THE RIGHT TO LIFE: AN ARGUMENT FOR EXTRATERRITORIAL APPLICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

WHO WILL PROTECT MY RIGHT TO LIFE?

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"The international community failed Rwanda and that must leave us always with a sense of bitter regret."
Kofi Annan

1. INTRODUCTION

Genocide has occurred repeatedly and, repeatedly, the world's reaction has been inadequate. The legal mechanisms as developed so far, like the procedure in the United Nations Security Council, have also proven to be inadequate. The positive obligations that the European Court of Human Rights has created under Article 2 of the European Convention on Human Rights should, however, be recognized as a potentially powerful tool to compel involvement. The possibility of using this same tool in other situations, e.g. in the case of genocide and under other conventions will be researched in this thesis. Imagine the possibility that an individual, affected by genocide, would be able to legally compel States to react to the threatened or evolving genocide. That possibility could make situations like the one seen in Rwanda a thing of the past.

a) The case of Rwanda

One million Rwandese – approximately 15 percent of the total Rwandan population – were killed by their fellow countrymen, many by their own neighbors between April and July of 1994.[1] Rwandans who were considered to be "Tutsi" were the main victims of the government-orchestrated mass killings that took place during the armed conflict (October 1990 – July 1994) between Rwandese government forces and an armed political group, the so-called Rwandese Patriotic Front (RPF).[2]

A major turning point in the armed conflict was the death on April 6 1994 of president Habyarimana when his plane was shot down.[3] Within hours of the president's death, members of the party that had supported the former government "began an orchestrated campaign of killings"[4]. The main victims of this campaign were the Tutsi, however, Hutus who opposed it would themselves be targeted.[5] The killings were "systematic, planned and condoned at the highest level." [6]

As early as 1990 the international community discussed the ethnicity-based identity cards used by the Habyarimana government in Rwanda. It would be exactly those identity cards that would serve as a death warrant for many Tutsi in 1994. Moreover, once the killings of Tutsi started, no country challenged the explanation given by Rwanda that the killings were spontaneous and uncontrollable; no effort was made to bring the perpetrators to justice. [7]

National and international leaders typified the situation as "confusing", "chaos" and "anarchy" instead of dealing with what was going on. As French and Belgian troops left the country, the UN mission was left "on tarmac, with the bullets flying and the bodies pilling up"[8] around them. The genocide was treated as part of the war that was going on in Rwanda at the time and thus not as a separate situation that needed to be addressed by the international community.[9]

The UN ordered the head of the peacekeeping operation to protect his own troops, rather than the Rwandan civilian population. The Security Council members debated the fate of the peacekeeping operation and then decided to withdraw most of the UN troops. A couple days later, the Security Council acknowledged the fact

that there was indeed a genocide going on that could be seen as separate from the war and that, henceforth, needed to be addressed. [10] Finally, it took the limited criticism of a few important countries (like France and the United States) to convince the Rwandans to realize they would no longer profit from international aid if they continued the killings. That, together with the fact that most Tutsi had already been slaughtered, finally made the genocide fade down.[11]

It was not until after all of these occurrences that the international community proceeded to take action. Eventually the International Criminal Tribunal for Rwanda (ICTR) was set up by the United Nations Security Council acting under UN Charter Chapter VII on 8 November 1994 "recognizing that serious violations of humanitarian law were committed in Rwanda"[12]. The Tribunal was established for "the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994."[13]

b) Central question

Keeping in mind these atrocities, the question arises whether there is a legal argument to be found in international law that countries (for example member states to the Genocide Convention or members of the United Nations) have a positive obligation to protect the right to life outside their territory. In other words, can human rights treaties encompassing the right to life be applied extraterritorially? In the case of Rwanda that would have meant that the Security Council as a body or States individually would have had the obligation to address what was going on effectively.

This paper will first take a closer look at the right to life itself. Where can this right be found in international law and what does it entail in terms of normative content and State obligations? What does not fall into the ambit of the right to life? Secondly, it will address the crime of genocide and the status that this crime has under international law. In particular, questions will be dealt with such as: what are the inherent features of this crime and may those features support extraterritorial application?

Subsequently, the dialogue between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, that both use standards of "control" to attribute legal responsibility to a State, will be summarized; may this be a foundation upon which an extraterritorial application of the right to life entailed in international human rights treaties can be based? Then the question of extraterritorial application of the provision(s) on the right to life contained in international human rights treaties on the international plane will discussed; can it be argued that the International Convention on Civil and Political Rights allows for such an application? This will be followed by the approach taken by the European Court of Human Rights with regard to the right to life; may an extraterritorial application of Article 2 (the right to life) of the European Convention on Human Rights be inferred from the case law of the Court?

