5 Article 4: The Right to Life and Integrity of the Person

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Subject(s):
Right to life
The Right to Life and Integrity of the Person

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

A. Introduction

This is relatively brief and in contrast to Article 2 of the European Convention on Human Rights (ECHR) and Article 4 of the American Convention on Human Rights (ACHR) which both set out grounds where deprivation of life may be permitted, such as through use of force, and where express mention is also made of the death penalty. Earlier drafts of the Charter in fact were more detailed and did include reference to capital punishment. For example, Article 17 of the M’Baye Draft read:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of his birth. No one shall arbitrarily be deprived of his life. In no case shall capital punishment be inflicted for political offences or related common crimes. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending for decision by the competent authority.

This provision does not outright prohibit the death penalty but sets out circumstances in which it will not be permitted and rights for those who are subject to this sentence. As will be seen below and in the discussion around fair trial these elements have now found their way into the jurisprudence and interpretation of the African Commission, even if they are not expressly mentioned in Article 4 of the African Charter on Human and Peoples’ Rights (ACHPR).

The Protocol on the Rights of Women in Africa, as does Article 4 of the ACHPR, links integrity with the right to life, but also with security of the person, the latter being found in Article 5 of the ACHPR. The Protocol provides more detail than is in the ACHPR, requiring States to take measures prohibiting and preventing violence against women, as well as ensuring the death penalty is not carried out on pregnant or nursing women.

The ACRWC adopts a slightly different tack linking life with survival and development. This provides that:

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

B. The Importance of the Right to Life and the Concept of ‘Life’
The right to life has been upheld by the African Commission as ‘the fulcrum of all other rights’; the supreme right of the human being and ‘therefore the foundational, or bedrock human right’. It is ‘the fountain through which other rights flow’, ‘basic to all human rights and without it all other rights are without meaning’. The African Commission has equally held that Article 4 should be ‘interpreted broadly’.

1. The Start of Life

Although the final provision does not mention from when ‘life’ may begin, there have been various references throughout the African Commission’s jurisprudence to the right to an abortion, even if not in absolute terms. The Protocol on the Rights of Women provides: ‘States Parties shall take all appropriate measures to … c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus’. As Zampas and Gher note ‘[t]his permissive, unqualified language represents a significant expansion of women’s right to access abortion in Africa’. It is notable that there are reservations to this provision by States party to the Protocol. Earlier versions of the General Comment on the Right to Life referred to ‘securing the continuation of biological life’. Concerns were raised by, for example, Amnesty International, and this is not found in the final version.

2. The Concept of Life

Recognising that ‘life’ has been given ‘a relatively broad interpretation by courts internationally, to include the right to dignity and the right to livelihood’, the African Commission similarly in its interpretation of Article 4 has noted that it should not adopt a narrow approach: ‘In order to secure a dignified life for all, the right to life requires the realization of all human rights recognized in the Charter, … particularly the right to peace’. The relationship with dignity is one that arises on numerous occasions and the African Commission has also interpreted this to apply in a range of contexts. For example, a ‘dignified life’ may be one which is the collective enjoyment of a range of rights. There may be some situations when the right to life will then not only have an immediate obligation but also the ‘progressive realisation of various economic, social and cultural rights will contribute to securing a full and dignified life. Violations of such rights may in certain circumstances therefore also entail violations of the right to life’. ‘Arbitrary executions’; ‘shootings by police officers’; and the ‘killing of innocent civilians in grenade attacks in Nairobi’ and ‘massacres’ ‘for reasons of their membership of a particular ethnic group’ in the context of the Rwanda genocide have all been found to violate Article 4, capturing many of the examples of deprivations of the right to life that take place in Africa. Similarly, the killing of persons with albinism in east Africa has been expressly identified as an arbitrary deprivation of the right to life and the integrity (p. 104) of persons. Many of the circumstances with which the African Commission is faced and on which it has had to pronounce relate to extrajudicial executions. In addition, it has noted that organised crime and terrorism ‘can pose significant threats to the enjoyment of the right to life’. In this respect the State response to this should be ‘robust’ but in compliance with international human rights law. More broadly, the African Commission has also recognized that an embargo imposed by States of the Great Lakes region against Burundi did not violate a number of rights in the ACHPR including the right to life due to this being endorsed by the then OAU and the UN: ‘The embargo was not a mere unilateral action or a naked act of hostility but a carefully considered act of intervention which is sanctioned by international law’. The African Commission did hold that it needs to be considered whether an embargo ‘is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main
perpetrators or authors of the nuisance complained of’. This was not thought to be the case here and no violation of the ACHPR was found.

C. The Absolute Nature of the Right and Deprivation of Life

The right to life is protected in customary international law and considered absolute: ‘Derogation from the right to life is not permissible in a time of emergency, including a situation of armed conflict, or in response to threats such as terrorism’. Indeed, a derogation provision included in earlier drafts of the ACHPR included the right to life as one of those from which no derogation was permitted, in line with other international treaties.

The African Commission’s case law in some, but not all circumstances, implies that there does not need to be a death for a violation of Article 4 to be found. In a number of cases against Mauritania, for example, it referred to ‘respect for life’, finding that ‘[d]enying people food and medical attention, burning them in sand and subjecting them to torture to the point of death point to a shocking lack of respect for life, and constitutes a violation of Article 4’. Similarly, where an individual was forced to go into hiding, the African Commission found a violation of Article 4, holding that he ‘is still alive but in hiding for fear of his life. It would be a narrow interpretation to this right to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one’s life and the dignity of his person, which this article guarantees would be protected in a state of constant fear and/or threats’.

In addition, ‘where a State or its agent has attempted unlawfully to kill a person, but that person survives, where it has unlawfully threatened the life of a person, or where it has forcibly caused a person to disappear and that person’s fate remains unknown, in addition to the violation of other rights, a violation of the right to life has occurred’. Actions which impact on the individual fearing for their life may have implications for his or her ability to pursue domestic remedies. In Communication 351/2007 Givemore Chari (represented by Gabriel Shumba) v Republic of Zimbabwe, an individual was subject to threats resulting, the complainant argued, in him leaving the country and so being unable to return to pursue domestic remedies in the local courts. The African Commission found that there was insufficient evidence to substantiate these claims and that the complainant, or indeed ‘any other person’, could have represented the alleged victim in the domestic courts of Zimbabwe even if the latter was not in the country.

There are a number of decisions on communications adopted by the African Commission which find violations of Article 4 where allegations of killings have been made, but where there is no further detail provided. For example, in an early case against Chad where there were accounts of fifteen individuals having been killed as a result of a civil war, as well as the assassination of a member of a human rights organization, the African Commission, in the absence of anything other than a blanket denial from the government, found a violation of Article 4.

