
African human rights law

The *African Charter on Human and Peoples' Rights*, adopted in 1981 by the Organization of African Unity, makes no mention of the death penalty, in contrast with the regional conventions of the European and American systems. Whether the drafters of the *African Charter* intentionally omitted reference to the death penalty and what conclusions are to be drawn from such an omission are questions to which we cannot provide a thorough answer, because of the paucity of available materials on the drafting history. Like the other instruments, of course, the *African Charter* provides for a right to life, for a protection against inhuman treatment, and for procedural safeguards in criminal proceedings.¹ According to article 4 of the *Charter*, no individual may be deprived 'arbitrarily' of life. It declares:

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.

One scholar, Etienne-Richard Mbaya, has written that article 4 of the *African Charter* permits the death penalty, which is widespread in Africa, providing it is imposed in accordance with the law.² It would be wrong to exaggerate the

¹ *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev.5, 4 EHRR 417, 21 *ILM* 58. For a comment on the right to life provision in the *African Charter*, see Johannes G. C. van Aggelen, *Le rôle des organisations internationales dans la protection du droit à la vie*, Brussels: E. Story-Scientia, 1986, p. 41. On the *African Charter* generally, see: Fatsah Ouguergouz, *La Charte africaine des droits de l'homme et des peuples*, Geneva: Presses universitaires de France, 1993; Keba Mbaya, *Les droits de l'homme en Afrique*, Paris: Pedone, 1992; René Degni-Ségui, 'L'apport de la Charte africaine des droits de l'homme et des peuples au droit international de l'homme', (1991) 3 *African Journal of International and Comparative Law* 699.

² Etienne-Richard Mbaya, 'A la recherche du noyau intangible dans la Charte africaine', in *Le noyau intangible des droits de l'homme*, Fribourg: Éditions universitaires Fribourg Suisse, 1991, pp. 207–226, at p. 221. See also: Keba Mbaya, *Les droits de l'homme en Afrique*, Paris: Pedone, 1992, p. 197. Since 1990, abolition has made considerable progress on the African continent. Nineteen African States are now abolitionist, either *de jure* or *de facto*. Mozambique, Namibia and Seychelles have ratified the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty*, GA Res. 44/128. If the Arab States of northern Africa are excluded, a majority of African States

scope of capital punishment in Africa, however. Leaving aside the Arab States north of the Sahara, nearly half of African States have stopped using the death penalty and many have abolished it *de jure*. South Africa set the tone when its Constitutional Court, in 1995, declared capital punishment to be contrary to the country's interim constitution.³ Even Rwanda, in legislation designed to facilitate genocide prosecutions adopted by the country's National Assembly in August 1996, has actually reduced the scope of the death penalty with respect to the previous provisions of the *Penal Code*.⁴ Perhaps the most dramatic international abolitionist initiative in Africa in recent years is the exclusion of the death penalty in the *Statute of the International Criminal Tribunal for Rwanda*.⁵

The language of article 4 of the *African Charter*, with its reference to 'arbitrary' deprivation of life, echoes article 6§1 of the *International Covenant on Civil and Political Rights*, and most certainly indicates a prohibition of the arbitrary use of capital punishment.⁶ Furthermore, the *African Charter* invites recourse to 'international law on human and peoples' rights', including the *Universal Declaration of Human Rights* and 'other instruments adopted by the United Nations'.⁷ To this extent, an analysis of the death penalty in light of article 3 of the *Universal Declaration* may be useful for the purposes of interpreting article 4 of the *African Charter*.⁸ The analysis of the right to life provision of the *Universal Declaration* in Chapter 1 of this book points towards abolition as a goal, relying in part upon the drafting history but also upon subsequent developments in State practice including 'soft law' principles adopted by United Nations organs. In this respect, it would seem reasonable that article 4 of the *African Charter* be interpreted in such a way as to incorporate norms such as those set out in the 'Safeguards Guaranteeing the Rights of Those Facing the Death Penalty'.⁹ Going even further, under a dynamic interpretation of the *African Charter*, one informed by jurisprudential developments such as the judgment of the South African Constitutional Court abolishing the death penalty, it is argued that the *African Charter* should be construed in the same manner as the Constitution

no longer employ the death penalty. See: John Hatchard and Simon Coldham, 'Commonwealth Africa', in Peter Hodgkinson and Andrew Rutherford, *Capital Punishment: Global Issues and Prospects*, London: Waterside Press, 1996, pp. 155–191; William A. Schabas, 'Abolition of the Death Penalty in Africa', in William A. Schabas, ed., *Sourcebook on the Abolition of the Death Penalty*, Boston: Northeastern University Press, 1997, pp. 30–65.