A final argument will be made that considers human rights treaties to be a special category of treaty; can the inherent nature of International Human Rights treaties support this view? In conclusion, the findings to the above sub-questions will be combined to answer the principle question of whether a legal argument can be found to support the idea that States have a positive obligation to protect the right to life based on an international human rights treaty to which they are a party, even if this would entail applying the specific provision of that treaty extraterritorially.

c) The methodology

In researching this topic, the arguments put forward will be based on primary sources including various human rights treaties and the Genocide Convention. Moreover, case law including (but not limited to) that of the European Court of Human Rights, the International Court of Justice and the Human Rights Committee will be referenced to sustain the arguments made. Thirdly, a wide range of secondary literature will be used including books, reports from Human Rights Organizations, General Comments of supervisory bodies and information obtained from various websites.

d) The scope of this thesis

It goes beyond the scope of this paper to discuss the possibilities of reservations to human rights treaties and the denunciation of such treaties. Also the problem of conflict between the application of international human rights law and international humanitarian law will not be addressed. This paper will not merely give a summary of the existing law, but it attempts to infer, from existing doctrine, a possibility to argue the extraterritorial application of human rights treaties.

2. THE RIGHT TO LIFE

As can be seen in the case of Rwanda, the right to life, arguably the most fundamental of all rights, can easily be violated. The right to life is enshrined in a number of international treaties. Below several of those treaties will be discussed in an attempt to comprehensively and accurately portray the current law on the right to life.

a) The Universal Declaration of Human Rights

"Bearing in mind the flagrant lack of respect for human life evinced during World War II, it was natural that the post-war catalogues of human rights should begin with the right to life."[14]

The oldest and most straightforward codification of the right to life that will be discussed in this thesis is set out in The Universal Declaration of Human Rights (UDHR) (1948) which was adopted though a United Nations General Assembly Resolution.

Article 3 of the UDHR states:

"Everyone has the right to life, liberty and the security of person".

Being a General Assembly Resolution, this document is formally not binding. It has, however, had an important impact on the drafting process of other –binding- treaties. Moreover, certain provisions that are set out in the UDHR have gained the status of customary international law.[15] As shall be seen shortly, other treaties have formulated more elaborate provisions containing the right to life.

b) European Convention for the Protection of Human Rights and Fundamental Freedoms

More popularly known as the European Convention of Human Rights (ECHR) (1950), this Convention articulates the right to life in Article 2.

Article 2 states:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> a) in defense of any person from unlawful violence;
>
> b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c) in action lawfully taken for the purpose of quelling a riot or insurrection.[…]

Different from the UDHR, the ECHR explicitly makes limited exceptions to the right to life and thus shows that this right is not absolute.[16] The European Court of Human Rights has dealt with cases involving Article 2 on numerous occasions. A selection of those cases shall be discussed in chapter 4.

c) The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) (1966) has set out the right to life in Article 6, which states;

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court […]
>
> 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

In General Comment Nº. 6 the Human Rights Committee states that the right to life is "the supreme right from which no derogation[17] is permitted even in time of public emergency" and which "should not be interpreted narrowly"[18] or in a restrictive manner.

d) Convention on the Prevention and Punishment of the Crime of Genocide

A right to life might also be inferred from Article II (a) of the Genocide Convention which states:

> In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such:
>
> (a) killing members of the group; […]

Following this provision, an individual has the right not to be killed, depending on the intent of the perpetrator. From that a right to life could be inferred.

As can be seen, the right to life has been articulated in several binding (and non-binding) instuments. The foregoing does not comprehensively survey all of the provisions which entail the right to life. Rather it is intended to set forth a conceptual framework for the right to life within which we shall operate in this thesis.

(e) Non-absolute character of the right to life

As has been briefly mentioned in chapter 2(b), the right to life is not an absolute right. Rather, the right to life may be infringed upon in certain circumstances.

I) THE DEATH PENALTY

As stated, Article 6 ICCPR[19] gives every human being the right to life. This is not, however, an absolute right. The ICCPR tolerates the death penalty, but it does not provide a justification for it[20]. In accordance with Article 6 (1), the application of the death penalty must not be *arbitrary* (Article 6 (1)); i.e. in the case that the death sentence is automatically passed following a verdict of (for example) murder. The specifics of a case should be reviewed by a Court. The Human Rights Committee has held that "the automatic and mandatory imposition of the death penalty constitute[s] an arbitrary deprivation of life, in violation of Article 6 of the Covenant"[21].

Furthermore, the law in force at the time should provide for the death penalty. If that law provides "no discretion, too little discretion, or an unbounded discretion"[22] then this criterion has not been met.

In accordance with the foregoing, under certain circumstances, the death penalty does not infringe on the right to life. States that have abolished the death penalty however, are under an obligation to ensure that extradition does not limit the right to life any further than they themselves are permitted to under the International Human Rights Treaties to which they are a Party.

Comparable to Article 6 ICCPR, Article 2 ECHR[23] protects the right to life, but makes an exception in the second paragraph for the execution of a lawful arrest. The European Court of Human Rights has also held that Article 3 (the prohibition of torture) cannot be construed as prohibiting the death penalty. In specific cases however, the way the punishment of the death penalty is imposed and the waiting period on death row, might bring the case under the scope of Article 3.[24]

II) WARFARE

The Second Optional Protocol to the ICCPR (1989) is aimed at the abolishment of the death penalty. Article 2 of this Protocol states that no reservations to it shall be admissible, "except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime".[25]

As the ICCPR, the ECHR also provides for an exception to the imposition of the death penalty in time of war in Article 15 ECHR:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party make take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> *2. No derogation from Article 2,* [i.e. the right to life] *except in respect of deaths resulting from lawful acts of war […].*

The Sixth Protocol to the ECHR (1983), which deals with the abolition of the death penalty, also provides for derogation in time of war. In Article 2 it states that:

> *A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. […]*

III) SELF-DEFENSE

A third category that demonstrates the non-absolute character of the right to life that will be discussed, is that of self-defense.

