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Protecting the right to life during assemblies: Legal and jurisprudential developments in the African human rights system

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Summary: *The right of peaceful assembly has been recognised as a critical component of democracy. In Africa it played a significant role in the liberation of states from colonial oppression, and continues to be used to express dissent. The actual exercise of this right, however, faces significant challenges. Too often, police officers use excessive or indiscriminate force during assemblies, leading to violations not only of the right of peaceful assembly but also, in some cases, of the right to life. Alive to the reality of the threat to life and limb posed by the unlawful use of force by the police during assemblies, over the past decades the African human rights system has developed standards for the use of force during assemblies. This article analyses the legal and jurisprudential developments around the protection of the right to life during assemblies and enquires as to whether they are consistent with international standards and whether they are adequate. It finds that despite progressive legal development on the protection of the right to life in law enforcement, in general, there is limited jurisprudence on the specific protection of the right to life in the context of the policing of assemblies. Consequently, the standards expressed in various instruments and resolutions are yet to be adequately interpreted and reinforced.*

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1 Introduction

On 28 September 2009 thousands of pro-democracy demonstrators assembled at a stadium in Conakry, Guinea to protest against the military rule of Captain Moussa Dadis Camara who took power in a bloodless *coup* after the death of President Lansana Conté.[1] In response to the peaceful protest, law enforcement officials comprising the national police, the national gendarmerie and the presidential guard opened fire on the demonstrators, dispersed significant quantities of tear gas, causing a panicked stampede, and attacked the assembly participants with bayonets and other crude weapons.[2] By the time the assault ended, at least 156 demonstrators had been killed or had disappeared, and more than one thousand others were seriously injured.[3] The gravity of the violations attracted global condemnation, including from the African Union (AU) Peace and Security Council.[4] A United Nations (UN) International Commission of Inquiry concluded that the violations were serious enough to be considered crimes against humanity.[5] The Guinea incident was neither the first nor the last time that gross human rights violations, including violations of the right to life, were committed in the context of assemblies. There have since been several incidents across Africa and beyond where assembly participants have lost their lives as a result of exercising their right to peaceably assemble.[6]

1 UN Security Council Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, S/2009/693, annex, paras 44, 61-63.
2 UN Security Council (n 1) para 29.
3 UN Security Council (n 1) para 70.
4 Communiqué of the 207th Meeting of the Peace and Security Council of the African Union, PSC/AHG/COMM.2 (CCVII), 29 October 2009, Abuja, Nigeria, https://www.peaceau.org/uploads/communiqueguineeeng.pdf (accessed 14 November 2021).
5 Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (n 1) para 180.
6 Eg, in 2013 at least 170 protesters in the Sudan were killed by law enforcement officials who opened fire at them to disperse them. See Human Rights Watch '"We stood, they opened fire": Killings and Arrests by Sudan's security forces during the September protests, 2014', https://www.hrw.org/sites/default/files/reports/sudan0414_ForUpload.pdf (accessed 14 November 2021). More recently, in the #EndSARS protests in Nigeria in October 2020 it was reported that at least 69 people were killed within days of the protest. See J Parkinson 'Nigeria protests: What's happening and why are people demonstrating against SARS?' *The Wall Street Journal* 26 October 2020, https://www.wsj.com/articles/nigeria-protests-whats-happening-and-why-are-people-demonstrating-11603277989 (accessed 14 November 2021).

Admittedly, some assembly participants can become violent and may pose a threat to the lives of law enforcement officials and other members of the public, thereby justifying an intervention by law enforcement officials, including through the use of force where such a response is necessary and proportionate. However, the overwhelming global concern in relation to the protection of the right to life in the context of assemblies has been the extra-judicial killings of protesters by state actors, or by non-state actors with the acquiescence of the state.[7] For example, in Resolution 281 of 2014 on the right to peaceful demonstrations, the African Commission on Human and Peoples' Rights (African Commission) expressed concern about the 'excessive use of force, live ammunition and tear gas to disperse peaceful demonstrators' and called on state parties to the African Charter on Human and Peoples' Rights (African Charter)[8] to ensure that the use of force and firearms by law enforcement agencies complies with international standards.[9] In Resolution 375 of 2017 on the right to life in Africa, the African Commission expressed particular concern about 'the prevalence of arbitrary deprivations of life occurring in the context of law enforcement operations, often through the use of excessive force by state agents'.[10] Going by the manner in which some protests have been managed in various countries across Africa, these concerns remain relevant.

The right to life and the right of peaceful assembly are both guaranteed in the African Charter. The African Commission has described the right to life as the 'fulcrum of all other rights' and 'the fountain from which all other rights flow'.[11] It has also emphasised the democratic significance of the right of peaceful assembly.[12] Violations of the right to life can have a chilling effect on the exercise

7 The UN General Assembly and the UN Human Rights Council have both raised concerns about the use of extra-judicial, summary or arbitrary executions and killings as a means of suppressing protests. See, eg, UN General Assembly Resolution 73/173, Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association, A/RES/73/173, adopted on 17 December 2018 para 3(a); UN Human Rights Council Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/38/11, adopted on 6 July 2018 Preamble and para 1.

8 Organisation of African Unity (OAU),African Charter on Human and Peoples' Rights (adopted 27June 1981, entered into force 21 October 1986) (1981) 1520 UNTS 217.

9 Resolution on the Right to Peaceful Demonstrations, ACHPR/Res.281 (LV) 2014, adopted at the 55th ordinary session held from 28 April to 12 May 2014, Luanda, Angola.

10 Resolution on the Right to Life in Africa, ACHPR/Res.375 (LX) 2017, adopted at the 60th ordinary session of the African Commission held in Niamey, Republic of Niger, 8 to 22 May 2017.

