the regional courts and new treaties adopted.[166] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belèm Do Parà), which entered into force in March 1995, was the first legally binding treaty to directly address violence against women.[167] It is now the 'most ratified treaty in the IASHR, with only the United States, Canada, and Cuba withholding their ratification deposits.'[168] This treaty was followed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo

[159] Sheila Dauer, 'Human Rights Responses to Violence Against Women' in Niamh Reilly (ed), *International Human Rights of Women* (Springer 2019) 230
[160] Enes Sarac and Muge Cinar, Main Features of The Inter-American Convention On Violence Against Women (Università degli Studi di Firenze 2021) 2
[161] Henriksson (n 146) 6
[162] Fareda Banda, 'Building on a global movement: Violence against women in the African context' (2008) 8(1) African Human Rights Law Journal 1, 22
[163] Henriksson (n 146) 13
[164] Dauer (n 159) 229
[165] Declaration on the Elimination of Violence against Women, Proclaimed by General Assembly resolution 48/104 of 20 December 1993 (DEVAW)
[166] Dauer (n 159) 229
[167] Ciara O'Connell, 'Women's Rights and the Inter-American System' in Niamh Reilly (ed), *International Human Rights of Women* (Springer 2019) 141
[168] ibid

Protocol) in November 2005.[169] Although designed to address the rights of women in the African region generally, Maputo 'contains comprehensive provisions on violence against women.'[170] Finally, the third regional treaty and the first European legal instrument addressing VAW entered into force in August 2014.[171] Although last to be adopted, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) is arguably the most far-reaching of the treaties in terms of prevention. Nonetheless, each of these instruments contain important provisions on state obligations to prevent VAW. These instruments as well as important caselaw will be used in this chapter to discuss the prevention obligations which have evolved to combat VAW.

This chapter therefore aims to contribute to the overall purpose of the thesis through providing an example of the development of prevention obligations. VAW has been selected as the chosen case study, as prevention has been recognised as 'a core element of a co-ordinated and strategic response to end violence against women'.[172] Moreover, the role due diligence plays as a "juridical bridge" between the traditional state-centric and public sphere focused human rights law, to the role the state may have in the relationship and conduct between individuals'[173] is especially important for VAW which had traditionally been seen as a private problem beyond the scope of IHRL due to the predominance of violence within the confines of the home and family.[174] Therefore, prevention obligations have gained significant importance in the area of VAW.

2. Dual Obligation of Due Diligence

All the key instruments addressing VAW have recognised the due diligence obligation to prevent.[175] The predominance of the due diligence obligation to prevent is so profound in

[169] Scholastica Omondi, Esther Waweru and Divya Srinivasan, 'Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa' (Equality Now 2018) 7
[170] Banda (n 162) 1
[171] Bruna Gamulin, 'Comparing practices by GREVIO and the UN CRPD Committee on awareness-raising initiatives' (Masters thesis, CEU 2020) 2; Grans (n 149) 133
[172] Marianne Hester and Sarah-Jane Lilley, 'Preventing Violence Against Women: Article 12 of the Istanbul Convention' (Council of Europe 2014) 5
[173] Henriksson (n 146) 19
[174] Banda (n 162) 17
[175] CEDAW, 'General Comment No, 19: Violence against women' (1992) t A/47/38; DEVAW (n 165); Belém do Pará (n 152) ; Istanbul Convention (n 158); Opuz v. Turkey, App No. 33401/02 (ECtHr, 2009); Zimbabwe

VAW that both the Inter-American Commission[176] and former Special Rapporteur on VAW, Yakin Erttirk have argued that it has become customary international law.[177] However, concerns have been raised that the meaning of due diligence and prevention obligations varies across these bodies.[178] Nonetheless, former special rapporteur on VAW Rashida Manjoo proposed that due diligence occurs at two levels: the structural and individual.[179] Manjoo argues that

> State responsibility to act with due diligence must be considered as a dual obligation i.e. (a) as a systemic responsibility, whereby States create responsive and effective systems and structures that address the root causes and consequences of violence against women; and (b) as an individual responsibility, whereby States provide victims with effective measures of prevention, protection, punishment and reparation.[180]

The rest of the chapter will therefore be divided using this two-level framework for due diligence. First obligations to prevent at the individual level will be analysed, including: sources of obligations, types of measures required and limitations. Then, structural obligations to prevent will be analysed, focusing on: sources of obligations, types of systemic prevention obligations and importance of cause.

3. Individual Responsibility

The CEDAW Committee and each regional system has recognised the state obligation to take preventative measures to protect an individual from risk of harm. These measures take the form of 'operational preventative and protective measures' which are 'intended to avoid a dangerous situation as quickly as possible'.[181]

case (n 108) and EWLA v. Federal Republic of Ethiopia (n 106); Jessica Lenahan (Gonzales) et al. v. United States Report No. 80/11, Case 12.626 (IACHR, 21 July 2011)

[176] Griffiths (n 66) 238; ibid para 122, 123

[177] Lee Hasselbacher, 'State Obligations regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection' (2009) 8 Nw U J Int'l Hum Rts 190, para 51

[178] Griffiths (n 59) 261

[179] Manjoo (n 58) 85

[180] ibid

[181] *Kurt v Austria* (n 155) para 178

3.1 Sources of individual prevention obligations

3.1.1 Caselaw

The obligation to take preventative operational measures emerged in ECHR caselaw. Despite the ECHR not containing a specific provision on VAW, the ECtHR has 'built up a substantial body of jurisprudence regarding domestic violence'.[182] Under both Article 2 (Right to Life) and Article 3 (Prohibition of Ill-treatment) the Court has recognised the obligation to take appropriate steps to safeguard the lives and bodily integrity of those within its jurisdiction.[183] This has created two key obligations: 'the duty to provide a regulatory framework; and the obligation to take preventive operational measures.'[184] This obligation to take preventive operational measures was first articulated by the Court in *Osman* (1998), a non VAW case, however, it was consequently confirmed to apply in the context of domestic violence.[185]