The ECHR provides for this exception in Article 2(2)(a) which allows States to use

force in self-defense or defense of another. This does not include the defense of property. The use of force is only permitted if this is considered to be "absolutely necessary".[26] The foregoing demonstrates that the right to life is enshrined in several treaties, including the UDHR, the ECHR, the ICCPR and the Genocide Convention. The supervisory bodies attached to those treaties have given substance to the right to life and articulated more in detail what obligations this right creates for the State Parties. These obligations will further be discussed in the subsequent chapters.

The foregoing also demonstrates that the right to life is not an absolute right, and that it thus may be derogated from in certain circumstances. Three of such circumstances are the death penalty, warfare and self-defense.

3. THE DEFINITION OF GENOCIDE

In this chapter the crime of Genocide will be discussed by looking at the Genocide Convention, the Statute of the International Criminal Court and the case law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The crime of genocide is "inevitably linked to the right to life as it involves the systematic elimination of a group of people in flagrant violation of the right to life."[27] The goal is to consider what the inherent features are of the crime of genocide and may those features support extraterritorial application.

a) The Convention on the Prevention and Punishment of the Crime of Genocide

International human rights law not only covers the right to life *sec*, i.e. the prevention of arbitrary killing, but also extends to the prevention and punishment of the crime of genocide. The law on genocide is applicable even if a State has not ratified international treaties encompassing human rights.[28]

The crime of genocide first appeared in the international legal field in General Assembly Resolution 96I which stated: "Genocide is the denial of the right of existence of the entire human group." This resolution instructed the Economic and Social Council of the United Nations to set up a draft convention. This draft Convention resulted in the Convention on the Prevention and Punishment of the Crime of Genocide.[29]

The Genocide Convention, which was unanimously adopted by the United Nations General Assembly on 6 December 1948, gives a definition of genocide (as partly stated above) in Article II:

> In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:
>
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.

The same Convention also states *inter alia* in article VIII that any contracting Party can call upon the United Nations to take appropriate measures for the prevention and suppression of acts of genocide.[30] So far, Article VIII of the Convention has only been invoked once, in 2004 by the United States.[31]

The Genocide Convention has been internationally accepted as the predominant document in international law on this type of war crime. The norms laid down in the Genocide Convention have become so important that they have obtained the status of customary international law. This was affirmed by the International Court of Justice in its judgment in 2006 when it stated that the norm prohibiting genocide should be regarded as a peremptory norm of international law.[32] From such norms no derogation is permitted. If there are conflicting norms in existing treaties or local or special norms of custom, the former would be considered void and the latter would be non-applicable.[33]

The International Court of Justice commented on the crime of genocide and the position it holds as an international crime in the case *Reservations to the Convention on Genocide*. The Court held: "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law'… the first consequence arising from this conception is that principles underlying the Convention are principles which are recognized by civilized Nations as binding on States, even without any convention obligation."[34] These principles are considered to be *erga omnes*. *Erga omnes* obligations concern the scope of application of the relevant rule and have a primarily procedural

focus. It concerns the extent to which states may have a legal interest in the subject matter at hand.[35]

"States have an obligation, besides not to commit genocide, in addition to prevent and punish violations of the crime by others"[36]. Moreover, "in cases of failure in this respect […] intervention may be justified to prevent or suppress such acts and to punish those responsible"[37]. It must be noted that this interpretation of the Convention is by no means uncontroversial. It is entirely possible to read the Convention in a manner that merely requires States to "prevent the commission of genocide as an instance of individual criminality"[38] and to conclude that one cannot infer from the Convention that "the obligation to prevent the commission of the crime of genocide […] give[s] rise to an obligation for States not to commit genocide"[39]

In the case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[40] the International Court of Justice noted with respect to the preliminary objection "that the obligation each state thus has to prevent and to punish the crime of Genocide is not territorially limited by the Convention"[41].

This point is reiterated by the Court in its 2007 judgment on the application of the above named Convention, but only in reference to the undertaking stated in Article I of the Genocide Convention.[42] This Article says that the Contracting Parties will undertake to prevent and punish the crime of genocide. It thus creates an obligation for States party to the Convention to take into account the humanitarian and civilizing purpose of the Convention.[43]

b) The Statute of the International Criminal Court

The Statute of the International Criminal Court (1998)[44] defines genocide in Article 6 as:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;

b) Causing serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.

