

DRAFT General Comment No.3 on Article 4 of the African Charter on Human and Peoples' Rights (the right to life)

Article 4 of the African Charter on Human and Peoples' Rights protects the inviolable right to life of all human beings, providing that no one may be arbitrarily deprived of this right. In this General Comment (No.3) the African Commission on Human and Peoples' Rights clarifies the nature of the right to life as recognised in the Charter and the extent of the obligation it imposes upon States Parties. It is designed to guide the interpretation and application of the Charter and to ensure its coherent application to a range of situations. It does not put in place new standards or best practice (as might for example a set of Guiding Principles on a particular aspect of the right) but rather establishes the African Commission's perspective on dimensions of a right that is universally recognised. The Commission has been guided in this endeavour by its Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings.

The General Comment will be adopted before the beginning of the African Year of Human Rights 2016 and can play a role in ensuring appropriate significance is accorded to this supreme human right, recognised by the African Commission as the fulcrum of all other rights. This further accords with the spirit of Goal 16 of the Sustainable Development Goals, aimed at promoting peaceful and inclusive societies by significantly reducing all forms of violence and related deaths.

After establishing the nature of the right, its scope, and the central role of accountability in securing its enjoyment, the General Comment establishes the implications of the right to life with respect to the continental and global decline of the practice of the death penalty, the use of force by state agents (whether in law enforcement operations or in armed conflict). It also underlines the responsibility of the State for violations by any agents whose actions it controls or otherwise approves, the State's heightened responsibility for violations in situations where it exercises direct control, as well as its responsibility for the protection of individuals from violations by other non-state actors. Finally, the General Comment stresses that the right to life should not be interpreted too narrowly, that a positive responsibility to protect dignified life may require the realisation of other human rights.

The General Comment proceeds from an understanding of a dignified life as part of the shared communal values of the continent and of the Charter's ambition to provide a better life for the peoples of Africa. A dominant thread of these values systems is that the life of another person is at least as valuable as one's own, and the value of one's life is tied to the value of others'. Respect for the right to life and dignity inherent in every human being is central to this.

The nature of the right and of the obligations of the State in respect of the right to life

1. The right to life is universally recognised as a fundamental human right. It is often described as the supreme human right, upon which all other human rights depend. The right to life is guaranteed by Article 4 of the African Charter, Article 5 of the Arab Charter and all of the other main global human rights instruments. It is recognised as part of [customary international law and] the general principles of law, and [in certain circumstances] is also recognised as a *jus cogens* norm. It is contained in the constitutions and other legal provisions of the vast majority of African and other States. All national legal systems criminalise murder and most criminalise other forms of homicide. Arbitrary killings committed or tolerated by the State are a matter of the utmost gravity. The right to life is aimed not only at securing the continuation of biological life, but of dignified life. The indivisibility of human rights further suggests that the protection of dignified

life lies in securing not only the right to life as a civil and political right, but social, economic and cultural rights as well.

2. States have a responsibility under the Charter to develop and implement a legal and practical framework to respect, protect, promote and fulfil this right. States must take steps both to prevent arbitrary killings and to conduct prompt, thorough and impartial investigations into any violations that may have occurred, holding those responsible to account and providing for an effective remedy and reparation for the victim or victims. States are responsible for violations of this right by all their organs (executive, legislative and judicial), and other public or governmental authorities, at whatever level (national, regional or local). States can also incur responsibility for the acts of non-State actors if there is a lack of due diligence on the part of the State to prevent the violation or to ensure proper investigation and accountability. No derogation from the right to life is possible, even in a time of emergency, including a situation of armed conflict, or responses to threats such as terrorism.
3. Building blocks of a proper State system for the protection of the right to life will include a law enforcement system with the necessary equipment and training, including proper autopsy and other forensic facilities, and an independent judiciary and legal profession based on the rule of law and free of corruption.
4. As part of their broader duty to protect, States have a particular responsibility to protect the human rights, including the right to life, of frequently targeted or particularly vulnerable groups or individuals, especially those from time to time highlighted in resolutions of the Commission.