D. Responsibility of the State

The State has a responsibility to ‘prevent and punish extra-judicial executions’. The African Commission has also referred to the obligation of the State to ‘respect and preserve human (p. 106) right’. Hence, where violence was used against demonstrators, whether or not authorized by the authorities, ‘the public authorities possess adequate means to disperse crowds, and that those responsible for public order must make an effort in these types of operations to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life’. On other occasions the African Commission has referred to duties to ‘respect, protect, promote and fulfil the right to life’, or simply

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just to ‘respect and ensure’ the right to life, and ‘respect the life of persons within its jurisdiction’. This duty to respect and ensure was found to have been violated when a number of individuals died as a result of ‘excessive and wrongful force by the law enforcement agents’.

The establishment of ‘truth’ for victims of violations has not been a particular focus of the African Commission, unlike for its Inter-American counterparts. However, its General Comment No. 3 does note in the context of accountability that ‘independent, impartial and properly constituted commissions of inquiry or truth commissions can play a role, as long as they do not grant or result in impunity for international crimes’.

1. Duty to Protect

There are various elements that have been identified as part of the duty to protect against arbitrary deprivation of life. Firstly, ‘[t]he duty of the State to protect the right to life has been interpreted broadly to include prohibition of arbitrary killing by agents of the State and to strictly control and limit the circumstances in which a person may be deprived of life by State authorities’. This duty also entails an obligation to conduct an investigation; to adopt provisions in criminal law to ‘deter the commission of offences against the person’; to set up law enforcement machinery for investigation and punishment of breaches of such law and ensure the system has appropriate equipment and training; to adopt and regularly update legislation protecting the right to life to bring it in line with international standards. In addition, there should be a judiciary and legal profession that is independent and impartial.

(p. 107) In line with other international treaties, the responsibility of the State towards protecting individuals in custody is heightened. Such an obligation includes ‘a positive obligation to protect all detained persons from violence or from emergencies that threaten their lives, as well as to provide the necessary conditions of a dignified life, including food, water, adequate ventilation, an environment free from disease, and the provision of adequate healthcare (including maternal healthcare and the provision of antiretroviral drugs). The State should provide necessary information on places of detention, the identity and age of those detained, as well as the authorities responsible’.

The duty is also broader than this. As the General Comment on the Right to Life notes:

the Charter envisages the protection not only of life in a narrow sense, but of dignified life. This requires a broad interpretation of States’ responsibilities to protect life. Such actions extend to preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies. The State also have a responsibility to address more chronic yet pervasive threats to life, for example, with respect to preventable maternal mortality, by establishing functional health systems. Such an approach reflects the Charter’s ambition to ensure a better life for all the people and peoples of Africa through its recognition of a wide range of rights, including the right to dignity, economic, social and cultural rights and peoples’ rights such as the right to existence and the right to peace. It is also rooted in widely shared communal values of the continent according to which the value of one’s person’s life is tied to the value of the lives of others.

There is also a recognition that the duty to protect may apply in other contexts too. ‘The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties. In cases where the risk has not arisen from malicious or other intent then the State’s actions may not always be related to criminal justice. Such actions include, inter alia, preventive steps to preserve and protect
the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies’.56

In addition, ‘Attention is also required to address more chronic yet pervasive threats to life, for example with respect to preventable maternal mortality, by establishing functioning health systems and eliminating discriminatory laws and practices which impact on individuals’ and groups’ ability to seek healthcare’.57

The African Commission has not been faced with many instances in which it has had to deal with the extra-territorial application of the ACHPR.58 However, in its General Comment No. 3 it does note the obligation on States to ‘respect the right to life of individuals outside its territory’.59 The extent of that obligation seems to take into account (p. 108) a variety of different approaches from international law,60 noting that it depends on ‘the extent that the State has jurisdiction or otherwise exercises effective authority, power or control over either the perpetrator or the victim (or the victim’s rights), or exercises effective control over the territory on which the victim’s rights are affected, or whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life. In any event, customary international law prohibits, without territorial limitation, arbitrary deprivation of life’.61

2. Duty to Investigate

As part not only of the duty to prevent but also to protect the right to life, is the obligation to investigate.62 This obligation arises ‘when individuals have been killed as a result of the use of force by agents of the State’.63 Drawing upon European Court of Human Rights jurisprudence,64 investigations must be carried out promptly and with ‘reasonable expedition’, ‘for the purpose of securing effective implementation of domestic laws, which protect the right to life’.

There will be a presumption of State responsibility for deaths in custody, and the burden of proof will therefore rest with the State65 and the ‘heightened responsibility extends to persons detained in prisons, in other places of detention (official and otherwise), and to persons in other facilities where the State exercises heightened control over their lives’.66

As has been seen in relation to other rights in the ACHPR, the African Commission has held that ‘it is not enough to investigate’67 but that such investigations must satisfy certain criteria. The list of this criteria is not always consistently presented, but it has referred in general to the requirement that investigations be ‘prompt, impartial, thorough and transparent’.68 They should be ‘in accordance with international standards: did they meet the test of effective official investigations under international human rights law?’69 That an investigation should be ‘carried out by entirely independent individuals’,70 has been interpreted as meaning ‘for the person responsible for the carrying out of the (p. 109) investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence’.71

Therefore, while the establishment of a commission of enquiry may satisfy these criteria in principle, a commission composed, for example, of the District Prosecutor and police and security officials, which was charged with investigating these agencies will not ‘provide the required guarantees of impartiality and independence’.72 An investigation should be ‘provided with the necessary resources’;73 and its ‘findings should be made public’.74 The result of the investigation should lead to prosecutions as appropriate.75

With respect to individuals who are State officials but who violated the right to life while not acting on behalf of the State, the African Commission has recognised the principles of State responsibility under international law and the concept of due diligence as outlined in the Inter-American Court’s judgment in Velásquez Rodríguez.76 In a case against Zimbabwe it was not disputed that one individual, Lameck Chemvura, died as a result of actions of members of the national army. He had been kicked, strangled and pressed against the floor.
of a train until he died. The army official suspected to have been responsible was arrested but the State claimed it was not responsible for the death as the official had acted without authorization. The African Commission agreed and found that Zimbabwe was not responsible for the acts of members of the army when carried out in their private capacity and such acts were therefore ‘not directly imputable’ to the State. The State did, however, have an obligation to investigate, prosecute the perpetrators and compensate the victims in respect of those acts. This must be undertaken with due diligence and a failure to do so will result in a violation of Article 4. So in this case, it was prepared to hold that as Zimbabwe had neither ‘properly responded to the death of Lameck Chemvura’ and did not ‘satisfactorily compensate’ his close relatives’, it was found to have violated Article 4. No further detail is provided by the African Commission on what elements of the response of the State were specifically found wanting. The Complainants had, however, argued that there was no ability to make a claim for wrongful death, even though the soldier was being prosecuted.

3. Duty to Prevent

There is an obligation to prevent violations of the right to life in particular ‘arbitrary deprivation of life’. These are where such deprivations are caused not only by State agents including the executive, legislative and judicial branches at national, regional or local levels, but also by non-State actors. The obligation to prevent violations also includes an obligation to investigate.

Holding perpetrators accountable is a further element of the obligation to prevent violations of the right to life. There should be effective remedies and reparation for victims and for the victims’ ‘immediate family and dependents … where appropriate’.