It is not uncommon for regional and international human rights bodies, to 'cross-pollinate and rely on each other to establish precedent'.[186] This practice has been demonstrated through the transplant of this individual prevention obligation. The IACtHR held in *Cotton Fields*, that the 'obligation to act with due diligence to prevent VAW requires that states must adopt comprehensive measures.'[187] Similarly, to the ECtHR the IACtHR held that this requires two types of obligations: an appropriate legal framework and 'preventive measures in specific cases in which it is clear that certain women may be victims of violence.'[188] In *Jessica Lenahan* the Commission solidified this obligation 'to adopt legal measures to prevent imminent acts of violence' arguing that it also arose under the American Declaration of the Rights and Duties of Man.[189]

The CEDAW Committee has not used the phrase preventative operational measures but has implied a comparable duty under the Covenant. In General Comment no 19 the CEDAW Committee recommended that 'States parties should take appropriate and effective measures

[182] Jelena Ristikj, 'Developments regarding Domestic Violence in the Case-Law of the European Court of Human Rights: Kurt v. Austria' (2020) 11 Iustinianus Primus L Rev 1, 7
[183] Registry, 'Guide on Article 2 of the European Convention on Human Rights' (European Court of Human Rights 2021)
[184] ibid
[185] *Opuz v Turkey* (n 175) para 128
[186] O'Connell (n 167) 150
[187] Henriksson (n 146) 47
[188] ibid; *Gonzales et al ('Cotton Field') v Mexico*, Series C No. 205 (IACtHR, November 16 2009) para 258
[189] *Lenahan v US* (n 175) para 177

to overcome all forms of gender-based violence, whether by public or private act'.[190] This includes recommendations for a legal framework to protect women from violence as well as the provision of 'Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence'.[191] In the seminal case for due diligence for VAW under CEDAW, *A.T. v Hungary* the Committee utilized this recommendation to find that 'the failure to provide a mechanism for protection orders against perpetrators of domestic violence was a violation of CEDAW',[192] thus, solidifying the obligation to provide individual prevention measures.

The African Commission has most closely transplanted the obligation to take preventative operational measures. The African Commission held that the obligation to protect does not only require the enforcement of an appropriate legal framework but also through protection 'against injurious acts which can be perpetrated by third parties'.[193] The commission has held that where the state is aware of a real risk to a 'specific individual or category of individuals… the duty to prevent violations requires the state to adopt and diligently implement customised measures of protection that would avert the impending violations or indeed curb or eliminate altogether the prevailing violations.'[194] In a further case, the Commission reiterated this duty as the obligation 'to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.''[195]

Therefore, the three regional human rights bodies and the CEDAW Committee have all recognised similar duties to take individual prevention measures to protect individuals or groups of individuals at risk.

3.1.2 Treaty Provisions for Individual Responsibility

The regional conventions on VAW also include similar obligations. The Istanbul Convention builds on and codifies some of the most important caselaw and principles on prevention created by the ECtHR.[196] This includes the obligation created in Article 50 to take preventative operational measures to protect individuals at risk of violence.[197] The Maputo

[190] General Comment No. 19 (n 175) Recommendation 24(a)
[191] ibid 24(t)
[192] Manjoo (n 58) 90
[193] INTERIGHTS v Cameroon (n 107) para 110
[194] EWLA v. Federal Republic of Ethiopia (n 106) para 125
[195] COHRE v. Sudan (n 110) para 147
[196] Griffiths (n 59) 214
[197] Grans (n 149) 150

Protocol also establishes obligations to protect individuals at risk of harmful practices. Article 5(d) requires states to take 'all necessary legislative and other measures' to protect 'women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.'[198] Individual protection is also envisaged by the Convention of Belém do Pará. Article 7(f) of the convention establishes obligation to provide protective measures for women who have been subjected to violence.[199]

3.2 Types of measures required

Despite this widespread recognition of state obligations to provide individual prevention measures, there is difficulty in determining the meaning of this obligation. Human rights bodies have been reluctant to establish set rules on how to fulfil this obligation. The ECtHR and African Commission have both emphasised that it is not their role to indicate the precise measures or combination of measures which should be taken by the state.[200] Nevertheless, this has not prevented both bodies from 'maintaining some minimum requirements'.[201] From these minimum requirements we can draw conclusions on what may be required under the individual prevention obligations. The most commonly held requirement under this obligation is to provide protection and exclusion orders, however the human rights bodies have acknowledged that other temporary protection measures may also fulfil this obligation.

The requirement for protection and exclusion orders have been a common theme in the jurisprudence of the human rights bodies. In *Lenahan* the Inter-American Commission held that 'restraining orders, and their adequate and effective enforcement' was one possible measure that could be used to fulfil the duty to adopt legal measures to prevent imminent acts of violence.[202] The European Court of Human Rights has also established in *Bevacqua and S. v. Bulgaria* and *Opuz v Turkey* that 'states party to the European Convention must provide individuals with the means to obtain some form of enforceable protective measure, such as an order of protection, a restraining order, or an expulsion order.'[203] In *Opuz* for example, the

[198] Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005 Article 5(d)
[199]Convention of Belém do Pará (n 152) Article 7(f)
[200] *Y and Others v. Bulgaira* App no. 9077/18 (ECtHR, 22 March 2022) para 109; *EWLA v. Federal Republic of Ethiopia* (n 106) para 128
[201] *Zimbabwe* case (n 108) para 155; Grans (n 149) 154
[202] *Lenahan v US* (n 175) para 177
[203] Hasselbacher (n 177) para 78

Court suggested that 'the authorities could have issued an injunction banning the person posing a threat from contacting, communicating with or approaching the person under threat.'[204] Thus, in these cases the Court endorsed protection and exclusion orders 'as a minimum requirement for compliance with due diligence obligations.'[205] The importance of protection and exclusion orders has since been regularly emphasised by the ECtHR.[206] The CEDAW Committee has also highlighted the importance of protection and exclusion orders in *A.T. v Hungary*.[207]

Nevertheless, the human rights bodies have recognised that there are other temporary protection measures which may also fulfil individual prevention obligations. For example, the dissenting judges in *Kurt* identified possible measures as: 'advising the applicant to move to a shelter with her children for a period of time; closer police protection of the family; the implementation of a victim notification system which would alert the applicant and her children if the husband were nearby'.[208] The African Commission has suggested similar measures, such as providing security at residences; conducting security patrols of at risk areas;[209] or provision of alternative housing or shelter.[210] The Istanbul Convention requires provision of similar measures.[211] These measures are only an indicator of possible approaches to fulfil the obligation and should not be seen as representative of all possibilities for compliance.