11 *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000) para 19.

12 Guidelines on Freedom of Association and Assembly in Africa, adopted at the 60th ordinary session of the African Commission on Human and Peoples' Rights held in Niamey, Niger, 8 to 22 May 2017.

of the right of peaceful assembly, and this may in turn disenfranchise communities whose only truly effective means of democratic participation is through assemblies. Consequently, safeguarding the right to life during assemblies is crucial.

Through the case law of the African Commission and the African Court on Human and Peoples' Rights (African Court), thematic and country-specific resolutions, Concluding Observations on state reports, and the adoption of guidelines and General Comments, the African human rights system has addressed the question of the protection of the right to life in the context of law enforcement operations. However, there is limited case law specifically on the use of force and the protection of the right to life during assemblies. In addition, in case law, where lives were lost in the context of an assembly, the African Commission has missed opportunities to develop or reinforce standards on the protection of the right to life during assemblies.

This article analyses the legal and jurisprudential developments around the protection of the right to life during assemblies. It begins with a discussion on the nature of the right to life and the right of peaceful assembly and the general obligations of states under the African Charter. This is followed by a discussion on the specific obligations of states to protect the right to life in the context of assemblies. Thereafter, an analysis of the standards on the protection of the right to life during assemblies as developed over time by the African Commission through soft law instruments, resolutions and Concluding Observations is presented. Lastly, the article discusses selected jurisprudence of the African Commission and the African Court in which the protection of the right to life during assemblies was implicated. It also considers selected case law where the African Commission could have but did not reinforce standards on protecting the right to life in the context of assemblies.[13]

2 The right to life and the right to peaceful assembly under the African Charter: General obligations of state parties

Article 4 of the African Charter requires states to respect the right to life of every individual and prohibits arbitrary deprivation of the

13 Although both the right to life and the right of peaceful assembly are also guaranteed in the African Charter on the Rights and Welfare of the Child, this article focuses specifically on the African Charter since it is the universally-applicable human rights instrument in the African human rights system.

right. States have a general obligation under article 1 of the African Charter to recognise the rights guaranteed in the Charter and to adopt legislative or other measures to give effect to these. Through its case law, Concluding Observations, resolutions and soft law instruments the African Commission has repeatedly emphasised the central importance of the right to life and clarified the scope of state obligations in relation to the right.[14]

The obligation to respect and protect the right to life has both substantive and procedural components.[15] The substantive component requires states to take steps to prevent arbitrary deprivations of life by both state agents and private individuals. A deprivation is considered arbitrary if it is unlawful under either international law or domestic law.[16] Arbitrariness in turn has been interpreted to include elements of inappropriateness, injustice, unpredictability and non-conformity with the requirements of reasonableness, necessity and proportionality.[17] An important step towards the prevention of arbitrary deprivation of life is the development of a domestic legal framework that ensures respect for and protection of the right to life.[18] Such a framework must also adequately regulate the use of force by law enforcement officials in accordance with international human rights standards.[19] States also have an obligation to protect the right to life of individuals from the reasonably foreseeable threats from private parties. A failure to take precaution to prevent such threats from materialising may give rise to liability.[20]

The procedural component of the right to life requires states to ensure accountability for violations of the right. Thus, states have an obligation to conduct prompt, effective, thorough, impartial and transparent investigations into potentially unlawful deaths.[21] The Minnesota Protocol on the Investigation of Potentially Unlawful

14 See, eg, Communication 295/04, *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, April 2012, African Commission on Human and Peoples' Rights, 51st ordinary session.
15 UN Human Rights Council Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/26/36, para 46.
16 General Comment 3: The Right to Life (art 4), adopted during the 57th ordinary session of the African Commission on Human and Peoples' Rights, held from 4-18 November 2015, Banjul, The Gambia para 12.
17 As above.
18 General Comment 3 (n 16) para 7.
19 General Comment 3 para 27. Also see Concluding Observations on the State Report of Eritrea (1999-2016), African Commission on Human and Peoples' Rights 62nd ordinary session, held in Nouakchott, Mauritania, 25 April to 9 May 2018 para 36.
20 General Comment 3 (n 16) para 9.
21 General Comment 3 paras 15-17.

Death[22] (Minnesota Protocol) sets out standards that states are expected to meet when investigating suspected unlawful deaths. Although it is a soft law instrument within the UN human rights system, it is widely recognised in the international human rights system as the guidance on the investigation of violations of the right to life.[23] Where it is established that a death was unlawful, the state has a responsibility to criminally prosecute and punish the offender, and provide reparations to the victims.[24] According to the African Commission, the failure to investigate suspicious deaths in itself is a violation of the right to life.[25] This is also the position in the UN human rights system.[26] In order for the obligation to investigate and ensure accountability to be discharged, states must put in place effective investigation and accountability mechanisms such as independent police oversight institutions.[27]

Article 11 of the African Charter recognises the right of every individual to assemble freely with others. The limitation clause under the provision sets out the potential grounds for restriction of the exercise this right, including national security, the safety, health and the rights and freedoms of others. Unlike other international human rights instruments, article 11 of the African Charter does not expressly stipulate the requirement that assemblies be peaceful. However, read in its entirety, and taking into account the interpretation of article 11 by the African Commission in its case law (and general international law) only peaceful assemblies are protected under the African Charter.

The extent to which states guarantee the right of peaceful assembly has implications for the enjoyment of the right to life. The greater the compliance with international standards on protection of the right of peaceful assembly, the lower the likelihood of the right to life being violated.[28] Thus, states have an obligation to establish a domestic legal framework that guarantees the right of peaceful assembly and which complies with international human rights standards.