The obligation to prevent arises in relation to individuals whose lives are at threat by non-State actors. In such instances the State must ‘take preventive operational measures to protect an individual’. In Communication 74/92 Commission Nationale des Droits de l’Homme et des Libertés v Chad, the African Commission held that because the Minister was ‘warned of the danger’ to an individual who had been assassinated but that he ‘refused to issue protection’, a violation of Article 4 was found. The African Commission held that ‘[t]he national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders’. Where individuals were killed during a civil war, the African Commission noted that the government of Sudan had a ‘responsibility to protect all people residing under its jurisdiction’, even if these ‘are not all the work of forces of the government’. Hence if the State ‘approves, supports or acquiesces in those acts or if it fails to exercise due diligence to prevent such killings or to ensure proper investigation and accountability’, it will be held liable for acts of non-State actors.

The obligations to protect individuals against the actions of non-State actors run alongside the State’s obligations for its own agents. In Zimbabwe Human Rights NGO Forum/Zimbabwe [footnote removed], the Commission noted that an act by a private individual or [non-State actor] and therefore not directly imputable to a State, can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence on the part of the State to prevent the violation or for not taking the necessary steps to provide the victims with reparation.
Where responsibility of the government is established for violations conducted by private actors, then the victims will be entitled to compensation, payable by the government. So Cameroon, ‘[d]ue to its obvious lack of diligence’, was held ‘responsible for the acts of violence which took place on its territory which gave rise to human rights violations, whether these acts had been committed by the State of Cameroon itself or by people other than the State’.98

Non-State actors has been defined in this context as encompassing ‘private individuals and corporations, including private military and security companies’ as well as ‘businesses domiciled in their territory or jurisdiction’.99 The insertion of ‘causing and contributing’ to arbitrary deprivation of life by corporations in particular in the African Commission’s General Comment No. 3, was a recommendation by Amnesty International highlighting the common standards in the UN on business and human rights.100

4. Deaths in Custody

Protection of the right to life ‘also includes a duty for the state not to purposefully let a person die while in its custody’.101 In the context of this case, ‘at least one (p. 112) of the victims’ lives was seriously endangered by the denial of medication during detention’.102

E. Right to a Remedy

As provided for in relation to violation of other rights in the ACHPR, the African Commission has also held a right to a remedy and reparation for a violation of the right to life. As part of the accountability of the State are included ‘measures such as reparation, ensuring non-repetition, disciplinary action, making the truth known, institutional review and, where applicable, reform. States must ensure that victims have access to effective remedies for such violations’.103 Reparations should be ‘full and effective’ and ‘proportional to the gravity of the violations and harm suffered’.104 They should ‘address the harm suffered by victims, including by their family and dependents’ and include guarantees of non-repetition.105

F. Single and Multiple Violations of the Right to Life

The African Commission has implied that the right to life, interpreted in its different forms, can be violated numerous times with respect to the same victims. In the case relating to Ken Saro-Wiwa, for example, the African Commission held that not only had there been a violation with respect to the execution of the individuals, but also the failure to provide medication during detention. It concluded that ‘there are multiple violations of Article 4’.106 Similarly, imposition of the death penalty after an unfair trial, failure to ‘respect life’, and arbitrary executions in Mauritania together were ‘repeated violations’ of Article 4.107

G. Death Penalty

1. Abolition/Moratorium

There is no reference to the death penalty in the ACHPR, unlike in other instruments.108 The UN Secretary General has stated that the ‘death penalty has no place in the 21st (p. 113) century’,109 and there is a trend in international law towards abolition.110 Information collated by the African Commission suggests that as at 2016 forty-two States have abolished the death penalty ‘in law or in practice’ but only eleven AU States are party to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).111
One area where the African Commission has been consistent is in calling for a moratorium on the death penalty, as illustrated in its 1999 Resolution Urging the State to Envisage a Moratorium on Death Penalty:

1. URGES all States parties to the African Charter on Human and Peoples’ Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter;

2. CALLS upon all States parties that still maintain the death penalty to:
   a) limit the imposition of the death penalty only to the most serious crimes;
   b) consider establishing a moratorium on executions of death penalty;
   c) reflect on the possibility of abolishing death penalty.

(p. 114) Similarly, States should ‘impose a moratorium on the execution of prisoners on death row by commuting their death sentences to life in prison’ and to ratify instruments prohibiting the death penalty.

Although the African Commission, through Articles 60 and 61 of the ACHPR, could read into Article 4 the jurisprudence of the UN Human Rights Committee and national courts such as the South African Constitutional Court, which support abolition of the death penalty, it has failed to be consistent in whether it considers the death penalty per se to be contrary to the ACHPR. On the one hand there have been instances where it has noted ‘its opposition to the imposition of the death penalty as it constitutes a violation of Article 4’. It has also acknowledged a moratorium does not go far enough:

A moratorium appears to be something of a halfway house between abolition and retention. The adoption of a moratorium on executions ought normally to be a step towards the ultimate decision proscribing the death penalty. In other words, one would have assumed that after a number of years of moratorium it would be difficult for a state to resume executions and that a moratorium is a move that paves the way for abolition of the death penalty.

In a 2011 decision against the DRC, it noted that ‘that even though the respect for the rights to a fair trial is guaranteed in the procedure leading to the imposition of the death penalty, nobody can in contemporary times overlook the purely abolitionist trend of the States towards this punishment’. Similarly in Communication 319/06, Interights and Ditshwanelo v The Republic of Botswana, it commented that it ‘considers it increasingly difficult to envisage a case in which the death penalty can be found to have been applied in a way that is not in some way arbitrary. As a result, it is difficult to conceive that, if called upon in future to do so, that the Commission will find that the death penalty, however, it is executed, is any longer compatible with the African Charter.’

(p. 115) On the other hand, however, while the African Commission may be prepared to state that the death penalty is not a practice it condones, its approach has been relatively weak as regards outright abolition. It has, for instance, only been ‘in favour of the abolition of the death penalty in Africa’ and agreed with an acknowledgement by the complainants in one case that ‘the imposition of the death penalty is not per se unlawful under the Charter or broader international human rights law’.

It is through persuasion and encouragement that it has called on ‘Member States of the African Union that have abolished the death penalty de jure to encourage other Member States which still carry out the death penalty about the necessity of abolishing the death penalty’. It continues to issue press releases and statements urging States not to implement the death penalty, condemning recent executions, and outlining the
consequences of it, and calling on States to ratify the Second Optional Protocol to the ICCPR. It has said the death penalty is a ‘barbaric and ineffective form of criminal justice’.

In the renowned case of Ken Saro-Wiwa where activists, including Ken Saro-Wiwa, were detained, tried, sentenced to the death penalty and subsequently executed, the African Commission held that the violation of Article 4 had been ‘compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any “irreparable prejudice” to the subjects of the communications before the Commission had concluded it consideration’. The issuance of provisional measures has been used in a small number of cases to attempt to prevent executions. In this particularly high-profile case, not only had the African Commission issued provisional measures but there had been international media attention and calls from many sources including at the UN urging the Nigerian government not to execute these individuals. One cannot consider that the government’s refusal to do so was simply contrary to calls by the African Commission but also against considerable international, regional and national pressure.

