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The African Union's right to intervene and the right to life: tension or concordance?

Dire Tladi with John Dugard***

Introduction

As one with such a long and fulfilling career in legal academia, Christof Heyns had many research interests. His research interests included legal philosophy, the right to dignity, the right to peaceful assembly and of course his interest in the life and contribution of Jan Smuts. But it is probably fair to say that the right to life was the driving force to Christof's academic pursuits. He has referred to the right to life as the supreme right.[1] His work as United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary execution and his participation in the work of the Working Group on the Death Penalty and Extrajudicial, Summary or Killings in Africa of the African Commission on Human and Peoples' Rights (African Commission) both exemplify this interest in the right to life. Indeed, even his work on the right of assembly was inspired by his commitment to the protection and sanctity of life.[2] The freedom

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** Professor of international law; a member of the International Law Commission between 1997 and 2011; and from 2001 to 2008, UN Human Rights Council special rapporteur on human rights in the Palestinian territories. John Dugard watched Christof grow in stature from a young scholar to an internationally acclaimed human rights lawyer, whose early commitment to ending apartheid was later transformed into a wider concern for human rights in Africa and beyond. He greatly admired Christof's innovative and creative mind and his ability to put his ideas into practice. In large measure this was due to the power of his intellect and the warmth of his personality.

1 See C Heyns & T Probert 'Casting fresh light on the supreme right: the African Commission's General Comments No. 3 on the right to life' in T Maluwa, M du Plessis & D Tladi (eds) *The pursuit of a brave new world in international law: essays in honour of John Dugard* (Brill 2017).

2 See for connection between the right to peaceful assembly and the right to life, C Heyns *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* (A/HRC/17/28), para 24 (Peaceful assembly report).

from violence project at the University of Pretoria was Christof's way of bringing all these different strands of the security of the human being together and can be seen as the culmination of Christof's pursuit of the promotion of the 'supreme right'.

The right to life is ubiquitous in international law. It is contained in all the important human rights treaties[3] and is generally regarded as forming part of customary international law. In the African context, article 4 of the African Charter on Human and Peoples' Rights (African Charter) provides that everyone 'shall be entitled to respect for his life'. While the right to life has not been included in the various lists of peremptory norms of general international law produced by the International Law Commission (ILC), it is difficult to argue against the right to life, or at least the prohibition of the arbitrary deprivation of life, as being part of *jus cogens*. According to the Fourth Report of the Special Rapporteur on peremptory norms, the right not to be arbitrarily deprived of life is accepted and recognised as a peremptory norm of general international law.[4] Christof himself has described the prohibition of arbitrary deprivation of life as well established 'in the rules of *jus cogens*'.[5]

At the same time, many of the other rules of international law that are accepted as *jus cogens* can be described as rules designed to promote freedom from violence which generally implicate the right to life. These include the prohibition of crimes against humanity, the prohibition of genocide and the prohibition of grave breaches, or more broadly war crimes.[6] The prohibition on the use of force, which is also *jus cogens*, is different from other rules of *jus cogens* since, unlike other generally recognised *jus cogens* norm, it is not directed at the protection of the rights and dignity of the human being but rather on the right of states. Yet, it also has an impact on life. Although directed at another state, the use of force as understood in *jus ad bellum* leads to the loss of life.[7]

Against this background, the topic of this chapter sits at the intersection of the right to life and *jus ad bellum* within the framework of African international law. The right of the African Union to intervene in its member states under the AU Constitutive Act implicates the law on

3 The 1966 International Covenant on Civil and Political Rights (art 6); 1948 Universal Declaration of Human Rights (art 3); 1950 European Convention on Human Rights (art 2); 2004 Arab Charter on Human Rights (art 5).

4 D Tladi *Fourth Report of the Special Rapporteur on peremptory norms of general international law* (Jus Cogens) (A/CN.4/727), at paras 128-130 (Fourth Report).