Another pattern found in the caselaw is emphasis on enforcement of prevention measures. It is not adequate for measures to be provided in law, if they are not effectively utilized. The importance of effective enforcement for compliance with prevention duties has been emphasised in each regional system and by the CEDAW committee.[212] For example, the IACtHR has established that 'prevention strategies must be effective, practically realised and implemented – their mere existence does not represent a good faith application of due diligence'.[213] Thus it has held that prevention measures should be accompanied by adequate

[204] Grans (n 149) 150; *Opuz v Turkey* (n 175) paras 128, 148
[205] Hasselbacher (n 177) para 56
[206] Tunikova and Others v. Russia App no 55974/16 (ECtHR, 14 December 2021) para 157
[207] Hasselbacher (n 177) para 26
[208] Joint dissenting opinion, Kurt v Austria (n 155) para 36
[209] EWLA v. Federal Republic of Ethiopia (n 106) para 128
[210] Banda (n 162) 15
[211] Meurens and Others (n 137) 28
[212] Kurt v Austria (n 155) para 144 ; Omondi, Waweru and Srinivasan (n 169) 20; Naidoo v. Minister of Police [2015] ZASCA 152 (Supreme Court of Appeal of South Africa); *Lenahan v US* (n 175) paragraph 163; Dauer (n 159) 234
[213] Griffiths (n5 9) 232

resources and regulations designed to ensure their implementation and enforcement.[214] The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the monitoring body for the Istanbul convention, has also emphasised methods to enforce prevention orders: 'for instance by the use of electronic tools, regular checks on the victim … and follow-up meetings with the perpetrator to explain the order in place and the consequences a breach could have.'[215]

3.3 Limitations of individual prevention obligations

Human Rights bodies have held that preventative obligations must have limits. For example, the ECtHR held in *Osman v the United Kingdom* that 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising'.[216] The Court justify this position as preventing the imposition of 'an impossible or disproportionate burden on the authorities.'[217] The Court recognises that 'difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources' necessitate limits on this preventative obligation.[218] Therefore, many different 'legal devices have been developed by human rights courts and treaty monitoring bodies in an attempt to delimit' the states duties of individual prevention.[219] One of the most important and regularly used examples is the so-called 'Osman Test'.[220]

This Osman test requires that '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 reasonably, might have been expected to avoid that risk.'[221] Thus the first consideration in prevention cases is 'whether the State had any preventive duties at all'.[222] Osman limits the application of individual prevention obligations, as where it

[214] *Lenahan v US* (n 175) Reparation Order 4
[215] *Kurt v Austria* (n 155) para 11
[216] *Osman v. the United Kingdom* App no. 23452/94 (ECtHR, 28 October 1998)
[217] ibid
[218] ibid
[219] Franz Christian Ebert and Romina I. Sijniensky, Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention? (2015) 15 Human Rights Law Review 343, 344
[220] ibid
[221] *Osman* (n 216) para 116
[222] Ebert and Sijniensky (n 219) 347

can be found that the state had no knowledge of the risk posed to individuals, then it may not be held responsible under the obligation to prevent.[223]

Although a creation of the European system, the *Osman* test has had influence in the Inter-American and African Human Rights systems. In *Pueblo Bello Massacre v Colombia* the IACtHR transplanted the 'ECtHR's concept into the Inter-American system.'[224] However, the IACtHR has not consistently applied the Osman test to all cases regarding right to life prevention obligations but importantly for this thesis the test has been used in cases regarding the obligation to prevent VAW.[225] Moreover, a similar test to the Osman test, was recently affirmed by the African Commission.[226] The Commission held in *EWLA v. Federal Republic of Ethiopia,* that the obligation to take preventative operational measures is triggered when the State becomes 'aware or must be deemed to have been aware' of a 'situation where a specific individual or category of individuals face a real risk of their rights and freedoms being seriously violated by non-state actors.'[227]

Concerns have been raised over the appropriateness of the *Osman* test for VAW. Academics and judicial figures alike have raised concerns over the adequacy of the application of the 'real and immediate risk' requirement in a domestic violence context. Academics Franz Christian Ebert and Romina I. Sijniensky raise concern over the *Osman* test's application to scenarios which 'differ significantly from that of the Osman case.'[228] In particular, Ebert and Sijniensky allege that the *Osman* test cannot appropriately deal with cases involving structural risk.[229] Structural risks may not fulfil the requirements for the *Osman* test as structural risks 'typically do not emanate from one specific individual or a clearly identifiable group nor are they necessarily limited to one or more specific individuals' as required by the *Osman* test.[230] Instead structural risks are 'fostered by prevalent social structures, such as racism or sexism, often resulting in patterns of widespread violence against members of a certain group'.[231] Ebert and Sijniensky's concern applies to violence against women, where

[223] Tërshana v. Albania 4 August 2020 App no. 48756/14 (ECtHR, 4 August 2020); Thomas Kwoyelo v Uganda App no. 431/12 (ACHPR, 12 February 2018) paras 210–12
[224] Ebert and Sijniensky (n 219) 352
[225] ibid 354
[226] Kwoyelo v Uganda (n 23)
[227] EWLA v. Federal Republic of Ethiopia (n 106) para 125-6
[228] Ebert and Sijniensky (n 219) 348
[229] ibid 345
[230] ibid (n 6) 363
[231] ibid

the risk faced by an individual may also be linked to the structural discrimination they face as women.

