

# **PUBLIC EMERGENCY MEASURES AND PRE-TRIAL RIGHTS IN SOUTHERN AFRICA**



**Africa Judges and Jurists Forum**

**A POLICY BRIEF**

## **The Africa Judges & Jurists Forum (AJJF)**

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, Intergovernmental entities, non-governmental formations, and the private sector.

158 Jan Smuts Avenue, Rosebank  
Johannesburg 2021  
South Africa  
E-mail: [info@africajurists.org](mailto:info@africajurists.org)  
[www.africajurists.org](http://www.africajurists.org)



**With Support From:**



© Copyright The Africa Judges & Jurists Forum (AJJF) June 2021.

AJJF permits free reproduction of extracts from any of its publications provided that due acknowledgement is given and a copy of this publication carrying the extract is sent to its headquarters at the following address:

**The Africa Judges & Jurists Forum (AJJF)**

158 Jan Smuts Avenue, Rosebank

Johannesburg

South Africa

E-mail: [info@africajurists.org](mailto:info@africajurists.org)

[www.africajurists.org](http://www.africajurists.org)

ISBN 978-9970-695-04-1

Johannesburg June 2021

All queries on rights and licenses should be addressed to the Communications Office, Africa Judges and Jurists Forum, email: [info@africajurists.org](mailto:info@africajurists.org)

Cover design: Michael Mwesiga, SMACCS Technologies (U) Limited.

Cover image: Further permission required for reuse.

**June 2021**

This brief was researched and written by D. Tinashe Hofisi and reviewed by Elizabeth Manganje.

# Table of Contents

.....	1
<b>Executive Summary .....</b>	<b>4</b>
<b>Key Recommendations.....</b>	<b>5</b>
<b>Methodology.....</b>	<b>6</b>
<b>Background .....</b>	<b>6</b>
<b>Vulnerabilities .....</b>	<b>7</b>
<b>Legal Obligations .....</b>	<b>8</b>
<b>Arrest.....</b>	<b>10</b>
<b>Pre-Trial Detention.....</b>	<b>13</b>
<b>Right to a fair trial within a reasonable period .....</b>	<b>13</b>

## Executive Summary

The COVID-19 global pandemic presents novel challenges and grave threats to health, human life, the rule of law and constitutional governance. Governments and individual citizens are encountering new pressures occasioned by the need to fight the pandemic whilst ensuring access to essential services and basic commodities. In several Southern African countries, the response to the pandemic has taken the form of national and localized restrictions and/or recommendations. These are often accompanied by regulatory measures suspending economic activities, enforcing social distancing and controlling national entry and exit. This has led to tension between the need for a healthcare response on the one hand and fundamental freedoms on the other, with courts called upon to decide which will reign supreme. In Malawi, an order for a national lockdown was also found unconstitutional<sup>1</sup> and the Gauteng High Court also made a similar finding in South Africa.<sup>2</sup>

The threats to constitutional norms have the potential to cause irreparable harm to constitutional governance. Further, the suspension of civil liberties has a disproportionate effect on detained persons, the poor and other marginalized and vulnerable populations. This policy brief focuses on law enforcement as emergency measures have increased the law-making powers of the executive and heightened the potential for abuse of power by the police. It seeks to prevent democratic backsliding and the fortification of police states under the guise of a public health response. The brief is informed by regional and international standards on pre-trial rights in the context of a public emergency. It treats the COVID-19 pandemic as both a health and constitutional crisis and seeks to ensure that governments place special emphasis on vulnerable groups and key populations through people-centered responses to the pandemic.

---

<sup>1</sup> See Al Jazeera, Malawi high court blocks coronavirus lockdown, <https://www.aljazeera.com/news/2020/4/17/malawi-high-court-blocks-coronavirus-lockdown>

<sup>2</sup> See Live Law, South Africa High Court Strikes Down Lockdown Regulations as Unconstitutional, <https://www.livelaw.in/foreign-international/south-africa-hc-lockdown-regulations-unconstitutional-157866>

## Key Recommendations

### 1.1 The Executive and the Legislature

- Introduce digital filing of court pleadings and allow virtual and remote court sittings.
- Suspend deprivation of liberty for persons with peculiar vulnerability to COVID-19 and other vulnerable populations such as pregnant women and the elderly.
- Suspend deprivation of liberty for petty offences.
- Provide law enforcement agents and prison officials with personal protective equipment (PPE).
- Introduce mechanisms for releasing arrested persons from detention in addition to judicial means where none exist.

