



# COVID-19 and State Compliance with Human Rights Standards in SADC

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# Table of Contents

EXECUTIVE SUMMARY.....P.6

1. INTRODUCTION.....P.7

2. COUNTRY PROFILES.....P.8

2.1 Mozambique.....P.8

2.2 Zimbabwe.....P.16

2.3 Botswana.....P.24

2.4 Zambia.....P.29

3. OVERALL FINDINGS AND RECOMMENDATIONS.....P.39

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# EXECUTIVE SUMMARY

Since March 2020, governments in Southern Africa have implemented measures to combat the spread of COVID-19, with the attendant effect of restricting some fundamental freedoms. International and domestic law allows reasonable limitation of some human rights when faced with a natural disaster such as the COVID-19 pandemic. However, limitation of rights must be consistent with the principles of proportionality and non-discrimination. Further, some rights are non-derogable and must be respected even during the subsistence of a national disaster or public emergency. In order to support the rule of law and encourage good governance, the Africa Judges and Jurists Forum (AJJF) undertook a study on state compliance with human rights in the context of the pandemic. The study focuses on four jurisdictions in Southern Africa: Botswana, Mozambique, Zambia and Zimbabwe. It compares domestic law and practice with regional and international obligations and best practices.

## Key findings:

- i. Emergency measures have resulted in the limitation of non-derogable rights including the right to life, freedom from torture and degrading treatment and the right to human dignity.
- ii. Some restrictive measures do not meet the requirements of reasonableness, necessity and proportionality. These include, but are not limited to, demolition of vending market stalls and the criminalizing public critique of government responses to the pandemic.
- iii. Unreasonably restrictive measures have been deleterious to the right of access to livelihoods.
- iv. Several rights and fundamental freedoms have been curtailed as part of the response to the pandemic and these include, but are not limited to the right to social security, adequate health care, adequate housing, access to water, dignity and equality.
- v. The COVID-19 pandemic has been used as a cover to deprive people of political representation, restrict civil space and strengthen authoritarianism.

# 1. INTRODUCTION

Human rights remain the cornerstone of good governance, the rule of law and democratic accountability. The protection of civil liberties is an essential guardrail against democratic backsliding and descent to totalitarianism. This is ever-more relevant in the context of a global pandemic when emergency measures permit derogation from certain freedoms. A people and rights centered approach is the only way that the pandemic will not devolve into a threat to the rule of law and constitutionalism whilst adequately responding to the immediate threat to human life. For this reason, the Secretary General of the United Nations issued guidelines on human rights centered state responses to the pandemic. The guidelines are a comprehensive tool for state actors which are a useful comparator in assessing state action in the context of the pandemic.

Several Southern African countries have legal obligations under the three United Nations human rights instruments commonly referred to as the international bill of rights. Article 4 (1) of the International Covenant on Civil and Political Rights (ICCPR) is the seminal international law provision germane to emergency provisions. It provides as follows:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

This means that states are permitted to derogate from the ICCPR only to the extent that is responsive to the emergency whilst upholding other obligations under international law and respecting the principle of non-discrimination. Further, certain rights are absolute in that they cannot be restricted even during times of a public emergency. These include the rights to life and freedom from torture.

All derogations from fundamental freedoms must be provided for by law and be necessary and proportionate. The severity, duration and geographic scope of the restrictions must be limited and responsive to the public emergency. That is to say, restrictive measures must not limit rights save to the extent that is necessitated by the emergency. These international principles have binding force as they have been domesticated by many SADC countries including Botswana, Eswatini, Mozambique, Zambia and Zimbabwe. In spite of these legal obligations, these states have implemented measures restricting the enjoyment of fundamental freedoms, including rights which are absolute under domestic and international law. In extreme cases, the derogations have included extra-judicial killings, abductions and acts of police brutality, thus highlighting grave threats to the legal and constitutional order. Even though the restrictive measures have been prescribed by law, some still fail the necessity and proportionality tests. Laws which criminalized criticism of governments' response to the pandemic were clearly unnecessary and disproportionate, as was the demolition of informal market stalls. Broadly restrictive lockdown measures without socio-economic safety nets also disproportionately affected ordinary workers and the right of access to livelihoods.

This report is designed to highlight the areas in which states can reform their response to the pandemic to live up to the national and international legal obligations. It is anchored in the belief that fundamental freedoms allow for comprehensive and holistic solutions which are sustainable, popularly accountable and human rights-compliant.

## 2. COUNTRY PROFILES

### 2.1 Mozambique

#### i. Overview of State Responses

On 12 March 2020, Mozambique's National Director of Public Health announced measures to combat the pandemic which included quarantining visitors from countries with over 1000 confirmed cases of COVID-19. This was later clarified on 16 March 2020 when the President indicated that the mandatory 14-day quarantine applied to all persons arriving from countries with active transmission, regardless of Mozambican citizenship. The President also suspended all foreign state travel and events with more than 300 people. At the time of the announcements, these limitations were not supported by any law.

The Centre for Public Integrity (CIP) issued a statement on 19 March 2020 labelling the measures as "manifestly insignificant given the scale of the threat in the region." The CIP called on the government to declare a state of national emergency in accordance with Constitution. The CIP also challenged the government to ensure the availability of water in public places and provision of mandatory and free testing for those with symptoms. A Presidential Decree issued on 20 March 2020 declared a state of emergency. The declaration was extended on three occasions. These decrees were ratified by the Assembly as required by the Constitution. During this time, COVID-19 cases were increasing mainly in Maputo city and Maputo province. On the third and final extension of the state of emergency, the government relaxed restrictions to allow resumption of activities in certain sectors including education, business, culture and tourism. These were to be opened "in strict compliance with the preventive measures and protocols defined by health authorities".

Following the expiration of the state of emergency, on 29 July 2020, the government declared a state of public calamity under the Legal Regime of Management of Disaster Risk Reduction and the associated Regulations of Disaster Risk Management and Reduction Law. Unlike a state of emergency, a state of public calamity subsists until terminated by the government. It introduced several measures to contain the spread of COVID-19. This included mandatory home quarantine for any citizen who had direct contact with a COVID-19 patient, provision of a Polymerase Chain Reaction (PCR) test results by travelers, mandatory 10-day home quarantine by travelers and an additional PCR test or 14-day quarantine. Further, wearing masks in crowded and public spaces was declared mandatory. Commendably, vulnerable persons and citizens aged 65 or over; persons with underlying chronic health conditions deemed to belong to risk groups; and pregnant women were to be provided special protection.

However, public transport, educational institutions, places of worship and public gatherings were adversely affected by the declaration of a state of public calamity. Based on continuous review of the situation, the government undertook to have gradual reopening of schools and colleges from 1 October 2020.

#### ii. Implications on human rights

The Constitution of Mozambique guarantees freedom of expression and access to information (art.48); the right to privacy (art.41); rights of children (art.47); the right to healthcare (art.89); the right to education (art. 88); freedom of assembly and association (art. 51, and article 52) and the right to profession or work (art. 84). These rights directly co-relate with the state's regional and international obligations and were affected by the implementation of emergency measures.

A state of emergency is recognized under domestic and international human rights law. The restrictions under a state of emergency must be in pursuit of a legitimate aim and must be provided by law. Any limitations must be necessary and proportionate to mitigating or responding to the emergency. These restrictions must be consistent with fundamental rights and freedoms, including non-discrimination. Vulnerable groups such as women, children, persons with disabilities, and internally displaced persons (IDPs) are entitled to protection without discrimination on any grounds.

The Constitution of Mozambique recognises international treaties which are ratified and these have the same force and effect as domestic laws. Such treaties include the African Charter on Human and Peoples Rights (African Charter) and the ICCPR. Other relevant instruments include the Convention on the Rights of Children and the Maputo Protocol to the African Charter on the Rights of Women in Africa. These instruments, and other persuasive declarations, require adherence to human rights standards, more so during public health disasters.

#### a) Freedom of Expression and Access to Information

Article 48 of the Mozambican Constitution protects freedom of expression and the right to information. Mozambique adopted an access to information law consistent with its constitution and international law obligations. Prior to the COVID-19 pandemic, there were several violations in respect of freedom of expression and access to information. Journalists and media houses were severely constrained by an inhibiting operating environment. This trend persisted during the pandemic, with reports indicating bombings of media premises as well as arrests, attacks and enforced disappearance of journalists.

The passing of laws that criminalize spreading of false information around COVID-19 has been prevalent in Southern Africa. The Mozambican emergency decree provided that during the duration of the State of Emergency, media outlets that broadcast information on COVID-19 contrary to official policy are sanctioned. Following concerns raised by civil society, a similar provision was passed providing that "without prejudice to civil and disciplinary sanctions, the dissemination of false information on COVID-19 and failure to comply with the restrictive measures in the cases provided for in this Decree are punishable under the terms of the applicable legislation."

The Media Institute of Southern Africa (MISA) Mozambique approached the courts arguing that the government through the decree was violating the Constitution by threatening to sanction "media that transmits information about Covid-19 contrary to the official position." In the court action, MISA Mozambique argued, among others, for a declaration that the press and media are required as an essential service for the purposes of implementing the state of emergency transparently.

In a violation of press freedoms, journalists who exposed police corruption under guise

of COVID19 responses faced retaliatory arrests. The arrest of investigative journalist Estacio Valoi, detention of Amnesty International researcher David Matsinhe and driver Girafe Saide Tufane and the repeated harassment of Matías Guente, the executive editor of Canal de Moçambique, an independent weekly investigative newspaper, were emblematic of this pattern of threats to free speech. Further, an arson attack was carried out on Canal de Moçambique offices on 23 August 2020, which destroyed the newsroom, furniture, the outlet's archives, and all the equipment normally used in content production.

## **b) Freedom of Assembly and Association**

Article 51 of the Mozambican Constitution enshrines freedom of assembly and demonstration for all citizens. This is supported by article 52 which recognises freedom of association. The state of emergency and state of public calamity placed restrictions on the exercise of these rights. Cases of arrests of citizens violating the state of emergency regulations were recorded. In April, the police reported that 869 persons had been arrested for violating the emergency measures. Despite the emergency declaration not stipulating a curfew, reports indicate that the law enforcement agents were implementing a curfew between 2200 hrs. and 0700 hrs. This was in violation of the emergency declaration and an example of police rent seeking behavior.