This definition is a copy of the provision in the Genocide Convention. The same definition is used in the Statute of the International Criminal Tribunal for the former Yugoslavia in Article 4(2). This underlines the importance of the first draft of this provision in the Genocide Convention.

c) Case law of the ICTY and ICTR

The first conviction for the crime of genocide did not come until 1998 with the trial of Jean-Paul Akayesu at the International Criminal Tribunal for Rwanda (ICTR). This was also the first time the Genocide Convention was upheld as law in an international courtroom.[45]

Apart from being the first case on genocide, the case of *Prosecutor v. Akayesu*[46] also has major legal importance as to the definition of genocide. The Court held in its judgment that rape and sexual violence constitute an act of genocide as long as "they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such."[47]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) further developed the legal definition of genocide in the case of *Prosecutor v. Jelisic*.[48] Both the Trial Chamber and the Appeals Chamber agreed that a perpetrator needs to have a very specific form of intent when committing the crime of genocide that can distinguish this crime from other offences such as crimes against humanity.[49]

Furthermore, in the first genocide conviction by an international tribunal in Europe, the ICTY, in *Prosecutor v. Krstic*[50] elaborates on what constitutes part of a group. The Trial Chamber concludes that by interpreting the Convention's words in their ordinary meaning, the significance of the words "in part" in the sentence "with intent to destroy, in whole or in part", amounts to the conclusion that "any act committed with the intent to destroy a part of a group, as such, constitutes an act of genocide within the meaning of the Convention."[51] Inherent to the crime of genocide is the systematic elimination of a group of people. It is clear from the title of the genocide convention, 'prevention and punishment', that this crime cannot only be dealt with after the fact, but that there is

also room for prevention and involvement. The ICJ has noted that the obligation each state has to abide by the Genocide Convention is not territorially limited.[52] This is in line with the supposition that the prevention of the crime of genocide is an obligation *erga omnes* and thus applies to all, regardless of whether they are a Party to the Convention. The Convention itself opens the door to extraterritorial application with Article VII which states that any contracting Party can call upon the United Nations to take appropriate measures to prevent genocide.

4. The Extraterritorial application of human rights treaties

In this chapter the dialogue between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, both of which use standards of 'control' to attribute conduct, i.e. the act of genocide, which then could trigger legal responsibility, will be sketched. Moreover, cases concerning the ICCPR and the ECHR shall be discussed to examine whether they may provide a basis for extraterritorial application of these treaties concerning the provisions on the right to life. In the next chapter, it will be argued that international human rights treaties concern a distinct category of treaties and that because of their distinct features, extraterritorial application should be permitted.

The jurisdiction of a State is primarily territorial. Other forms of jurisdiction are available under international law e.g. the citizenship of an individual or the flag of a ship, but this form of jurisdiction is limited by the sovereignty of the State in which these entities find themselves.

a) The 'dialogue' between the ICJ and the ICTY

A line of argument that has been created through judgments of the International Court of Justice and later through judgments of the International Criminal Tribunal for the former Yugoslavia involves that of *'effective control'* (following the *Nicaragua* judgment by the ICJ and also mentioned in the ICJ's *Genocide case*) and *'overall control'* (following the *Tadić* judgment delivered by the ICTY).

In the *Nicaragua case* the International Court of Justice took the view that the role the United States had in "the financing, organizing, training, supplying and equipping of the contras", even if this role was dominant or decisive, did not amount to actually having control over the contras to such an extent that their acts could be attributed to the United States. The participation of the United States and the control it had, does not in itself constitute that the United States "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law" […]. For the conduct of the contras to "give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed (emphasis added).[53] This part of the *Nicaragua case* was later applied again in the *Genocide case*[54] in paragraph 399.

In the *Tadić case* the International Criminal Tribunal for the former Yugoslavia used a different standard for assessing whether certain conduct could be attributed to a particular State and thus would be subject to their jurisdiction, because the ICTY considered the 'test' that had been formulated in the *Nicaragua case* too narrow. Instead, the ICTY developed a new 'test' on the basis of 'overall control'.

The ICTY gave two reasons for revising the 'test' that the ICJ had developed in the *Nicaragua Case*. The first reason is based on the Draft Articles on State Responsibility developed by the International Law Commission which is "founded on a realistic concept of accountability which transcends legal formalities." A State is responsible, irrespective of whether that State issued specific instructions, for those acts committed by "individuals who make up an organized group under its *overall control*" (emphasis added).[55]

The second reason relied upon is that the 'test' formulated in the *Nicaragua case* as an exclusive test is inconsistent with judicial and State practice. Courts, including the European Court of Human Rights, have used the test formulated in the *Nicaragua case* when it comes to "unorganized groups of individual acting on behalf of the State, but have accepted a lower degree of control in the case of (para)military groups."[56]

The test formulated in the *Nicaragua case* and the one subsequently formulated in the *Tadić case* apply only to situations in which either effective control or overall control can be argued. Where neither of these forms of control can be demonstrated, it is necessary to advance another argument for the applicability of international human rights treaties. This paper seeks to put forward an argument that will allow courts to interpret international human rights treaties in an extraterritorial

manner, regardless of whether either 'overall control' or 'effective control' can be shown.

b) International Covenant on Civil and Political Rights

It has been noted that Article 2(1) ICCPR obliges State Parties to ensure the right to life to "all individuals within its territory and jurisdiction". This, however, does not imply that the State Party concerned cannot be held responsible for violations of Article 2 which were committed by one of its agents on the territory of another State, regardless of whether the other State consented or opposed the actions committed.[57]