³ S. v. *Makwanyane*, 1995 (3) SA 391.

⁴ 'Organic Law No. 8/96 of 30 August 1996', *Journal officiel*, Year 35, No. 17, 1 September 1996.

⁵ UN Doc. S/RES/955 (1994), annex. This is discussed in detail in Chapter 6.

⁶ Tunguru Huaraka, 'The African Charter on Human and Peoples' Rights: A Significant Contribution to the Development of International Human Rights Law', in Daniel Prémont, ed., *Essais sur le concept de 'droit de vivre' en mémoire de Yougindra Khushalani*, Brussels: Bruylant, 1988, pp. 193–211, at p. 203.

⁷ *African Charter on Human and Peoples' Rights*, art. 60.

⁸ Amos Wako, 'Comparison of the African Charter of Human and Peoples' Rights and the Optional Protocol to the International Covenant on Civil and Political Rights', [1991–92] *CHRY* 145.

⁹ ESC Res. 1984/50 (see Appendix 8, p. 413). Subsequently endorsed by GA Res. 39/118.

of South Africa.¹⁰ The basic organ for the implementation of the *African Charter* is the African Commission on Human and Peoples' Rights.¹¹ States parties to the *Charter* are required to submit periodic reports, although compliance is irregular and those that do report rarely refer to capital punishment.¹²

At its twenty-sixth ordinary session, held in Kigali, Rwanda, in November 1999, the African Commission on Human and Peoples' Rights adopted a 'Resolution Urging States to Envisage a Moratorium on the Death Penalty'.¹³ The preamble to the resolution notes that article 4 of the *African Charter* 'affirms the rights of everyone to life'. Reference is also made in the preamble to recent resolutions of the United Nations Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights calling for a moratorium on the death penalty. The preamble notes that three African States have ratified the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, and that nineteen African States have abolished the death penalty either *de facto* or *de jure*. Concern is expressed that some States parties to the *African Charter* impose the death penalty under conditions not in conformity with the rights to a fair trial guaranteed therein. Reference is also made to the exclusion of the death penalty in the statutes of the two *ad hoc* tribunals but, noticeably, there is no similar reference to the *Rome Statute of the International Criminal Court*.

The operative paragraphs of the resolution read as follows:

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:

¹⁰ Manfred Nowak, 'Is the Death Penalty an Inhuman Punishment?', in Theodore S. Orlin, Allan Rosas and Martin Scheinin, *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, Turku, Finland: Institute for Human Rights, Åbo Akademi University, 2000, pp. 27–45, at pp. 42–43.

¹¹ *African Charter on Human and Peoples' Rights*, arts. 30 *et seq.*

¹² Nigeria, in its periodic report dated 1993, referred to abolition of the death penalty for drug trafficking, unlawful dealing in petroleum products and counterfeiting of currency, and its replacement with life imprisonment. 'Periodic Report of Nigeria', OAU Doc. ACHPR/MOC/XIII/006. But other States make no reference whatsoever to the death penalty in their reports: e.g. 'Periodic Report of Cape Verde', OAU Doc. ACHPR/MOC/XIII/009; 'Periodic Report of Ghana', OAU Doc. ACHPR/MOC/XIII/008; 'Periodic Report of Togo', OAU Doc. ACHPR/MOC/XIII/010. On the reporting procedure, see: Astrid Danielsen, *The State Reporting Procedure under the African Charter*, Copenhagen: Danish Centre for Human Rights, 1994; Felice D. Gaer, 'First Fruits: Reporting by States under the African Charter on Human and Peoples' Rights', (1992) 10 *Netherlands Quarterly of Human Rights* 29; Philip Vuciri Ramaga, 'The Tenth Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 8–15 October 1991', (1992) 10 *Netherlands Quarterly of Human Rights* 356; Claude E. Welch Jr., 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment', (1992) 14 *Human Rights Quarterly* 43.

¹³ 'Resolution Urging States to Envisage a Moratorium on the Death Penalty, 13th Activity Report of the African Commission on Human and Peoples' Rights', OAU Doc. AHG/Dec.153(XXXVI), Annex IV.