A peace advocacy regional group, ACCORD recorded that in April 2020, taxi drivers reportedly blocked main roads in the port city of Ncala and riots broke out in protest of the authorities' decision to seize motorbikes and ban motorcycle taxis for contravening social distancing measures. Eleven people were arrested. On 17 August 2020, another 150 people on Inhaca island in Maputo were arrested for violating the state of emergency. Only 11 cases were heard in the courts, and the rest released without being required to pay for the bond or after paying fines. The district police commander, alleged that the arrests were in connection with the illicit sale and consumption of alcoholic drinks in public places, and the gathering and movement of crowds for no legitimate purpose.

## **c) Right to Health Care**

Article 89 of the Constitution provides that all citizens shall have the right to medical and health care, within the terms of the law, and shall have the duty to promote and protect public health. Article 116 further stipulates steps that the state must take to advance the right to health care. Due to structural, economic and social factors, including protracted conflict, the country has poor health services coverage, lacks potable water, basic sanitation, suffers food insecurity, malnutrition, and infrastructure challenges. Mozambique is heavily reliant on international partners for health support, reaching over 70 % of external support in some financial calendars.

The conflict-ridden region of Cabo Delgado has been unable to respond to the COVID-19 pandemic. According to the United Nations' Office for the Coordination of Humanitarian Affairs (OCHA), the conflict has led to 25 health facilities being closed and 596 health workers fled due to insecurity. The World Health Organisation (WHO) recorded that "of the 1,643 health centres in the country, some 19 % do not have access to water, and 17 % do not have sanitation facilities." Water borne diseases that had not dissipated since the cyclones resurfaced. Cyclones had destroyed several health facilities. Access to health care was decimated in more than 50 districts. In addition, most of the health care facilities had limited provisions, equipment and personnel. The tests for and management of COVID-19 cases remains expensive for the average citizen. Private

hospitals were reportedly charging USD \$97 for diagnostic tests, with fake tests in the range of \$7.

## **d) Right to Education**

The Mozambican Constitution provides for the right to education. Article 88 enshrines the right to education and interpreted with article 47 on the provision of care and primary interests of the child. The state of emergency closed schools. Closure of schools has ripple effects on household stability, and social protection schemes directed at school children. The WHO-Mozambique documented that as of 23 March 2020, about 235,000 children were no longer accessing critical school feeding programmes.

UNICEF Mozambique lamented that the COVID-19 crisis is a 'child-rights crisis' with far reaching consequences in health, education, secure income and safety of children. The schools' closure affected at least 8 million children, and 15,000 schools. Schools are places of sanctuary and safety, and their closure exposed children to violations including sexual abuse and forced child marriages. The pandemic struck at a time when Mozambique faced continuous structural weaknesses in its education system. Thus, remote or online education entrenches exclusion and the divide between the rich and poor as online education does not cater for children in IDPs camps, or those in communities destroyed by cyclones. Teachers are poorly equipped to handle in class teaching, let alone online teaching.

## **e) Prison conditions**

The prisons are notorious for overcrowding. The Mozambique 2018 Human Rights Report recorded that the prisons were at 222 % capacity with 18,185 prisoners. The prisons are exposed to other medical and health issues due to inadequate hygiene, food, and medical care. Following the COVID-19 outbreak, the prison authorities suspended all visits to inmates as part of the preventive measures.

According to the UN Resident Coordinators' update on COVID-19, on 6 March 2020, the Mozambican parliament approved an Amnesty and Pardon Law for those with sentences not exceeding one year. In total, 5,302 prisoners met the requirements for release. The Mozambican prison system has approximately 21,000 inmates against an installed capacity for 4,498 prisoners. While no COVID-19 cases had been recorded by time of conducting research for this report, the overall situation in the prisons portends a crisis in the unfortunate event of an infection. Already, inmates are exposed to poor hygiene, overcrowding, insufficient health and places them at very high risk.

## **f) Internally displaced persons**

Like elsewhere in the world, the internally displaced persons in Mozambique experience specific forms of deprivation. They are extremely vulnerable and they need protection and assistance. By virtue of their displacement, they lack the basic necessities they would require to respond effectively to a virulent pandemic such as COVID-19. Nevertheless, the rights enshrined in the Constitution must be enjoyed by all without discrimination and must not be restricted on account of displacement.

The numbers of IDPs continued to increase with the insecurity and insurgence in the north and those displaced due to cyclones. The WHO in its appeal for funding estimated

that over 100,000 IDPs in 76 sites across Mozambique's six provinces were affected by Cyclones Idai and Kenneth in 2019 and over 200,000 displaced by the insecurity in Cabo Delgado.

As the UN Secretary General observed, IDPs and other communities that were already vulnerable before the pandemic face multiple crises of health, social economic and protection. These crises require holistic and simultaneous interventions. IDPs whether of natural disasters or conflict are unable to access medical support, as they are removed from their primary health care centers, or in constant state of transition. Most IDPs camps are overcrowded, with limited sanitation facilities.

The COVID-19 impact on women, girls and persons with disabilities who are IDPs is already disproportionate. Individuals on treatment for chronic illness, and those requiring sexual health reproductive care are deprived of these facilities. A conflict monitoring group, Armed Conflict Location & Event Data Project (ACLED), noted that the Cabo Delgado province has 164,240 HIV/AIDS patients, of whom 100,150 receive antiretrovirals, and 3,611 tuberculosis patients under treatment. The exact numbers of patients displaced due to the armed conflict is not known.

Mozambique as many countries in Southern Africa has migrant workers, mainly in South Africa. Mozambique experienced huge volumes of returnees from South Africa. The International Organisation of Migration (IOM) estimated that over 14,000 Mozambicans returned on commencement of lockdown measures in South Africa. The returnees faced discrimination in their communities. But even within Mozambique certain migrants especially of Asian or Chinese origin were discriminated and stigmatized as the source of the virus. As Kyled observed Mozambicans were avoiding contact with Chinese who reside in Mozambique. The stigma, discrimination and xenophobia associated with COVID-19 has made many IDPs, migrant workers and foreign nationals unsafe.

### **g) Right to social protection, right to work**

The Constitution has no specific provision on social protection other than article 95 and further expanded in article 125 which speaks to support people with disabilities and article 124 which provides that the elderly must be provided with special protection by their families, state and society as vulnerable communities. The Constitution provides for "special protection," and not social protection, though this could be interpreted to mean the same. Mozambique's social protection system is weak. Specific rights that social protection systems will advance include the right to an adequate standard of living, food, housing, education and right to health care.

The right to work is guaranteed in the Constitution as a right and duty for every citizen. The World Bank observed that "about 80 % of the Mozambican labor force work in the informal sector, with a majority of retail informal firms likely to be majority-owned by women, 52%, against 45% for manufacturing and 38 % for services." This means that a significant population needed some form of humanitarian assistance. A report attributed to the Minister of Labour and Social Security announced that at least 39,000 people had lost their jobs in the formal sector due to COVID-19 as at the time this research was conducted. The state of emergency restricted the number of workers in any factory to a third of the normal workforce, with a turnover of teams every 15 days.

The informalised economy and emergency orders that caused markets to shut down, small enterprises to stop trading, moved families from meagre to zero earnings. In Maputo, there were reports of the police confiscating the goods and wares from traders. In some instances, informal market stalls were destroyed under the guise of COVID-19 responses but in pursuit of city beautification agendas. The efforts to respond to the pandemic ignored the economic factors and high levels of poverty, and the measures were not proportionate to the economic realities. Reports of law enforcement agents confiscating merchandise from market vendors, further depriving these individuals the right to work and food with significant implications on household and community wellbeing were recorded.

As part of COVID19 response efforts, Mozambique appealed for assistance to the international community. An appeal of USD\$ 73.5 million was made to the World Bank. These funds were initially set for the reconstruction work on the Cyclone Idai and Kenneth Emergency Recovery and Resilience Project (CERRP). The funds were supposed to be used for providing social protection for the poor. The government intended to provide cash transfers to an estimated 250,000 urban poor households. The payment was to consist of MZN 1,500 (USD\$21) per month for 6 months. Reports suggested that an additional USD 700 million for direct budgetary support had been requested from IMF. The funds were deployed to fuel, electricity, and health sector, but no food distribution or relief was provided to those affected by COVID-19. In November, the EU provided an additional €100 million for education, health and social protection. Whether these funds will be deployed to the right beneficiaries remains to be seen as transparent procurement and accountability tend to suffer during emergencies.

## **iii. Recommendations**

### **a) Ratification of international instruments.**

Economic and social rights have been restricted due to the measures adopted in response to the pandemic. These are largely related to the right to work, and social protection. Mozambique has components of these rights guaranteed in the Constitution. The study recommends that Mozambique ratifies the International Covenant on Economic Social and Cultural Rights (ICESCR). This has the potential to improve monitoring the implementation of these rights due the wealth of standards and frameworks associated with this instrument. The ratification should include the optional protocol that allows for individual complaints to the treaty body.

### **b) Accountability in enforcing state of emergencies.**

The authorities in Mozambique must ensure that emergency restrictions are sanctioned by law, are necessary and proportionate. Constant monitoring of the government's implementation of the state of public calamity provisions is necessary in order to check against potential excesses. Clarity on the time-restrictions or any changes made should be publicly disseminated. The limitations imposed on freedom of association, and assembly and movement must be constantly reviewed, through independent judicial mechanisms, to avoid State overreach.

### **c) Human rights training and capacity for law enforcement.**

One of the most serious threats to enjoyment of rights in any state of emergency or state of public calamity are the law enforcement agents. Mozambique has a history of conflict and is experiencing an active conflict which has seen the deployment of military and law enforcement forces with reports of excessive use of force, arbitrary arrests, and executions. Competence in human rights, international humanitarian law and international criminal law is urgently required. As part of accountability, investigations on violations occasioned by the law enforcement agents must be investigated and offenders prosecuted.

### **d) Respect freedom of expression.**

The operating environment for journalists and media practitioners was restricted before the pandemic. The declaration of a state of emergency and public calamity resulted in further erosions of media freedoms and rights. The government must investigate all cases of attacks on media houses, and all cases of attacks and enforced disappearances of journalists that have been recorded during the COVID-19 period and before.