The scope of the prohibition on the “arbitrary” deprivation of life

5. A deprivation of life is arbitrary and thus unlawful if there is not a justification that is acceptable under international law, or under more protective domestic law provisions. As a general rule there can only be justification under international law for the intentional deprivation of life if it is the only way to protect another life or lives. The right to life continues to apply during armed conflict, where the international standards for deprivation of life, in respect of the conduct of hostilities, need to be interpreted with reference to the rules of international humanitarian law.
6. The obligation not arbitrarily to deprive someone of his or her life also applies to any use of deadly force by a State outside of its territory. A State may also have positive obligations to protect the right to life of individuals who are outside the State’s own ordinary territory. This depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or both), or exercises effective control over the territory on which the killing takes place. Such obligations would also be violated should the State engage in conduct which could reasonably have been foreseen to result in an unlawful deprivation of life.

The requirement of accountability

7. The failure of the State transparently to take appropriate measures to investigate suspicious deaths and to identify and hold accountable individuals or groups responsible for violations of the right

to life itself constitutes a violation by the State of that right, even more so where there is tolerance of a culture of impunity. Where there are indications that life may have been arbitrarily taken, there must be thorough, prompt, impartial, and transparent investigations to ascertain whether that was the case.

8. Effective systems of police investigation and accountability through legal processes (including the availability and analysis of forensic evidence, as well as independent oversight mechanisms) should be established where they are not in place.
9. Accountability, in this sense, will normally involve criminal prosecution, but independent, impartial and properly established commissions of inquiry or transitional truth commissions can play a role. Accountability can also encompass measures such as reparation, disciplinary action, making the truth known, institutional review and, where applicable, reform.
10. Non-State entities such as private individuals and corporations, including private military and security companies, that are responsible for arbitrary deprivation of life should also be held accountable.
11. Although States may face particular practical challenges in achieving accountability in situations of armed conflict, the obligation to take all feasible measures of accountability remains. Appeals to national security or State secrecy can never be a valid basis for failing to meet the obligation to hold those responsible for arbitrary deprivations of life to account, during armed conflict or counter-terrorism operations.
12. Transparency about laws and policies governing the right to life and the circumstances of its lawful deprivation and about state conduct in relation to killings as well as of the process and outcomes of investigations is a necessary element in fulfilling the state obligation to respect, protect, promote and fulfil the right to life.

The abolition of the death penalty

13. The African Charter does not provide for the death penalty, and the Commission has on several occasions passed resolutions calling on states to abolish the death penalty, or at least to establish a moratorium, in line with the continental and global trend. It has developed a Protocol on the Abolition of the Death Penalty to which it encourages all states to adhere. International law requires States to take steps towards the abolition of the death penalty, if they have not yet abolished it in order to secure the right to a dignified life, in addition to other rights such as the right to be free from torture, and cruel inhuman or degrading treatment.
14. Those States which have abolished the death penalty in law shall not reintroduce it, and shall not collaborate with executions in retentionist States through extradition, deportation, or other means. Those States with moratoria on the actual act of executions must take steps to formalise abolition in law.
15. In those States which have not yet abolished the death penalty it is vital that it is used for only the most serious crimes—understood to be the crimes involving intentional killing—and that its application be guided by international standards concerning the protection of vulnerable groups. If, for any reason, the criminal justice system of a State does not, at the time of trial or conviction,

meet the criteria of Article 7 of the African Charter or the particular proceedings in which the penalty is imposed have not stringently met the highest standards of fairness, then the subsequent application of the death penalty will be considered arbitrary. Mass trials resulting in the death penalty without due consideration to fair trial standards are illegal and should not take place. In no circumstances shall the imposition of the death penalty be mandatory for an offence. Military courts should not have the power to impose the death penalty.

16. Where the death penalty has not yet been abolished, it shall be used in a completely transparent fashion, with States giving public notice of the timing, manner, and number of executions.

The use of force in law enforcement

17. The primary duty of law enforcement officials is to protect the safety of the public. The intentional use of lethal force by law enforcement officials and others is impermissible unless it is strictly unavoidable in order to protect the lives of such officials or other persons (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary). The State must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to appropriate equipment and training as well as careful planning of individual operations, where appropriate. States must adopt a clear legislative framework for the use of potentially lethal force by law-enforcement and other actors that complies with these international standards.
18. The militarisation of law enforcement should be discouraged. Particular attention should be paid to ensuring the availability and use of appropriate “less-lethal” weapons. However such weapons should not be abused – they can also cause death or serious injury. Where necessary, special training concerning the use of such weapons should be provided.
19. Where advanced technology is employed, law enforcement officials must remain personally in control of the actual delivery or release of force, in a manner capable of assuring respect for the right to life of any particular individual, as well as the general public.