5 See C Heyns & T Probert 'Securing the right to life: a cornerstone of the human rights system' *EJIL Talk* 11 May 2016.

6 On some norms of international law generally accepted as constituting jus cogens, see J Dugard, M du Plessis, T Maluwa & D Tladi *Dugard's international law: a South African perspective* (Juta 2018) at 50.

7 See C Heyns *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* (A/HRC/23/47), para 57.

the use of force, *jus ad bellum*, while article 4 of the Charter implicates the right to life. While Christof himself had not (or perhaps had not yet) focused his work on *jus ad bellum*,[8] the topic of this chapter addresses an area that Christof may have found interesting because of its implication for the right to life. In the next section, the chapter provides a broad account of the right to life in international law, in particular under the African system. The chapter then directs itself to the right of the Union to intervene, and explore, in particular, its connections to the right to life.

The right to life in African international law

General

The right to life is provided for in all the major international human rights instruments. It is enumerated as the first right in the International Covenant on Civil and Political Rights (ICCPR).[9] The ICCPR provides that '[e]very human being has the inherent right to life' and that '[n]o one shall be arbitrarily deprived of his life.' Similarly, the Universal Declaration on Human Rights provides that '[e]veryone has the right to life'.[10] Synthesising these two instruments, Christof, as Special Rapporteur on extrajudicial, summary or arbitrary executions, expressed the view that what was essential was the 'inherent' nature of the right to life (a word which appears in the ICCPR), noting that it 'underscores the fundamental importance of this right'.[11] In his view, the right to life requires not only that the state protects individuals from deprivation of life from other members of society but that, in addition, the agents of the state also respect the right.[12] Christof then emphasises that what is prohibited under these instruments is '"arbitrary" deprivation of life' and that the deprivation of life that is 'non-arbitrary' is not covered by the ICCPR.[13]

The notion of arbitrary deprivation thus provides the threshold for what is permissible taking of life and what falls foul of the rules of international human rights law. In describing arbitrariness, the Human Rights Committee has noted that 'any substantive deprivation of life must be "prescribed by law," and must be defined with sufficient precision'.[14] The notion of prescribed by law itself is understood as

8 For a notable exception, see Heyns (n 7) para 57.
9 ICCPR art 6.
10 Universal Declaration art 3.
11 See Peaceful assembly report (n 2) para 44.
12 As above.
13 As above.
14 Human Rights Committee General Comment 36 (Article 6: The Right to Life) (CCPR/C/GC/36), para 19.

including both domestic and international law.[15] Christof himself observed that the word 'arbitrary' did not simply mean contrary to law,[16] since such a narrow interpretation would deny the protection of any objective content. To this end, General Comment 36 of the Human Rights Committee states that the deprivation of life may 'be authorised by domestic law and still be arbitrary'.[17] In particular the General Comment states that the

> notion of 'arbitrariness' is not to be fully equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process, as well as elements of reasonableness, necessity and proportionality.[18]

According to Christof, the right to life is the 'fountain from which all human rights spring', observing that its infringement was 'irreversible'.[19] The Human Right Committee has described the rights contained in article 6 of the ICCPR as having attained peremptory status.[20] While the ILC has not included the right to life in its list of peremptory norms, the report of the Special Rapporteur on peremptory norms did identify that right to life, or the right not to be arbitrarily deprived of life, as *jus cogens*.[21] For this proposition, the report relies on state practice,[22] in the form of domestic court cases and treaty practice in the form of the application of non-derogation clauses to the right to life in human rights treaties,[23] and outputs of regional human rights bodies such as the Inter-American Commission.[24]