In September 2009 a conference, 'Question of the Death Penalty in Africa', was held by the African Commission in Rwanda. The resulting Kigali Framework Document on the Abolition of the Death Penalty in Africa included recommendations that the African Commission ‘continue its campaign to abolish the death penalty’, through awareness raising and proposing alternative solutions; African State constitutions should include a clause prohibiting the death penalty and the African Commission should urge States to ratify the Second Optional Protocol to the ICCPR. This conference also gave support to the proposal for a protocol to the ACHPR on abolition of the death penalty. At a Second Regional Conference on the Question of the Death Penalty in Africa in Cotonou in April 2010, despite the reluctance of several States, it was suggested that there should be a roadmap towards the adoption of a protocol. The subsequent Study on the Death Penalty similarly set out various strategies that the African Commission committed to adopt: engagement with States to encourage abolition; awareness raising and education around the need for abolition; engagement with other actors and with the UN; encouragement of States to ratify the second Optional Protocol to the ICCPR. It also confirmed the need for the African Commission to work on the adoption of a Protocol to the ACHPR on abolition of the death penalty. While it is to be welcomed that at its 56th Session the African Commission adopted a draft Protocol on the Abolition of the Death Penalty, its progress appears to have been stalled at the AU’s Specialized Technical Committee on Legal Affairs who have raised concerns with the legal drafting.

The hesitancy towards outright abolition is still there, as illustrated by the response of the African Commission in February 2015 to mass death sentences imposed by Egypt on over a thousand persons in 2014 and 2015. Despite condemning Egypt for its ‘disregard to regional and international fair trial standards, the unlawful imposition of mass death sentences, and the persecution of journalists and human rights defenders’, it urged the government to ‘observe an immediate moratorium on the death sentences’, but only to ‘reflect on the possibility of abolishing capital punishment’. The General Comment No. 3 on the right to life similarly also calls on States which have abolished it to ‘not reintroduce it, nor facilitate executions in retentionist states through refoulement, extradition, deportation or other means’; for those who have a moratorium to ‘take steps to formalize abolition in law’; and for those which have yet to abolish it ‘that it is used for only the most serious crimes—understood to be crimes involving intentional killing’. Clarification of
what amounts to ‘the most serious crimes’ is provided in Communication 277/2003, Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v Botswana. Affirming that the death penalty for such crimes would not violate Article 4, the African Commission noted that this phrase should be interpreted ‘in the most restrictive and exceptional manner possible and that the death penalty should only be considered in cases where the crime is intentional, and results in lethal or extremely grave consequences’. Drawing upon the Rome Statute, the African Commission found that murder would fall into this category, as would intentional crimes which involved ‘the use of firearms resulting in the death of another’, but ‘economic, nonviolent or victimless offences such as economic crimes and drug related offences would amount to a disproportionate imposition of the death penalty and thus a violation of the right to life under Article 4 of the African Charter’. Despite not finding a violation of Article 4 in this case, it did find a violation of Article 5 and still called on the State to ‘take urgent measures with a view to abolish the death penalty’.

The only situations where it has consistently called for abolition is in relation to crimes committed by children, pregnant or nursing women and has added to this list, ‘elderly (p. 118) persons or persons with psycho-social or intellectual disabilities’. In Communication 259/02, Working Group on Strategic Legal Cases v Democratic Republic of Congo, the African Commission was asked to consider the imposition of death sentences on seven children. Responding to the argument by the Democratic Republic of Congo that the sentences had been commuted by presidential pardon and therefore no violation had occurred, the African Commission held that ‘as the death penalties imposed unjustly on the victims as a measure of last resort had been commuted to various terms of imprisonment, it does not in any way settle the violation perpetrated against the child soldiers, even though it reduces the effects. In this instance, the principle governing the effectiveness of human rights remedies is that the violations must be remedied, and the Respondent State cannot be absolved from this obligation by adopting mitigating measures or alternative measures’. Drawing upon international law standards including Article 6(5) of the ICCPR and Article 37 of the UN CRC, the African Commission consequently found that imposition of the death sentence on juveniles was in violation of Article 4 of the ACHPR.

Returning an individual to their home where his life would be under threat from a civil war was found to be a violation of Article 4.

Thus, while the African Commission has been prepared to hold that the death penalty carried out in violation of Article 7 will be arbitrary, it has not yet been willing, as for example Ackermann J did in Magwanyane, to hold that the death penalty itself is arbitrary. Its references, such as in 2011, that ‘[w]hatever one may say, the legality of the violation of the right to life through the imposition of the death penalty cannot be considered as an absolute restriction’. Nevertheless there is clear value in the African Commission taking a stronger stance in terms of setting regional standards.

2. Must be Article 7 Compliant Trial

What the African Commission has held consistently is that if ‘the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4’. So where ‘prisoners were executed after summary and arbitrary trials’, the right to life was found to have been violated. Conversely, it could also be presumed, and implied, by Communication (p. 119) 223/98, Forum of Conscience v Sierra Leone, that if the trial ordering the execution is considered to be fair, then the imposition of the death penalty will not violate the right to life.
In some early cases the African Commission focused on the nature of the trial, for example, finding that trials resulting in the death penalty which themselves did not comply with Article 7 of the ACHPR would subsequently render the execution contrary to Article 4 of the Charter.\textsuperscript{161} When faced in particular with high profile cases such as that of Ken Saro-Wiwa in Nigeria, and Mariette Bosch in Botswana, the African Commission shied away from calling for an outright abolition and declaring the death penalty \textit{per se} to be in violation of the African Charter. Instead, in Communication 240/2001, \textit{Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana}, for example, the African Commission noted that:

\begin{quote}
While it is accepted that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence but also the circumstances of the individual offender … there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed.\textsuperscript{162}
\end{quote}

Instead it chose to focus on the claim that the courts did not consider the full circumstances and whether the sentence was disproportionate to the gravity of the crime. The Commission looked at extenuating circumstances but found that:

\begin{quote}
Thus while the African Commission acknowledges that the seriousness or gruesome nature of an offence does not necessarily exclude the possibility of extenuation, it cannot be disputed that the nature of the offence cannot be disregarded when determining the extenuating circumstances. As such, the African Commission finds no basis for faulting the findings of both the trial court and Court of Appeal as it relates to this issue.\textsuperscript{163}
\end{quote}

It hence based its findings on whether the national courts had given adequate consideration to the facts and issues in the case. Neither did it accept that there was sufficient evidence to indicate there was failure to give reasonable notice of the date and time of the execution, although it was prepared to say that a failure to do so would have amounted to cruel, inhuman and degrading punishment and treatment. The African Commission concluded that ‘[i]n the circumstances it would be fundamentally unfair to the Respondent State to deal with the substance of this issue save to observe that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to “arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal”’.\textsuperscript{164} It could be argued (p. 120) that this is a weak statement by a Commission trying to set down some more general guidance but constrained by political pressures. There was also evidence that the request placed before the African Commission for provisional measures to ask the government to postpone the execution was not dealt with properly by the Commission and it failed to act until it was too late.\textsuperscript{165}