In General Comment Nº. 31, the United Nations Human Rights Committee has stated that "State Parties are required by Article 2, paragraph 1 [ICCPR], to respect and to ensure the Covenant rights to all persons who may be within their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party […]"[58] The International Court of Justice has adopted the Human Rights Committee's position with regard to the ICCPR.[59]

The Human Rights Committee emphasizes that "States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life."[60] Moreover, States should take care that their own government forces do not engage in the arbitrary killing of its civilians. Thus, States have a *positive obligation* to protect the right to life.[61] The right to life under this Convention also entails that States "adopt positive measures" for the protection of this right[62], which, as paragraph 1 states, "shall be protected by law". This requires that a State puts into place laws that make homicide and murder punishable. Furthermore, a State is "required to take actual steps of enforcement with a view to preventing violations of the right to life or, if a violation could not be averted, to punishing the perpetrator(s)."[63]

It is this same Human Rights Committee that, in the (first) Optional Protocol to the ICCPR, obtained a mandate to "receive and consider […] communications from individuals claiming to be the victim of violations"[64] of any rights set forth in the Covenant. In Article 4, the Optional Protocol mentions so-called "views", that the Human Rights Committee renders on cases. These "views" are not binding, but in signing the Optional Protocol a State obligates itself to comply with its procedure until the end. The end is reached when a State examines a given view and addresses it.

One of the first cases in which The Human Rights Committee recognized that human rights can apply extraterritorially when an individual is in the power of the authorities was *Lopez Burgos v. Uruguay*.[65] This case concerned violation of the ICCPR by state agents of Uruguay on the territory of Argentina. The applicant was kidnapped in Argentina by Uruguayan agents and secretly detained there and then brought to Uruguay. The United Nations Human Rights Committee interpreted Article 2 in a teleological manner in stating that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory"[66] and thus the "the notion of jurisdiction also covers acts of State agents which had taken place outside the territory of the State"[67]. The Committee relied on Article 5 ICCRP "according to which the Covenant may not be invoked as justification for acts aimed at the destruction of any of the rights and freedoms recognized therein."[68]

The Committee further observed that it is not banned "either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its jurisdiction ... ") from considering this case, because the acts were not committed in Uruguay, but rather by agents of Uruguay on the territory of Argentina.[69]

The Inter-American Commission of Human Rights has also used the teleological argument to declare jurisdiction over acts committed outside of the territory of a State Party. The Commission states that "[s]ince human rights are inherent to all human beings by virtue of their humanity, States have to guarantee [them] to any person under their jurisdiction, which the Commission understands to mean any person "subject to its authority and control".[70]

The Committee has also commented on the wording in Article 1 of the Optional Protocol which uses the words "individuals subject to its jurisdiction". These words, according to the Committee do not refer to the physical place of the acts, but "rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant wherever they occurred."[71]

This relationship can also be seen in cases that deal with extradition by States that do not have the death penalty to States that do. In *Kindler v. Canada*, the Committee decided that "it does not consider the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death [to] *per se* [amount] to a violation of Article 6 of the Covenant."[72] However, if the application of the death penalty would be a foreseeable consequence when extraditing a person, then the State making the decision to extradite might be in violation of the Covenant.[73] The latter was the case in *Roger Judge v. Canada*, where the Committee found Canada to be in violation of the Covenant. Although the Committee recognized that Canada "did not itself impose the death penalty" it considered that "by deporting him [Judge] to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution"[74].

The above case law demonstrates that there is a trend when it comes to the right to life that seems to become more and more inclusive. Courts and Committees seem to be less reluctant to apply the Convention in a manner that coincides with the (modern) view that international human rights are attached to each individual, regardless of where they find themselves and not granted at the grace of a State (keeping its sovereignty fully intact).

c) The European Convention of Human Rights

I) ARTICLE 2 ECHR

Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) phrases the right to life as follows:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> a) In defense of any person from unlawful violence;
>
> *b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
>
> *c) In action lawfully taken for the purpose of quelling a riot or insurrection* […]

The main objective of Article 2 ECHR is to protect the individual against its own State. Besides that, however, an application can also be directed against an individual when the act that violated Article 2 was committed by that individual, but due to insufficient protection by the State. This is the case because complaints about infringement of Articles under the ECHR can only be directed against acts or omission that the States bears the responsibility for. A State has to take appropriate steps to protect the right to life, according to the Commission. The Commission has also stated that "Article 2 indeed gives rise to positive obligations on the part of the state."[75]

A consequence of this positive obligation to the right to life is that States have to carry out an investigation if the infringement on that right was allegedly committed by state agents.[76] The European Court of Human Rights acknowledged this in the case *McCann and Others v UK*.[77] In this case the Court held that the obligation of a State to protect the right to life "consists of three main aspects: the duty to refrain, by its agents, from unlawful killing; the duty to investigate suspicious deaths; and, in certain circumstances, a positive obligation to take steps to prevent the avoidable loss of life."[78] This case had been brought by the relatives of the three individuals that had been killed by British security forces in Gibraltar. The Court held that the use of the phrase "absolutely necessary in paragraph 2 [of Article 2 ECHR] indicated that the force used had to be strictly proportionate to the achievement of one of the aims set out in sub-paragraphs 2(a)-(c)."[79] "Looking at all the facts, therefore, the Court concluded that it had not been necessary to use lethal force and that the killings amounted to a violation of Article 2."[80]

