

Africa, The AfCHPR on the interplay between human rights and IHL

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

The African Commission on Human and Peoples' Rights General Comment No.3 on the Right to Life (Article 4)

[**Source:** General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples' Rights Held From 4 to 18 November 2015 in Banjul, available at:

http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf

[...]

Introduction

1. The African Commission on Human and Peoples' Rights (the Commission) has described the right to life as the fulcrum of all other rights. It is non-derogable, and applies to all persons at all times. In General Comment No.3, the Commission clarifies the nature of the right to life as recognised in Article 4 of the African Charter on Human and Peoples' Rights (the Charter) and the extent of the obligation it imposes upon States Parties. It is designed to guide the interpretation and application of the right to life under the Charter and to ensure its coherent application to a range of situations, including its implementation at the domestic level.

The General Comment does not put in place new standards or highlight best practices but rather sets out the Commission's perspective on dimensions of this universally recognised right.

2. The Charter imposes on States a responsibility to prevent arbitrary deprivations of life caused by its own agents, and to protect individuals and groups from such deprivations at the hands of others. It also imposes a responsibility to investigate any killings that take place, and to hold the perpetrators accountable. This intersects with the general duty, recognised in the Charter, of all individuals to exercise their rights and freedoms with due regard to the rights of others. Organised crime and terrorism can pose significant threats to the enjoyment of the right to life and require a robust State response, but one that at all times takes into account the requirements of international human rights law.

3. The General Comment proceeds from an understanding that 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. [...]

4. Article 4 of the Charter enshrines the right to life as follows: '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. The nature of the right and of the obligations of the State in respect of the right to life

5. The right to life is universally recognised as a foundational human right. It is guaranteed by Article 4 of the African Charter and all of the other main global and regional human rights instruments. The right not to be arbitrarily deprived of one's life is recognised as part of customary international law and the general principles of law, and is also recognised as a *jus cogens* norm, universally binding at all times. The right to life 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 arbitrary killings committed or tolerated by the State are a matter of the utmost gravity.

6. The right to life should not be interpreted narrowly. In order to secure a dignified life for all, the right to life requires the realisation of all human rights recognised in the Charter, including civil, political, economic, social and cultural rights and peoples' rights, particularly the right to peace.

7. States have a responsibility under the Charter to develop and implement a legal and practical framework to respect, protect, promote and fulfil the right to life. States must take steps both to prevent arbitrary deprivations of life and to conduct prompt, impartial, thorough and transparent investigations into any such deprivations that may have occurred, holding those responsible to account and providing for an effective remedy and reparation for the victim or victims, including, where appropriate, their immediate family and

dependents. States are responsible for violations of this right by all their organs (executive, legislative and judicial), and other public or governmental authorities, at all levels (national, regional or local). 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.

[...]

9. A State can be held responsible for killings by non-State actors if it 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.

[...]

B. The scope of the prohibition on the 'arbitrary' deprivation of life

12. A deprivation of life is arbitrary if it is impermissible under international law, or under more protective domestic law provisions. Arbitrariness should be interpreted with reference to considerations such as appropriateness, justice, predictability, reasonableness, necessity and proportionality. Any deprivation of life resulting from a violation of the procedural or substantive safeguards in the African Charter, including on the basis of discriminatory grounds or practices, is arbitrary and as a result unlawful.

13. The right to life continues to apply during armed conflict. During the conduct of hostilities, the right to life needs to be interpreted with reference to the rules of international humanitarian law. In all other situations the intentional deprivation of life is prohibited unless strictly unavoidable to protect another life or other lives.

14. A State shall respect the right to life of individuals outside its territory. A State also has certain obligations to protect the right to life of such individuals. The nature of these obligations 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 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.

C. The requirement of accountability

15. The failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right. This is even more the case where there is tolerance of a culture of impunity. All investigations must be prompt, impartial, thorough

and transparent.

[...]

20. Although States may face particular practical challenges in achieving accountability in situations of armed conflict, they must undertake all feasible measures of accountability to ensure respect for the right to life. 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, including during armed conflict or counter-terrorism operations.

21. Transparency is a necessary part of accountability. Transparency about laws, policies, practices and the circumstances of any limitations of the right to life as well as about the process and outcomes of investigations is a necessary element in fulfilling the right to life.

D. The abolition of the death penalty

[...]

24. The death penalty shall not be imposed for crimes committed by children, and the burden of proof rests upon the State to prove the age of the defendant. Military courts shall not have the power to impose the death penalty.

[...]