15 As above, para 12.
16 Heyns and Probert (n 1) at 49.
17 General Comment 36 (n 14) para 12.
18 As above.
19 Heyns & Probert (n 1) at 46.
20 See General Comment 36 (n 14) para 68 ('Reservations with respect the peremptory and non-derogable obligations set out in Article 6 are incompatible with the object and purpose of the Covenant').
21 Tladi *Fourth Report* (n 4) para 128.
22 *RM v Attorney-General,* Judgment, High Court of Kenya, 1 December 2006, [2006] EKL ('On this, a perusal of the authoritative sources and international jurisprudence reveals that although the applicants are correct in the definition of *jus cogens* as outlined above and its current classifications it has not yet embraced parental responsibility and the rights associated with it. The closest linkage is the right to life and we are not convinced that the challenged section(s) threaten the right to life.') and *Nada (Youssef) v. State Secretariat for Economic Affairs*, Judgment of the Swiss Federal Court of 2007 of 22 April 2008 ('*Allgemein werden zum ius cogens elementare menschenrechte wie das Recht auf Leben* [In general, fundamental human rights such as the right to life become jus cogens]')
23 See, for example, ICCPR art 4; European Convention on Human Rights art 15.
24 See *Victims of the Tugboat '13 de Marzo' v Cuba,* Case 11.436, Decision of the Inter-American Commission on Human Rights of 16 October 1996, Report 47/96, para. 79 ('Another point that the Inter-American Commission on Human Rights must stress is that the right to life, understood as a basic right of human beings enshrined in the American Declaration and in various international instruments of regional and universal scope, has the status of *jus cogens*. That is, it is a peremptory rule of international law, and, therefore, cannot be derogable. The concept of *jus cogens* is derived from a higher order of norms established in ancient times and which cannot

The right to life under the African human rights system

In addition to the global instruments referred to above, the right to life is also provided for in regional human rights treaties, including the European Convention,[25] the American Convention[26] and the Arab Convention.[27] The right is also protected in article 4 of the African Charter, which provides 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.

In a number of decisions on individual complaints, the African Commission has described the right to life as the 'fulcrum of all other rights' and as the 'fountain through which other rights flow'.[28] The African Commission has further described the right to life as the 'supreme right of the human being'.[29] In particular, for the Commission, the prohibition of arbitrary deprivation of life means that 'the law must strictly control and limit the circumstances in which a person may be deprived of his life'.[30]

In 2015, the African Commission adopted General Comment 3 on the right to life under the African Charter, to which Christof was a significant contributor.[31] While the General Comment is, of course, not binding, it does serve an important guide for the interpretation of Article 4 of the African Charter.[32] According to Heyns and Probert,

be contravened by the laws of man or of nations.)

25 Art 2(1) of the ECHR states: 'Everyone's right to life shall be protected by law'.

26 Art 4 of the American Convention on Human Rights: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life'.

27 Art 5(1) of the Arab Charter on Human Rights provides that '[e]very human being has the inherent right to life', while art 5(2) provides that the right to life 'shall be protected by law' and that '[n]o one shall be arbitrarily deprived of his life.'

28 See, for example, *Gabriel Shumba v Zimbabwe,* Communication 288/2004, Decision of 2012, para 130. See also *Forum of Conscience v Sierra Leone,* Communication 223/998, Decision of 2000, at para 20 and *Interights and Ditshwanelo v Botswana,* Communication 319/06, Decision of 2015, para 20.

29 *Gabriel Shuma* (n 28) para 130.

30 As above.

31 See African Commission on Human and Peoples' Rights, General Comment 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, 2015. On the acknowledgement of Christof's contribution, see the Preface, by the Chairperson of the Working Group that prepared the Comment ('The African Commission is very grateful for the valuable contribution from members of the Working Group and experts to the text, in particular from Professor Christof Heyns, the UN Special Rapporteur on extrajudicial, summary and arbitrary executions.')