II) SCOPE OF OBLIGATIONS DERIVING FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS

It is a basic principle of law that a State is only bound to a treaty or convention if it has consented to it. Rules of customary law also fall within that scope, save for the State that has acted as a persistent objector. Infringement of those rules of law trigger the responsibility of that State. This however, implies that the infringements have taken place within the limits of the jurisdiction of that State. "While such jurisdiction may primarily be territorial, it also covers the acts by the State

outside the territory of that State, as confirmed by the case-law of the European Court of Human Rights (which will be discussed in further detail in the sub-chapter (iii)).”[81]

European Community law confers rights on individuals and imposes obligations on them. Those rights, become part of “their legal heritage.”[82] In the classic *Van Gend en Loos case* the Court confirmed this when it stated that “[T]he Community constitutes a new legal order ... for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.”[83] With this passage the Court made it very clear that it was prepared to enforce the rights set out in the ECHR against an individual’s own State if need be.[84]

The European Court of Human Rights has encouraged references by national courts and has declared that “[w]here such rights flow from supranational law national courts have an obligation to enforce them in accordance with instructions from the ECJ rather than from higher national courts.”[85] The Court has used the “doctrine of effectiveness”, according to which the special character of the ECHR “requires that its provisions be interpreted and applied so as to make its safeguards ‘practical and effective’ rather than ‘theoretical or illusory’.”[86]

I) CASES

The question of extraterritorial application was dealt with as early as 1974 in the case of *Cyprus v. Turkey*[87] by the European Commission on Human Rights. This case looked at the “extraterritorial jurisdiction of a State Party and the consequent extraterritorial limits of the Convention’s applicability”.[88] The Commission stressed that “the term ‘jurisdiction’ “is not limited to the national territory of the High Contracting Party concerned.”[89] Parties are held to secure the rights and freedoms as laid down in the European Convention on Human Rights to “all persons under their actual authority and responsibility whether that authority is exercised within their territory or abroad.”[90]

In the case of *Cyprus v. Turkey* the European Commission on Human Rights applied a test of “control”. This test was later also applied in *Loizidou v. Turkey*[91], and referred to as the “effective control” test. In the latter case the Court held that:

> “*Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.*”[92]

Under the circumstances of this case this means that Turkey’s responsibility:

> “must also be engaged by virtue of the acts of local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey”[93]

Although the Court did not elaborate on the notion of “effective control” it may be assumed that the Court “meant the capacity of a State to exercise power through its agents in an unhindered manner in a specific area outside its territory and, furthermore, for a period of time allowing for the “effective” deployment of this power.”[94]

In the case of *Bankovic v. Belgium*[95], the Court took a step back when it denied jurisdiction of the case. The case concerned a bombing by NATO of a radio and television station in Kosovo in 1999 that killed 16 people. The applicants contended, *inter alia*, that the bombing violated the right to life (Article 2 ECHR). The Court declared the application inadmissible because the act took place outside of the jurisdiction of the States whose troops were involved in the bombing.[96] In this case the Court thus chose to apply a narrow interpretation of the Convention.

It is clear from the above-mentioned examples that the Court has yet to decide in a definitive manner on the (territorial) scope of the Convention. This thesis argues that the scope should be broad and inclusive. A few examples of cases of the European Convention on Human Rights where the application of that treaty *de facto* results in some form of extraterritorial application will now be discussed.

The first example is the case of *Salah Sheekh v. The Netherlands*[97]. Sheekh was not to be sent back to Somalia, because the treatment he would be exposed to there would violate Article 3 ECHR and this treatment was foreseeable for The Ne-

therlands rather than merely a possibility. Therefore expulsion of Sheekh would be in violation of Article 3 of the Convention. This suggests that the ECHR -implicitly- condemned the action that would occur in Somalia and held those actions to the standards of the European Convention on Human Rights. In this way, in essence, applying the ECHR to the act that would happen in Somalia and thus beyond the territory of the application of the ECHR.

A second example can be found in the case of *Soering v. The United Kingdom*[98] in which the European Court of Human Rights decided that the "death row phenomenon" would constitute an infringement of Article 3 of the Convention. Thus Soering was not to be extradited by the United Kingdom to the United States. The Court held unanimously that, in the event of the British authorities' decision to extradite the applicant to the United States of America being implemented, there would be a breach of Article 3 of the Convention (the prohibition of torture or inhuman or degrading treatment or punishment)."[99]

In this case the death penalty was challenged before the European Court of Human Rights. The Court held "that Article 2 could not operate to prevent a State from extraditing an individual to face the death penalty *per se*. Nevertheless, extradition would violate the Convention where it exposed the individual to a significant risk of treatment running counter to the Article 3 guarantee of freedom from torture and inhuman or degrading treatment or punishment. In the particular circumstances of this application, the Court found that the death-row phenomenon, as practiced in the US State of Virginia, involved such a risk."[100] The European Court of Human Rights does the same thing here as it did in *Salah Sheekh v. The Netherlands*: -implicitly- condemning the situation that would occur in the United States and holding that situation to the standards of the European Convention on Human Rights. Thus again, in essence, applying the ECHR to the United States, which would constitute application beyond the territory of the ECHR.