### **e) Enhance access to information.**

Since the pandemic, the generation and dissemination of information moved to online spaces. Internet access became an essential need, not only for access to information, but as a platform for economic and educational activity. The challenge is that, internet access is for a privileged few as cost and access is a factor. Private internet and mobile companies should consider supporting efforts that enable inclusion and access for individuals and communities, including reducing transaction costs for sending of mobile money.

### **f) Improve accountability for public resources.**

For funds deployed in response to COVID-19, there must be full accountability on expenditure. Misuse of national funds has been reported before, with several cases pending before national, regional and international courts involving senior ruling elite and government officials. Multilateral institutions have continued to lend Mozambique funds during this critical time which is commendable. Transparency on how these funds are used is essential for the effectiveness of the support and in building the confidence of citizens in state institutions. Further, citizens must be continuously empowered to hold government accountable for use of resources. Through their internal systems and structures, the World Bank, IMF and EU, any other bilateral creditors must disclose the loan terms sheets and details, and engage with civil society, academia and public watchdog groups.

### **g) Strengthening public health systems.**

Mozambique's health systems are dependent on foreign aid and development support. This must change, if affordable, and sustainable health systems are to be availed to citizens. The commitment to support health budgets by 15% of the national budget under the Abuja Declaration was missed by most African countries. A weakened public

health system that already suffers severe shortages in personnel, equipment including protective personal equipment (PPEs) undermines the country's ability to respond to COVID-19. Investment in resourcing the institutions must be prioritized and the government must demonstrate that commitment by increasing the resource allocation to the health sector.

### **h) Improve on social protection.**

With a largely informalised economy, Mozambique must hasten the development of its social protection system. The national social security institution must demonstrate competence in administering social protection grants. Individuals whose properties or houses were destroyed by local governments taking cover under COVID-19 to conduct urban renewal exercises, must be compensated. Informal traders whose goods were confiscated and destroyed must also be compensated for losses incurred. This will contribute to ending impunity for violation of economic and social rights.





## 2.2 Zimbabwe

### i. Overview of State's responses

In Zimbabwe, COVID-19 comes within the context of protracted economic and political instability. The virus faces a disarmed healthcare system, with prevailing socio-economic conditions inhibiting optimal state responses to the pandemic.

On 17 March 2020, President Emmerson Mnangagwa declared the COVID-19 pandemic a national disaster in terms of section 27 of the Civil Protection Act. Under both the Constitution of Zimbabwe of 2013 and the Public Health Act of 2018, the government bears the duty to protect both the rights to health and life. The first set of COVID-19 response measures in Zimbabwe were announced by the President on 23 March 2020. These included the banning of all non-essential travel (excluding returning residents) and traffic, both inbound and outbound, except for movement of cargo; banning entertainment and recreational activities; capping public gatherings to 50 people; and restricting hospital visits to one visit per day per patient. Early closure of schools and tertiary institutions was ordered, and quarantine and self-isolation of suspected cases was announced.

Institutionally, a high level national taskforce was established to lead the response. Subsequent to this, the government announced additional measures, namely a total lockdown for 21 days starting on 30 March 2020. Only essential movement related to seeking health services, to the purchase of food and medicines and other essential supplies and critical services, was exempted. Wearing face masks in public spaces became mandatory. All public transportation services, except the State-owned Zimbabwe United Passenger Company (ZUPCO), were suspended. Consequently, the Minister of Health and Child Care acting under section 68 of the Public Health Act, promulgated several regulations to implement public health measures. On 18 April 2020, which was day 21 of the lockdown, the President extended the COVID-19 national lockdown by a further 14 days to 3 May 2020, in response to the rising number of positive cases in the country. A further extension was announced on 1 May 2020 which was day 33 of the national lockdown, by a further 14 days to 17 May 2020. In both cases, enabling statutory instruments were promulgated.

On 16 May 2020 President Mnangagwa announced an indefinite extension of the lockdown, stating that the country would remain under "Level 2" of the lockdown. The "Level 2" lockdown announcement was shrouded in lack of clarity. There was no public communication that the lockdown would come in various stages, nor was it clarified how many stages the lockdown was made up of. Neither was it explained what each stage of the national lockdown entailed. Nonetheless, the President stated that government would assess the situation at two-week intervals.

The national lockdown and attendant response measures were implemented through a wave of regulations. In total, the government had promulgated about 40 COVID-19 related

regulations as of December 2020. Among the regulations was Statutory Instrument 96 of 2020, through which rent and mortgage payments were deferred for the duration of the lockdown, and a moratorium on evictions was imposed. This was subsequently ended by Statutory Instrument 135 of 2020. Subsequent regulations relaxed the lockdown, and allowed for reopening of certain businesses under specific measures.

Statutory Instrument 200 of 2020 was significant in that it introduced prosecution for false reporting during the national lockdown. Any person who publishes or communicates false news about any public officer, official or enforcement officer involved with enforcing or implementing the national lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the State's enforcement of the national lockdown, would be liable for prosecution under section 31 of the Criminal Law Code and liable to the penalty of a fine up to or exceeding level 14 or imprisonment for a period not exceeding twenty years or both. A nationwide curfew was also introduced, between 8:00pm to 6:00am. Low-risk sporting activities and gatherings were restricted to times between 9:00am and 3:00pm. The curfew was later relaxed to start at 10:00 pm and ending at 6:00am.

### ii. Implications on human rights

#### a) The right to demonstrate

As effects of the national lockdown became apparent on the working class, protests against the weakening economy started to sprout. The first of the protests was led by opposition MDC Alliance youth leaders on 13 May 2020 in Warren Park, Harare. The flash "hunger protest" was aimed at highlighting the plight of citizens. Police officers responded by initially arresting Joana Mamombe Member of Parliament for Harare West, and MDC Alliance leaders, Cecilia Chimhiri and Netsai Marova for defying the lockdown by organising the protest. Under unclear circumstance, the trio found themselves outside police custody, and instead as victims of a gruesome abduction and subsequent torture. They were discovered dumped on 14 May in Bindura, a town outside Harare, following a period of their lawyers failing to locate them. MDC Alliance youth leader Obey Sithole was also arrested and detained for one night on 26 May in connection with the protest. Similarly, on 29 June, Makomborero Haruzivishe was arrested at Mbare Magistrates Court over the Warren Park flash demonstration and taken to Harare Central Police Station where he was detained for 5 hours before being released without charge.

On 20 June in Mutare, at least 35 nurses protesting against the lack of personal protective clothing were arrested for staging a demonstration, ostensibly for violating COVID-19 regulations. On 6 July, police officers in Harare also arrested 12 nurses and charged them with contravening COVID-19 regulations, for protesting salary cuts and lack of PPEs.

On 19 June 2020 police officers arrested pro-democracy protesters, Namatai Kwekweza and Vongai Zimudzi outside the New Government Complex in Harare for allegedly participating in a gathering with intent to cause public violence, breach of peace, bigotry as provided under section 37 of Criminal Law (Codification and Reform) Act. The duo sat with placards outside the complex urging the government to consult three million people who voted in favour of the Constitution to gather their input before amending the Constitution as the government plans to do. On 31 July, police officers arrested eighteen people including award-winning novel writer Tsitsi Dangarembga and MDC Alliance Spokesperson Fadzai Mahere, for staging peaceful and socially-distanced protests against corruption.

The State continued to criminalise and restrict peaceful assembly and association with laws such as section 22 of the Criminal Law (Codification and Reform) Act and the newly enacted Maintenance of Peace and Order Act [Chapter 11:23] which has deleterious provisions that erode the freedoms of peaceful assembly and of association. This law is not aligned with the Constitution and international standards. The State's approach has disregarded the Constitutional Court's counsel in *Democratic Assembly for Restoration and Empowerment & 3 Ors v Saunyama N.O & 3 Ors*, per Makarau JCC that:

[P]rotests and mass demonstrations remain one of the most vivid ways of the public coming together to express an opinion in support of or in opposition to a position. [...] Long after the demonstrations, and long after the faces of the demonstrators are forgotten, the messages and the purposes of the demonstrations remain as a reminder of public outrage at, or condemnation or support of an issue or policy. [...] Demonstrations have thus become an acceptable platform of public engagement and a medium of communication on issues of a public nature in open societies based on justice and freedom.

The right to demonstrate is provided under section 59 of the Constitution. In light of the constitutionally guaranteed right to demonstrate and petition, citizens should only be required to satisfy the COVID-19 regulations of physical distancing and wearing of face masks. There has, instead, been a trend by law enforcers to use disproportionate force to disperse protesters and the invoking of COVID-19 regulations to crush protests. The UN High Commissioner for Human Rights stated in a statement on Zimbabwe on 24 July 2020 that: "Merely calling for a peaceful protest or participating in a peaceful protest are an exercise of recognized human rights." Among the 10 Principles for the Proper Management of Assemblies developed in September 2016 by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, is the principle that: "No person should be held criminally, civilly or administratively liable for the mere act of organizing or participating in a peaceful protest."

As with many rights, the right to protest is subject to limitation. All limitation must be in terms of section 86 of the Constitution, both in substance and process. Under section 86(2), the right to protest "may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."

According to the UN Human Rights Committee's 2020 General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights, "the imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations to it. Restrictions should not be aimed at discouraging participation in assemblies, potentially causing a chilling effect." Pre-emptive arrests of protest organisers, propaganda about "violent" protests being planned and intimidation in any manner or form are illegal and unconstitutional methods of limiting the right to demonstrate.

The UN High Commissioner for Human Rights has advised that: "While recognizing the Government's efforts to contain the pandemic, it is important to remind the authorities that any lockdown measures and restrictions should be necessary, proportionate and time-limited, and enforced humanely without resorting to unnecessary or excessive force." The right to demonstrate is not automatically suspended on account of lockdown. Measures adopted by the State must meet the Emergency Measures and COVID-19: Guidance issued by the High Commissioner for Human Rights on 27 April 2020, which require that restrictions "must meet the requirements of legality, necessity and proportionality, and be non-discriminatory."