32 See para 7 of the Commentary to Draft Conclusion 13 of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, *Report of the International Law Commission at the Seventieth Session* (2018) (A/73/10). See also *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v United Arab Emirates),* Judgment of the

general comments are 'official interpretations of legal obligations' and are 'an important part of international human rights law.'[33] While the contribution states that the general comments are 'official' and 'part of international human rights law', this does not mean that they are binding. Heyns and Probert do state that the status of general comments 'remains a subject of academic debate'.[34] More importantly, they describe these interpretations as 'persuasive', suggesting that the African Commission ought to be seen as 'more persuasive' given the Commission's broad mandate.[35] General Comment 3 itself describes its role as being 'designed to guide the interpretation and application of the right to life under the Charter'.[36] It is intended to promote 'the coherent application … including [the implementation of the right] at the domestic level'.[37]

The General Comment describes the right not to be arbitrarily deprived of life as 'part of customary international law' and a right that is 'recognised as a *jus cogens* norm, universally binding at all times.'[38] Consistent with consequences for *jus cogens*,[39] the General Comment states that the right to life 'should not be interpreted narrowly' but should be interpreted in such a way as to promote the realisation of other rights in the Charter 'particularly the right to peace.' The emphasis on the right to peace is interesting given that, under the Charter, the right to peace is not, as such, an individual right, but rather a collective right of peoples, nations and states.[40]

Article 4 does not prohibit all deprivations of life. It is only arbitrary deprivation of life that is prohibited. According to the General Comment, a 'deprivation of life is arbitrary if it is impermissible under international

International Court of Justice of 4 February 2021, para at 101, in which the Court recalled that under its jurisprudence, it ascribes 'great weight' to interpretations of expert bodies but that it was 'in no way' bound by such interpretations.

33 Heyns & Probert (n 1) at 47.

34 As above.

35 As above.

36 General Comment 3 (n 31) para 1.

37 As above.

38 General Comment 3 (n 31) para 5.

39 See Draft Conclusion 20 of the ILC Draft Conclusions on Peremptory Norms of General International Law, *Report of the International Law Commission at the Seventy-First Session* (A/74/10) ('Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former'). The corollary of this interpretative rule is that *jus cogens* norms have to be given their full effect including through a generous interpretation.

40 See art 23(1) of the African Charter on Human and Peoples' Rights which provides that all 'peoples shall have the right to national and international peace and security', noting that the principles of solidarity and friendly relations are to govern 'relations between States.' In this context, art 23(2) recalls states shall ensure that their 'territories shall not be used as bases for subversive or terrorist activities against the people of any other State party'.

law, or under more protective domestic law provisions'.[41] This standard, by laying emphasis on 'international law' rather than domestic, provides a more objective test for arbitrariness, precluding the possibility of viewing 'arbitrariness' as based on the discretion of domestic law. Domestic law, under the standard put forward by the Commission, is relevant only if it provides greater protection than international law. In addition to providing a more objective standard, by basing the test for arbitrariness on consistency with international law, the test also permits a more evolutive standard which can shift as the standards of international law continue to evolve. More concretely, the General Comment states that 'considerations such as appropriateness, justice … [and] reasonableness …' are relevant for determining proportionality.[42]

The obligations of states under article 4 of the Charter include to 'take steps to prevent arbitrary deprivation of life'.[43] The General Comment is, for the most part, directed at the use of force under domestic law. While the General Comment does address the use of force under international humanitarian law,[44] it does not address, at least not directly, *jus ad bellum*, which is the subject of article 4(h) of the Constitutive Act of the African Union. This intersection, the right to life under article 4 of the African Charter and *jus ad bellum* in the form of article 4(h) of the Constitutive Act, is explored in the next section, both in terms of concordance and tension.