### 1.2 The Police

- Use persuasion and community engagement in the process of law enforcement.
- Only use deprivation of liberty as a measure of last resort.
- Use alternative means of securing attendance of persons at court such as summons and written notices to appear.
- Present arrested persons in court as swiftly as practicable.
- Use alternative means of releasing accused persons such as police bail.

### 1.3 Police, Prisons and Correctional Facilities

- Make detention facilities more sanitary whilst ensuring social distancing and providing PPE.
- Provide healthcare services to those showing signs of COVID-19 and separate them from the general population of detainees.
- Regularly present detained persons to a court of law.

## Methodology

This policy brief is the result of external desk research of primary and secondary materials. Primary sources reviewed include international law, regional instruments, constitutional and statutory provisions. It also includes an assessment of prevailing legal regimes and emergency measures. Secondary sources include press reports, academic papers and position papers by civil society. The policy brief seeks to bridge the gap between obligations under international law and state practice. Thus, obligations under international law form the basis for policy recommendations to ensure that the public health response is mindful of rule of law fundamentals.

## Background

Each of the fourteen Southern African countries has imposed, or is still under, some form of lockdown, restriction or set of recommendations. The vast majority of countries, nine in total, have imposed national lockdowns of varying degrees.<sup>3</sup> A further two countries have localized lockdowns,<sup>4</sup> two more have national recommendations<sup>5</sup> whilst Botswana lifted its localized lockdowns in June 2021.<sup>6</sup> Typically, restrictions include stay at home orders, restricted entry and exit at national borders and other ports of entry, restrictions on public gatherings and closure of places of work.

The prevalence of emergency measures has disrupted operations of courts, thereby restricting access to justice and prolonging pre-trial incarceration. The African Commission on Human and People's rights has noted the disproportionate effect of the pandemic on persons deprived of

---

<sup>3</sup> South Africa, Madagascar (Garda, <https://www.garda.com/crisis24/news-alerts/474696/madagascar-officials-extend-covid-19-related-state-of-emergency-through-at-least-may-18-update-25>), Malawi (Reuters, <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/countries-and-territories/malawi/>), DRC (BBC, <https://www.bbc.com/news/world-52103747>), Mauritius, Zimbabwe, Angola, Lesotho and Mozambique (US Embassy, <https://mz.usembassy.gov/covid-19-information/>).

<sup>4</sup> Eswatini and Namibia, though Zimbabwe has also recently enacted localized lockdowns. See Xinhuanet, Zimbabwe imposes lockdown in two more districts following spike in COVID-19 cases, [http://www.xinhuanet.com/english/africa/2021-06/12/c\\_1310004797.htm](http://www.xinhuanet.com/english/africa/2021-06/12/c_1310004797.htm)

<sup>5</sup> Tanzania and Zambia.

<sup>6</sup> See Reuters, Botswana lifts coronavirus lockdown in capital city, <https://www.reuters.com/article/us-health-coronavirus-botswana/botswana-lifts-coronavirus-lockdown-in-capital-city-idUSKBN23M2VM>.



liberty.<sup>7</sup> The United Nations Office on Drugs and Crime (UNDOC), United Nations Office of the Commissioner for Human Rights (OHCHR), UNAIDS and the World Health Organization (WHO) have also underscored the need to limit pre-trial detention in the context of the COVID-19 pandemic.<sup>8</sup> This places detained persons at the intersection of public health safeguards and rule of law concerns. As such, it is incumbent on governments to ensure that law enforcement is guided by both the need to protect public health and to uphold the rule of law.

## Vulnerabilities

There is a peculiar rule of law challenges presented by the prevalence of emergency measures. The use of arrest and pre-trial detention is itself a public health hazard.<sup>9</sup> Communicable diseases spread faster in the closed setting of detention facilities. The deprivation of liberty in a period in which access to the courts is restricted heightens the potential for arbitrary detention and overcrowding. This may also have a deleterious effect on the right to trial within a reasonable period, the right to liberty and overall access to justice. Many jurisdictions already struggle with adherence to legal limits for pre-trial detention and the pandemic presents an added layer of vulnerability given the limited access to courts and higher number of persons who need to be transported to be presented in court.