This concern that Osman overlooks 'the peculiarity of domestic violence as a distinctive social phenomenon' has also been raised by ECtHR judges.[232] Specifically ECtHR judges have raised concerns that the 'immediacy' of the Osman test does not serve well in the context of domestic violence.[233] The requirement for immediacy raises concerns as domestic violence is often characterised by 'continuous practice of intimidation and abuse' and thus does not easily fulfil the incident-based understanding of the 'real and immediate risk' requirement as seen in the *Osman* case.[234] The ECtHR has made attempts to resolve this issue. In *Kurt v Austria*, the Court confirmed that 'authorities must assess the reality and immediacy of any risk to life by taking due account of the particular context of domestic violence.'[235] However, this principle does not seem to have resolved the concerns as evidenced by the strong dissenting opinions over its application in this case.[236]

It is not only domestic violence that Osman fails to understand, the Osman test also raises concern in its application to any form of VAW. The inadequacy of the Osman test for dealing with structural risk in VAW cases is demonstrated through its use in the *Cotton Fields* case. In this case the Osman test was used 'as a means to decline State responsibility for the failure to prevent the disappearance' of three young women in Ciudad Juárez despite widely known significant risk to women in the region.[237] Despite acknowledging that 'the State was aware of the situation of risk for women in Ciudad Juárez' it held that it 'had not been established that it knew of a real and imminent danger for the victims in this case'.[238] This demonstrates how Osman fails to incorporate structural risk to women within its assessment of real and immediate risk and therefore limits the application of individual prevention obligations for VAW.

In addition, the use of the Osman test limits the potential of individual prevention measures to prevent harm. In situations of domestic violence, the point in time in which the authorities'

[232] Ristikj (n 182) 7
[233] ibid
[234] ibid
[235] *Kurt v. Austria* (n 155) para 164; Lisa Maria Weinberger, 'Kurt v. Austria: a missed chance to tackle intersectional discrimination and gender-based stereotyping in domestic violence cases' (Strasbourg Observer, 18 August 2021) <https://strasbourgobservers.com/2021/08/18/kurt-v-austria-a-missed-chance-to-tackle-intersectional-discrimination-and-gender-based-stereotyping-in-domestic-violence-cases/ > accessed 29/03/2022
[236] Joint Dissenting Opinion, *Kurt v Austria* (n 155) para 2
[237] Ebert and Sijniensky (n 219) 364
[238] ibid; Cotton Field Case (n 188) para 282

obligations are perceived to have arisen is often after 'an individual's rights have already been jeopardised.'[239] Judge de Albuquerque highlighted this concern in his concurring opinion in *Valiuliene v Lithuania.*[240] Judge de Albuquerque argued that 'at the stage of an "immediate risk" to the victim it is often too late for the State to intervene'.[241] Albuquerque argued that the Courts caselaw had implied that 'immediate risk in the context of domestic violence infers that the risk, namely the batterer, is already in the direct vicinity of the victim and about to strike the first blow.'[242] Judge de Albuquerque's argument is backed up by the risk factors which the ECtHR has used to establish 'real and immediate risk'. For example, in *Tunikova* the ECtHR used the following factors to evidence that the authorities ought to have known of a real and immediate risk: 'the perpetrator's history of violent behaviour and failure to comply with the terms of a protection order, an escalation of violence representing a continuing threat to the health and safety of the victims, the perpetrator's access to weapons and the victim's repeated pleas for assistance'.[243] These risk factors evidence domestic violence has already occurred. This demonstrates that a risk assessment generally requires evidence of previous violations of the applicants' rights in order to establish obligation to take preventive operational measures. Consequently, it may be argued that the obligation to take preventive operational measures does not fulfil the goal of prevention obligations: to prevent an injurious act.

Nevertheless, this obligation should still be seen as prevention. At its most ideal use, individual prevention can recognise imminent risk to an individual and addresses this risk before the violence occurs. However, even if this risk is not identified until some form of violence already occurs the preventative operational measures may still be utilised as secondary prevention. The measures would retain a prevention function as they act to stop the continuation of harm and prevent further escalation. Thus, depending on when and how they are utilised, individual prevention obligations correspond to either preventing human rights infringement or preventing continuation.

[239] Obreja (n 60) 189
[240] *Valiuliene v. Lithuania* App no. 33234/07 (ECtHR, 26 March 2013)
[241] ibid Concurring Opinion of Judge Pinto De Albuquerque, para 31; Ronagh McQuigg, 'Kurt v Austria: domestic violence before the Grand Chamber of the European Court of Human Rights' (2021) 5 European Human Rights Law Review 550, 553
[242] Volodina v. Russia App no 41261/17 (ECtHR, 9 July 2019) Separate Opinion of Judge Pinto De Albuquerque, Joined by Judge Dedov para 12; ibid
[243] *Tunikova and Others v. Russia* (n 206) para 105

4. Systemic Responsibility

The second type of due diligence obligation to prevent identified by Manjoo relates to 'systemic responsibility, whereby States create responsive and effective systems and structures that address the root causes and consequences of violence against women'.[244]

4.1 Sources of systemic prevention obligations

Remedies or reparations in individual cases have been an important forum for prevention obligations. This may be surprising as remedies are 'by nature, "after the fact" rather than preventative'. [245] However, inclusion of orders to guarantee non-repetition can serve as a transformative tool.[246] Transformative remedies are based on a concept of rectification rather than restitution. Whilst restitution for the individual remains important, for the 'elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused'.[247] Through rectification the human rights bodies recognise that 're-establishment of the same structural context of violence and discrimination is not acceptable' and will only promote further violence.[248]