The right to life and the right (of the Union) to intervene

The concordance

The first point of concordance between the right to life and the right of the AU to intervene under article 4(h) is that, like the right to life, the acts for which the AU has the right to intervene, namely, crimes against humanity, genocide and war crimes, all have *jus cogens* status.[45] The acceptance and recognition of the prohibition of genocide, for example, as *jus cogens* was first implicitly acknowledged by the International Court of Justice (ICJ) in its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*.[46] The Court, relying

41 General Comment (n 31) para 12.
42 As above.
43 General Comment (n 31) para 7.
44 General Comment (n 31) paras 32 to 35.
45 See for a more detailed discussion of the *jus cogens* status of crimes against humanity, war crimes and genocide than is possible here see Dire Tladi *Fourth* Report (n 4), at paras 78-83 (prohibition of genocide), paras 84-90 (crimes against humanity) and 116-121 (war crimes).
46 *Reservations to the Convention on the Prevention and Punishment of the Crime of*

on that advisory opinion, later explicitly described the prohibition of genocide as *jus cogens*.[47] It is unsurprising that the prohibition of genocide has been constant in the list of norms of recognised by the ILC as possessing the character of *jus cogens*.[48]

In addition to recognising the peremptory character of crimes against humanity in the Draft Conclusions on Peremptory Norms,[49] the ILC has also recognised the peremptory character of the prohibition of crimes against humanity in the Articles on the Prevention and Punishment of Crimes against Humanity.[50] The prohibition has also been recognised in the jurisprudence of the ad hoc tribunals and in domestic jurisprudence as *jus cogens*.[51] With respect to the prohibition of war crimes, there is admittedly some divergence of views as to what elements of war crimes constitute *jus cogens*. It may, for example, be argued that only the 'grave breaches' under the Geneva Conventions constitute *jus cogens*, or, that any violation of international humanitarian law constitutes *jus cogens*. Notwithstanding this divergence of views, there is generally acceptance that some core of 'war crimes' constitutes *jus cogens*. In this respect, the ICJ described 'many rules of international humanitarian law applicable to armed conflict' as being 'so fundamental to the respect of the human person and the "elementary considerations of humanity" …[that] they constitute intransgressible principles of international law'.[52]

The concordance between the right to life in article 4 of the African Charter and the right of the Union to intervene in members states under article 4(h) of the Constitutive Act also underlies the objective of both provisions. Article 4(h) of the Constitutive Act provides for

> the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

Genocide, Advisory Opinion, *ICJ Reports* 1951, p.15, at 23, where the Court described the prohibition of genocide in the following words: '"a crime under international law" involving a denial of the right to existence of entire human groups, a denial which shocks the conscience of the mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations … the principles underlying the Convention are principles which are recognised as a civilised nations as binding on States, even without any conventional obligation ..'

47 See, for example, A*pplication of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia),* Judgment, *ICJ Reports* 2015, p.3 at para 87

48 See, for example, Draft Conclusion 23 and Annex of the Draft Conclusions on Peremptory Norms (n 39).

49 As above.

50 See Preamble, 2019 Articles on the Prevention and Punishment of the Crimes against Humanity, *Report of the International Law Commission,* Seventy-first Session (A/74/10).

51 See, e.g. *Prosecutor v Zoran Kupreškić,* Judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, IT-95-16-T, para 520.

52 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, *ICJ Reports* 1996, p. 226, at para 79.

The Constitutive Act makes plain the centrality of human rights in general, and the right to life in particular. Article 3 of the Constitutive Act includes, as an objective of the Union, the promotion and protection of 'human and peoples' rights 'in accordance with the African Charter … and other relevant human rights instruments.'[53] It also provides that in the pursuit of its objectives, the AU should function in accordance with a number of principles including the 'respect for … human rights',[54] and the 'respect for the sanctity of human life'.[55] The 'grave circumstances' identified in article 4(h) of the Constitutive Act all implicate threats to life.