When policing demonstrations under COVID-19 regulations, the right to dignity and freedom from torture, cruel, inhuman and degrading treatment or punishment are non-derogable rights. Under section 86(3) of the Constitution, no law may limit and no person may violate these rights. If people are to be arrested and taken through due process in relation to the demonstration, their dignity must be protected and they must not be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

## b) Personal security and freedom from torture

Within the first 180 days of COVID-19 lockdown, the Zimbabwe Human Rights NGO Forum documented 12 abductions. Section 49 of the Constitution of Zimbabwe grants every person the right to personal liberty, which includes the right not to be detained without trial and not to be deprived of liberty arbitrarily or without just cause. Section 52 protects the right to personal security and to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources. Section 53 enshrines freedom from torture or cruel, inhuman or degrading treatment or punishment. In spite of the existence of the constitutional guarantees, the State continues to be implicated in cases of abductions followed by torture or severe assaults. From the patterns that have emerged in cases of abductions, victims of such abductions included political and non-political activists, calling for the respect of human rights and the law, implying that the State is using abductions and torture as another weapon to silence dissent or attack human rights defenders.

Prominent examples include the abduction and torture of MDC Alliance Harare West Member of Parliament Joana Mamombe and MDC Alliance Youth Assembly leaders Cecilia Chimbi and Netsai Marova on 13 May 2020. The trio was also sexually assaulted. The nation was perturbed when the Minister of Home Affairs and Cultural Heritage during a press briefing on 4 June casually dismissed the disappearance and subsequent torture as staged and fake. The trio now face charges of publishing falsehoods prejudicial to the State through allegedly faking their abduction. The trio's case is still ongoing.

On 30 July, unknown assailants abducted Tawanda Muchehiwa in Bulawayo. Muchehiwa was dumped about 5 km from his place of residence on 1 August around 2200hrs following a High Court ruling earlier in the day directing the police to produce him before a Bulawayo magistrate within 72 hours of the order. Muchehiwa sustained serious injuries, with doctors who attended to him saying he was exhibiting symptoms of acute renal failure.

At least 11 abductions were linked to the planned 31 July 2020 anti-corruption protest. Due to the frequency, cases of assault of civilians by security personnel have been impossible to quantify. Even after a judgment was pronounced by the High Court of Zimbabwe prohibiting the police from using unwarranted and disproportionate force against citizens in the enforcement of the national lockdown, in the case of Lucia Masvondo and Zimbabwe Lawyers for Human Rights v Minister of Home Affairs and Cultural Heritage & Others, cases of excessive use of force and assault in effecting the lockdown persisted nationwide. One particularly brutal case occurred in Bulawayo. On 16 April 2020, two sisters Nokuthula Mpofu and Ntombizodwa Mpofu were brutally assaulted for hours with batons on their backs, hips and legs by police officers who accused them of violating the national lockdown. The two sisters were leaving a supermarket in Cowdray Park. They were handcuffed to their backs, repeatedly assaulted and detained, only to be released without charge. The National Peace and Reconciliation Commission intervened and assisted the two women in filing a formal police complaint. Six police officers were arrested in connection with the case.

### c) The right to life and extra-judicial killings

The Zimbabwe Human Rights NGO Forum documented four cases of extrajudicial killings during the first 180 days of the COVID-19 lockdown. On 30 March police officers in Bulawayo assaulted Levison Ncube who died on 7 April 2020 from the injuries sustained during the assault. The police officers had reportedly used excessive force in apprehending Ncube who had been found strolling outside eMabuthweni suburb in Bulawayo in defiance of the national COVID-19 lockdown. Another case involved MDC Alliance member Mazwi Ndlovu who died following assaults by the ruling ZANU-PF party supporters in Bulilima Ward 2 in Matabeleland South, on 24 July 2020. It was alleged that ZANU-PF members assaulted him for querying a partisan maize distribution list. In Karoi, MDC Alliance District Coordinating Chairperson, Councillor Lovender Chiwaya's body was found dumped on his doorstep with signs of torture and aggravated assault. The MDC Alliance reported that Chiwaya was being threatened with death by State agents regarding his involvement in the planned 31 July anti-corruption protests prior to his death

### d) Freedom of expression and freedom of the media

As noted above, Zimbabwe enacted regulations which prohibited the manufacture and spreading of false information about the COVID-19 pandemic. In part the regulations state that:

any person who publishes or communicates false news about any public officer, official or enforcement officer involved with enforcing or implementing the national lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the State's enforcement of the national lockdown, shall be liable for prosecution under section 31 of the Criminal Law Code...

This law criminalizes the spreading of false information regardless of the publisher's intention or whether any harm was or could have been foreseen by the publisher. This law had a chilling effect on the freedom of expression. It encourages self-censorship among journalists and the public as it exposes them to arrest and detention for up to 24 hours, on mere suspicion that they may have communicated falsehoods. The President of Zimbabwe is also on record, threatening citizens that they would be jailed for 20 years if they spread false information.

The state also used the national lockdown as an excuse to harass journalists through arrest, detention and torture. A case in point is that of journalists Leopold Munhende and Munashe Chokodza who were arrested when they were coming from work. Despite identifying themselves as journalists by showing their press cards, they were made to lie down on the ground and were beaten with truncheons and whips. Another case is that of Frank Chikowore and Samuel Takawira who were arrested during the course of their work and were prosecuted for contravening the lockdown orders. Although the two were eventually found not guilty of the charges, they had spent four nights in detention and four months on trial. Several other cases of similar harassment of journalists and citizens were reported.

### e) The right of access to water

Inadequate water supplies by local municipalities forced residents to spend long hours in queues at boreholes, in contravention of lockdown and social distancing regulations. Cases of harassment, verbal and sexual abuse of women were rampant at water

collection points. Community members with private boreholes charged exorbitant prices for water. Generally, the scarcity of potable water and the continuous rise in prices of basic commodities remained the primary reasons for the defiance of the lockdown nationally. In response to court action, the Harare City Council made efforts to deploy water tankers to supply a number of suburbs, especially high density areas. The City Council also started to fix some dysfunctional community boreholes. Nationally, water shortages have remained dire throughout the COVID-19 period.

### f) The right to livelihoods, including food

Under the cover of lockdown, government ordered a clean-up campaign in urban areas, with municipalities pulling down vending stalls and other structures deemed illegal in a manner reminiscent of the infamous operation Murambatsvina of 2005. In Mbare, Harare City Council employees destroyed vending stalls and informal shops near Rufaro Stadium, the Magaba informal market and other open space markets. Demolitions also occurred in Highfields at Machipisa Shopping Centre. In Kwekwe, the Town Council destroyed vending stalls and structures that were built on undesignated areas. Town Council officials also destroyed goods that were locked up in some of the tuckshops and structures that they destroyed.

This disrupted the livelihoods of many vulnerable Zimbabweans. During the demolitions, goods and products belonging to informal traders were destroyed and confiscated by local authorities. In April at Sakubva farmers market in Mutare, police officers destroyed vegetables, fruits and other agricultural products during a raid of the farmer's market.

A number of court challenges were brought by local residents' associations to challenge the demolitions. An interim court order was obtained to halt the demolitions, but that did not fully stop the destruction. With food desperately needed by people in lockdown, many of whom were not economically productive during the height of the lockdown due to their informal economic belonging, the politics of food emerged. Cases of partisan distribution of food aid were recorded nationwide. In most reported incidents, ruling party supporters hijacked food aid distribution processes by changing the distribution lists to only benefit ZANU PF members. The Zimbabwe Human Rights NGO Forum submitted eight cases of partisan distribution of food aid involving sixty-seven victims to the Zimbabwe Human Rights Commission on 21 May 2020, and the Commission undertook to investigate the cases.

The common modus operandi have been for ruling party functionaries to collect names of beneficiaries who are party members, and diverting Department of Social Welfare-managed food aid to such members. These reports were received from Zengeza; Nyachityu in Mutare; Bindura North, Mashonaland Central; Zengeza East in Harare; Mudzi North in Mashonaland East; Bubi in Matabeleland North Province; Dangamvura, Chikanga and Sakubva in Manicaland; and Chiredzi and Gutu in Masvingo province.

Charitable establishments also sought to fill in the gap and provide food aid. This was done, for instance, in Beitbridge and Chivi by Caritas International Zimbabwe. In Buhera, World Vision distributed aid while the World Food Programme (WFP) did the same in Tsholotsho.

### g) Right to health care

Outside COVID-19 related threats, the right to health was under severe threat and strain.

The Constitution provides under section 76 that every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health care services. In terms of the provision, every person living with a chronic illness has the right to have access to basic healthcare services for the illness, and no person may be refused emergency medical treatment in any health care institution. However, the realities on the ground painted a different picture.

Challenges persisted in accessing clinics for health care services, including access to anti-retroviral therapy services, treatment for common diseases such as malaria and vaccinations. This is attributed to lack of public transportation, denial of passage by security forces, and lack of PPE resulting in clinics turning away patients. The pandemic also exacerbated challenges to women's rights in accessing sexual and reproductive health care. For children and pregnant women, municipal wellness clinics were for the most part closed as health care workers were reportedly taking in very serious cases or reported that they did not have the required PPE to attend to those in need of care. Those with chronic illnesses were also unable to access medication due to lockdown induced shortages and closures of medical facilities. In Epworth, there were long queues of people seeking medical assistance at Domboramwari Clinic. The area leading into the clinic was crowded with community members anxiously waiting for their turn. As part of COVID-19 measures, the clinic had instituted that only 4 people are allowed to come into the clinic at a given time to avoid congestion.

In Harare, municipal clinics placed a limit of the number of pregnant women who could access services – reportedly ten in a number of clinics, such as at Kuwadzana 4 Polyclinic. Before the lockdown, Maternity Clinics used to admit patients awaiting delivery. This changed and they started admitting only those already experiencing labour pains. Such reports were received from Bulilima West, Mberengwa North, and Zaka Central.

### **iii. Recommendations**

#### **a) Capacitation of medical response.**

Sufficient funding must be committed to the COVID-19 public health response. This allocation must be accompanied with strong transparency and accountability mechanisms to address leakages. The government must expeditiously roll out a massive training programme on COVID-19 targeting all health workers, including private practitioners, to enhance the workforce preparedness.