On another occasion the African Commission noted that a law in Egypt ‘imposes a penalty on a particular crime in specified circumstances but did not provide an avenue for a competent judiciary to evaluate the appropriate penalty, in light of all of the circumstances of the case. The penalty is effectively mandated by law for certain categories of offences, with the President empowered to decide not to apply that sentence if he so decides. This is at odds with the requirements of right to life, as reflected in international legal practice’.\textsuperscript{166} Thus, ‘[h]aving held that the trial of the applicants offended Article 7 of the African Charter, it follows that any implementation of the death sentence imposed on the applicants by the Supreme State Security Emergency courts will therefore amount to an arbitrary deprivation of life’.\textsuperscript{167} This approach of questioning the mandatory nature of the death penalty and not...
permitting judicial discretion is one which has been adopted by other international bodies.\textsuperscript{168}

What is interesting, in the case against Egypt where the individuals had not yet been executed, was that the African Commission did not find a violation of Article 4: [t]he victims are still under the custody of the Respondent State, through a process that denied them due process and are not yet executed'.\textsuperscript{169} So while there may be a violation of Article 7 and the right to a fair trial in such circumstances, Article 4 may not be violated until the execution has taken place.\textsuperscript{170}

The African Commission disagreed with the argument in one case against Botswana that the legal representation provided by the State was inadequate as it relied on junior and inexperienced lawyers. Instead it held that this had been proven and had not been raised as an issue on appeal; the defence team should, however, be ‘competent, capacitated and committed’.\textsuperscript{171} Where clemency was provided but not subject to judicial review, the African Commission similarly did not find a violation of Article 4 holding that clemency was a prerogative power.\textsuperscript{172}

(p. 121) 3. Rules on the Conduct of Executions

If the death penalty must be carried out, the African Commission has held that it should be ‘used in a completely transparent manner, with States giving reasonable advance notice of the timing, manner, and number of executions to those involved, including those under sentence of death, their families and lawyers, and to the public at large’.\textsuperscript{173} The sentence should not be conducted in public or by methods which ‘cause unnecessary physical or mental suffering’.\textsuperscript{174} The body should be ‘treated with respect’ and returned to the family.\textsuperscript{175}

H. Reading Other Rights into Article 4

In Communication 155/96, \textit{Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria},\textsuperscript{176} the African Commission implied a right to food in the ACHPR as ‘inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation’.\textsuperscript{177} This right, derived from the ACHPR ‘and international law’:

\begin{quote}
require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.\textsuperscript{178}
\end{quote}

The destruction of food sources by the government and private oil companies as well as impingements of the Ogoni in Nigeria to feed themselves were in violation of the right to food.\textsuperscript{179}

In addition, a right and access to water has also been referred to by the African Commission on a number of occasions, as derived from Article 4 of the ACHPR. It has noted that ‘[t]he right and access to water are essential to the full enjoyment of the right to life and all the rights contained in the African Charter. A denial of such right is a denial of the basic right and the denial of the right to life as enshrined in the article 4 of the African Charter’.\textsuperscript{180} Furthermore, this has been linked to housing. Where Botswana (p. 122) deprived the Bushmen of the Central Kalahari Game Reserve from access water through an existing borehole the African Commission condemned this as ‘a clear sign that the Government of
Botswana is determined to continue what is perceived as a policy of keeping the Bushmen from returning home’.\textsuperscript{181}

The Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004 notes in addition, that:

The social, economic and cultural rights explicitly provided for under the African Charter, read together with other rights in the Charter, such as the right to life and respect for inherent human dignity, imply the recognition of other economic and social rights, including the right to shelter, the right to basic nutrition and the right to social security.\textsuperscript{182}

\section{I. Violation of the Right to Life During Conflict}

As noted above, the right to life is absolute in the ACHPR. The African Commission’s General Comment on Article 4 provides that ‘[i]nternational humanitarian law on the conduct of hostilities must only be applied during an armed conflict and where the use of force is part of the armed conflict. In all other situations of violence, including internal disturbances, tensions or riots, international human rights rules governing law enforcement operations apply’.\textsuperscript{183} In addition, ‘[d]uring the conduct of hostilities, the right to life needs to be interpreted with reference to the rules of international humanitarian law [IHL]’.\textsuperscript{184} This has been seen as a ‘remarkable statement’ as ‘for the first time, a human rights treaty body made it explicit that, when human rights law norms are placed in the background to favour the application of IHL norms, a breach of the latter entails a violation of the former’.\textsuperscript{185}

International humanitarian law should govern what amounts to an arbitrary deprivation of liberty during times of armed conflict,\textsuperscript{186} although the African Commission does not define armed conflict in these contexts.\textsuperscript{187} A violation of international humanitarian law which ended in death will be an arbitrary deprivation of the right to life.\textsuperscript{188} As Todeschini notes this ‘consolidated an established interpretive trend, according to which IHL provides the yardstick to evaluate when use of force in the conduct of hostilities amounts to arbitrary deprivation of life in violation of relevant human rights norms’.\textsuperscript{189}

\section{(p. 123) J. Enforced Disappearances}

In Communication 204/97 Movement Burkinabé des droits de l’Homme et des Peuples v Burkina Faso the African Commission, citing the violation of the right to life as contained in the Declaration on the Protection of all Persons against Forced Disappearances,\textsuperscript{190} and that disappearances also violated Articles 5 and 6 of the ACHPR, found violations of Article 4.\textsuperscript{191} The African Commission’s General Comment on Article 4 further requires that ‘States shall take appropriate measures to investigate cases of enforced disappearances committed by persons or groups acting without the authorisation, support or acquiescence of the State, and to bring those responsible to justice’.\textsuperscript{192} However, it is not clear why the African Commission did not follow Amnesty International’s recommendation on the draft General Comment to include a more detailed paragraph on enforced disappearances.\textsuperscript{193}

\section{K. Use of Force by Law Enforcement Officials}

Drawing upon the UN’s Special Rapporteur on extrajudicial, summary or arbitrary executions reports,\textsuperscript{194} and the Code of Conduct for Law Enforcement Officials an Basic Principles on the Use of Force and Firearms by law Enforcement Officials,\textsuperscript{195} the African Commission has recognised the impact of the use of force by law enforcement officials on the right to life but that ‘in some cases of urgency, law enforcement officials are given the power by law to use coercive measures and even in exceptional cases to take life-and-death decisions on the spot’.\textsuperscript{196} Such powers are necessary to protect the public and the law enforcement officials themselves: a ‘system that is seen as too protective of the rights of
suspects is unlikely to be effective in practice. The challenge clearly is to find the right balance between overly permissive and overly restrictive. The starting point is that life should not be taken by the State, and any action that seeks to fall in the narrow confines of exceptions to this rule requires strong motivation’.\textsuperscript{197} In line with other international law standards, any force used must be reasonably necessary, proportionate and only employed in ‘exceptional circumstances’\textsuperscript{198}