The use of force in armed conflict

20. In armed conflict, what constitutes an “arbitrary” deprivation of the right to life during the conduct of hostilities is to be determined by reference to international humanitarian law. This law does not prohibit the use in hostilities of force against lawful targets (for example combatants or civilians directly participating in hostilities), or certain proportionate and unavoidable incidental civilian deaths caused by attacks on lawful targets. In all circumstances, however, lethal force must be used strictly in accordance with the provisions of international humanitarian law, in particular with regard to distinction, proportionality and precaution in attack.
21. States should not claim that any potentially more permissive standards of international humanitarian law on the use of force apply in a context where the objective conditions of an armed conflict do not exist, or where there is not a nexus to such an armed conflict. Outside of the specific situation of the conduct of hostilities in an armed conflict, the more restrictive rules governing law enforcement operations apply.

22. The use of new weapons technologies such as remote controlled aircraft should be measured against the standard whether they increase the protection of the right to life of those affected. Any machine autonomy in the selection of human targets or the use of force should be subject to meaningful human control.
23. Where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best demonstrated by pursuing all such options.

Other violations that may be attributed to the State

24. Any intentional killing at the hands of a State agent that falls outside the narrowly-defined exceptions of a judicial sentence, killing in the conduct of hostilities during armed conflict and in compliance with international humanitarian law, or the exercise of legitimate force in defence of one's own life or the life of another, will amount to an arbitrary deprivation of life. An agent of the State in this context can be understood as any individual or group acting under the control or authority of the State or at the State's instigation, or with the consent or acquiescence of such an authority. In addition to its responsibility to hold the individual perpetrator accountable for murder under domestic law, the State is itself to be accountable for its own international responsibility arising from the act of its agent. Independent oversight bodies (both domestic and international) have a crucial role to play in ensuring accountability in this regard, and should also take appropriate action concerning allegations of disappearances, which can often be a prelude to an extrajudicial execution.

Arbitrary killings in state custody (custodial deaths)

25. When the State deprives an individual of liberty, its control of the situation yields a heightened level of responsibility to protect that individual's rights. This includes a positive obligation to protect detained persons from violence or from emergencies such as fire or flooding, as well as to provide the necessary conditions of a dignified life, including food, water, an environment free from disease, and the provision of adequate healthcare. The State should provide necessary information on places of detention, the identity of those detained, as well as the authorities responsible. Consequently, when a person dies in State custody, there is a presumption of State responsibility and the burden of proof rests upon the State to prove otherwise through a thorough, effective and transparent investigation carried out by an independent and impartial body. This 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.

Responsibility for violations by non-state actors

26. The State also has an obligation to protect individuals from violations at the hands of other private individuals. The State should make sure that all individuals are able to exercise their rights and

freedoms, for example, by promoting tolerance and raising awareness. Moreover, the State has a responsibility for those deaths where authorities knew or ought to have known of an immediate threat, but also for killings by private individuals which are not adequately investigated and prosecuted by the authorities. These responsibilities are heightened when an observable pattern has been overlooked or ignored.

Interpreting the right to life broadly

27. The right to life should not be interpreted narrowly. The right to life cannot be enjoyed fully by individuals whose lives have been threatened. In the case of “death threats” this implies that the State must investigate and take reasonable steps to protect the threatened individuals. Similarly, States should not take steps (through extradition or other mechanisms) to place individuals in circumstances where their lives might be endangered.
28. However, threats to life take many different forms. The State has a positive duty to protect individuals 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 circumstances include, inter alia, preparation and responses to natural disasters, famines and outbreaks of infectious diseases.
29. Given the role of the State in the enjoyment of a number of other rights which might, collectively, be constitutive of the condition of life, especially a dignified life, its actions with respect to the progressive realisation of various socio-economic and cultural rights should also be considered as part of its response to threats to life. Violations of social, economic or cultural rights may in certain circumstances therefore also entail violations of the right to life.