E. The use of force in law enforcement

27. The primary duty of law enforcement officials- meaning any actor officially tasked with exercising a law enforcement function, including police, gendarmerie, military or private security personnel- is to protect the safety of the public. 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 the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations. States must adopt a clear legislative framework for the use of force by law-enforcement and other actors that complies with international standards, including the principles of necessity and proportionality. Force may be used in law enforcement only in order to stop an imminent threat. The intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary).

[...]

29. Members of the armed forces can only be used for law enforcement in exceptional circumstances and

where strictly necessary. Where this takes place all such personnel must receive appropriate instructions, equipment and thorough training on the human rights legal framework that applies in such circumstances.

30. Particular attention should be paid to ensuring the availability and use of weapons less likely to cause death or serious injury than are firearms. However such weapons should not be abused –they can also cause death or serious injury. Special training concerning the use of such weapons should be provided.

31. 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 ensuring respect for the rights of any particular individual, as well as the general public.

F. The use of force in armed conflict

32. In armed conflict, what constitutes an ‘arbitrary’ deprivation of life during the conduct of hostilities is to be determined by reference to international humanitarian law. This law does not prohibit the use of force in hostilities against lawful targets (for example combatants or civilians directly participating in hostilities) if necessary from a military perspective, provided that, in all circumstances, the rules of distinction, proportionality and precaution in attack are observed. Any violation of international humanitarian law resulting in death, including war crimes, will be an arbitrary deprivation of life.

33. International 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.

34. 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 ensured by pursuing this option.

35. The use during hostilities of new weapons technologies such as remote controlled aircraft should only be envisaged if they strengthen 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. The use of such new technologies should follow the established rules of international law.

G. State obligations with respect to persons held in custody

36. 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 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.

37. Where 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 prompt, impartial, thorough and transparent investigation carried out by an independent 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.

[...]

Discussion

I. Relationship between IHL and Human Rights Law

1. What are the different theories pertaining to the interplay between IHL and HRL; and what is the meaning of the *lex specialis*? During armed conflict, is IHL always the *lex specialis* to IHRL? Does the whole body of international humanitarian law displace IHRL? Does the displacement rather occur at the level of specific rules/norms? Or is *lex specialis* to be determined on a case by case basis, looking into which body of law has the more precise rules relating to the factual elements involved in the issue? [See ICJ/Israel, Separation Wall / Fence Security in the Occupied Palestinian Territory]

2. Can customary IHL be taken into account when determining whether IHL or human rights law is the *lex specialis* on a specific issue? Can the practice and case-law of international human rights bodies be taken into account?

3. (Paras 13, 32 and 33) In the Commission's view, does international human rights law apply during an armed conflict? Even to hostile acts committed by combatants? If yes, how must it be determined whether that law or IHL prevails in the event of contradiction between them? On which issue should IHL prevail? Human rights law prevail? Why?

4. (Paras 15, 20 and 21)

a. Under IHL, are States under an obligation to investigate all deaths resulting from an armed conflict? Only those incidents that involve civilian casualties? Only those incidents that may constitute war crimes? Are states under the obligation to report civilian casualties? Do States have to make the results of their investigations public? Does the obligation to search for the dead and missing persons imply such investigations? (GC I-IV, Arts 49/50/129/146; P I, Art.33; CIHL, Rules 117 and 158)

b. In the Commission's view, what is the scope of the obligation to investigate killings? Does the obligation to investigate continue during armed conflicts? Does it include all the killings during conduct of hostilities? Civilian casualties? Is it realistic? What is the nature of the obligation envisaged by the Commission with regard to investigating suspicious deaths and all killings by State agents? How does this fit into the stipulations under IHL? Does human rights law complement IHL in this respect? Is IHL the *lex specialis*?

c. Do you think that applying human rights law to armed conflict situations provides greater protection for everyone? In IAC? In NIAC?

II. Conduct of Hostilities

5. (Paras 27, 29, and 33)

a. What are the main differences between the rules applicable to law enforcement ("law enforcement

paradigm”) and those applicable to the conduct of hostilities (“conduct of hostilities paradigm”)?

b. How do we determine whether the use of force in a given situation should be regulated under the law enforcement paradigm or that of the conduct of hostilities? Do factors such as proximity to a conflict zone, level of control over territory and low level of violence matter in such a determination? Alternatively, do these paradigms apply in parallel? If yes, is that practically feasible?

c. Is the law enforcement paradigm relevant when force is used against legitimate targets? Is IHL always the *lex specialis* in this regard? Even during non-international armed conflicts? Situations of occupation? Can one suggest that the conduct of hostilities paradigm would prevail inside the conflict zone while law enforcement regulates the use of force in other areas?

d. When is a state entitled to use lethal force? In the Commission’s view, is it possible to use members of the armed forces for law enforcement operations? What precautions should States apply in such situations? Are these realistic?