---

<sup>7</sup> See African Commission on Human and People's Rights, Press Statement on Human Rights Based Effective Response to the Novel Covid-19 Virus in Africa , <https://www.achpr.org/pressrelease/detail?id=483>

<sup>8</sup> See UNODC, WHO, UNAIDS and OHCHR, Joint Statement on Covid-19 in Prisons and Other Closed Settings <https://www.who.int/news/item/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>

<sup>9</sup> See UNODC, WHO, UNAIDS and OHCHR Joint Statement no.8 supra ; African Commission Press Statement no.7 supra.

## Legal Obligations

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) 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 ... 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.*

As such, derogations from the ICCPR are only permitted in countries where a state of public emergency is declared. Such derogations must still be consistent with international law and live up to the requirements of being proportional, non-discriminatory, temporary and limited in geographic and substantive scope.

It must be noted that certain aspects of the ICCPR, and international law in general, are not subject to derogation. For instance, the prohibition against arbitrary detention has been accepted as a ‘peremptory norm’ of international law, from which there can be no derogation even during a state of public emergency.<sup>10</sup> Further, article 9 of the ICCPR, which protects liberty and security of the person, also has special status. It states that every person arrested or detained for suspicion of committing an offence must be brought before a judicial officer promptly and has a right to a trial within a reasonable period or their release. More importantly, this article prohibits states from making it a general rule that persons awaiting trial are detained in custody.<sup>11</sup> This right is contained in several other international standards.<sup>12</sup> It is central to the administration of justice and ensures judicial oversight in respect of arrest

---

<sup>10</sup> Human Rights Council: General Comment 29, States of Emergency (Article 4 of the ICCPR), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) paras 8 and 10, General Comment 35 on article 9, (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014) para 66.

<sup>11</sup> See article 9(3) of the ICCPR.

<sup>12</sup> See article 16(6) of the Convention on Migrant Workers; Principles 4 and 11 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Article 10(1) of the Declaration on the Protection of All Persons from Enforced Disappearance .

and detention. It also ensures that pre-trial incarceration does not devolve into arbitrary detention. As such, this right cannot be derogated from even during public emergencies.<sup>13</sup>

Unlike the ICCPR, the African Charter on Human and People's Rights (African Charter), does not permit any derogations from enjoyment of rights, even during a public emergency. The protections in terms of the Charter remain extant, more crucially the protections of the right to liberty and right to a fair trial under articles 6 and 7. In fact, decrees issued during a state of emergency which permit arrest for vague reasons and bare suspicion have been held to be contrary to the African Charter.<sup>14</sup> Further, arrest without warrant in the absence of reasonable suspicion, failure to inform persons of the reason for arrest and their rights upon arrest have all been found contrary to the African Charter.<sup>15</sup> In response to the pandemic, the African Commission on Human and People's Rights released a press statement with twelve guidelines for state parties to the African Charter.<sup>16</sup> The guidelines restate the need for non-discrimination, legality and the need to protect vulnerable groups. The African Commission also released its resolution for a successful response to COVID-19.<sup>17</sup>

Thus, the regional and international law protections against arbitrary arrest and detention remain extant notwithstanding emergency measures to combat the pandemic. The ICCPR, African Charter and various other human rights instruments require that the rights of arrested and detained persons are upheld by the state. That is to say, freedom from arbitrary arrest and detention as well as the right to a trial within a reasonable period all remain active even as a state enacts restrictions on access to the courts. This makes international law a crucial site of accountability during the prevalence of public health emergencies such as that occasioned by the COVID-19 pandemic.

---

<sup>13</sup> HRC report, UN Doc. A/49/40, vol. I, annex XI, p119.

<sup>14</sup> Amnesty International and Others v Sudan, (48/90, 50/91, 52/91, 89/93) ACHPR, (1999), para. 59.

<sup>15</sup> Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan, (379/09), ACHPR (2014) paras 102-107

<sup>16</sup> African Commission Press Statement no.7 supra.

