

**69<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights  
15 November – 6 December 2021**

**Statement under Agenda Item 3: Human Rights Situation in Africa  
NGO Observer Status No. 334**

Dear Honorable Chairperson and Commissioners

The Dullah Omar Institute for Constitutional Law, Governance and Human Rights (DOI) welcomes the opportunity to make this statement to the 69<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights (African Commission). The DOI engaged in research (in Southern and East Africa) on the use of States of emergency, - disaster, and - calamity within the context of COVID-19 with a particular emphasis on criminal justice and human rights.<sup>1</sup> In this regard we paid particular attention to measures taken by States, litigation on restrictions imposed, compliance with fair trial rights and the effectiveness of oversight mechanisms during COVID-19 restrictions.

We make the following statement based on our key research findings as referred to above:

**Noting** that at least 17 African countries implemented States of Emergencies, nine States of Disaster or Calamity; 11 Public Health Emergencies and two have issued State of Health Alerts; while also enacting various measures in the form of lockdowns or curfews to restrict population movement and aiming to prevent the spread of the virus.

In our comparative study of five African countries; namely, Kenya, Malawi, Mozambique, South Africa and Zambia, we found that although the Constitutions and laws of each of these countries had some form of emergency measure provisions available, the term 'pandemic' is not explicitly used. COVID-19 has brought about the

---

<sup>1</sup> T Lorizzo et al., '*Appendix Three - Country Survey: Mozambique*', Research Report (Dullah Omar Institute, 2021), <https://acjr.org.za/acjr-publications/appendix-three-mozambique.pdf>; J Mangwanda et al., '*Appendix One - Country Survey: Kenya*', Research Report (Dullah Omar Institute, 2021), <https://acjr.org.za/acjr-publications/appendix-one-kenya.pdf>; L Muntingh et al., '*Criminal Justice, Human Rights and COVID-19 - a Comparative Study of Measures Taken in Five African Countries*', Research Report (Cape Town, 2021), <https://acjr.org.za/acjr-publications/combined-covid-19-report-13-10-2021-final.pdf>; K Petersen et al., '*Appendix Five - Country Survey: Zambia*', Research Report (Dullah Omar Institute, 2021), <https://acjr.org.za/acjr-publications/appendix-five-zambia.pdf>; K Petersen et al., '*Appendix Four - Country Survey: South Africa*', Research Report (Dullah Omar Institute, 2021), <https://acjr.org.za/acjr-publications/appendix-four-south-africa.pdf>; J Redpath et al., '*Appendix Two - Country Survey: Malawi*', Research Report (Dullah Omar Institute, 2021), <https://acjr.org.za/acjr-publications/appendix-two-malawi.pdf>.

realization that pandemic-specific laws are necessary, and should be included in legislative and constitutional provisions. Mozambique and Kenya, for example, have now included pandemic-related terminology and developed pandemic-specific laws to guide possible future pandemics.

The promulgation of extraordinary COVID-19 measures (or the attempt thereto), introduced through declarations of States of emergency or disaster, curfews and other decrees, have restricted fundamental rights and freedoms and weakened the scope of parliamentary oversight. Examples in this regard include South Africa, Kenya and Malawi.

We are concerned that the promulgation of such measures, which increased State powers, and provided for no, or limited, legislative oversight, open the door for authoritarian creep. We therefore call upon African States to ensure that extraordinary events, such as a prolonged public health crisis, and any pandemic specific laws, and any extension thereof, are subject to parliamentary oversight.

We are aware that the gravity and exigency of the COVID-19 pandemic at the beginning of lockdowns made public participation in the promulgation of measures difficult (e.g. Kenya and South Africa), but as the lockdown progressed and new data became available, which ameliorated the effects of the spread of the pandemic, we became increasingly concerned about the lack of public participation in the promulgation of subsequent measures, which must at least be thoroughly interrogated to affirm their reasonableness and justification.

Under international human rights law, limitations of rights are permitted in certain circumstances. However, we are concerned about the use of force, killings and torture meted out by police and the military in the countries we reviewed in enforcing COVID-19 measures. This clearly constituted unjustifiable limitations of the rights to life and the prohibition of torture.

In Kenya and South Africa, the Courts ruled against the use of force by law enforcement agencies and called upon leadership to provide policing guidelines and operational procedures to its members enforcing the COVID-19 measures. We therefore call upon States to ensure that their law enforcement officials are properly trained and equipped to comply with human rights standards in all circumstances, including public health emergencies, and that they are held accountable for human rights violations. In this regard we place particular emphasis on the absolute prohibition of torture, carrying the status of a peremptory norm under international law, meaning there can be no justification for a derogation.<sup>2</sup>

---

<sup>2</sup> *Filártiga v. Peña-Irala*, No. 630 F.2d 876 (2d Cir.) (30 June 1980).

Whilst measures have been taken to reduce the prison population in some countries, the remand populations are likely to have increased due to arrests for violations of COVID-19 measures. We call on the African Commission to encourage States to ensure that minor infringements of COVID-19 measures:

- are not criminalised;
- detention is not used to ensure the presence of an alleged violator at court and that infringements are declassified;
- imprisonment is not imposed as a penalty, even when conditional to the payment of a fine, and
- expunge criminal records already imposed under COVID-19 related laws.

Looking ahead, it will be important to draw lessons from the COVID-19 pandemic period by examining the core common problems countries experienced in order to improve their pandemic preparedness. Irrespective of the context of future pandemics; upholding, promoting and advancing human rights should be a central focus of all government endeavors.

We therefore call on the Focal Point on Human Rights in Conflict Situations in Africa, tasked by Resolution 447 of the African Commission to uphold human rights during situations of emergency and in other exceptional circumstances,<sup>3</sup> to consider our observations and concerns in the development of Guidelines on adhering to human and peoples' rights standards under the African Charter when declaring States of emergency or disaster.

**Submitted by:**

Prof L M Muntingh (lmuntingh@uwc.ac.za)  
Africa Criminal Justice Reform  
Dullah Omar Institute  
University of the Western Cape  
South Africa

Ms K E Petersen (kepetersen@uwc.ac.za)  
Africa Criminal Justice Reform  
Dullah Omar Institute  
University of the Western Cape  
South Africa

10 November 2021

Ms J Manganda (jmangwanda@uwc.ac.za)  
Africa Criminal Justice Reform  
Dullah Omar Institute  
University of the Western Cape  
South Africa

---

<sup>3</sup> ACHPR/Res. 447 (LXVI) 2020.