6. (Para.32) Is it only lawful to target combatants and civilians directly participating in hostilities if doing so is necessary from a military perspective? How could such a limitation be deduced from IHL? From IHRL? Could the latter be argued to prevail on this issue? (**See also** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities, Section IX)

7. (Para.34) Is there an obligation under IHL to capture rather than kill a lawful target? A person with a continuous combat function? A civilian directly participating in hostilities? Is your answer different for international and non-international armed conflicts? For children? (P I, Arts. 43, 48, 50, 51, 52; P II, Art.13; CIHL, Rule 1). [**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

8. What does international human rights law say about using lethal force against terrorist suspects?

9. (Para. 35) Does human rights law regulate means of warfare? If so, how? What principles apply to the use of force in IHRL? Is IHL *lex specialis* with regard to means of warfare? Does IHL prohibit the use of autonomous weapons? What is the position of the Commission with particular reference to the potential development of autonomous weapon systems? When is it possible to use new weapons technologies? In your opinion, does the language used by the Commission imply that the use of such weapons outside situations of armed conflict (i.e., for so-called “targeted killings” would violate the right to life?

III. Protection of the Right to Life

10. (Paras 5, 12, 13, 14 and 32)

a. Does IHL protect the right to life? In IAC? In NIAC? Extraterritorially? What does arbitrary deprivation of life during the conduct of hostilities mean? (GC I-IV, Common Art.3; GC III, Arts.102 and 130; GC IV, Arts.68 and 147; P I, Arts.40 ,41, 51 and 75; P II, Arts. 4 and 13; CIHL, Rules 14, 15, 17, 18, 19, 46, 47, 48, 76, 84 and 89)

b. How could one determine the scope of the prohibition on the ‘arbitrary’ deprivation of life? What does the Commission refer to when it states ‘arbitrariness should be interpreted with reference to considerations such as appropriateness, justice, predictability, reasonableness, necessity and proportionality’?

c. (Para. 14) What is the position of the Commission on the extraterritorial application of the right to life?

d. (Para. 14) Does customary international law prohibit arbitrary deprivation of life without territorial limitation? In the Commission’s view? When is a state responsible for the violation of the right to life outside its territory? For a violation of its negative obligation to respect the right to life? For a violation of its obligation to protect the right to life? Does the commission make such classification? When is a State said to have effective control over a person?

e. Do both IHL and IHRL require compliance with principles of necessity and proportionality in the deployment of lethal force? Do these principles work identically under IHL and IHRL? In the Commission’s

view? In your view?

11. (Para. 21) Does IHL require transparency on targeting policies? Could IHRL be considered to govern such transparency?

12. (Para.24)

a) Is it possible to impose the death penalty under IHL? Under human rights law? What categories of persons may never be subjected to the death penalty under IHL? Under the Commission's General Comment? (GC III, Art.100; GC IV, Arts.68; P I, Arts.76 and 77; P II, Art.6 (4))

b) Under IHL does a military court have a power to impose the death penalty? In IAC? During NIAC? Under IHRL? In the Commission's view? (GC I-IV, Common Art.3; GC III, Arts. 84, 87, and 100; GC IV, Arts. 66 and 68; P I, Art.75; P II, Art.6).

IV. Treatment of Persons, Detention

13. Does IHL provide a sufficient legal basis for detention and sufficient protections for detained persons? In IAC? In NIAC? What is the extent of State's obligation with respect to persons held in custody? Under IHL? Under international human rights law? (GC I-IV, Common Art.3; GC III, Arts.12-108, 126; GC IV, Arts.27-34, 37-46, 49, 68, 78-135, 143; P I, Art.11; P II, Art.5 and 6; CIHL Rules 99-102, 118-123, 127).

14. Does IHL of non-international armed conflict accept or even authorize detention? Does a state have an inherent power to detain under Common Art.3? How about armed groups? Are domestic laws and international human rights law *lex specialis* regarding detention and treatment issues in NIAC? Or should we use the grounds and procedures of detention under IHL for international armed conflicts by analogy? (GC I-IV, Common Art.3; P II, Art.5).

15. (Paras 36 and 37) In the Commission's view, what are the obligations of a state towards individuals deprived of their liberty? Does it make distinction between persons detained in the context of armed conflict and outside such a context? In IAC and NIAC? Is it necessary to make such a distinction? Why/why not?