<sup>17</sup> See African Commission on Human and People's Rights, Resolution on Human and Peoples' Rights as Central Pillar of Successful Response to COVID-19 and Recovery from its Socio-Political Impacts - ACHPR/Res. 449 (LXVI) 2020 <https://www.achpr.org/sessions/resolutions?id=480>

## Arrest

In many jurisdictions, emergency measures have introduced new offences which are enforced by the police.<sup>18</sup> However, the fact that the pandemic has shut down economies and threatened lives and livelihoods is debilitating enough without a menacing police service or military wantonly threatening arrest and detention. This is particularly noteworthy since heavy handed police responses have been reported in several countries including, but not limited to, Angola, Malawi, Mauritius, Mozambique, South Africa, Zambia and Zimbabwe.<sup>19</sup>

The African Commission's Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa issued a press release condemning the excessive use of force by the police during the Covid-19 pandemic.<sup>20</sup> Law enforcement remains essential for crime prevention, prosecution of offenders and maintenance of law and order. Nevertheless, a distinction must be drawn between ordinary crime and the offences occasioned by the imposition of emergency measures. That is to say, the enforcement of lockdown measures must not be the basis for new and broadened criminal liability.<sup>21</sup> Enforcement of lockdown measures should be empathetic in the context of a global health crisis.<sup>22</sup> The African Commission on Human and People's Rights has underscored the need to emphasize persuasion and community engagement in the process of law enforcement, with detention only used as a measure of last resort.<sup>23</sup> The COVID-19 pandemic is uniquely deleterious as police brutality intersects with the public health challenges.<sup>24</sup> As such, there should be no tolerance for aggressive law enforcement, assault of civilians and other abuses.<sup>25</sup> Such cases must

---

<sup>18</sup> See Xinhuanet, Over 20,000 arrested in S.Africa for breaching COVID-19 lockdown rules, [http://www.xinhuanet.com/english/2021-01/13/c\\_139665259.htm](http://www.xinhuanet.com/english/2021-01/13/c_139665259.htm)

<sup>19</sup> See Freedom House, Heavy-Handed Pandemic Responses Could Fuel Unrest in Southern Africa, <https://freedomhouse.org/article/heavy-handed-pandemic-responses-could-fuel-unrest-southern-africa>, Amnesty International, Southern Africa: Government intervention required as millions face hunger under COVID-19 lockdown regimes <https://www.amnesty.org/en/latest/news/2020/04/southern-africa-government-intervention-required-as-millions-face-hunger-under-covid19-lockdown-regimes/> and Freedom House Joint Statement SADC: Restrictive COVID-19 Regulations Presenting Concerning Ramifications for Enjoyment of Human Rights, Including Livelihoods <https://freedomhouse.org/article/sadc-restrictive-covid-19-regulations-presenting-concerning-ramifications-enjoyment-human>

<sup>20</sup> See Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on Reports of Excessive use of Force by the Police during the COVID-19 Pandemic <https://www.achpr.org/pressrelease/detail?id=491>

<sup>21</sup> See Prison Policy Initiative, The most significant criminal justice policy changes from the COVID-19 pandemic <https://www.prisonpolicy.org/virus/virusresponse.html>, providing measures taken by American states to actively reduce the number of arrests in response to the pandemic.

<sup>22</sup> See Freedom House no.19 supra.

<sup>23</sup> See African Commission Resolution no. 17 supra.

<sup>24</sup> See Freedom House no.19 supra.

<sup>25</sup> See African Commission Resolution No.17 supra at para 2 (e) and (f). See also Black Lives Matter: Police Brutality in the Era of COVID-19, <https://lerncenter.syr.edu/2020/06/16/ib-31/>

be investigated, prosecuted and victims paid compensation. Law enforcement agencies should not pose a threat to civilians in a physical or indeed physiological manner. They must be provided with PPE and enforce social distancing in the manner they discharge their duties. A business as usual approach would endanger members of the public and lead to overcrowding in detention facilities.<sup>26</sup>

The act of depriving liberty must be guided by the procedural safeguards of an arrest warrant or reasonable suspicion of the commission of an offence. This standard must not be lowered due to emergency measures.<sup>27</sup> Further, in all instances where persons can be presented in court without any pre-trial detention, this should be the preferred method of policing.<sup>28</sup> The UNDOC, OHCHR, UNAIDS and the WHO have recommended that arrest and pre-trial detention are only used as a measure of last resort.<sup>29</sup> Deprivation of liberty when there is a highly infectious pandemic increases exposure and potential of further spread. The use of non-custodial measures has been suggested to curb overcrowding and reduce the spread of the virus.<sup>30</sup> Government policy should encourage the use of summons and written notices to appear as the primary methods of bringing accused persons to court.<sup>31</sup>