22 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), (UN Publication, Sales E.17.XIV.3).
23 See, eg, references to the Minnesota Protocol in General Comment 36: Article 6 (The Right to life) 2018, UN Human Rights Committee, CCPR/C/GC/36, para 27 and General Comment 37: Article 21 (The Right of Peaceful Assembly), 2020, UN Human Rights Committee, CCPR/C/GC/37, fn 133.
24 General Comment 3 (n 16) para 15.
25 As above. Also see Resolution on the Right to Life in Africa (n 10).
26 General Comment 36: Article 6 (The Right to life) 2018, UN Human Rights Committee, CCPR/C/GC/36.
27 General Comment 3 (n 16) para 16.
28 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/17/28, UN Human Rights Council para 13.

The obligation to respect the right of peaceful assembly requires states not to interfere with its exercise, for example, by imposing restrictions that fall outside the scope of article 11 of the African Charter. In its jurisprudence, the African Commission has emphasised the need for states to ensure that any restriction on the exercise of the right of peaceful assembly meets the test of necessity and proportionality. For instance, in *Media Rights Agenda v Nigeria*[29] the Commission emphasised that restrictions must not negate the essence of the right of peaceful assembly, but must be aimed at facilitating the exercise of the right.[30] The duty to facilitate involves creating an environment that supports the exercise of the right of peaceful assembly by, for example, taking positive measures such as clearing or rerouting traffic.

The obligation to protect requires states to prevent state agents or third parties from interfering with or violating the rights of assembly participants. This duty must be discharged with regard to the principle of non-discrimination, especially because some assemblies pursue controversial or anti-government causes and, therefore, may be more predisposed to interferences.[31] In the event that force has to be used as a means of fulfilling the obligation to protect, such use of force must comply with international human rights principles governing the use of force by law enforcement officials.

3 Protection of the right to life in the context of assemblies: Specific obligations

As stated earlier, the protection of the right to life in the context of assemblies has been a major concern in the African and international human rights system. The manner in which assemblies are managed by law enforcement officials has a bearing not only on the right of peaceful assembly but also on the right to life. This is particularly so because law enforcement officials may in some cases use force and even firearms against assembly participants. In addition, assemblies that pursue controversial ideas may attract violent responses from other members of the public. It also bears reminding that some assembly participants may be violent and may consequently pose a threat to the lives of other members of the public or law enforcement officials. However, as noted earlier, the more prevalent concern is the

29 (2000) AHRLR 262 (ACHPR 2000).
30 *Media Rights Agenda* (n 29) para 65.
31 See, eg, Resolution on the Right to Peaceful Demonstrations (n 9). The African Commission calls on state parties to protect assembly participants regardless of their political affiliations or sex.

violent suppression of assemblies by state security agencies, thereby leading to loss of life.

The general responsibilities of states with regard to the right to life and the right of peaceful assembly discussed above apply in all contexts. However, the unique challenges that law enforcement officials may face during public order operations call for more context-specific obligations of the state, besides those already noted. To begin with, law enforcement officials have a duty to refrain from using force when policing assemblies, unless force is a necessary and proportionate response to the behaviour of the participants.[32] Where some participants are violent, the obligation of the police to facilitate and protect those assembling peacefully remains.[33] Additionally, the violent participants do not lose protection under other provisions of the African Charter.[34] Thus, the right to life and bodily integrity of all assembly participants, whether peaceful or not, must be respected and protected. There is also an obligation to refrain from using lethal force against participants, and only resort to such force in order to avert an imminent threat of death or serious injury.[35] Further, the use of firearms simply to disperse assemblies is prohibited.[36]

Law enforcement officials also have a duty to protect the lives of assembly participants from arbitrary deprivation by private individuals. This obligation covers the reasonably foreseeable threats to the lives of the participants. As mentioned before, if lives are lost during assemblies, there is a duty to investigate the deaths and ensure accountability. As part of the duty to protect, states must also take precautionary measures to reduce the likelihood of police resorting to the use of force, whether lethal or less lethal. Such measures include training law enforcement officials on public order management and equipping the police with appropriate less-lethal weapons and protective equipment.[37]

Invariably, where the right to life is violated in the context of an assembly, the right of peaceful assembly is also violated. However, as will be seen in the selected case law discussed later, greater attention is usually paid to the violation of the right to life and not that of peaceful assembly. As mentioned earlier, the right to life is 'the

32 General Comment 3 (n 16) para 27.
33 General Comment 3 para 28.
34 General Comment 3 (n 16).
35 As above.
36 General Comment 3 para 28.
37 General Comment 3. Also see Concluding Observations on the 6th Report of Namibia para 54; Concluding Observations on the State Report of Malawi, 2015 para 123.

fountain from which all other rights flow'. If it is violated, there is no possibility of enjoying any other right. Therefore, it is not surprising that less attention would be paid to questions concerning peaceful assembly where the right to life has been violated in the context of an assembly. It nevertheless is important to address questions pertaining to the right of peaceful assembly to a greater depth than the African Commission has done before. As mentioned earlier, the greater the protection of the right of peaceful assembly, the higher the likelihood that the right to life would be safeguarded in that context. Given that the use of force by law enforcement officials during assemblies poses an obvious threat to the right to life, the development and reinforcement of standards of protection of the right in the specific context of assemblies are necessary. What follows is a discussion of the standards that have been developed in the African human rights system.

4 Development of standards on protection of the right to life during assemblies in the African human rights system

Mutua argues that while human rights standards have been developed in most areas touching on human dignity, there is still a need to establish new legal frameworks in areas where the norms are not adequately developed, and to elaborate and strengthen norms that are well-established.[38] The protection of the right to life and the right of peaceful assembly is firmly entrenched in the African human rights system. However, the establishment of standards around these and other rights is an evolving process which must respond to emerging challenges.