(p. 124) Proportionality has been interpreted as requiring that ‘the rights of the person threatened are measured against those of the deceased persons ... in an objective way, in the light of the prevailing circumstances at the time when the final decision on the use of lethal force is made’.\textsuperscript{199} Furthermore, ‘life should not be taken by the State, and any action that seeks to fall in the narrow confines of exceptions to this rule requires strong motivation. Furthermore, the Respondent fails to prove that the deceased persons were suspected criminals’.\textsuperscript{200} The principle of ‘protection of life’ requires that ‘while life may not be sacrificed to protect other values, under closely defined circumstances one life may be taken as a last resort in order to protect another life or lives’.\textsuperscript{201}

In a case against Zimbabwe where the police shot at an individual’s car leading to the death of another, and where the police were not at the time under threat, the African Commission held that ‘it is not the fact that someone suspected of having committed a crime stands to be arrested as such that justifies the use of firearms but rather the immediate danger that this person poses to life’.\textsuperscript{202} Where, in the same case, another individual fled the police and when arrested but then subsequently escaped, he was shot in the head at point-blank range. He was not armed and the African Commission noted that as he posed no ‘immediate threat to the safety of the police officers or any other member of the public. Thus a lower level of force would have been sufficient to restrain or apprehend’ him.\textsuperscript{203} In relation to both these individuals, the African Commission found that the situation was not one of ‘last resort to protect lives’ and therefore the use of force was not justified.\textsuperscript{204}

Similarly, deaths as the result of assaults by police officers when carrying out their duties will also violate Article 4.\textsuperscript{205}

\textbf{L. Special Mechanisms}

\textbf{1. Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions}

The genocide in Rwanda in 1994, to which the African Commission had until its occurrence paid little attention to the escalating situation in the country,\textsuperscript{206} prompted in (p. 125) part the decision of the African Commission to appoint at its session in April that year a Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.\textsuperscript{207} The mandate provided to the Special Rapporteur at this stage was simply ‘mainly to focus on the situation in Rwanda’.\textsuperscript{208} It was not until October 1995 where more detailed terms of reference which had been drafted by the Special Rapporteur, were approved by the African Commission.\textsuperscript{209}

In the early years, little work was done, consisting of a handful of reports and statements to the sessions.\textsuperscript{210}

The 1996 terms of reference provide as follows:

1. To propose the implementation of a reporting system on cases of extrajudicial, summary and arbitrary executions in African States, especially by keeping a register of the identity of the victims.

2. To follow up, in collaboration with government officials, or failing that, with international, national or African NGOs, all enquiries which could lead to discovering
the identity and extent of responsibility of authors and initiators of extrajudicial, summary or arbitrary executions.

3. To suggest ways and means of informing the African Commission in good time of the possibility of extrajudicial, summary or arbitrary executions, with the goal of intervening before the OAU Summit.

4. To intervene with States for trial and punishment of perpetrators of extrajudicial summary or arbitrary executions, and rehabilitation of the victims of these executions.

5. To examine the modalities of creation of a mechanism of compensation for the families of victims of extrajudicial, summary or arbitrary executions, which might be doing [sic] through national legal procedures, or through an African compensation fund. 211

The methodology that the Special Rapporteur would adopt included verifying allegations but which should not ‘in any way, substitute for the police and judicial organs of the concerned country, nor play the role of detective, it nevertheless remains that he must evaluate the adequacy of the means of inquiry made by national organs and the (p. 126) credibility of the conclusions adopted by national investigative organs.’ 212 In carrying out his mandate, he should also have ‘recourse to all methods of investigation, specifically by requesting the assistance of States and national, international and African NGOs,’ 213 and ‘can be assisted in his mission by any person whom he judges competent to perform this task well’. 214 What the balance should be between the focus on Rwanda (which had been the main incentive to appoint the Special Rapporteur) and to a certain extent Burundi, 215 and a broader agenda with the inclusion of other countries, was never entirely clear. 216 This and a failure to conduct on-site visits, even as part of a general delegation of the African Commission, 217 explains in part why this particular special mechanism faced criticisms. 218 The Special Rapporteur was engaged in responding to urgent calls, for example, to prevent individuals being executed, 219 but his work was limited. It was perhaps of little surprise when criticisms came from the Rwandan government, NGOs and members of the Commission itself, resulting in Commissioner Ben Salem resigning from the position in 2000. 220

2. Working Group on the Death Penalty

At its 37th Session the African Commission appointed two Commissioners to work with the Special Rapporteur on Prisons to consider the death penalty. At the subsequent session the Working Group was broadened to include two experts and mandated to:

(p. 127)

- Elaborate further a Concept Paper on the Death Penalty in Africa;
- Develop a Strategic Plan(s), including a practical and legal framework on the abolition of the Death Penalty;
- Collect information and continue to monitor the situation of the application of the Death Penalty in African States;
- Develop a funding proposal with a view to raising funds to meet the costs of the work of the Working Group;
- Submit a progress report at each Ordinary Session of the African Commission;
- Collaborate with other partners, including International, National, Governmental and Non-Governmental Institutions for the successful fulfilment of its mandate. 221
Although its membership has changed over the years, the Working Group has met a number of times; organised sub-regional conferences on the death penalty; examined laws relating to the death penalty in a number of States; and recently finalised the Study on the Question of the Death Penalty in Africa which was adopted at the 50th Session of the Commission. Given that the Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings had not been operational since the Commissioner’s resignation in the early 2000s, the mandate of the Working Group on the Death Penalty was expanded to include this issue in October 2012. Its title was accordingly amended to the ‘Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa’. The Working Group consequently has an additional mandate to ‘Monitor situations relating to extra-judicial, summary or arbitrary killings in all its ramifications; Collect information and keep a database of reported instances of situations concerning extra-judicial, summary or arbitrary killings in Africa; Undertake studies on issues of relevance to extra-judicial, summary or arbitrary killings; Advise the Commission on urgent measures to be taken to address situations of extra-judicial, summary or arbitrary killings that require immediate attention; Respond effectively to information that comes before it, in particular when an extra-judicial, summary or arbitrary killing is imminent or when such a killing has occurred; Submit its findings, conclusions and recommendations on the situation of extra-judicial, summary or arbitrary killings to each session of the Commission’.

M. Evidence

In Communication 266/03 Kevin Mgwanga Gunme et al v Cameroon, noting the government’s claim that the allegations were not substantiated by evidence such as death certificates, forensic evidence or investigation reports, the African Commission held:

the parties do not have equal access to official evidence such as police reports, death certificates and forensic medical certificates. The Complainants endeavoured to inquire into the alleged violations and gave names of the alleged victims. The Respondent State restricted itself to questioning the reliability of the evidence presented by the Complainants. It did not deny the alleged violations. The Respondent State had the opportunity to inquire into the alleged violations. The Respondent State did not conduct such investigation and redress the victims, it thus failed to protect the rights of the alleged victims. The Commission finds that it violated Article 4 of the African Charter.