The Inter-American system has been particularly effective in establishing transformative remedies. For example, the IACtHR was commended for its gender-sensitive and transformative reparations in the *Cotton Fields* case. Since *Cotton Fields* this trend has continued in IASHR caselaw.[249] The adoption of transformative remedies in the IASHR can be linked to its relationship with the Belém do Pará convention. The Belém do Pará Convention has been 'cited in over 20 cases before the Inter-American Commission and Court.'[250] Uniquely, the Belém do Pará Convention allows for supervision by the Commission as set out in the Convention or the Court as established in the Courts caselaw.[251] Pursuant to Article 12 of the Convention, only obligations under article 7 are judiciable.[252]

[244] Manjoo (n 58) 85
[245] Griffiths (n 59) 234
[246] ibid
[247] ibid; Cotton Fields Case (n 188) para 450
[248] ibid
[249] ibid 233
[250] Caroline Bettinger-López, '6 Violence Against Women: Normative Developments in the Inter-American Human Rights System' in Rashida Manjoo and Jackie Jones (eds), The Legal Protection of Women from Violence: Normative Gaps in International Law (1st edn, Routledge 2018)191
[251] ibid 168
[252] Convention of Belém do Pará (n 152) Article 12

However, the IACtHR has established that Articles 8 and 9 can be used to aid interpretation of the obligations in Article 7 and of the other obligations in 'other pertinent inter-American instruments.'[253] Therefore, making space for the justiciability of the wide range of obligations established in the Belém do Pará Convention.

The Maputo Protocol also gives the African Court on Human and Peoples' Rights the power to interpret.[254] However, reliance on the Maputo Protocol before this court has been limited as jurisdiction is limited to states who have made a declaration accepting the Court's jurisdiction. [255] At the time of writing only eight states have existing valid declarations.[256]

The caselaw of the ECtHR has also produced some systemic prevention obligations. In 2018 academic Lisa Grans, surveying ECtHR caselaw, cast doubt over the court's ability or willingness to provide 'any concrete primary prevention obligations in individual cases.'[257] However, since this argument was made by Grans, the ECtHR appears to have begun to introduce some obligations of systemic prevention in its recommendations. This may potentially be explained through the ECtHR's changing relationship with GREVIO (the monitoring body for the Istanbul Convention). The *SECOND GENERAL REPORT ON GREVIO'S ACTIVITIES* details the activities undertaken to develop the relationship between GREVIO and the ECtHR.[258] The report argues that 'The Istanbul Convention is in fact increasingly used by the Court as a tool to interpret the ECHR when issuing judgments related to states' legal obligations to prevent and prosecute violence against women'.[259] References to the Istanbul Convention have been made by the ECtHR since the adoption of the Convention.[260] However, it is only in the more recent cases where this seems to have resulted in the Court ordering measures of systemic prevention.[261]

Therefore, whilst the regional caselaw has recognised some forms of primary prevention, it has been the introduction of the three specialised regional treaties and the role of CEDAW

[253] Bettinger-López (n 250) 176
[254] Maputo Protocol (n 198) Article 27; Orago and Nassali (n) 127
[255] Orago and Nassali (n 134) 127
[256] 'Declarations' (African Court of Human Rights) <https://www.african-court.org/wpafc/declarations/> accessed 03/06/2022
[257] Grans (n 149) 148
[258] GREVIO, 'Second General Report on Grevio's Activities' (Council of Europe 2021)
[259] ibid para 123
[260] Gizem Guney, 'The Group of Experts under the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence and the ECtHR: Complementary or Contradictory Tools?' (EJIL Talk, 31 March 2020) < https://www.ejiltalk.org/the-group-of-experts-under-the-istanbul-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence-and-the-ecthr-complementary-or-contradictory-tools/> accessed 03/06/2022
[261] For Example: *Tunikova and Others v. Russia* (n 206) para 158

Committee that has expended the notion of prevention and state responsibility to include measures of systemic prevention.

4.2 Types of systemic prevention obligations

The various human rights instruments have created different types of systemic prevention obligations in relation to violence against women. Therefore, it is useful to categorise these obligations in order to understand the types of measures that may be required. Nevertheless, this cannot be a strict categorisation as many of the obligations will overlap, due to their similar purpose of aiming 'to create the systemic change needed to eliminate gender-based violence against women.'[262] Moreover, in practice it is more efficient to theoreticise each type of measure as strongly interlinked as 'one piece of the puzzle in efforts to prevent violence against women'.[263]

4.2.1 Awareness raising/education

One type of primary prevention obligation that has arose is the provision of education or awareness raising. It is argued that awareness raising, and education is the 'first step in changing attitudes and behaviour that perpetuate or condone the various forms of violence against women.'[264] Education and awareness raising aims to increase knowledge on both women's rights and the issue of VAW, its causes and consequences.

There are many sources of awareness raising and education obligations for VAW. In the universal context, CEDAW General Recommendation no 19 sets out obligations for 'public information and education programmes'.[265] CEDAW has also recommended awareness raising on specific issues of concern, such as the sexual and reproductive health of adolescent girls.[266] The regional courts and treaties have also established similar educational/awareness raising obligations. For example, African Commission, has also recommended awareness campaigns, for example it recommended the immediate provision of 'sensitisation campaigns' about the illegality and penalties of harmful practices, in areas where such

[262] Hester and Lilley (n 172) 14
[263] Karin Heisecke, Raising Awareness of Violence Against Women: Article 13 of the Istanbul Convention (Council of Europe 2014) 8
[264] ibid 5
[265] General Comment no 19 (n 175) recommendation 24(t)(ii)
[266] General recommendation No. 28 (n 154) para 21

practices are prevalent.[267] Moreover, the Maputo Protocol also mentions 'sensitisation' but rather than focusing on specific areas of concern it asks states to 'Integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.'[268]