Over the last two decades, global attention has increasingly been paid to the protection of the right of peaceful assembly, and particularly to the potential for large-scale violations of the right to life in cases where states resort to the use of force to suppress dissent. Consequently, there have been significant developments globally and in Africa around the protection of both the right to life and the right of peaceful assembly. In the UN human rights system, the Human Rights Committee adopted General Comment 36[39] on the right to life in 2018 and General Comment 37[40] on the right of peaceful

38 M Mutua *Human rights standards: Hegemony, law and politics* (2016) 141.
39 General Comment 36: Article 6 (The Right to Life), 2018, UN Human Rights Committee, CCPR/C/GC/36.
40 General Comment 37: Article 21 (The Right of Peaceful Assembly), 2020, UN Human Rights Committee, CCPR/C/GC/37.

assembly in 2020. The adoption of these General Comments was preceded by other steps taken to address questions concerning the right to life and the right of peaceful assembly. For example, the UN Human Rights Council established the mandate of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association in 2010 with a view to enhancing the promotion and protection of the right of peaceful assembly.[41] Through various reports to the Human Rights Council and the UN General Assembly, the mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions also addressed the question of protection of the right to life during assemblies.[42] Also relevant to the protection of the right to life is the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement[43] (Guidance on LLWs). In relation to assemblies, the Guidance on LLWs provides that in cases where the use of less-lethal weapons is justified, precaution should be taken to prevent or mitigate the risk of death or serious injury.[44] It further provides that the use of less-lethal weapons to disperse assemblies should be a measure of last resort,[45] and that firearms should never be used to disperse assemblies.[46]

In the African human rights system, the African Commission has also continually developed standards on the protection of the right to life and the right of peaceful assembly. Noting the potential for law enforcement officials to infringe on the right to life while policing assemblies, it has also elaborated state obligations to protect lives in the context of law enforcement operations such as public order management. It has done this through its Concluding Observations on state reports, thematic and country-specific resolutions, the development of guidelines and general comments, and through case law, a selection of which is discussed later in the article.

With respect to Concluding Observations, the African Commission in the past has made recommendations on the eradication of

41 UN Human Rights Council Resolution 15/21 The rights to freedom of peaceful assembly and of association, A/HRC/RES/15/21, adopted 6 October 2010.
42 See, eg, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/17/28, 23 May 2011; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014; and Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the proper management of assemblies, Maina Kiai, Christof Heyns, UN Human Rights Council, A/HRC/31/66, 4 February 2016.
43 OHCHR UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (2020).
44 OHCHR (n 43) para 6.3.1.
45 OHCHR para 6.3.3.
46 OHCHR para 6.3.4.

police excesses;[47] the training of security forces on public order management,[48] prevention of arbitrary deprivation of life by law enforcement officials,[49] and accountability of law enforcement officials who violently repress protests.[50] One of the limitations of the state reporting mechanisms has been that states do not regularly submit their reports, and in some cases reports that have been submitted do not contain adequate information.[51] Further, there is little evidence that states generally implement the recommendations of the African Commission.

In a major step towards elaborating the nature of the right to life and the scope of state obligations, the African Commission adopted General Comment 3 on the right to life under the African Charter. The General Comment interprets the right to life broadly, indicating that the Charter does not merely protect physical existence, but it protects a dignified existence.[52] It reiterates the substantive obligation of states to prevent arbitrary deprivations of life by both state actors and private individuals or entities.[53] It also emphasises the procedural obligation of states to investigate unlawful deaths and ensure accountability of perpetrators.[54] Further, it establishes that an unlawful attempt by a state agent to kill a person amounts to a violation of the right to life in addition to other rights, even if the targeted person survives.[55] It further adds that an unlawful threat against the life of a person by a state agent also amounts to a violation of the right to life.[56] These interpretations have implications in the context of assemblies, particularly where law enforcement officials use force and firearms in circumstances that are not permitted under international law. For example, in relation to unlawful threats against a person's life, it could mean that a threat to use lethal force to disperse peaceful protesters may amount to a violation of the right to life. The African Commission has not determined a communication

47 Concluding Observations on Zimbabwe, 7th to 10th Report (1996-2006), 41st ordinary session of the African Commission on Human and Peoples' Rights, 16-30 May 2007, Accra, Ghana para 29.
48 Concluding Observations on Malawi, 57th ordinary session of the African Commission on Human and Peoples' Rights, 4-18 November 2015, Banjul, The Gambia para 123.
49 Concluding Observations on Malawi (n 48) para 62.
50 Concluding Observations on Ethiopia, 46th ordinary session of the African Commission on Human and Peoples' Rights 11-25 November 2009, Banjul, The Gambia paras 38 & 51.
51 Eg, in its Concluding Observation on Kenya's 8th to 11th periodic report the African Commission observed that that there was no information on the freedom of assembly and of association. See Concluding Observations on Kenya, 8th to 11th periodic report, 41st ordinary session, 16-30 May 2007, Accra, Ghana.
52 General Comment 3 (n 16) para 3.
53 General Comment 3 paras 2 & 7.
54 As above.
55 General Comment (n 16) para 8.
56 As above.

in which security agents threatened the lives of assembly participants but did not actualise the threats, but it has found a violation of the right to life in a case where a person received death threats from security agents.[57]

The General Comment also sets out how the right to life applies in various contexts, including in the context of law enforcement. It affirms the obligation of states 'to 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'.[58] Further, it emphasises the obligation of states to establish a legislative framework regulating the use of force by law enforcement officials which complies with international standards, including the principles governing the use of force.[59] In relation to the use of lethal force, it states that '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)'.[60] The need for states to equip law enforcement officials with less lethal weapons and to train them on their use is also emphasised in the General Comment.[61] Given the central role of law enforcement officials in the context of assemblies, these standards, which reflect international standards, are of particular significance for the protection of the right to life during assemblies. For example, the taking of precautionary measures is an important way of preventing potentially volatile situations from escalating and putting at risk the right to life.