#### **b) Access to information and truth-telling.**

There is need to provide access to up-to-date and credible and evidence-based information to guide decision-making and shape citizen behaviour. Responsible leadership calls for depoliticising of the response action. The principles of good governance as captured in section 3(2) of the Constitution embodies the kind of leadership and approach required in this disaster period. It is imperative for government to be candid about infections, both in the statistics it releases and the information of how cases are being managed. Government must release consistent, regular, accurate and detailed updates in the interests of openness, accountability and transparency. The government should consider establishing reliable and accessible centres of information and to work closely with all media outlets in ensuring that information about COVID-19 gets to all citizens. Further simplified information must be provided in all the languages recognized in the Constitution on detection, prevention and treatment support available.

This includes information for the hard of hearing and the visually impaired.

#### **c) Adherence to minimum standards of human rights.**

Human rights compliant law-enforcement and policing must be encouraged. Minimum standards set at international and regional levels, and under the Constitution, are not mere administrative but substantive rules, which ought to shape the government's response. Any deviation from these must be to improve on those minimum standards. This includes striking the right balance between public health response and protection of rights, both individual and collective. This point is reinforced by WHO Director-General, Dr. Tedros Adhanom Ghebreyesus who says that "all countries must strike a fine balance between protecting health, minimising economic and social disruption, and respecting human rights." Consistency in the enforcement of regulations is needed. It is a fundamental principle of law that there must be certainty and predictability, as opposed to arbitrariness.

#### **d) Review and reform of disaster management framework.**

There is need to align the Civil Protection Act with international best practices that look at disaster prevention in a holistic manner. The Civil Protection Act must be aligned to the Constitution to allow for Parliamentary oversight over disaster response measures, in the interest of checks and balances. The country's disaster management framework must address the disproportionate impact of disasters such as COVID-19 which impose related restrictions on vulnerable groups. Such vulnerable groups ought to be provided with adequate access to health care and other measures to address disaster impact, including financial and other assistance.

#### **e) Institutional reform. Compliance is difficult without institutional reform.**

Security sector reform is key. Most of the challenges currently experienced expose deep-seated governance and service delivery issues. Law enforcement agencies must be trained on how to implement public health or emergency measures proportionately. In relation to the incessant human rights violations being perpetrated at the hands of the security forces, the government must expeditiously facilitate the establishment of the Independent Complaints Mechanism as provided for under section 210 of the Constitution. This section stipulates that: "An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services and for remedying any harm caused by such conduct."

#### **f) Socio-economic safety nets.**

With 74% of the Zimbabwean population in informal employment, and relying on daily informal work for survival, a prolonged lockdown has an unbearable impact. Government must provide real and meaningful social safety nets which include food and some financial packages. The Committee on Economic, Social and Cultural Rights (CESR) aptly observes in General Comment No. 14 that the right to health is closely linked to and dependent upon the realisation of other human rights, including the right to water, food, housing and work. For a country where life and survival for the majority depends on the informal economy, confinement to the home and cessation of economic activity is a matter of life and death.

## 2.3 Botswana

### i. Overview of state response to the COVID-19 pandemic

In response to the COVID-19 pandemic, Botswana introduced a national state of emergency. The state of emergency was introduced by President Mokgweetsi Masisi acting pursuant to section 17 of the Constitution of the Republic of Botswana (1966), as read together with the Emergency Powers Act of 2020. In terms of section 3 of the Emergency Powers Act, the President is empowered to make regulations that are necessary and proportional in order to, among others, secure public safety. Initially, the state of public emergency lasted for a month (ending in April), before it was extended further to a six month period, ending 2 October 2020. It has since been extended to March 2021. As part of the state of emergency, the government has imposed restrictions on human movement, public gatherings and at some point, schools were closed down while courts also scaled down their operations.

### ii. Implications on human rights

#### a) Freedom of Expression

Section 12 (1) of the Constitution of Botswana protects the freedom of expression. However, the vast array of already existing criminal legislation, makes the realisation of the right to freedom of expression difficult to enjoy, over and above some harsh COVID-19 legislative measures. Scholars opine that: 'although the (Botswana) constitution provides for freedom of expression, the freedoms are limited by laws that parliament makes and continues to make, and by the regulations that the executive makes and continues to make. These laws, regulations and procedures, have largely diluted the extent to which freedom may be exercised.'

Section 31 (3) of the Emergency Powers Act criminalised 'any person who publishes a statement ... with the intention to deceive ... about any measure taken by the Government to address COVID-19, commits an offence and is liable to a fine not more than P100 000 or to imprisonment for not more than 5 years or to both.' The section further captures and makes reference to 'offensive statement against government.' The "offensive statements" are not defined, creating legal uncertainty in meaning and purpose of the regulation. Under the COVID-19 measures, three people were arrested and arraigned on charges of acting contrary to the provisions of the regulations, for publishing on social media, information that is 'likely to deceive' the public about Covid-19 measures taken by Government.

#### Section 12 (1) of the Botswana constitution protects the freedom of expression:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom

of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

The limitations provided under the constitution, section 12 (2) are that the exercise of the right could be constrained 'in the interests of defence, public safety, public order, public morality or public health.' The curtailment of the rights must be reasonable in a democratic society, and reasonableness of the limitations is measured under particular circumstances and prevailing situations. The limitations to the rights provided by some of the regulations under the Covid-19 measures are not rationally connected to the purpose of the legislation, and or reasonable in a democratic society, falling short of the country's international obligations it ratified.

The government's interference with social media free expressions through vague COVID-19 regulations hunting down statements that it believes 'deceived' people, without properly defining deceit, cannot be reasonably justified in a democratic society.

There is a rule against 'unconstitutional legislative vagueness' and some sufficient degree of clarity is important for society to deduce that which is unlawful from lawful conduct. Clear and explicit legislative standards were glaringly lacking in the enforcement of some of the pandemic measures. Clarity is important especially in criminal law, as the public may have their liberty deprived for steering into unlawful conduct without the benefit of explicit legislative framework, arising out of legal vagueness. At best, some of the measures, in so far they impacted on freedom of expression, were arbitrary, irrational and vindictive. It should be noted that: 'A vague law impermissibly delegates basic policy matters to policemen, prosecutors and judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. So the legislature is prevented from passing arbitrary and vindictive laws.'

Prior to the introduction of these measures, already statutes existed that impacted on freedom of expression through criminalisation of certain publications. The existing legislative framework was on its own without the accompanying state of emergency measures, a significant form of intimidation to the print media whose primary function is the publication of information. In *Chimakure v Attorney General*, it was held that 'ideas and information are the result, basis and means of cognitive interpretation by man of the real world around him or her. It is by imparting ideas and information he or she holds to others that an individual can let them know his or her thoughts on matters of private and public concern. In that way he or she is able to influence the attitude of others towards him or her. In that regard freedom of expression consists of the right to express and convey one's conviction and opinion on any matter orally or by writing, printing or any other method addressed to the eyes and ears of other people.'

A pattern of the emergence of repressive laws, whose net effect was suppression of freedom of expression and media has been observed in Botswana, affecting both the public and media. The trend has been an 'increase rather than a decrease in legislation that drastically erodes the ability of the press to inform the public on important matters.' The enactment of the law under COVID-19 that criminalises 'offensive statements against government' ought to be viewed in this context. The state is either oblivious to, or disinterested in observing the persuasive Article 19 of the UDHR, which states that: 'Everyone has the right to freedom of opinion and expression; this right includes freedom

to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Whatever limitations are introduced by the state, they generally ought to be justifiable and reasonable. Article 29 of the UDHR, provides the scope of legislative limitations that are only justifiable:

solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society... These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

### **b) Freedom from arbitrary arrest and equal protection of the law**

Article 9 of the UDHR provides that 'No one shall be subjected to arbitrary arrest, detention or exile.' It further under Article 7, states that: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' This right is armoured again under the ICCPR, which provides, in Article 9 that: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' These international obligations are reinforced in the Botswana Constitution. Section 5 of the Constitution provides for the protection of the right to personal liberty, outlawing deprivation of personal liberty except in circumstances authorised by law.

COVID-19 measures were in some instances accompanied by arbitrary and often violent state responses particularly targeted at opposition members. The coincidence that it had to be members of the opposition, smacks of political vindictiveness on the part of the state. The spokesperson of the Botswana Patriotic Front, Justice Motlhabane, was allegedly assaulted and arbitrarily arrested on 10 April 2020 by the police. The arrest provoked human rights concerns, and raised a spectre of heavy handedness, under the guise of implementing COVID-19 measures. The assault of a political activist, exercising his rights under the constitution, did not warrant excessive use of disproportionate force that violated the individual's dignity and freedom. Under ACHPR Article 6, Botswana does have obligations to guarantee that 'Every individual shall have the right to liberty and to the security of his person,' and that: 'No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

The cognate right to freedom from arbitrary arrest, is equality before the law. The harassment of political opponents has politically discriminatory devices, which speaks to selective political persecution of opponents. The UDHR, under Article 7, states that all are equal before the law and are entitled without any discrimination to equal protection of the law, which is fortified under the ACHPR Article 3, stating that every individual shall be equal before the law and entitled to equal protection of the law. The right to equality before the law and equal protection, also a guarantees to all people's equal and effective protection against discrimination.

### **c) Freedom from inhuman and degrading Punishment**

Human dignity, followed by equality and freedom, are considered the most fundamental of rights in any open and democratic society, such as Botswana. The recognition of

human dignity as a right is an acknowledgement of the intrinsic worth of human beings. They are entitled to be treated as worthy of respect and concern. Reports of assaults of opposition leaders during the pandemic was a dent on their dignity, and could be viewed in the form of a discriminatory and selective approach to the application of rules. Freedom from assault entails that the human dignity should be by law, and under international obligations, be shielded from violations.

Instant and degrading application of violence on the public by the state machinery, partly finds unfortunate approval in the country's legal framework. Under the Penal Code of 1964, corporal punishment is lawful as a sentence for crime for males. The legalisation of corporal punishment, concurrently institutionalised state violence against the public in the form of resultant wanton assaults of arrested individuals, yet the concept of dignity is foundational to modern international human rights law. It should be noted that by acquiescing to the Charter of the United Nations, Botswana "reaffirmed (its) faith in . . . the dignity and worth of the human person." The Botswana constitution, in section 7, provides for the protection of citizens from 'inhuman treatment,' and or 'subject (ion) to torture or to inhuman or degrading punishment or other treatment.'