The most extensive provisions on awareness raising and education obligations can be found in the Istanbul Convention. Not only does article 13 oblige the states to conduct awareness raising on the forms and consequences of VAW, it also obliges that these programmes are held 'on a regular basis and at all levels'.[269] Moreover it encourages cooperation with human rights institutions and women's organisations.[270] The article also requires 'states parties to ensure that the general public is informed of measures that are available to prevent acts of violence' by disseminating information on national, regional and local services available.[271] The Istanbul convention also has detailed education obligation which applies to both formal education and in 'informal educational facilities, as well as in sports, cultural and leisure facilities and the media'.[272]

4.2.2 Tackling stereotypes and gender norms

Another key obligation to prevent VAW is the duty to tackle gender stereotypes. The obligation to address stereotypes is an overlapping obligation to awareness raising and education but deserves focused attention, as one of the most frequently invoked forms of systemic prevention in addressing VAW.

Interestingly, all the human rights instruments addressing VAW use extremely similar wording to set out the obligation to tackle stereotypes and gender norms.[273] In DEVAW this was set out as the obligation to:

> Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices,

[267] EWLA v. Federal Republic of Ethiopia (n 106) para 128
[268] Maputo Protocol (n 198) Article 12(1)(e)
[269] Istanbul Convention (n 158) Article 13(1)
[270] ibid
[271] Heisecke (n 263) 7
[272] Istanbul Convention (n 158) Article 14(2)
[273] *X and Y v Georgia,* 25 August 2015 CEDAW/C/61/D/24/2009 para 9.7; Joint Comment (n 153) para 31; *Lenahan v US* (n 175) para 126; Convention of Belém do Pará (n 152) Article 8(b); Maputo Protocol (n 198) Article 2(2); Istanbul Convention (n 158) Article 12(1);

customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women[274]

Another frequent theme of this obligation is the duty to involve the media. The Istanbul Convention, Convention of Belém do Pará, Maputo Protocol and General Comment No 19 all involve the media in addressing stereotypes. However, the approach they take differs. The Maputo Protocol emphasises the role of the state and regulation, to prevent the perpetuation of stereotypes in the media.[275] On the other hand, the Istanbul Convention and Convention of Belém do Pará take an interesting approach of asking the media and private sector to cooperate to address stereotypes. These conventions ask the media to cooperate to create policies and guidelines which work towards respecting women's dignity.[276] Thus, although each regional instrument recognises the role of the media in perpetuating stereotypes, the type of prevention obligation required is phrased in different terms.

Another important method of eradicating stereotypes and gender norms that has been recognised is through educational curriculum,[277] demonstrating the overlaps between different types of prevention measures. This obligation to address stereotypes also overlaps with the obligation to provide training for officials. Human rights bodies have recognised the re-enforcement effect stereotypes have for VAW. VAW is encouraged or aggravated when it is 'reflected, implicitly or explicitly' in the policy and practice of state authorities.[278] Moreover, when the stereotypes that encourage VAW are embedded within the law or legal practice, impunity for VAW prevails and individual measures of prevention may fail. Thus, human rights bodies have recognised that policies and programs aimed at restructuring stereotypes and addressing discriminatory socio-cultural practices must include 'programs to train public officials in all branches of the administration of justice and police'.[279]

4.2.3 Training of Officials

The need to provide appropriate training for officials is recognised in DEVAW, by the IASHR, in Belém do Pará, Maputo Protocol and in the Istanbul Convention. In DEVAW this

[274] DEVAW (n 165) Article 4(j)
[275] Maputo Protocol (n 198) Article 12 and 13
[276] Convention of Belém do Pará (n 152) article 8(g); Istanbul Convention (n 158) Article 17
[277] Maputo Protocol (n 198) Article 4(2)(d)
[278] O'Connell (n 167) 148
[279] Griffiths (n 59) 241; *Lenahan v US* (n 175) para 201

obligation is phrased as 'training to sensitize them to the needs of women'.[280] This form of training could improve the use of individual measures of prevention. The above section demonstrated how the risk of violence to women is recognised too late to prevent harm, therefore training of official in the particularities of VAW may address this problem. This idea is supported by the IACHR who accompany the order for the introduction of protection orders with complementary obligations to introduce 'training programs for the law enforcement and justice system officials who will participate in their execution'.[281] This idea of including obligations of training, on the handling of cases of VAW, is also found in the jurisprudence of the African Commission.[282]

4.2.4 Empowerment Measures

Another unique prevention obligation is the requirement for empowerment measures. It is suggested by women's rights advocates that VAW is intrinsically 'linked to women's social and economic status in society, which creates vulnerabilities to male domination and violence'.[283] Therefore, achieving de jure and de facto equality is perceived as 'a key element in the prevention of violence against women'.[284]

The most explicit reference to empowerment measures may be found in article 12 of the Istanbul Convention, which requires 'necessary measures to promote programmes and activities for the empowerment of women.'[285] This provision 'refers to empowerment in all aspects of life, including political and economic empowerment.'[286] Other instruments provide an indirect prevention obligation through empowerment. For example, in a case concerning sexual violence against young indigenous women, the IACtHR held that the state must adopt measures, including the provision of food and shelter so that the girls may continue their education at the institutions which they attend.[287] Another example of an indirect empowerment obligation is provided in general comment no 19, which mandates 'training and employment opportunities and the monitoring of the employment conditions of domestic

[280] DEVAW (n 165) Article 4 (i)
[281] *Lenahan v US* Recommendations 4
[282] EWLA v. Federal Republic of Ethiopia (n 106) para 160
[283] Orago and Nassali (n 134) 108
[284] Istanbul Convention (n 158) Premable
[285] ibid Article 12(6)
[286] Hester and Lilley (n 172) 37
[287] Griffith (n 59) 236

workers'.[288] This obligation does not reference empowerment but will have the effect of increasing economic empowerment.