The African Commission has also adopted various resolutions relevant to the protection of the right to life in the context of assemblies. In Resolution 281 of 2014 on the right to peaceful demonstrations, the Commission expressed concern about the excessive use of force, including lethal force to disperse demonstrations and condemned the unlawful killings of peaceful demonstrators. It called on states to

> refrain from disproportionate use of force against demonstrators whilst fully complying with international standards on the use of force and firearms by law enforcement officials; conduct impartial and independent investigations into all human rights violations to ensure

57 *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000).
58 General Comment 3 (n 16) para 27.
59 As above.
60 As above.
61 General Comment 3 para 30.

> that all perpetrators are held accountable; protect peaceful protesters regardless of their political affiliation, and/or sex.[62]

Similar concerns about the excessive use of force by law enforcement officials had been expressed in an earlier resolution on police and human rights in Africa.[63]

These concerns have persisted, as expressed in subsequent resolutions of the African Commission. For example, in Resolution 375 of 2017 on the right to life, the Commission again expressed concern about arbitrary deprivation of life during law enforcement operations through excessive use of force, and the subsequent failure by states to investigate suspicious deaths caused by state security agents. It urged state parties to the African Charter to, among other measures, ensure that their domestic laws on the use of force comply with international standards; that law enforcement officials are provided with appropriate less lethal weapons and personal protective equipment; and to establish accountability mechanisms to ensure independent, effective and thorough investigations into suspicious deaths.

Apart from thematic resolutions, the African Commission also adopts country-specific resolutions to address particular human rights concerns in specific states. For example, in 2019, following mass protests in the Sudan and the violent suppression of the protests, the African Commission adopted Resolution 413 of 2019 on the human rights situation in the Republic of the Sudan.[64] The Commission expressed concern about the use of excessive force to disperse protesters and use of live ammunition and tear gas against protesters, resulting in deaths and serious injuries. It called on the Sudanese government to refrain from using excessive force against protesters and to ensure prompt, thorough and effective investigations into the allegations of gross human rights violations.

As new concerns emerge, the African Commission has also responded by adopting more resolutions to address the concerns. For example, in a 2021 resolution the Commission noted the potential implications of artificial intelligence (AI) technologies on the right to life and the freedom of assembly, among other rights,

62 Resolution on the Right to Peaceful Demonstrations (n 9).
63 Resolution on Police and Human Rights in Africa, ACHPR/Res 259(LIV) 2013 adopted at the 54th ordinary session of the African Commission on Human and Peoples' Rights, 22 October-5 November 2013, Banjul, The Gambia.
64 Resolution on the Human Rights Situation in the Republic of The Sudan, ACHPR/Res. 413 (EXT.OS/ XXV) adopted at the 25th extra-ordinary session of the African Commission on Human and Peoples' Rights, 19 February-5 March 2019, Banjul, The Gambia.

and committed to undertake a study on the impact of AI and other new and emerging technologies on human rights in Africa.[65] In the context of the COVID-19 pandemic, the Commission, taking note of the measures taken by states to combat the disease, expressed concern about the

> excessive use of force by law enforcement officers against peaceful demonstrators in some African states, including the use of live ammunition, tear gas and water cannons by law enforcement authorities in suppressing and dispersing demonstrators, which had claimed the lives of many people.[66]

It adopted a resolution calling on states to guarantee fundamental human rights, including the right to life and the right of peaceful assembly, when enforcing measures.[67] The Commission also expressed concern about the use of COVID-19 emergency measures to restrict civic freedoms and particularly highlighted the use of excessive force by law enforcement officials against protesters in Ethiopia, Nigeria, Côte d'Ivoire, Guinea and Uganda.[68] It adopted a resolution urging state parties to the African Charter to ensure that law enforcement officials involved in the policing of assemblies use force in accordance with international human rights standards.[69] Although the various resolutions highlight the problem of the use of excessive force leading to loss of life during assemblies, they do not necessarily provide an elaboration of the content of the state obligation to protect life during assemblies.

Aside from the Resolutions, the African Commission has also adopted the Guidelines on the Freedom of Association and Assembly in Africa (Guidelines on Association and Assembly')[70] and the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa in 2017 (Guidelines on Policing Assemblies).[71]

65 Resolution on the Need to Undertake a Study on Human and Peoples' Rights and Artificial Intelligence (AI), Robotics and Other New and Emerging Technologies in Africa, ACHPR/Res. 473 (EXT.OS/ XXXI) 2021, adopted at the 31st extra-ordinary session of the African Commission on Human and Peoples' Rights held virtually 19-25 February 2021.

66 Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States, ACHPR/Res. 474 (EXT.OS/ XXXI) 2021, adopted at the 31st extra-ordinary session of the African Commission on Human and Peoples' Rights held virtually 19-25 February 2021.

67 As above.

68 Resolution on the Need to Protect Civic Space and Freedom of Association and Assembly, ACHPR/Res. 475 (EXT.OS/ XXXI) 2021, adopted at the 31st extra-ordinary session of the African Commission on Human and Peoples' Rights held virtually 19-25 February 2021.

69 Resolution (n 68) operative para 1.

70 Guidelines on Freedom of Association and Assembly, adopted at the 60th ordinary session of the African Commission on Human and Peoples' Rights, Niamey, Niger, 8-22 May 2017.