The definition of 'genocide', for example, consists of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group' and include 'the killing members of the group' and 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole'.[56] The act of genocide has the potential to deny not only individuals of their right to life, but 'entire human groups'.[57] Werle and Jessberger describe the various episodes of genocide, what they call 'systematic annihilation of entire groups of people', and the loss of life resulting from those episodes.[58]

Similarly, crimes against humanity often involve loss of life and very often on a massive scale. The Rome Statute defines 'crimes against humanity' as acts committed 'as part of a widespread or systematic attack directed against any civilian population'.[59] The particular acts constituting crimes against humanity when meeting the threshold just mentioned, include murder, extermination, persecution, torture, and other inhumane acts,[60] all of which are acts which either result in the loss of life, or constitute a threat to life. This definition is, in the main, reproduced in the International Law Commission's Draft Articles on the Prevention and Punishment of the Crimes against Humanity.[61] Werle

53 See AU Constitutive Act art 3(h).

54 AU Constitutive Act art 4(m).

55 AU Constitutive Act art 4(o).

56 See art II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. See also art 7 of the 1998 Rome Statute of the International Criminal Court.

57 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (above note 46), at 23 ('The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups'). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 47) at para 63, emphasising the intent to physically destroy a group, in part or in whole. See Dugard and others (n 6) 252.

58 G Werle & l Jessberger *Principles of international criminal law* (OUP 2014) at 289-291.

59 See art 7(1) of the Rome Statute (n 56).

60 As above.

61 Draft art 2 of the 2019 Articles on the Prevention and Punishment of the Crimes against Humanity, *Report of the International Law Commission,* Seventy-first Session

and Jessberger consider that the two acts most clearly and definitively connected with the loss of life, namely, killing and extermination, are the most 'serious cases' of crimes against humanity.[62] Moreover, they point out that crimes against humanity 'target fundamental human rights, in particular life'.[63]

The same pattern is true for war crimes – the third basis for intervention under article 4(h) of the AU Constitutive Act. The various categories of war crimes, as defined under the Rome Statute, have a clear connection with the taking or threatening of life.[64] For example, in respect of 'grave breaches of the Geneva Conventions',[65] particular acts that constitute the taking or threat of life include wilful killing, torture or inhuman treatment and wilfully causing great suffering, or serious injury.[66] Under the category 'other serious violations of the laws and customs applicable in international armed conflict',[67] particular acts that are identified as involving the taking of or threat to life include intentionally directing attacks against the civilian population, intentionally directing attacks against personnel involved in humanitarian assistance or peacekeeping missions and intentionally launching attacks in the knowledge that such attacks will cause incidental loss of life to civilians and the killing or wounding of combatants having laid down their arms.[68] The Statute also identifies particular gases and weapons the use of which constitute war crimes.[69] As with crimes against humanity, the protected rights in the prohibition of war crimes include the right to life and bodily integrity.[70]

Finally, it is worth recalling that the duty on states in respect of the right to life is not only for the state itself not to take life arbitrarily but also to take steps to prevent the arbitrary deprivation of life.[71] This refers primarily to steps that a state must take within its own territory.[72] Nonetheless, there is no *a priori* reason why this cannot apply to the prevention of arbitrary deprivation of life abroad *when the steps in question are taken collectively under legitimate multilateral action.*

(A/74/10).

62 Werle & Jessberger (n 58) at 238.

63 Werle & Jessberger (n 58) at 333.

64 See art 8 of the Rome Statute.

65 Art 8(2)(a) of the Rome Statute.

66 As above.

67 Art 8(2)(b) of the Rome Statute.

68 As above.

69 As above.

70 Werle & Jessberger (n 58) at 409.

71 General Comment 3 (n 31) para 7.

72 In this respect, Heyns & Probert (n 1), at 66, in describing the duty to prevent, argue that this duty requires States to take measures 'within their territory or other areas under their control'.