The three persuasive human rights documents, namely the UDHR, the ICCPR, and the ICESCR, unquestionably illustrate concept of human dignity. Dignity, is specifically captured in Article 1 of the UDHR, which asserts that: 'all human beings are born free and equal in dignity and rights,' while Article 22 declares that 'economic, social and cultural rights' are indispensable for human dignity. As such subjection of the human body, to some inhuman and degrading treatment or punishment, through wanton, deliberate and indiscriminate application of assaults and pain is a grave violation of human dignity. Its affirmation under international law, raises dignity to a level beyond reproach.

Article 5 of the ACHPR protects 'every individual' who 'shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

Nicholas Kgopotso of the Umbrella for Democratic Change (UDC), was allegedly harassed by 12 police officers for allegedly causing noise during the current COVID-19 lockdown and and two persons (Neo Dikgole and Thuso Sebinyane) who were allegedly assaulted by the police (Office of the President, 11 April 2020).

Articles 7 of ICCPR and Article 5 of UDHR, all encapsulate the importance of dignity, and the effrontery towards the same, is frowned upon comprehensively in so far as it subjects an individual to 'torture or to cruel, inhuman or degrading treatment or punishment.'

It is important to note that, there have been recommendations for Botswana to abolish all forms of penal corporal punishment by the Human Rights Committee in 2008. This is despite its own constitution specifically outlawing 'inhuman and degrading' forms of punishment, the government rejected several recommendations to outlaw it, palpably contradicting its international obligations. There is apparently no attempt at making it unlawful, and there are no envisaged opportunities for law reform.

### iii. Recommendations

- a) To his credit, President Mosisi, condemned police brutality during the lockdown, before ordering investigations and assuring the public that his government would continue to uphold the rule of law and respect for human rights. However, the condemnation of police brutality by the state, will mean nothing without legal reforms to address the legalisation of violence, and violation of human dignity. All the legislation which authorises the use of violence, including corporal punishment, must be repealed.
- b) Restrictive measures imposed during the state of emergency need to be strictly necessary and proportionate as is required under Article 4 of the ICCPR and the Constitution of Botswana. These measures ought to be rationally connected to the purpose, with a limited period that doesn't create apprehension and uncertainty among citizens. To that end, the regulations imposing restrictions against freedom of expression must be abolished as they are at the very least unnecessary but also highly disproportionate.
- c) The government must ensure that the restrictions imposed are equally and fairly applied. Reports of selective application of these restrictions against the opposition must be thoroughly investigated in a transparent manner.



## 2.4 Zambia

### i. Introduction

Like most countries across the globe, Zambia has had to confront the corona virus and find solutions to mitigate against the global pandemic that initially broke out in December 2019, in Wuhan, China before rapidly spreading across the world. Since the detection of its first case in March 2020, Zambia has struggled to contain the rate of infection that continued on a steady upward trajectory standing at 18,716 cases of infections and 373 COVID-19 related deaths as at the time of this research. For Zambia, the pandemic could not have struck at a worse time.

The corona virus has not only presented a health crisis, but it has also exacerbated the socio-economic situation in Zambia, fast-tracking economic collapse for a country that was already overburdened by a debilitating debt crisis accompanied by serious fiscal deficits, gross fiscal indiscipline by the State and well-documented cases of corruption by public officials and the connected political elites.

Within this context of a gloomy macro-economic environment, Zambia made attempts at various measures to mitigate the impact of the pandemic on the public health system and the broader socio-economic environment. Zambia's responses to the pandemic have been primarily through legislative instruments, policy directives and some administrative guidelines to tackle the corona virus.

However, Zambia stands accused of taking advantage of the pandemic to pursue sinister political ends under the guise of enforcing COVID-19 regulations and guidelines. Under the presidency of Edgar Lungu, the State has faced criticism that it took advantage of the pandemic to entrench autocracy and suppress any voices of dissent.

This report firstly considers Zambia's response to mitigate against the impact of COVID-19 before reviewing how the State has fared in upholding human rights obligations under international law in the context of the pandemic. Finally, the report proffers some recommendations, in light of the findings made regarding the State's compliance with its human rights obligations.

### ii. Overview of measures introduced by the State

On 25 March 2020, President Lungu issued his first statement in response to the COVID-19 pandemic, setting the policy tone on Zambia's acknowledgment of the arrival of the pandemic and the government's mitigation strategy on the impact of the virus. Capturing the mood and gravity of the situation, the president remarked as follows:

The world today faces one of its greatest adversaries that threatens mankind, the coronavirus disease. The coronavirus disease, also called covid-19 has decimated lives across the world. This virus is mean, devastating, and morbid. A few weeks ago, it was

heard from a distance in China, today it is in the neighborhood. Today, you and I are not safe anymore and until we comply with what the health authorities are saying, it may spread quickly and endanger our lives.

The President's statement captured the gravity of the matter demanding a response from the Zambian government and all relevant stakeholders. To this end, Zambia took legislative, policy and administrative measures to fight back against the pandemic described as one of the world's greatest adversaries. The primary legislative step taken by government was the promulgation of two related public health statutory instruments in accordance with the Public Health Act, Chapter 295 of the Laws of Zambia, which empowers the minister of health to declare an infectious disease as a notifiable disease, and promulgate regulations to manage an infectious disease. Through two statutory instruments (SIs) namely Statutory 21 and 22 of 2020, as well as various pronouncements and directives, the government adopted guidelines and measures to contain the COVID-19. Some of these measures necessarily came with restrictions on the movement of people and included:

- The imposition of one metre social distancing when an individual showed flu-like respiratory symptoms such as cough and/or sneezing. Individuals showing such symptoms are urged to stay at home and avoid interacting with the public.
- Limitations on large public gatherings
- Restricting people from embarking on non-essential cross-border foreign travel.
- The compulsory screening of all arriving international travellers at points of entry
- The deployment of peace officers in public areas to enforce COVID-19 public health measures and presidential directives.
- Empowering the Ministry of Local Government to aggressively monitor and enforce compliance with public health measures and presidential directives, especially in public places like market stalls, trading areas and bus stops
- To strictly enforce restrictions on bars and night clubs to operate

The government adopted an emergency plan and a complementary budget to contain the pandemic and mitigate against its impact as part of the wide-ranging measures to help protect the lives of citizens against the pandemic. A key strategy by government was a comprehensive information dissemination plan to raise awareness and influence behaviour. On 14 March 2020, the Minister of Health Dr. Chitalu Chilufya announced that the State would disseminate COVID-19 related material, information through radio, public television, and social media. The information would include, preventative measures promoting public safety and case updates reporting the number of new cases, deaths, and recoveries. The information was to be disseminated in the main local languages, namely Bemba, Tonga, Lozi and Nyanja and in sign language as well as briefings that would cater for the deaf population. To complement this initiative, parliamentarians were tasked to coordinate and facilitate community awareness-raising and information dissemination at constituency level.

### **iii. Human rights implications of the State's interventions in the context of the COVID-19 pandemic**

Over the years, Zambia has shown its willingness to uphold human rights as evidenced by its ratification of the major international human rights instruments. Zambia is a State Party to the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination

against Women (CEDAW) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), among others.

However there has been a noticeable shift towards the flagrant violation of human rights and disguised autocracy in recent years, and particularly so under the Mr. Edgar Lungu's presidency. With the breakout of the pandemic, the State has seized the opportunity to promulgate and enforce restrictive legislative, policy and administrative measures that, in effect, stifle the enjoyment of rights of perceived political opponents and government critics. While the COVID-19 pandemic necessitated the implementation of public health measures that would require the limitation of some of the rights in accordance with the Constitution and applicable human rights standards, this did not entail a blanket imposition of an effective martial law State.

A major concern since the advent of the pandemic has been the disproportionate and arbitrary application of regulations and policies under the guise of the doctrine of necessity to preserve public health. While Zambia took several measures that could be deemed legitimate to contain the spread of the pandemic, in some respects, the State went beyond the purview of what could be deemed justifiable and permissible, given Zambia international human rights obligations. Using the cover of fighting the pandemic, the State embarked on some unjustified human rights violations that included the excessive restrictions to the right to movement, association and assembly, abusive law enforcement practices that included unlawful/arbitrary arrests and unjustified detentions especially targeting human rights defenders and perceived political opponents. These issues of concern are discussed in greater detail below, juxtaposed against Zambia's international human rights obligations.

#### **a) Equal protection before the law**

A major concern regarding Zambia's response to the pandemic has been the disproportionate and arbitrary application and interpretation of the law by the State. The security agencies have been responding to what is essentially a public health emergency by employing martial law with wanton disregard to Zambia's human rights obligations. It is trite that certain human rights remain infallible and sacrosanct even during public emergencies. The entitlement to equal protection of the law and due process is one such non-derogable right that citizens retain. Following the promulgation of the emergency measures by government, the police announced some standard operating procedures to enforce the COVID-19 regulations. However, in purportedly enforcing the COVID-19 regulations, the police ended up engaging in legal overreach and abuse of the law. One of the practices adopted by the police was the arrest and fining of people an equivalent of \$US39 for failing to wear masks in public, when no law gave them such powers. The practice was only stopped after the Home Affairs Minister, Stephen Kampyongo directed the police to stop exercising power that the law had not vested in them. Following a public outcry on the clear abuse of the law by the police, the minister came out and affirmed the correct legal position by stating that:

I know that of late, we have had some complaints coming from the members of the public in the manner some of our police officers have interpreted the statutory instrument. We are aware that in the statutory instrument, there is a provision which talks about the punitive kind of measures that should be taken by those who are contravening SI and the directives given by His Excellency the President..... The interpretation of this section is to be done by the courts of law so that's why they are saying conviction. Police Service does not convict, police arrests suspects who are then subjected to the due process of the courts and as they are saying, upon conviction,...