The African Commission itself has also drawn upon reports of UN Special Rapporteurs with respect to the human rights situation in particular States to assist it in coming to its conclusions.

N. Burden of Proof and Rules of Evidence

The African Commission has a ‘long-standing practice’ of holding that the burden of proof rests with the government ‘in cases of human rights violations’. It has held this to mean that ‘[i]f the government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at the least probable or plausible’.

(p. 129) O. Remedies

Beyond some generalized requirement that the State, for example, take ‘all the necessary measures for guaranteeing the effective protection of human rights at all times, and
everywhere both in times of peace and in times of war. A range of remedies have been recommended for violations of the right to life.

1. Investigations

As a remedy to a violation of the right to life, distinct from the obligation to investigate alleged violations, the African Commission has also recommended that the State carry out investigations. For example, in respect of extensive human rights violations in Darfur committed by the military, armed groups and Janjaweed militia, the African Commission called for the State to conduct ‘effective official investigations into the abuses’.

2. Legislative Reform

Recommendations have been made in the event of a finding of a violation of Article 4 that the State should amend legislation. This has varied from the broader and more vague ‘undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations’, to the State being required to ‘harmonize the State Security Emergency Laws with a view to bringing it in conformity with the Charter and other international legislations and regional norms and standards’. Similarly, where Zimbabwean law did not permit the parents and heirs of the deceased persons from taking court action to claim damages for the loss of their children, Zimbabwe was recommended to ‘undertake law reform to bring domestic laws on compensation in case of wrongful killings into conformity with the African Charter and other international standards, especially in respect to effective and satisfactory compensation as outlined above’.

3. Prosecute Those Responsible

The African Commission has urged the State, in the event of violations of the right to life by non-State actors, to prosecute those responsible.

(p. 130) 4. Provision of Compensation

In a few cases compensation has been awarded for a violation of the right to life. In Communication 272/03, Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon where individuals were attacked during post-election violence, the African Commission ordered the State to ‘give fair and equitable compensation to the victims and without delay, to pay fair and equitable compensation for the prejudices suffered by the victims or their beneficiaries’. The amount was to be fixed in accordance with national laws.

Persons subject to the death penalty but which were not carried out, resulted in the African Commission not finding a violation of Article 4 but, rather, violations of other provisions of the ACHPR. It called not only for the victims to be released but also for the State ‘to adequately compensate the victims in line with international standard’. Conversely, where a violation of Article 4 was found even though death sentences against minors were commuted, the African Commission called on the State to pay compensation to the individuals, of an amount to be determined by national law, and ‘by taking into consideration the injury suffered, the duration of the procedure and the expenses incurred’.

‘Effective and satisfactory compensation’ to ‘the legal heirs and next of kin of the four deceased persons’ was ordered in one case. This compensation was to cover ‘any financially assessable damage and the satisfaction shall consist in an acknowledgment of the breach and a formal apology’. A particular payment of ZWD$97,000.00 to the parents of Beaven Tatenda Kazingachire for the cost of the funeral was not considered to be
satisfactory by the African Commission and ‘does not effectively remedy the violations suffered (wrongful killing as a result of police assault)’.245

5. Obligation to Refrain

With respect to the death penalty, recommendations from the Commission have included the obligation not to carry out the death penalty.246

(p. 131) 6. Reform the Courts

With respect to a lack of fair trial and the imposition of the death penalty, the Commission called on the State to: ‘Reform the composition of the State Security Emergency Courts and ensure their independence’.247

7. Release the Individuals

The Commission has called on the State to release individuals held after an unfair trial which led to the imposition of the death penalty.248

Footnotes:

1 See Chapter 8.
4 Article 5 ACRWC is entitled ‘Survival and development’.
5 Communication 223/98, Forum of Conscience v Sierra Leone, 6 November 2000, para 20.
6 Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 146.
9 Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 146.
10 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, paras 6 and 41.
11 Article 14(2)(c).


Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 146.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 6.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 43.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 43.


Communications 64/92-68/92-78/92_8AR Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa v Malawi, 22 March 1995, para 6.


See e.g. Centre of Governance and Human Rights, Unlawful Killings in Africa a study prepared for the UN Special Rapporteur on extrajudicial, summary or arbitrary executions,


27 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 2.

28 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 2.


31 Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 137.


33 Article 33(2) of the M’Baye Draft.

34 See Communication 334/06, Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt, 1 March 2011, para 232 where individuals were subject to the death penalty but it was not carried out, no violation of Article 4 was found.


37 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 8.

38 Communication 351/2007, Givemore Chari (represented by Gabriel Shumba) v Republic of Zimbabwe, 1 March 2012.

39 Communication 351/2007, Givemore Chari (represented by Gabriel Shumba) v Republic of Zimbabwe, 1 March 2012, paras 69–70. See also Communication 307/07, Mr. Obert Chinhamo v Zimbabwe.
See e.g. 227/99 Democratic Republic of Congo v Burundi, Rwanda, Uganda, 29 May 2003.


Communications 204/97, Movement burkinabé des droits de l’Homme et des peuples v Burkina Faso, 7 May 2001, para 43.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 7.

Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 139.

Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 139.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 17.

Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 147.

Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 147.

Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 147.

Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 147; General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 10.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 10.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 10.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 36.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 3.
General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 41.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 42.


General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 14.


General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 14.


General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 37.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 37.


General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 7.


Communication 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 125.

Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 134.

Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 133.

Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 134.


Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 139.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 2.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 7.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 2.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 2. See further below.
88 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 2.

89 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 7.

90 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 7.

91 Communications 279/03-296/05, Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 147.

92 Communication 74/92, Commission nationale des droits de l’Homme et des libertés v Chad, 11 October 1995, para 5.

93 Communication 74/92, Commission nationale des droits de l’Homme et des libertés v Chad, 11 October 1995, para 22.


95 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 9.


99 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 18.


General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 17.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 19.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 19.


General Comment No. 20: Replaces General Comment No.7 concerning prohibition of torture and cruel treatment or punishment (Article 7): 10/03/1992, para 6: ‘The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering’. UN Commission on Human Rights’ resolutions 1998/8 and 1999/61, UN Sub-Commission on the Promotion and Protection of Human Rights’ resolution 1999/4, 2nd Protocol to the International Covenant on Civil and Political Rights, the Statute on the International Criminal Court and the Resolution of the UN Commission on Human Rights, 2005/59, on the Question of the Death Penalty. C. Anyangwe, ‘Emerging African jurisprudence suggesting the desirability of the abolition of capital punishment’, 23(1) AJICL (2015) 1–28.
59th Ordinary Session of the African Commission on Human and Peoples’ Rights


ACHPR/Res.42(XXVI)99, adopted in November 1999 at its 26th Ordinary Session.


Statement by the African Commission on Human and Peoples’ Rights on World Day against the Death Penalty, 10 October 2013.


Communication 259/02, Working Group on Strategic Legal Cases v Democratic Republic of Congo, 24 July 2011, para 69.