Empowerment obligations have also focused on cultural empowerment. For example, in a joint recommendation on harmful practices the CRC and CEDAW Committee encourage states to 'empower girls and women and boys and men to contribute to the transformation of traditional cultural attitudes that condone harmful practices, act as agents of such change and strengthen the capacity of communities to support such processes.'[289] This provision is particularly interesting as it requires empowerment for both 'boys and men' as well as 'girls and women'. Inclusion of boys and men as agents of change is a somewhat controversial notion among VAW activists, with the concern being that that inclusion of men and boys will quickly lead to the exclusion of women and girls.[290] However, in the Istanbul Convention the potential contribution of men and boys in preventing VAW is explicitly recognised.[291]

4.2.5 Perpetrator Programmes

Another prevention obligation primarily aimed at men and boys is the creation of perpetrator programmes. Perpetrator programmed are referred to using different terminology in different settings. General Comment no 19 recommends 'rehabilitation programmes for perpetrators of domestic violence'.[292] Whereas, the Istanbul Convention requires 'preventative intervention and treatment programmes.[293] Under the Istanbul convention, two types of programmes should be introduced for both domestic violence perpetrators and for sex offenders.[294] The programmes for domestic violence perpetrators work to prevent reoffending by teaching perpetrators to adopt non-violent behaviour tactics.[295] However, they also encourage perpetrators to 'examine their attitudes and beliefs towards women.'[296] The ECtHR has also endorsed treatment programmes for perpetrators as 'desirable' and emphasised their prevalence in many member states.[297] The phrasing used does not suggest a binding obligation for such programmes under the ECHR. However, it does suggest that these

[288] General Comment No. 19 (n 175) Recommendation 24(p)
[289] Joint Comment (n 153) para 17
[290] Griffiths (n 59) 166
[291] Istanbul Convention (n 158) Article 12(4)
[292] General Comment No. 19 (n 175) Recommendation 24(r)
[293] Istanbul Convention (n 158) Article 16
[294] Hester and Lilley (n 172) 6
[295] Istanbul Convention (n 158) Article 16(1)
[296] Hester and Lilley (n 172) 6
[297] *Kurt v Austria* (n 155) para 181

programmes may be viewed as one potential method of compliance with obligations under the Convention.

It may be questioned whether the duty to create perpetrator programmes falls within this category of systemic prevention. Perpetrator programmes are reactive in that they occur after an initial act of violence. Moreover, they are not aimed at the general population rather at specific individuals to prevent the risk of their further perpetration. However, perpetrator programmes are linked to systemic prevention as they also aim to address the underlying causes to prevent re-offending.

4.2.6 Monitoring

Monitoring is another important category of obligations. There are two key types of monitoring obligations: the first is the obligation to monitor the details of the problem of VAW against women, including prevalence, causes and effects. This type of monitoring may be used to understand the specificities of the problem of VAW. The second is obligation to monitor the effectiveness of preventative measures. This obligation can be used to support the implementation of prevention obligations, for example, if monitoring of effectiveness shows that one type of systemic prevention has a bigger impact than another, the state may adapt their approach accordingly. Moreover, if monitoring can show impact of prevention measures than it may be used to justify their continuance or expansion. DEVAW, General Comment no 19 and Belém do Pará contains obligations for both types, whereas the Maputo Protocol provision on monitoring focuses on the effectiveness of preventative measures.[298]

4.3 Importance of Cause

Monitoring of cause and effect of VAW is an important task. As 'systemic prevention is aimed to address the root causes and consequences of violence against women'[299] it must understand these causes and consequences. Whilst it is recognised that there is no one cause

[298] General Comment No 19 (n 175) recommendation 24(c); DEVAW (n 165) Article 4(k); Belém do Pará (n 152) Article 8(h); Maputo Protocol (n 198) Article 4(2)(i)
[299] Manjoo (n 58)

nor contributing factor of VAW.[300] It has been consistently held that discrimination and inequality is the most instrumental cause of VAW.

The link between VAW and discrimination is undeniable in that it is an inherent part of the concept of VAW. It is the context of discrimination in which it occurs that makes violence against women different from other forms of violence.[301] International Human Rights law has also recognised the link between violence against women and discrimination. In IHRL VAW is understood as both a human rights violation in itself and a form of discrimination against women.[302] This connection to discrimination is recognised by every source of authority for human rights obligations regarding VAW.

Moreover, systemic responsibility as recognised under IHRL instruments for VAW 'specifically, relies on clearly conceiving of violence against women as gendered and discriminatory.'[303] The discrimination framing portrays VAW as a social phenomenon which is 'reproduced and sustained within the social order and by social norms and practices.'[304] In this sense prevention is conceived as an effective or legitimate pursuit as it is implies that 'Men who use violence are not 'naturally' violent; they become violent through socialisation and social interaction and they can, therefore, change their behaviour.' [305] Consequently, it is believed that if preventative interventions 'address the range of factors that trigger or enable' VAW then it is preventable.[306] For example, the development of the obligation to address stereotypes is an acknowledgement that this form of discrimination contributes to the perpetuation of VAW, or the obligation of empowerment addresses inequality faced by women due to discrimination.

4.4 Importance of systemic prevention

For some systemic prevention is the most important form of prevention. For example, Griffiths argues that individual prevention is not enough as it simply prevents 'individual incidents such that women are 'spared' violence that would otherwise befall them'.[307]

[300] Hester and Lilley (n 172)
[301] Henriksson (n 146)
[302] ibid
[303] Griffiths (n 66) 272
[304] Heisecke (n 263) 9
[305] ibid
[306] ibid
[307] Griffiths (n 66) 100

Individual prevention also fails to recognise the affect VAW has on all women. The pervasive nature of VAW forces all women and girls to live in constant fear.[308] Griffiths explains this concept by arguing that group-based violence such as VAW

> serves a terroristic function, intimidating not only the individual who has been attacked but all other members of the same group who fear that they could be next. Thus, all women – including those who have not been direct victims – pay the price for violence against women in lost options, autonomy, and peace of mind.[309]

This terroristic function of violence has been recognised by Human Rights courts.[310] It has also been evidenced in research. In an EU wide survey of 42,000 women one in five had worried in the past year 'about the possibility of being physically or sexually assaulted.'[311] Furthermore, 53 per cent of women stated that they 'avoid certain situations or places, at least sometimes, for fear of being physically or sexually assaulted'.[312]

VAW is allowed to have this effect because women fear that they will be next. Systemic prevention aims to tackle this as 'Rather than looking to remove women from the path of violence, primary prevention looks to tear up the road.'[313] This is achieved through tackling the root causes of VAW, in order to systematically reduce its prevalence.