Now, regrettably, we have had some officers in certain areas who have taken it upon themselves to collect admission of guilt fees from members of the public and I want to make a clarion call just as the police commander has already done, honourable minister, to all our command structures that this matter must be dealt with immediately. And so, what that means, I have here the communication from the police command to all commissioners of police in the divisions, all the 10 divisions that we have, in which this matter has been brought to the attention and guidance has been provided and in this guidance, the police command is directing all the police commissioners to monitor the implementation of the presidential directives and enforcement of the SI 22 in their respective provinces and ensure that the enforcement is carried out within the framework of the law.

Another concern pertaining to the application of the COVID-19 regulations and the archaic Public Order Act (POA) has been the selective application of the law- with the ruling Patriotic Front (PF) members getting preferential treatment whilst members of the opposition were arrested for the same conduct engaged in by the PF members. Government agents and people linked to the PF party continue to be allowed to gather freely in large numbers without any compliance with the health and safety regulations. On the other hand, members of the opposition political parties and dissenting voices continue to be routinely harassed and denied permission to hold any meetings, whether such meetings comply with the COVID-19 regulations and public order laws or not. For example, on 22 June 2020, when a group of youths attempted to protest against the socio-economic challenges faced by Zambia, the police deployed a fully armed police unit in riot gear that patrolled the streets in armoured vehicles in a show of force and attempt to suppress the demonstrations. The youth were forced to retreat into the bush where they beamed their issues to a live audience via various social media platforms.

## **b) Freedom of expression, independence of the media and access to information**

There is ample evidence that the State has been increasing its clamp down on free expression, freedom of the media and access to information under the guise of enforcing COVID-19 regulations. On April 9, Zambia's broadcasting regulator, cancelled Prime TV's license, "in the interest of public safety, security, peace, welfare or good order," In the statement issued announcing the cancellation, the regulator demanded that Prime TV surrender its license and immediately stop broadcasting. In a choreographed process, the State immediately deployed the police at Prime TV's premises in Lusaka and forced all personnel to leave the building as part of the enforcement measures to the regulator's directives. While there seems to be no legal grounds for the regulator's actions, it is noted that the independent broadcaster has been a vocal critic of the government and the television station had refused to flight government's COVID-19 adverts for free.

In a further sign of the constriction of space to exercise the freedom of expression, one Lawrence Kasonde was arrested on 24 November 2020 in Kitwe after a video of him encouraging citizens to vote out the current government received wide circulation on social media. Whilst such utterances should be protected by the constitutional guarantees on freedom of expression, Kasonde still found himself arrested and charged with defaming the President.

Elsewhere, On 15 November 2020 Pastor Kennedy Mambwe, who owns an independent media house was arrested and detained by the police without due cause. A Facebook page run by his media house had done a live streaming of a clash between members of the ruling Patriotic Front and the opposition United Party for National Development

(UPND). His arrest and detention was unjustified and represents a violation of the twin rights of freedom of expression in the context of the freedom and independence of the media and the right to access to information.

In another worrying development the Zambia Information and Communications Technology Authority generated and distributed mass texts threatening to prosecute any persons who disseminated false information related to COVID-19. The underlying legal provisions relied on to disseminate the message were declared unconstitutional as they unjustifiably limited the right to freedom of Expression.

The right to access to information is well entrenched under international human rights law. During a public health crisis like the (previously unknown) COVID-19 pandemic, this right takes greater importance as it is the one that anchors the realization of other rights such as the right to enjoy the best attainable state of physical and mental health. It is critical that the State ensures that its citizenry effectively receive and understand the nature of the corona virus and steps that should be taken to mitigate against its impact. This can only be achieved through a comprehensive information dissemination programme that reaches all people in a language and form that is understood by all. In this regard, the Zambian government information dissemination strategy has remained mired in inadequacies that have affected the enjoyment of this right. The main challenge has been the general lack of adequate information across the media platforms such as television, social media, radio, and print media. The dissemination of information has also been limited to a few specific local languages thus negatively impacting the ability of all people to understand what the virus entails and take preventative measures.

## **c) Political rights**

A common thread of President Lungu's reign in power has been the conflation between the State and the ruling party and the lack of tolerance for any dissent, characterised by a heavy-handed approach to suppressing political opponents and other dissenting voices. President Lungu's use of State resources and machinery to suppress political dissent flouts political rights enshrined in international human rights instruments that entrench the citizens' rights to freely participate in political processes which includes the individual and collective right of people to form, to join and to participate in the activities of a political party or organisation of their choice. The COVID-19 pandemic presented the ruling party with another opportunity to use State structures to curtail political activities of opposition parties. This seems to be part of a strategy to gain a campaign head start, in anticipation of the forthcoming elections in August 2021. While the ruling Patriotic Front (PF) has continued to hold uninterrupted public campaigns to mobilise communities for the 2021 elections, the security agents together with PF supporters have repeatedly stopped or interrupted any opposition party meetings under the guise of enforcing COVID-19 regulations. For example, on 14 November 2020 Charmaine Musonda who is a member of the opposition United Party for National Development (UPND) was brutally assaulted and robbed at her home by suspected PF supporters. The attack came at a time the Ms. Musonda was preparing to attend a UPND rally. The attack is consistent with the intimidatory tactics by PF members who seem to enjoy State impunity when they attack opposition candidates and supporters. To date no arrests have been made in connection with the case, despite an announcement by the police that they had launched investigations into the case. A prominent opposition figure, Saboi Imboela has noted that the PF government has found the COVID-19 regulations to be an even more effective legislative tool than the draconian Public Order Act to curtail opposition parties' activities. Commenting on the use of the emergency public health regulations, she noted that, "They haven't been tolerant, in terms of parties going out there and mobilising. Before they would use the public order Act [but] right now, the COVID-19 situation is actually

working better for them than even the public order Act.” On 1 October 2020, police in the town of Kitwe confiscated computers at a local internet café, which were intended to assist local residents who wished to utilize the online pre-registration platform but had no access to computers or internet. The owner, an academic affiliated with the UPND opposition party, provided computers at a local market to allow for residents to freely access computers if they wished to partake in the online pre-registration process. Police arrested 2 individuals assumed to be managing the internet café on behalf of the owner, in addition to ceasing all gadgets found on the premises. Though the police have since released the gadgets and the two individuals arrested, the owner has been advised to discontinue operating the café.

The lack of political tolerance by the State and the ruling PF party has been repeatedly condemned by the Zambia Human rights Commission (HRC). On the occasion of the Day of National Prayer (18th October 2021) the HRC issued a statement exhorting the State to take all practical measures to de-escalate national tension and political violence in order to create a conducive environment for the promotion and protection of human rights and freedoms for all. The Human Rights Commission noted that:

The current political environment is toxic with hatred and acts of discrimination, thereby grossly undermining national unity, peace and stability. The continued escalating political tension and violence is extremely worrying, and the Government must provide effective leadership towards restoring law and order and respecting human rights and freedoms without any form of discrimination.

It further noted that the discriminatory application of laws relating to freedoms of movement, assembly and expression based on one’s political affiliation or divergent views are the root causes of political tension and violation of human rights. The HRC placed the blame squarely at the PF’s door noting that, “regrettably, the country continues to witness individuals engaging in acts of lawlessness and hate speech targeting opposition party leaders left scot-free while the victims of such politically sponsored verbal and physical violence are the ones being pursued by the Zambia Police Service. Such discriminatory application of the law is causing political tension, violence and is grossly undermining national unity, peace and prosperity” The HRC concluded by calling upon the Government to decisively, “deal with acts of lawlessness by its supporters in the same manner it is dealing with acts of lawlessness or violence allegedly committed by individuals and groups of individuals holding and/or expressing divergent views.” It is therefore apparent that the problem of political intolerance and attacks on political plurality remains a challenge as the State together with the PF party continue to exploit the pandemic to gain political advantage over political rivals.

#### **d) Freedom of Assembly, Association and Movement**

The Constitution and the ACHPR both entrench individual and collective rights of people to freely interact, move, associate, and assemble as long as they are not interfering with other people’s rights as they do so. Unfortunately, these interlinked and complementary rights have been under persistent attack by the State for political ends. The State has continued to unjustifiably interfere with the rights of political parties, civic groups and individuals to gather and associate as they consider such activities to be precursors of mass mobilisation for resistance. Unsurprisingly the State has come down heavily on persons seeking to exercise such rights during the COVID-19 period. A case in point happened on 15 November 2020, when the leader of the opposition Movement for Multi-party Democracy (MMD) Nevers Mumba was blocked by the police from entering Vubwi District purportedly because President Lungu had a scheduled visit on the same location. He was stopped from entering the area even though he had informed the police of

his intentions in accordance with the law. Political gatherings and particularly ruling party gatherings are still on going with participating State actors and their supporters publicly failing to observe social distancing and masking rules. On the effect of COVID on associational and assembly rights in Zambia, Amnesty International states in their report, Ruling by fear and repression, that:

Since the outbreak of the COVID-19 pandemic in March 2020, the authorities have prohibited public assemblies by civil society and opposition parties on the pretext of public health concerns. While it may be argued that restrictions on assemblies are necessary to contain the spread of the coronavirus, gatherings organised by PF supporters and civic groups aligned to the party in power have continued unabated, even amidst the pandemic. Often pro-government or pro-ruling party processions did not require prior approval by police. Opposition NDC president Chishimba Kambwili disclosed that since his party was formed in 2017, police have only approved one meeting out of 69 applications that have been submitted by his party between then and July 2020. “Every time we notified the police our requests for a public meeting were turned down [by the police], who cited ‘security concerns’.

On 22 June, a few youth protestors gathered to demonstrate against corruption and police brutality in an undisclosed location due to fear of the State who rejected protest requests and warned over illegal gatherings. The youth aired their protest on Facebook live, attracting an audience of over 90,000 viewers who used the platform to share their opinions and participate in the protest.