Tension

While there is some obvious concordance between the right to life in article 4 of the African Charter and the right of the Union to intervene in response to acts of genocide, crimes against humanity and war crimes, there are also areas of tension. At the outset, even before the areas of tension are described, it is worth pointing out that these two provisions operate in two different areas of international law. While article 4 of the African Charter operates in the area of international human rights law, article 4(h) of the AU Constitutive Act falls squarely within *jus ad bellum*. The intersection between international human rights, including the right to life, and international humanitarian law has certainly been considered, including in Christof's work.[73] Yet, the intersection between international human rights law and the *jus ad bellum,* unlike the *jus in bello*, has not been a major focus of consideration.[74] Moreover, it may be argued that there is no intersection between the two areas, since the duty to prevent the arbitrary deprivation of life might be seen as territorially bound. In this respect, Heyns and Probert have noted that while the right to life implies not only 'the duty to refrain from' arbitrarily taking life but also the duty 'to protect [life]' through various measures, these measures relate to guaranteeing 'that the right to life is respected within their territory or other areas under their control'.[75] Yet, this quotation from Heyns and Probert does not mean, or need not necessarily mean, that extraterritorial action to prevent the loss of life is always prohibited. It really only means that the right to life does not create *the obligation to act extraterritorially*. Whether states are *permitted* to act to prevent the arbitrary deprivation of life is dependent on other considerations.

Against this background, a tension between the right to life and the right of the Union to intervene forcibly is that the right to intervene militarily might itself lead to the loss of life, not only of the those guilty of war crimes, crimes against humanity and genocide, but also of innocent people caught up in the crossfire. Of course, in these circumstances, the principles of proportionality under the rules of international humanitarian law can serve to mitigate the loss of innocent life in the event that intervention does take place.[76] Thus, once a decision to intervene under article 4(h) of the Constitutive Act (or for that matter under any rule of international law permitting intervention)

73 See Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,* (2012) (A/HRC/20/22), at paras 65-70. See also Heyns & Probert (n 1) at 63-66.

74 Exceptionally, see Heyns (n 7) at para 57-62.

75 Heyns & Probert (n 1) at 66.

76 See J Dugard *Confronting apartheid: a personal history of South Africa, Namibia and Palestine* (Jacana, 2018) at 204.

and 'foreseeably inflicting excessive incidental casualties' would be contrary to the law of armed conflict and thus unlawful.[77] Thus, the rules of international humanitarian law, while not enough to prevent innocent loss of life, would serve to minimise it.

While the rules of international humanitarian law can address the conduct of hostilities, they cannot address the question whether the intervention itself – the decision to intervene – is lawful. As described above, arbitrariness as the standard for the lawfulness or not of the deprivation of life, is to be assessed on the basis of, among other factors, whether the deprivation is consistent with law.[78] This includes not only domestic law, but also international law.[79] This means that, if an intervention undertaken pursuant to article 4(h) of the AU Constitutive Act is prohibited under international law, then any deprivation of life resulting from that intervention would be arbitrary and, as a consequence, a breach of the right to life. This constitutes, perhaps, the main area of tension between article 4 of the African Charter and article 4(h) of the AU Constitutive Act.

Different views have been expressed about the consistency with international law of article 4(h) of the Constitutive Act and, in particular, the consistency of any act of intervention undertaken thereunder with the prohibition on the use of force.[80] As with the right to life and the prohibition of the acts referred to in article 4(h) as forming the basis of the right of the Union to intervene, the prohibition on the use of force is *jus cogens*,[81] making the question of the intersection between article 4 of the African Charter and article 4(h) of the AU Constitutive Act all the more intriguing. Of course, the right to intervene under article 4(h) is, itself, not *jus cogens*. It is therefore apposite to ponder its lawfulness under international law.

As mentioned above, there are different views on the consistency with international law of article 4(h) of the Constitutive Act. At one end of the spectrum, there is a view that any action pursuant to article 4(h) which is not endorsed or approved by the UN Security Council falls foul of the prohibition on the use of force and would be thus be unlawful and a violation of *jus cogens*. Any resulting loss of life would consequently amount to arbitrary deprivation of life and thus would

77 Dugard (n 76) at 64.

78 See General Comment 3 (n 31) para 12.

79 As above.

80 For a comparison of different views see T Maluwa 'African state practice and the formation of some peremptory norms of general international law' in D Tladi (ed) *Peremptory norms of general international law* (jus cogens): *disquisitions and disputations* (Brill, 2021) 291-299 and O Corten & V Koutroulis 'The *jus cogens* status of the prohibition on the use of force: what is its scope and why does it matter?' in D Tladi (ed) *Peremptory norms of general international law* (*jus cogens*): *disquisitions and disputations* (Brill, 2021) 646-651.