Communication 319/06, Interights and Ditshwanelo v The Republic of Botswana, 18 November 2015, para 66.

Press release on the execution of Mahmoud Hassan Abdel-Naby, Banjul, 10 March 2015, italics added.

Communication 334/06, Egyptian Initiative for Personal Rights and Interights v Egypt, 3 March 2011, at para 225, see also para 142.


Press release on the execution of Mahmoud Hassan Abdel-Naby, Banjul, 10 March 2015.

Statement by the African Commission on Human and Peoples’ Rights on World Day against the Death Penalty, 10 October 2013.


General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia.


See e.g. UN Special Rapporteurs on extrajudicial, summary or arbitrary executions and on the independence of judges and lawyers, press release HR/4209 8 November 1995.


Communication 467/14, Ahmed Israel and 528 Others v the Arab Republic of Egypt, 8 August 2015, para 176.


138 The Cotonou Framework Documents towards the Abolition of the Death Penalty in Africa. Adopted by the Second Regional Conference for North and West Africa on the Question of the Death Penalty in Africa, Cotonou, Benin, 12-15 April 2010, para 9(b). The States who did not support this at that time included Algeria, Egypt, Libya and Tunisia.


143 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, paras 23–24.


146 Communication 277/2003, Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v Botswana, 12 October 2013, para 205.

147 Communication 277/2003, Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v Botswana, 12 October 2013, para 204.


150 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, paras 24-25.

151 Communication 259/02, Working Group on Strategic Legal Cases v Democratic Republic of Congo, 24 July 2011, para 46.
152 Communication 259/02, Working Group on Strategic Legal Cases v Democratic Republic of Congo, 24 July 2011, paras 70 and 72.

153 Communication 249/02, Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea, 7 December 2004, para 47.

154 S v Magwanyane and Another, 1995 3 SA 391 (CC), at para 166.


156 Communication 259/02, Working Group on Strategic Legal Cases v Democratic Republic of Congo, 24 July 2011, para 70 and 72.


161 In respect of a series of cases against Mauritania, Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interaricafricaine des Droits de l’Homme and RADDHO, Collectif des Veuves et Ayants-droit v Mauritania Association Mauritanienne des Droits de l’Homme v Mauritania, 2000, ‘Following the November 1987 trial, which already violated the provisions of article 7, three army lieutenants were sentenced to death and executed, para 10. The trial itself constituted a violation of the African Charter. Furthermore, the Commission is of the view that the executions that followed the said trial constitute a violation of article 4’.

162 Para 31.

163 Para 37.

164 Para 41.


perspective on the doctrine of extenuating circumstances in death penalty cases’, 14


170 Communication 334/06, Egyptian Initiative for Personal Rights and Interights v Egypt, 3 March 2011.

171 Communication 319/06, Interights and Ditshwanelo v The Republic of Botswana, 18 November 2015, paras 71 and 69 and 72 respectively.

172 Communication 319/06, Interights and Ditshwanelo v The Republic of Botswana, 18 November 2015, para 81.


174 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 26.

175 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 26.

176 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria, 27 October 2001.

177 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria, para 65.


179 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria, para 66.

180 Press release on the situation facing the Bushmen of the Central Kalahari Game Reserve in Botswana.

181 Press release on the situation facing the Bushmen of the Central Kalahari Game Reserve in Botswana.


183 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 33.

184 General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 13.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 32.


General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 32.


Declaration on the Protection of all Persons against Forced Disappearances, General Assembly of the United Nations in Resolution 47/133 of 18th December 1992, Article 1(2).

Communication 204/97, Movement burkinabé des droits de l’Homme et des peuples v Burkina Faso, 7 May 2001, para 44.

General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 38.


200 Communication 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 121.

201 Communication 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 122.

202 Communication 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 117.

203 Communication 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 119.

204 Communication 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 122.

205 Communication 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, paras 124.


208 Seventh Activity Report of the African Commission on Human and Peoples’ Rights 1993–4, ACHPR/RPT/7th (Documents of the African Commission, p.317), para 26. See also ‘Resolution on the Situation in Rwanda’, adopted at the same session, paragraph 4 of which ‘[i]nvites the Special Rapporteur … to pay special attention to Rwanda and report back to the 16th Session’.


212 Report on Extra-judicial, Summary or Arbitrary Executions, Tenth Activity report of the African Commission on Human and Peoples’ Rights, Annex VI, section III.B.

213 Report on Extra-judicial, Summary or Arbitrary Executions, Tenth Activity report of the African Commission on Human and Peoples’ Rights, Annex VI, Section II, D.
Report on Extra-judicial, Summary or Arbitrary Executions, Tenth Activity report of the African Commission on Human and Peoples’ Rights, Annex VI, Section II.D.


E.g. by April 1998, Chad, Comoros and the DRC as well as Rwanda and Burundi, Eleventh Activity Report of the African Commission on Human and Peoples’ Rights 1997–8, ACHPR/RPT/11th, para 29; by October that same year it was also Angola and Sierra Leone, Twelfth Activity Report of the African Commission on Human and Peoples’ Rights 1998–9, ACHPR/RPT/12th, para 24; and a few months later, at the 25th Session, reduced to only Rwanda, Burundi and Chad, Twelfth Activity Report of the African Commission on Human and Peoples’ Rights 1998–9, ACHPR/RPT/12th (Documents of the African Commission, p. 685), para 25.


E.g. in relation to executions in Rwanda, Final Communiqué of the 23rd Ordinary Session of the African Commission on Human and Peoples’ Rights, DOC/OS/45(XXIII), para 9.


Resolution ACHPR/Res.227 (LI) 2012 on the expansion of the mandate of the Working Group to questions on extrajudicial, summary or arbitrary killings, adopted at its 52nd Ordinary Session, held from 9 to 23 October in Yamoussoukro, Côte d’Ivoire.

Resolution on the expansion of the mandate of the Working group on Death Penalty in Africa, ACHPR/Res.227.

Resolution on the expansion of the mandate of the Working group on Death Penalty in Africa, ACHPR/Res.227.


‘UN and Reports of International Human Rights Organisations attest to the fact that the Respondent State has fallen short of its responsibility. For instance, in her 2006 Report, the UN Special Rapporteur on the Human Rights Situation in The Sudan noted that ‘the human rights situation worsened from July 2005 ... and a comprehensive strategy responding to transitional justice has yet to be developed in the Sudan’. She added that the cases prosecuted before the Special Criminal Court on the events in Darfur ‘did not reflect the major crimes committed during the height of the crisis in Darfur ... only one of the cases involved charges brought against a high-ranking official, and he was acquitted’.


238 Communications 279/03-296/05, Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 229(c).

239 Communications 272/03, Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon, 25 November 2009, paras 2 and 3.

240 Communications 272/03, Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon, 25 November 2009, paras 2 and 3.


243 Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 145(b).

244 Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012, para 136.

245 Communication 295/04, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, 2 May 2012.

246 Communication 334/06, Egyptian Initiative for Resonal Rights and Interights v Egypt, 3 March 2011, para 233.