#### **e) Right to Life**

The Zambia police has a history of using excessive force and this problem has been brought to fore by the COVID-19 pandemic, with the police taking centre stage as the main instrument of increased political repression under President Lungu’s administration. There has been a significant increase in the number of incidences of police brutality during the COVID-19 period. According to the Human Rights Commission, “This year the Commission has so far received and is investigating more than 10 cases of alleged torture, mainly at the hands of the Zambia Police Service. Some cases constituted aggravated torture and resulted in the death of victims and the Commission will be releasing the details of final investigations and recommended action against the perpetrators and redress of the victims or the estate of the deceased as the case maybe.” The pattern of the use of violence and brutality by the police as a means to enforce COVID-19 regulations is most disturbing given that the police are the primary custodian of protect citizens against unlawful acts. On 26 September 2020, in a case of reckless and unwarranted brutality, police shot and killed a 17-year-old boy while purportedly enforcing COVID-19 regulations in a Lusaka night club. The brutal killing by the police sparked spontaneous demonstrations by the local community which resulted in running battles between the police and the locals. The conduct of the police is particularly heinous given the absolute prohibition under international law on the use of excessive and unjustified force, torture and any other inhuman and degrading treatment.

#### **f) Economic and Social Rights**

Under President Lungu, Zambia’s economic climate has remained bleak, due to a number of debilitating factors that have included a rapidly depreciating exchange rate, erratic electricity supply, the heavy reliance on external sources to finance the growing fiscal imbalances, and a debilitating public debt in excess of 80 % of the gross domestic product. The COVID-19 pandemic further exacerbated an already struggling economy

that has negatively impacted industry and business with the consequential impact of high unemployment and fall of the general standard of living of the ordinary citizen. The cataclysmic economic crisis combined with the COVID-19 pandemic has left the Zambian government struggling to fulfil some socioeconomic rights as discussed below.

### g) The Right to Attain the Highest Standard of Health

The capacity of Zambia to fulfil its public health obligation in line with international human rights standards has been largely compromised by the country's ever increasing fiscal deficit that has negatively impacted the public fiscus. The COVID-19 pandemic has merely served to compound the economic challenges as the government has had to channel part of the limited resources from the public purse towards mitigating against the impact of the pandemic. Resultantly, the full attainment of the right to health has been grossly affected. The resource constraints have resulted in inadequate health-care worker trainings which then affect the end user services. The trainings have also been criticized for not being customized to the different needs and capacities of the different health institutions across the country. There has also not been enough supply of the COVID-19 test kits. Equally problematic has been the shortage of personal protective equipment (PPE), which puts lives of frontline public health workers at risk. According to the HRC, a lot of entities were failing to adhere to the guidelines of providing PPE to those in the frontline of fighting the coronavirus exposing them to the risk of getting infected and further transmitting the virus to the people they come into contact with. Another challenge has been the delays in the release of COVID-19 results, resulting in some unconfirmed symptomatic COVID-19 patients being mixed with non-COVID-19 patients in general wards, thereby increasing the risk of transmission. The isolation wards have also been overwhelmed by the admission numbers resulting in people being sent back home to self-isolate, which creates more problems of exposure and risk of further infections. There has also been an increase in cases of community transmission due to the flawed and inconsistent reporting mechanisms on monitoring and evaluation of self-isolating patients by community healthcare workers.

Overall, because of the resource constraints a lot of districts lack the capacity to effectively and efficiently implement the health contingency plans to contain the spread of the pandemic. These factors taken together have negatively impacted the ability and chances of the ordinary Zambian to enjoy the right to health as prescribed by international human rights standards.

### h) Right to Education

The lockdown measures inevitably impacted the ability of learners to continue with the uninterrupted learning, given the communicable nature of the virus. As part of the measures to contain the pandemic, the government, through the Ministry of General Education, adopted the Education Contingency Plan for Novel Coronavirus (COVID-19). Some of the measures contained in the policy document included:

- Adopting distance learning mechanisms to mitigate short-term and longer-term effects of school closures on learners.
- Developing online learning platforms.
- Implementing lesson programmes on television and local radio stations to support the continuity of learning for children in non-examination classes that are not able to access schools.
- Broadcasting radio lessons for learners at primary level on Zambia National Broadcasting Cooperation

- and selected community radio stations countrywide.
- Supporting feeding programmes through alternative mechanisms during the COVID-19 pandemic.
- Provision of psychosocial support to students.
- Re-opening of examination classes to ensure that end of year examinations continue as planned.
- Sanitisation of schools with provisions for handwashing facilities and soaps.

While on paper, the policy document entrenched progressive action points to help minimize learner disruptions and sustain the realization of the right to education, its operationalization has remained inadequate at best. Given the socio-economic challenges of the country most of the proposed interventions have not been implemented due to resource constraints and what seems to be lack of political decisiveness. The average Zambian learner struggles to access some of the proposed online learning platforms as most families do not have resources to invest in what is certainly considered luxury-data costs. Without access to the electronic media platforms and data/wifi the online learning remains accessible to the privileged few. These challenges are further compounded by the recurring power problem in Zambia that results in long load-shedding hours across the country. There has also been a consistent lack of information across the country regarding learning programmes run on television and radio. There have also been reports of poor support and follow up services of the teacher training of the ICT platforms that affected the smooth delivery of school curriculums. Most of the capacitation in information technology has been limited to the more prominent public schools with most schools in the peripheries not benefitting from the training programmes. Further, most teachers do not have access to the online platforms. Not all schools have the capacity to implement and support online learning platforms. A number of the private schools have utilised the online learning platforms which exacerbated the rich-poor divide and brings to the fore the inadequacies of the government's ability fulfil its obligations to afford everyone the right to education.

### iv. Recommendations

Under the circumstances it is critical that the government reconsiders its approach to addressing the COVID-19 challenges, and more specifically address the human rights challenges that have been brought to the fore by the pandemic. More specifically the government of Zambia is exhorted to consider and implement the following recommendations:

- a) The government of Zambia should without delay recommit to upholding its human rights obligations, as set out in the Constitution.
- b) Complementing the domestic human rights framework are the various international human rights obligations that Zambia has ratified. Zambia should, without fail, recommit to taking all such obligations into account when it implements regulations, policies, and administrative measures to contain the COVID-19 pandemic.
- c) Zambia should unbundle the government-ruling party conflation and ensure that the government as a separate entity from party politics, represents interests of all citizenry and guarantees equal protection of the law to all.
- d) The government must seriously consider and implement the various recommendations made by the Human Rights Commission regarding upholding human rights in the context of a pandemic.

- e) The government must put in place legal, policy and administrative measures in place to guide the enforcement of COVID-19 regulations using a rights-based approach.
- f) The government must build the capacity of security agents to enforce laws using a rights-based approach.
- g) The government must support accountability mechanisms like the Human Rights Commission to hold security agents accountable and punish any conduct that violates rights of citizenry as part to encourage attainment of justice for the victim and non-repetition on the part of perpetrators and deterrence on would-be perpetrators.

## 3. OVERALL FINDINGS AND RECOMMENDATIONS

In light of the preceding discussion, the following are the key human rights issues which have emerged from this study and recommendations made by Africa Judges and Jurists Forum:

3.1 States should prepare to invest adequate efforts in securing vaccines to inoculate the populations of the region. Vaccines should be administered promptly and free of charge to all populations including in rural areas without discrimination.

3.2 As a lesson learned from the ongoing vaccine hoarding by the rich nations which been variously referred to as “vaccine nationalism,” or “vaccine apartheid,” the region should take a long-term view to the promotion of the health of its people and their protection during times of public emergency. Governments must take deliberate steps to reduce overdependency on international pharmaceutical supply chains by investing in scientific innovation.

3.3 Governments should urgently increase public financing for health in the region to ensure that the promise of the right to health guaranteed in international human rights law, including the African Charter on Human and Peoples' Rights is not merely rhetorical. Health system including infrastructure, equipment, workforce and working conditions must be improved and ensure its reach to the masses.

3.4 Improve the capacities of the economies in the region to provide for, and manage social protection to citizens and all population groups at all times including during states of public emergency.

3.5 In some States, restrictive measures have resulted in derogations from non-derogable rights including the right to life, freedom from torture and degrading treatment and the right to human dignity. AJJF recommends that practical legal measures be taken to ensure that the victims of these violations obtain appropriate relief which restores the rights and deters against future violations. This should include, but not limited to damages and personal costs against the perpetrators.

3.6 Law enforcement and security forces must be provided with adequate human rights education to sensitize them about their duty to observe non-derogable rights at all times, including during states of emergency or states of public disasters.

3.7 In some cases, the restrictive measures were unnecessary. This includes the demolition of vending market stalls during lockdown and the criminalization of public statements which criticize government's responses to the COVID-19 pandemic. AJJF recommends that authorities regularly review the restrictions and discontinue those which are not strictly necessary to combat the spread of COVID-19. Compensation must also be considered, in line with regional and international law, for the victims of human rights violations arising from the implementation of unnecessary restrictive measures.

3.8 Certain measures were implemented in a manner which disproportionately limited human rights. This includes lockdown measures which, in some cases, were implemented in a way which disproportionately undermined the right of access to livelihoods. AJJF recommends that authorities establish specialized oversight mechanisms dedicated to monitoring the implementation of restrictive measures to ensure compliance with domestic, regional and international law. Compensation must also be considered, in line with regional and international law, for the victims of human rights violations arising from the disproportionate implementation of COVID-19 restrictive measures.

3.9 In some cases, states simply failed to respect and fulfil certain human rights including the right to social security, the right to adequate health care, the right of access to adequate housing, the right of access to water and the right to equality. AJJF recommends that measures be undertaken to enforce accountability on the violations of these rights. AJJF also recommends that states must respect their domestic, regional and international human rights obligations, including the duties to respect, protect and fulfil all socio-economic rights during the pandemic.

3.10 Some governments used the COVID-19 pandemic as a cover to strengthen authoritarianism and deprive people of their right to political representation. AJJF recommends that states must respect and protect the right to political participation and representation. In particular, AJJF calls upon states to ensure that the right to regular, free and fair elections be respected during the pandemic, in line with domestic, regional and international law.

End

## About AJJF

The Africa Judges & Jurists Forum (AJJF) is a network of judges and jurists across the continent. The membership of AJJF is inspired by the imperative to promote the rule of law in the context of Africa's development. The Headquarters of AJJF are based in South Africa. The Forum works with governments, inter-governmental entities, non-governmental formations, and the private sector. the duties to respect, protect and fulfil all socio-economic rights during the pandemic.



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