71 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), adopted at the 21st extra-ordinary session of the African Commission on

The Guidelines on association and assembly emphasise the need for states to ensure that laws regulating assemblies are aimed at facilitating the enjoyment of the right.[72] It also emphasises the duty to protect assembly participants from interference by others, as well as the duty to protect bystanders and other parties.[73] The Guidelines on policing assemblies have more specific guidance on the protection of the right to life in the context of assemblies. For instance, it provides that 'firearms are not an appropriate tactical tool for the policing of assemblies' and 'must never be used to disperse an assembly'.[74] The Guidelines further emphasise the importance of training law enforcement officials on various aspects of policing assemblies, including the use of force and firearms, the use of less lethal weapons, the protection of particularly vulnerable groups, and conflict management in the context of assemblies.[75] In addition, the Guidelines elaborate the importance of planning operations with a view to minimising the need to use force or firearms.[76] Guidance is on accountability for the use of force and firearms.[77]

Together, these Guidelines elaborate in detail various aspects of protection of the right to life during assemblies. Although they are soft law instruments, they have been cited by the African Commission in its case law,[78] Concluding Observations[79] and resolutions.[80] This has consequently enhanced their normative value.

5 Selected case law of the African Commission and the African Court

The interpretation of the standards discussed above in actual cases is an important way of clarifying the scope of the state obligation to protect life in the context of assemblies. Generally, the jurisprudence of the African Commission and the African Court is limited. However, there have been cases where the African Commission, in particular, has elaborated the state obligation to protect life in law enforcement operations.

Human and Peoples' Rights, 23 February-4 March 2017, Banjul, The Gambia.

72 Guidelines on Association and Assembly (n 70) para 66.

73 Guidelines (n 70) paras 94-95.

74 Guidelines on Policing Assemblies (n 71) para 21.2.4.

75 Guidelines on Policing Assemblies para 7.

76 Guidelines on Association and Assembly (n 70) para 9.

77 Guidelines on Association and Assembly (n 70) para 8.

78 See, eg, Communication 344/07*George Iyanyori Kajikabi v The Arab Republic of Egypt* African Commission on Human and Peoples' Rights (2020).

79 Concluding Observations, Eritrea (n 19) para 36.

80 See, eg, Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States, ACHPR/Res 474 (EXT.OS/ XXXI) 2021; and Resolution 375/2017, Resolution on the Right to Life in Africa, ACHPR/Res 375(LX)2017.

What follows is an overview of four selected cases from the African Commission and the African Court through which the question of protection of the right to life in the context of law enforcement operations, including assemblies, was addressed. Save for one case which was determined in 2020, the remaining cases were all determined before the adoption of General Comment 3 discussed above. As will be seen, the interpretation of the right to life and the obligation of states in that regard in these cases is reflected in General Comment 3 as well as in the resolutions, guidelines and Concluding Observations of the African Commission.

5.1 *Gunme & Others v Cameroon*

The complainants in this case[81] alleged numerous violations of the rights of the people of Southern Cameroon, including violations of the right to life and the right of peaceful assembly. The complaint gave accounts of violent suppression of peaceful protests by state security agencies, leading to a loss of lives. It was also alleged that some demonstrators who were arrested for participating in unlawful political rallies died in detention as a result of ill-treatment.[82] Although Cameroon cast doubt on the reliability of the evidence presented by the complainants, the African Commission observed that Cameroon did not conduct investigations into the allegations and it also did not provide redress for the victims of the violations.[83] Consequently, the Commission found that Cameroon had violated article 4 of the African Charter. It further observed that security agencies in Cameroon had suppressed peaceful demonstrations through the use of force against demonstrators and their arrest and detention under inhumane conditions, thereby causing the deaths of some of the victims. The Commission noted that 'the victims who died, or had been detained suffered while exercising their exercise of the right to freedom of assembly'.[84] Consequently, it found that article 11 of the African Charter had also been violated.

In this case, when finding a violation of the right to life, the African Commission based its decision primarily on the failure by Cameroon to investigate the alleged violations. It did not delve into the substantive aspects of the obligation to protect life during assemblies. Nevertheless, in its finding of a violation of the right of peaceful assembly, the Commission mentioned in passing that

81 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 110.
82 *Gunme* (n 81) para 136.
83 *Gunme* para 112.
84 *Gunme* 137-138.

excessive force had been used against the demonstrators and as a result lives had been lost. It would have been helpful for the Commission to interrogate in greater detail the circumstances of the use of force by the police against the demonstrators and assess them against international standards. For example, in their defence Cameroon argued that the demonstrators who had died during a confrontation with the police had been involved in an illegal rally.[85] In response to the defence, the Commission could have affirmed that participation in an assembly considered unlawful under national law does not in itself justify the use of force. Assuming Cameroon had conducted thorough investigations and prosecuted some officers, would the Commission still have found a violation of the right to life? In the absence of a consideration of the violation of the substantive aspect of the right to life, it is difficult to tell what the answer would be.

5.2 *African Commission on Human and Peoples' Rights v Libya*

The brief facts of this case are that following the arrest and detention of an opposition lawyer, peaceful demonstrations took place in Benghazi, Libya between 16 and 19 February 2011. The demonstrations were violently suppressed by security forces who randomly fired live ammunition at the demonstrators. Many were killed while scores of others were seriously injured. It was indicated that the use of excessive force, including by machine guns, by Libyan security forces amounted to gross violations of the right to life, the security of the person, freedom of expression, and the right of peaceful assembly. The case was originally submitted to the African Commission which then referred it to the African Court. In an order for provisional measures, the African Court ordered Libya to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons'.[86]

Although ultimately the African Court struck out the application due to a lack of evidence,[87] the order for provisional measures was a step towards urgently putting a stop to the gross violations of the rights of demonstrators by Libyan security forces.