- (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 the death penalty.

The resolution was a response to concerns expressed by non-governmental organizations about death sentences recently carried out in African countries. The Commission's Special *Rapporteur* on Summary, Arbitrary and Extrajudicial Executions, Mohamed Hatem Ben Salem,¹⁴ noting international activity aimed at abolition of the death penalty, proposed that the Commission make a statement on the subject and call for a moratorium. Ben Salem agreed with a request from the Chair to prepare a draft text. During debate, representatives of Rwanda and Sudan opposed the resolution, adopting positions similar to those taken by these countries in the United Nations Commission on Human Rights.

A year earlier, Rwanda itself had been targeted by a resolution of the African Commission on Human and Peoples' Rights with respect to its proposed execution of twenty-three persons convicted of genocide. The scheduled executions coincided with the twenty-third ordinary session of the Commission, being held in the Gambia, in April 1998. The Commission issued an urgent appeal to the government of Rwanda for postponement of the executions, stating this would violate article 4 of the *African Charter of Human and Peoples' Rights*, which guarantees the right to life. The Commission called for a proper investigation of the allegations against the accused and a new trial with adequate legal assistance.¹⁵

The individual petition mechanism of the *African Charter on Human and Peoples' Rights* is vaguely worded, compared with comparable provisions in other regional and universal human rights instruments.¹⁶ Only recently, the process has become relatively public and transparent with the publication of the Commission's views on individual communications. In several cases, the African Commission has touched upon issues related to the death penalty. The most important of these concerned the execution of human rights defender Ken Saro-Wiwa by Nigeria in November 1995. The Commission had issued a provisional measures request to Nigeria not to execute Saro-Wiwa while his petition was being considered, but this was ignored by the Nigerian authorities. In its reasons issued in October 1998, the Commission held that in violating the provisional

¹⁴ Ben Salem was appointed Special *Rapporteur* on Summary, Arbitrary and Extrajudicial Executions in 1994. He resigned from the position in 2001. There is no evidence in his work of any activity concerning capital punishment that might be comparable to that undertaken by the parallel *rapporteur* of the United Nations Commission on Human Rights.

¹⁵ Amnesty International, *Africa Update*, October 1998, AI Index: AFR 01/05/98, p. 2.

¹⁶ *African Charter on Human and Peoples' Rights*, art. 55. See: Chidi Anselm Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment', (1998) 8 *Transnational Law and Contemporary Problems* 359; Rachel Murray, 'Decisions by the African Commission on Individual Communications Under the African Charter on Human and Peoples' Rights', (1998) 46 *International and Comparative Law Quarterly* 412.

measures request, Nigeria had breached article 1 of the *African Charter*.¹⁷ The execution and related events prompted the Commission to hold an extraordinary session in Kampala and eventually to send a mission of inquiry to Nigeria.

With respect to article 4 of the *Charter*, which protects the right to life, the Commission observed:

Given that 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. The violation is 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 its consideration. Executions had been stayed in Nigeria in the past on the invocation by the Commission of its rule on provisional measures (Rule 109 now 111) and the Commission had hoped that a similar situation will obtain in the case of Ken Saro-Wiwa and others. It is a matter of deep regret that this did not happen. The protection of the right to life in Article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of Article 4.¹⁸

The Commission found that a number of other provisions of the Charter, concerning such matters as freedom of expression, opinion and peaceful assembly, were also violated by Nigeria.

Communication 154 alleges that the actual reason for the trial and the ultimate death sentences was the peaceful expression of views by the accused persons. The victims were disseminating information and opinions on the rights of the people who live in the oil producing area of Ogoniland, through MOSOP and specifically a rally. These allegations have not been contradicted by the government, which has already been shown to be highly prejudiced against MOSOP, without giving concrete justifications. MOSOP was founded specifically for the expression of views of the people who live in the oil producing areas, and the rally was organised with this in view. The Government's actions is [*sic*] inconsistent with Article 9.2 implicit when it violated Articles 10.1 and 11.¹⁹

The Commission described the execution of Ken Saro-Wiwa as 'a blot on the legal system of Nigeria which will not be easy to erase'. It added: 'To have carried out the execution in the face of pleas to the contrary by the Commission