In the case of *Loizidu v. Turkey* mentioned above, the European Court of Human Rights considered the validity of territorial restrictions that Turkey has made in declarations concerning the competence of the Human Rights Commission and the Court. The Court concluded that "those restrictions were impermissible under the terms of the Convention."[101] In applying the European Convention on Human Rights extraterritorially, the Court "merely had to interpret the meaning of the term 'jurisdiction' in Article 1 ECHR. "The Court requires *effective control* over a territory, which is particularly fulfilled in the case of military occupations."[102] "The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or though a subordinate local administration"[103]

In the case of *Öcalan v. Turkey*[104] the Court used exactly the same argument as in the earlier discussed case of *Lopez Burgos v. Uruguay*: that control over an individual may also lead to state responsibility.[105] [A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully- in the latter State. Accountability in such situation stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not carry out on its own territory."[106] In the Ö*calan case*, the Court recognized that "States have 'jurisdiction' over individuals who are in the territory of one State but who are found in the hands of another State's agents."[107]

The case law of the European Court of Human Rights seems even more compelling and willing to accept a wide interpretation and range of applicability of the ECHR. How far this range of applicability will reach remains to be seen in the future. The Court has used legal arguments to accept jurisdiction, in circumstances in which it could also have rejected jurisdiction. Thus, the Court has accepted an important role in determining the extent of jurisdiction it can exercise under the ECHR. The future could see this inclination progress towards a *de facto* extraterritorial application of the ECHR, although it will most likely, for the nearer future, still be formulated in a way much like we have seen in the above cases: very implicitly.

This would not be the first time that a Court has accepted an expanded interpretation of a provision in a convention. The Inter-American Court of Human Rights has recently seen a number of cases with pertain to the right to cultural identity, "although the right to cultural identity was not expressly spelled out as such at the time of the adoption of the American Convention on Human Rights (of 1969) […]".[108] The Inter-American Court of Human Rights responded to the changing needs

of protection that were not explicitly foreseen by the drafters of the American Convention on Human Rights by reading this right into provision that were explicitly present in the Convention.[109]

5. INTERNATIONAL HUMAN RIGHTS TREATIES: A SPECIAL CLASS OF TREATIES

Human rights treaties: a special category of treaty

The UN Human Rights Commission has emphasized the special nature of human rights treaties.[110] "The Convention was clearly intended by the UN and the parties to be definitely universal in scope and that it had been adopted for a purely humanitarian purpose so that state parties did not have interests of their own but a common interest."[111] Human rights treaties encompass provisions that are of common concern to all of human kind. Those treaties are not merely contracts between sovereign States, but they embody a State's will to commit itself to a higher purpose: the protection of human rights for individuals. In such contracts, it has been asserted, that the State is *formally* a party, but *essentially* (taking into account the scope of what is dealt with) it is a representative for its inhabitants.

The above idea stems from the "understanding that human kind has common values"[112]. The nature of treaties has changed from being bilateral and containing "equal and reciprocal benefits and burdens for each party" to "treaties proclaiming common values for human kind and aiming at their protection", thus not containing "reciprocal benefits to the parties, in the same way that trade or extradition treaties do, but instead [these new treaties] impose obligations often referred to as 'unilateral' because the primary beneficiaries of the obligations are either the world community […] or persons or groups within the State parties themselves"[113]. Noting the above, a distinction can be made between 'treaty-contracts' and 'law-making treaties'. The latter are intended to possess a universal character and general relevance, like international human rights treaties whereas the former apply only between the States that signed them and as such only apply to a specific number of States and lack general relevance.[114]

In this respect, the following excerpt from the ICJ Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[115] of 1951 is illustrative: "*The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions*"[116]

"The nature of human rights is universal, and their object and purpose is the protection of the individual from abuse by States. As recognized in jurisprudence, potential abuse by States cannot only occur on the State's own territory, but also outside."[117] The scope of international human rights treaties has thus far, as can be seen in case law, been limited to situations in which authorities either have effective or overall control over the situation. However, given the above observations, international human rights should be protected everywhere, regardless of which State has effective or overall control. "Jurisprudence and State practice have recognized the application of international human rights treaties not only in non-international armed conflict, but also in international armed conflict, including situations of occupation. This means that human rights have been applied outside of the territory of the parties."[118] This trend should be broadened with reference to the conscience of the international community:

why should one individual have the right to be protected and not another. The reasoning that bases its argument on the sovereignty of the State is no longer convincing in the globalized world we live in today. Some international human rights, like the right to life or *ius cogens* norms such as the prohibition of genocide, should inherently apply to all individuals, regardless of the State to which they belong and regardless of the place in which they reside.

As mentioned in the introduction, it goes beyond the scope of this paper to discuss the possibilities of reservations to international human

rights treaties and the denunciation of such treaties. But just as food for thought, consider that if the above argument is accepted, i.e. that international human rights law represents a distinct and special category of international treaty, then that implies that (in a perfect world) denunciation of such treaties should be prohibited and that reservations would not be tolerated.

If this would have been the case during the atrocities that occurred in Rwanda, mentioned in the introduction, then the Security Council could not have failed to take action, in the manner they did in the case of Rwanda. At least not without incurring legal responsibility after the fact.