5. Chapter Summary

In summary, two types of prevention obligations have arisen under instruments addressing VAW: individual prevention obligations and systemic prevention obligations. These obligations address different types of risks, individual obligations require evidence of a specific risk to an individual or group of individuals, whereas systemic obligations recognise that there is a general risk of VAW to all women and thus create obligations to tackle the underlying causes. Both types of obligations are important to prevent VAW, as both obligations address different points in the timeframe of prevention. Systemic prevention has potential to protect a wider number of women from harm. However, individual prevention is

[308] Omondi, Waweru and Srinivasan (n 169) 85
[309] Griffiths (n 66) 267
[310] ibid 235
[311] 'Violence against women: an EU-wide survey, Main results' (European Union Agency For Fundamental Rights, 2014) 139
[312] ibid
[313] Griffiths (n 59) 100

important to address situations where systemic prevention has been unable to prevent a risk from emanating from an individual. Therefore, a combination of both measures is the ideal solution to address VAW.

CONCLUSION

Although prevention obligations are prevalent throughout international human rights law, attention given to these obligations has been notably limited. Therefore, this thesis aimed to increase attention to these obligations through analysing the development of prevention obligations in international human rights law.

The findings in this thesis demonstrate that there are many factors which have contributed to why the development of prevention obligations have been overlooked. Firstly, prevention obligations are difficult to conceptualise, as beyond the basic definition, there is little agreement over the requirements for prevention categorisation. Moreover, certain definitions of prevention obligations are cast too wide, thus undermining the conceptual clarity of prevention obligations. Prevention obligations also may have been overlooked due to the way in which many of these obligations have developed. Many prevention obligations are implied rather than express in the human rights instruments, as evidenced by the development of the obligation to prevent by the regional systems, the HRC and CESCR. Therefore, analysis of state obligations which takes a narrow focus of express state obligations would overlook key obligations to prevent. Furthermore, prevention obligations which have been implied by human rights courts and treaty bodies, have been introduced under a broader category of obligations, for example to protect or ensure. Therefore, they have perhaps been subsumed by these categories, which hasn't allowed these obligations to get the sole attention that this thesis purports they deserve.

Despite this lack of attention, this thesis found that the development of prevention obligations has had significant impact on human rights protection, in two aspects. Firstly, prevention obligations developed as part of the human rights law approach to address state responsibility for non-state actors. It was shown how prevention forms an important part of achieving indirect horizontal effect. Thus, the introduction of prevention obligations stops states from becoming passive bystanders to violations caused by private actors. Instead with the introduction of prevention obligations and potential liability for omission, states are forced to become active participants in the protection of human rights violations. This is extremely important for effective human rights protection due to the threat private actors pose to human rights.

Secondly, this thesis demonstrated how prevention has the potential to be the most effective form of state obligation at providing protection from harm. Prevention obligations have unique potential as an *ex-ante* measure, whilst other obligations respond to an interference after it occurs, prevention aims to stop this interreference from occurring. Preference for prevention should therefore be obvious as when effectively utilized these obligations prevent the injurious act from occurring, which accordingly would prevent the harm faced by the individual. Moreover, prevention obligations can 'ease the burden and cost of the post-incidence intervention'[314] as there is little need for investigation, punishment or redress where violations do not occur.

This thesis may aid the implementation of prevention obligations. The discussion was limited to the laws as it is not as it is implemented. However, it is widely acknowledged that 'the adoption of human rights instruments is clearly not an end, but the beginning.'[315] This thesis may contribute to this goal of implementation. Through improving the understanding of the sources, scope and content of prevention obligation the practical implementation may be improved. Where obligations remain unclear 'states can all too easily pass the buck and remain bystanders to' the violation of human rights globally.[316] Therefore, whilst this thesis does not directly address implementation concerns, it may indirectly contribute to solving this problem.

The scope of this thesis was narrowed due to the choice to focus on VAW as a case study. Whilst this was necessary to provide in-depth analysis within the confined space of this thesis, it may limit this thesis' ability to provide conclusions which apply to all areas of international human rights law. VAW provided a useful case study as it showed the value of a dual level due diligence, including individual and systemic prevention obligations. Moreover, analysis into individual prevention obligations can be useful for understanding prevention obligations in other areas as the obligation is not unique to VAW. In fact, the ECtHR has applied the individual obligation discussed in a wide range of scenarios, from industrial activities to instances of self-harm.[317] However, as shown by the analysis into its application in the area of VAW, despite originating from the same obligation, its application is contextual. Thus, each area of application is deserving of its own study. Moreover, the criticism applied to the Osman test related to its inability to understand the particularities of

[314] Obreja (n 60) 189
[315] Banda (n 162) 2
[316] van der Have (n 8) 3
[317] Article 2 Guide (n 183) para 12

VAW. Therefore, further research will need to address these particularities in the application of individual prevention measures in other areas of human rights law. Furthermore, VAW was chosen due to the expansive development of systemic prevention obligations. However, as it was shown that these obligations are intrinsically linked to the understanding of VAW as gendered and discriminatory. Further research will be needed to assess whether such obligations do or may exist in other areas of human rights law, which do not contain this element.

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