85 *Gunme* para 111.
86 *African Commission on Human and Peoples' Rights v Libya* (2011) AHRLR 175 (ACtHPR 2011) Order for Provisional Measures 4/2011 para 25.
87 *African Commission on Human and Peoples' Rights (Benghazi) v Libya,* App 4/2011, African Court on Human and Peoples' Rights (Order on Merits of the Application) 15 March 2013.

5.3 *George Iyanyori Kajikabi v Egypt*

In this case[88] a group of about 2 500 Sudanese nationals in Egypt participated in a sit-in demonstration in the Mustafa Mahmoud park close to the offices of the United Nations High Commissioner for Refugees (UNHCR) in Cairo. The number of demonstrators had gradually increased over a period of three months. Riot police forcibly removed them from the park, and in that process about 30 people died and many others suffered varying degrees of injury. Among the issues addressed by the African Commission were the breaking up of the peaceful sit-in protest through the indiscriminate use of force resulting in injury and death, and the failure by Egypt to investigate the alleged violations.

In finding that violations of both the right to life and the right of peaceful assembly had occurred, the African Commission emphasised the obligation of states to take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents. It also emphasised that force may be used in law enforcement only in order to stop an imminent threat of death or serious injury and clarified that force in this context includes deadly force and any other lesser form of force. This appears to be a more stringent standard than the UN human rights system's standard. In UN Human Rights Committee's General Comment 36, the presence of an imminent threat of death or serious injury is required in respect of use of lethal or potentially lethal force, and not lesser forms of force.[89] Arguably, the UN standard is the more practical one since there may be law enforcement situations that require the use of some level of force in contexts where there is no immediate threat of death or serious injury. For example, if demonstrators block a major highway for a long period, thereby causing great inconvenience to others, law enforcement officials may need to use force to disperse them if they fail to comply with orders to disperse.

The African Commission further emphasised that even if acts of violence occur during assemblies, participants retain their rights to bodily integrity and other rights and force may not be used except in accordance with the principles of necessity and proportionality.[90] It also noted the need for laws that strictly limit the circumstances

88 *Kajikabi v Egypt* Communication 344/07, African Commission on Human and Peoples' Rights (2020) para 171.
89 General Comment 36 (n 39) para 12.
90 *Gunme* (n 81) para 172.

when firearms may be used in accordance with international human rights standards.[91]

The African Commission also considered whether the police, through insufficient planning of the operation, could be held accountable for the deaths even in the cases where death was caused solely by trampling as well as asphyxiation, based on the state's duty to protect life. Given the manner in which the riot police dealt with the crowd, it found that Egypt was responsible for the deaths that resulted from trampling and asphyxiation.[92] On the duty to investigate, the Commission noted that in relation to the right to life, the duty is on the state to initiate effective investigations and observed that victims have no duty to initiate such investigations.[93] This is crucial because in most cases, victims of rights violations by law enforcement agents usually are not able to identify them. Further, in an environment where dissent is suppressed, victims may not be willing to come forward to lodge their complaints for fear of state reprisals. By reinforcing the duty of the state to investigate, the African Commission clarified that the duty is triggered when the state knows or ought to have known about a potentially unlawful death, and not when a victim reports to the state authorities. This is a position that is also reflected in the UN's Minnesota Protocol.[94]

Taken collectively, the Concluding Observations, Guidelines, resolutions and decided cases paint the picture of the African Commission acting proactively to clarify and then to underline relevant standards for the protection of the right to life in the context of assemblies. The *Kajikabi v The Arab Republic of Egypt* case, in particular, provides a comprehensive elaboration of the state's duty to protect the right to life in the context of assemblies. It emphasises the importance of the principles governing the use of force by the police, especially the principles of precaution, necessity, proportionality and accountability as they apply in the context of assemblies. In relation to precaution, it is commendable that the Commission found a violation of the right to life in relation to persons who died as a result of trampling and asphyxiation, since the law enforcement agencies had failed to plan their operation in a manner that would best protect life. This is significant because states are likely to consider such deaths accidental and, therefore, hold no one accountable for them. The Commission's analysis of the principles of necessity and proportionality with reference to Egypt's Police Act also highlighted

91 *Gunme* para 173.
92 *Gunme* para 178.
93 *Gunme* para 185.
94 Minnesota Protocol (n 22) para 15.

the need for states to ensure that their laws do not grant the police broad discretion to use force against assembly participants. That the Commission also affirmed that the duty to investigate is triggered if a state knows or ought to have known about a violation of the right to life is also a positive element of the decision. Deaths in the context of assemblies often may only be reported in the media and the victims' families will often shy away from seeking legal redress especially if their kin have been characterised as offenders. By this decision, whether or not victims' relatives report, states must investigate and a failure to do so is itself a violation of the right to life.

Despite the foregoing, the African Commission and the African Court could still do more to develop jurisprudence on the protection of the right to life in the context of assemblies. Given that direct access to the African Court is limited to the citizens of only six countries that have deposited the relevant declaration under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court (African Court Protocol) the case law of the African Court understandably is limited. In relation to the African Commission, access is much broader. However, given the length of time the Commission takes to determine communications, the quality of access to the Commission may be questioned. For example, the *Kajikabi* case discussed above related to events that took place in 2005. The Communication was submitted in 2007 but was only concluded 13 years later, in 2020. The delay in the determination of the cases may adversely affect the willingness of victims to approach the Commission.

Aside from these challenges, the African Commission has also missed opportunities to reinforce the state obligation to protect the right to life during assemblies through some Communications it has handled before. Two of these Communications are discussed next.