It seems that the inherent nature of international human right treaties can especially support the view that these treaties might be seen as a special category of treaty. As has been seen in this chapter, international human rights treaties, although established and agreed upon by sovereign States, confer rights upon the individual inhabitants of these states. Once they have acquired such rights, they cannot be stripped of them. In other words, following this view, once an international human rights treaty has been ratified, its effects cannot be undone.

6. CONCLUSION

The right to life is included in several international treaties and has been recognized worldwide. Although the right to life is not absolute, this right can be viewed as one of the most core rights the international human rights treaties include. The right to life is a non-derogable right. The scope of the right to life, however, does not include a guarantee of non-applicability of the death penalty nor protection of life under all circumstances. That being said, as we have seen, there are only very specific situations in which the non--absolute character of the right to life arises.

The right to life is a fundamental part of the Genocide Convention, which aims to prevent and punish the systematic elimination of a group of people. The Genocide Convention makes clear that it is not only intended to react to systematic killings, but that it might also serve as a legal foundation to prevent those killings. This obligation stemming from the Genocide Convention is perceived as an *erga omnes* obligation which also finds its foundation in case law rendered by the ICJ indicating that the obligation of each State to abide by the Genocide Convention is not territorially limited by that Convention. This, together with Article VII of the Genocide Convention, which gives States the opportunity to call on the United Nations to take appropriate measures to prevent genocide, provides a possibility to apply this Convention extraterritorially.

It has been noted that the case law of the ICJ and the ICTY has stretched the borders of the application on treaties, but that more would be needed to infer extraterritorial application of international human rights treaties. The case law of the UN Human Rights Committee and the European Court of Human Rights has demonstrated a trend toward a broader application of the ICCPR and the ECHR. When it comes to the right to life, both the UN Human Rights Committee and the European Court of Human Rights have found legal arguments to expand their jurisdiction to the extent that they can address the matter.

International human rights treaties, in particular, are capable of conferring the rights they grant to individuals once a State has signed the treaty and thereby guarantee that a State cannot take those rights away again. Those rights, more specifically the right to life, can then be protected by the signatories of the treaty, regardless of the State of citizenship or residence of the individual in question. This reading of the treaties suggests that the protection of the right to life should always apply, and thus would mean that international human rights treaties which encompass this right may be applied extraterritorially.

Looking at the case law of the relevant international judicial bodies, the extraterritorial application of the right to life conveyed in international human rights treaties is much less farfetched then one might think. Although the precise obligations that States might have in case of extraterritorial application are unclear, the door has been left open for future cases to be interpreted in such a matter. The more atrocities, like the one in Rwanda, that this world witnesses and the more political pressure these will bring; the more likely it will be that the extraterritorial application of the right to life in international human rights treaties will be legal practice rather than mere academic debate.

The question remains, however, what the specific obligations of States would be in case of such an extraterritorial application and to what scope those obligations would extend. This paper has focused on the discussion regarding the possibility of extraterritorial application of international human rights treaties. The scope to which such application might extend will be left to a future discussion.

NOTES

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95. *Bankovic et al. v. Belgium*, European Court of Human Rights, application nº. 52207/99, 19 December 2001.
96. *Bankovic et al. v. Belgium*, European Court of Human Rights, application nº. 52207/99, 19 December 2001, press release by the Registrar (970).
97. *Salah Sheekh v. The Netherlands*, European Court of Human Rights, application nº. 1948/04, 11 January 2007.
98. *Soering v United Kingdom*, Series European Court of Human Rights, application No 14038/88, 7 July 1989.
99. Liz Heffernan, Editor, *Human Rights a European Perspective*, The Round Hall Press in association with Irish Centre for European Law, 1994, p. 102.
100. Ibid.
101. The Hebrew University of Jerusalem, Faculty of Law *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Cordula Droege. Research paper Nº. 14-07, December 2007, p. 327.
102. Ibid.
103. *Loizidu v. Turkey*, paragraphs 62-64 (preliminary objections).
104. *Ocalan v. Turkey*, European Court of Human Rights, 12 March 2003.
105. The same argument was also used in the case of *Issa and Others v. Turkey*.
106. The Hebrew University of Jerusalem, Faculty of Law *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Cordula Droege. Research paper Nº. 14-07, December 2007, p. 333.
107. Ibid.
108. Antionio Augusto Concado Trindade, 'The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights' p. 477, in Multiculturalism and International Law, p. 477-499, Koninklijke Brill NV 2009.
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110. Malcolm N. Shaw, *International Law*, sixth edition, Cambridge University Press 2008, p. 923.
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114. Malcolm N. Shaw, *International Law*, sixth edition, Cambridge University Press 2008, p. 94 and 95.
115. *Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide*, ICJ Advisory Opinion, May 28, 1951, (1951 I.C.J. 15).
116. Ibid. p. 7 and 8.
117. The Hebrew University of Jerusalem, Faculty of Law *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Cordula Droege. Research paper Nº. 14-07, December 2007, p. 335.

118. The Hebrew University of Jerusalem, Faculty of Law *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Cordula Droege. Research paper Nº. 14-07, December 2007, pp. 324, 325.