¹⁷ *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria* (Comm. No. 137/94, 139/94, 154/96 and 161/97), Twelfth Activity Report of the African Commission on Human and Peoples' Rights, 1998–1999, OAU Doc. ACHPR/RPT/12th, Annex V, (2000) 7 IHRR 274. The *African Charter* has also been invoked before Nigeria's domestic courts in death penalty litigation: *Nemi v. The State*, [1994] 1 LRC 376 (Supreme Court, Nigeria), at p. 386 (Bello CJN); also at p. 400 (Uwais JSC). On the death penalty in Nigeria, see: Mike Ikhariale, 'Death Penalty in Nigeria: A Constitutional Aberration', (1991) 1 *Journal of Human Rights Law and Practice* 40.

¹⁸ *Ibid.*, paras. 103–104. ¹⁹ *Ibid.*, para. 110.

and world opinion is something which we pray will never happen again. That it is a violation of the Charter is an understatement.²⁰ The Commission concluded, *inter alia*, that there had been a violation of articles 4 and 7 ‘in relation to the conduct of the trial and the execution of the victims’.

Another series of petitions directed against Nigeria concerned an expedited procedure in capital trials developed for crimes involving firearms and robbery. The Commission held that the Robbery and Firearms (Special Provision) Decree No. 5 of 1984 which imposes capital punishment without the possibility of an appeal breaches the right to an appeal, which is ensured by article 7§1(a) of the *African Charter*.²¹

In a series of four cases filed against Sudan by non-governmental organisations, petitioners raised the issue of the death penalty being available for a broad range of offences pursuant to the 1983 Penal Code, including political offences such as subversion, failure to report a planned mutiny, upsetting the national economy, organizing a strike, possession of undeclared foreign currency and drug offences. They also alleged that there is no appeal of a death sentence, and that legal representation is denied at new trials.²² One of the petitions charged that twenty-eight army officers who had been executed in April 1990 were allowed no legal representation.²³ The Commission observed that Sudan’s insistence that these executions were carried out in accordance with the law in force were ‘insufficient’, and concluded there had been a violation of the right to fair trial, protected by article 7 of the *African Charter*.²⁴ The Commission also declared there had been a violation of article 4, but it is unclear whether this related to the capital punishment of the army officers or to various summary executions carried out within Sudan. No specific comment by the Commission addressed the issue of the number and nature of crimes for which the death penalty is available.

A petition filed against Botswana by Mariette Bosch invoked the *African Charter* to challenge her death sentence. Botswana went ahead with the hanging despite the pending proceedings.

The *African Charter of the Rights and Welfare of the Child*, which was adopted in 1990 but which only came into force on 29 November 1999, establishes that: ‘Death sentence shall not be pronounced for crimes committed

²⁰ *Ibid.*, para. 115.

²¹ *Constitutional Rights Project v. Nigeria* (Comm. No. 60/91), (1986–97) LRAC, Series A, Vol. 1, p. 54, 3 IHRR 132. See also: *Constitutional Rights Project (in respect of Zamani Lekwot and six others) v. Nigeria* (Comm. no. 87/93), (1986–97) LRAC, Series A, Vol. 1, p. 82, 3 IHRR 137.

²² *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v. Sudan* (Comm. No. 48/90, 50/91, 52/91, 89/93), Thirteenth Activity Report of the African Commission on Human and Peoples’ Rights, 1999–2000, OAU Doc. AHG/222/36th, Annex V.

²³ *Ibid.*, para. 13. ²⁴ *Ibid.*, para. 6.

by children.²⁵ As in the United Nations *Convention on the Rights of the Child*, a child is defined as 'every human being below the age of 18 years'.²⁶ The *Charter* also states that children should not be subject to inhuman or degrading treatment, and that the essential purpose of the criminal justice system is to promote reintegration in the family and rehabilitation.²⁷ Like the *African Charter of Human and Peoples' Rights*, the *Charter of Rights of the Child* should be construed with reference to international human rights law, and specifically the *Convention on the Rights of the Child* and the *Universal Declaration of Human Rights*.²⁸ The African Committee of Experts on the Rights and Welfare of the Child is charged with implementation of the instrument.²⁹

²⁵ *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49, art. 5§3.

²⁶ *Ibid.*, art. 2. ²⁷ *Ibid.*, art. 17. ²⁸ *Ibid.*, art. 46. ²⁹ *Ibid.*, arts. 32 *et seq.*