5.4 *International PEN v Nigeria*

This Communication[95] concerned the detention and trial of Kenule Saro-Wiwa, an activist and president of the Movement for the Survival of the Ogoni People (MOSOP). The trial stemmed from events during a rally organised by MOSOP on 21 May 1994 where four Ogoni chiefs were killed. Saro-Wiwa, who was prevented from attending the rally, was later arrested alongside 14 other defendants and months later was charged with inciting members of MOSOP

95 *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 1-13.

to murder the four Ogoni leaders. Nine defendants, including Saro-Wiwa, were sentenced to death and subsequently executed.

The complainants alleged a violation of various provisions of the African Charter, include the right to life and the right of peaceful assembly. The African Commission disagreed with the position taken by the Nigerian tribunal before which the defendants were put on trial that by wrongfully organising political rallies and permitting large crowds of MOSOP youth to assemble, the defendants had 'created the fire that consumed the four Ogoni chiefs'. The Commission observed that such a position could have a negative impact on the right of peaceful assembly. [96] It found that there had been a violation of the right to life on account of the unfairness of the trial and execution of the defendants. It also found a violation of article 11 of the African Charter. Nevertheless, the African Commission did not adequately address particular aspects of protection of the right of peaceful assembly which the Communication raised. For example, the Commission did not interrogate whether Nigeria had complied with the principle of precaution by putting in place measures to ensure public safety during the assembly and to prevent arbitrary deprivation of life by private parties. Although it found the position of the Nigerian tribunal problematic, it could justly have used stronger language to affirm that organisers of assemblies can only be held responsible for their own unlawful conduct and not the criminal acts of others. Further, the Commission did not adequately link the execution of the defendants (which it found to be a violation of the right to life) to the violation of their right of peaceful assembly. As seen in *Gunme* discussed above, actions taken after assemblies by state authorities may also diminish the protection of the right of peaceful assembly and the right to life and bodily integrity.

5.5 *Movement Burkinabé v Burkina Faso*

This complaint[97] concerned various human rights violations committed by the Burkina Faso government over several years, particularly between 1991 and 1997 when the Communication was submitted. One of the allegations was that in May 1995, two students were shot dead at close range by security officials during a peaceful demonstration by students. It was further alleged that no investigation had been conducted into the deaths. The African Commission condemned the use of excessive force by state security

96 *International Pen* (n 95) para 106.
97 *Movement Burkinabé des droits de l'Homme et des peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001) para 10.

agents against demonstrators and noted that excessive force should not be used even in circumstances where the demonstrations are unauthorised. It also observed that 'the public authorities possess adequate means to disperse crowds' and that 'those responsible for public order must make an effort … to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life'.[98] The Commission found that there had been a violation of the right to life. However, in spite of its condemnation of the use of excessive force against demonstrators, surprisingly the Commission held that a violation of article 11 of the African Charter had not been established.[99] Consequently, it did not link the violation of the right to life to the violation of the right of peaceful assembly. In its reasoning, the Commission determined, the complainants had not presented sufficient evidence to show that there had been a violation of article 11. This conclusion was not in harmony with the Commission's own observation on the use of force against peaceful demonstrators.

Notably, these two Communications were both determined before the three progressive ones discussed above. This can be seen as evidence that the African Commission has progressively enhanced the protection of the right to life during law enforcement operations. This growth is also seen in the detail with which the Commission addressed the question of protection of the right to life during assemblies in the recent decision in the *Kajikabi* case, as compared to the earlier case of *Gunme v Cameroon*. However, two key cases over a period of 40 years of the Commission's existence is a drop in the ocean.

6 Concluding remarks

This article has shown that the African human rights system has contributed to the development of standards on the protection of the right to life in law enforcement contexts, including during assemblies. Through several Concluding Observations on state reports, the African Commission has brought to the fore the problem of arbitrary deprivation of life through excessive use of force and made recommendations to states to establish legal frameworks on the use of force that comply with international human rights standards. Through its resolutions, it has also consistently called on states to refrain from using excessive force against demonstrators and to promptly, thoroughly and impartially investigate all cases of

98 *Movement Burkinabé* (n 97) para 43.
99 *Movement Burkinabé* para 45.

suspicious deaths. The Commission has also emphasised the need for states to take other measures such as training of security agencies on public order management and provision of appropriate less lethal weapons.

Some of the recent significant normative developments highlighted in this article include the adoption of General Comment 3 on the right to life and the adoption of the Guidelines on the freedom of association and assembly in Africa and the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. Together, these documents provide detailed guidance to state parties to the African Charter on the implementation of their obligations under articles 4 and 11. The standards contained in these documents are also reflected in the past and more recent jurisprudence of the African Commission. The recent developments provide opportunities to strengthen the protection of the right to life in assemblies. States, for example, can tap into the existing frameworks developed by the African Commission and use these to strengthen or develop their own domestic frameworks. It is crucial that these standards are reflected in domestic legal frameworks of African states since domestic law is the first line of defence for protection of human rights at the national level.

One area where the African human rights system still lags behind is in the entrenchment of the standards in the jurisprudence of the African Commission and the African Court. As the more accessible treaty body, the African Commission has better prospects of developing its jurisprudence and, therefore, should strengthen and make more effective its case-handling procedures in order to improve the quality of access to the Commission. Where Communications raise concerns touching on the right to life in the context of assemblies, the Commission should be deliberate in its interpretation of standards it has developed through other mechanisms such as guidelines and General Comments.

In light of the growing use of new technologies in law enforcement, standards ought to be developed to elaborate state obligations in relation to the protection of the right to life and the right to peaceful assembly. However, it is encouraging that the African Commission has recently adopted a resolution committing to undertake a study to develop guidelines on the use of AI technologies and robotics.