81 See Tladi *Fourth Report* (n 4) paras 62-68.

be breach of international law. This perspective is based on a strict reading of the law of the Charter on the prohibition of the use of force which foresees only two exceptions to the prohibition, namely self-defence and authorisation of the UN Security Council. At the other end of the spectrum, intervention under article 4(h) may be seen as a new exception to the prohibition on the use of force or even an evolution of existing exceptions, whether through evolutive interpretation of the Charter or evolution of state practice and *opinio juris*.

A possible (middle of the road) view is that intervention under article 4(h) is permissible under the law of the Charter on the basis of Security Council endorsement of such intervention *but that in the absence of an affirmative decision to the contrary,* the Council *is deemed* to have endorsed any action under article 4(h) if duly authorised by the AU Assembly. This alternative view would be dependent on the interpretation of article 53 of the Charter, which provides that the 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council'.[82] The phrase 'without the authorisation of the Security Council' would seem to imply the necessity of a positive decision by the Council before any action under article 4(h) could be undertaken. Nonetheless, it is not inconceivable, if there is sufficient practice (and acceptance of that practice) for that language to be read as permitting intervention in the absence of an affirmative decision to the contrary. After all, under the language of the Charter abstention by a permanent member should be read as a veto,[83] yet due to practice and the acceptance of that practice, abstentions do not prevent the adoption of resolutions.[84] Given that the rule in question in the current case – the prohibition on the use of force – is *jus cogens*, it would be necessary, in addition to showing the consistent practice accepting the intervention without an affirmative endorsement, that the rule emanating from that practice is

82 Art 53(1) of the UN Charter.

83 Art 27(3) of the Charter provides as follows: 'Decisions of the Security Council … shall be made by an affirmative vote of nine members *including the concurring votes of the permanent member* ' (emphasis added).

84 *Legal Consequences for States of the African Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, *ICJ Reports 1*971, p.16, at para 22, responding to South Africa's argument that UN Security Council resolution was improperly adopted because France and the United Kingdom had abstained from the vote: 'However, the proceedings of the Security Council extending over a long period time supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions … This procedure followed by the Security Council, which has continued unchanged … has been generally accepted by Members of the United Nations and evidences a general practice of that Organisation'.

accepted and recognised as peremptory as well.[85] Yet, this too is not an insurmountable hurdle given that the purpose of that practice (and possible rule) would be to prevent atrocities, the prohibition of which is considered *jus cogens*. Whether the law has reached this state (or whether it will in the future) is not at all certain, but it does seem clear that ultimately the proper relationship between article 4 of the African Charter and article 4(h) of the AU Constitutive Act will be dependent on the permissibility of intervention under general international law of intervention undertaken pursuant to article 4(h) of the Constitutive Act.

Conclusion

The intersection between the right to life under article 4 of the Charter and the right of the Union to intervene under article 4(h) of the Constitutive Act raises an intriguing question. It is a pity that Christof never brought his remarkable mind to bear on this intractable question. After all, at the heart of the question is the centrality of those rules of international law that Christof arguably cherished more than any other – the right to life and the sanctity of life.

Christof's reverence for life was not purely academic. It was also very much personal. He also believed not just in ensuring that life was lived but that it was lived fully. Christof's son, Adam, shared with us a profound sentiment that his father left him, which captures the reverence for a life well and fully lived. It is appropriate to end this chapter in honour of Christof, about Christof's most cherished rule, with that sentiment: '*Jy het net een kans. Eendag sal die ligte uitgaan.*'[86]

85 See generally Mehrdad Payandeh 'Modification of Peremptory Norms of General International Law' in Tladi (n 80).

86 Own translation: You have just one chance [at life]. One day the light will go out.