This aversion to arrest must also manifest in the treatment of human rights activists and other human rights defenders. Reports indicate that human rights defenders have been constrained from their work under the guise of national and localized lockdowns. In Eswatini and Zimbabwe, journalists have been arrested in the course of their work.<sup>32</sup> Further, opposition figures including parliamentarians Joana Mamombe and Regai Tsunga have been arrested for being part of a peaceful protest in respect of the former and for being part of food relief efforts for the latter.<sup>33</sup> The African Commission's Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa stated that enforcement of regulatory measures should not be used to restrict civic space, target human rights defenders and unduly interfere with their work.<sup>34</sup>

---

<sup>26</sup> See UNODC, WHO, UNAIDS and OHCHR Joint Statement no.6 supra and African Commission Press Statement no.7 supra.

<sup>27</sup> See African Commission Press Statement no.7 supra.

<sup>28</sup> See African Commission Resolution no.17 supra.

<sup>29</sup> See UNODC, WHO, UNAIDS and OHCHR Joint Statement no.6 supra.

<sup>30</sup> See UNODC, WHO, UNAIDS and OHCHR Joint Statement no.6 supra and African Commission Press Statement no.7 supra.

<sup>31</sup> See African Commission Resolution No.17 supra at para 2 (d) and (i).

<sup>32</sup> See Freedom House Joint Statement No.19 supra.

<sup>33</sup> Id.

<sup>34</sup> See Press release of the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa on the Protection of Human Rights Defenders during the Covid-19 Pandemic <https://www.achpr.org/pressrelease/detail?id=496>

Government can also, as part of the emergency measures, suspend the arrest of such vulnerable groups as minors, pregnant women and persons living with disabilities.<sup>35</sup> This should have a particular focus on persons with peculiar vulnerability to COVID-19 which includes the elderly, those with asthma and other core-morbidities.<sup>36</sup>

---

<sup>35</sup> See International Drug Policy Consortium, COVID-19: PRISONS AND DETENTION IN AFRICA, [https://aenweb.blob.core.windows.net/aenweb/pages/files/Advocacy\\_note\\_-\\_COVID\\_19\\_and\\_Prisons\\_in\\_Africa\\_-\\_Final.pdf](https://aenweb.blob.core.windows.net/aenweb/pages/files/Advocacy_note_-_COVID_19_and_Prisons_in_Africa_-_Final.pdf)

<sup>36</sup> See African Commission Resolution No.17 supra at para 2 (g). See also African Commission Press Statement no.7 supra.

## Pre-Trial Detention

In those instances, where deprivation of liberty is absolutely necessary, states should work to limit the period of pre-trial detention. Where there is a requirement of presentation in court within forty-eight hours, this must be treated as the outer limit, with people being presented in court as soon as is practicable.<sup>37</sup> Countries with alternatives to judicial grant of bail should require the use of such avenues as police bail to reduce pre-trial detention.<sup>38</sup>

States should invest in improving the health and general sanitation of detention facilities.<sup>39</sup> Detained persons should maintain social distance and be provided with PPE. It is vitally important that all persons showing signs of infection are provided access to healthcare and removed from the general population of detainees. Such measures necessarily require increased monitoring of detention facilities by the judiciary or some other independent body.

## Right to a fair trial within a reasonable period

Limited access to courts derogates from the right to a fair trial within a reasonable period. Inordinate delays occasioned by the pandemic are prejudicial to detained persons as well as the state. Judicial oversight is key in protecting the integrity of the justice delivery system.<sup>40</sup> As such, detained persons must be regularly presented before a court of law.<sup>41</sup> Where this is not possible, states should consider virtual and remote court sittings. South Africa has made remarkable progress in the area of e-filing and instituting remote and virtual court operations.<sup>42</sup> In the long term, these measures should increase overall access to justice in countries where fuel shortages have made it difficult to ensure attendance at court.

---

<sup>37</sup> See Project on Government Oversight, Pretrial Detention in a Pandemic <https://www.pogo.org/analysis/2020/06/pretrial-detention-in-a-pandemic/> for the quintessence of the right to liberty in the context of the pandemic.

<sup>38</sup> See UNODC, Position Paper Covid-19 Preparedness and Responses in Prisons, [https://www.unodc.org/documents/justice-and-prison-reform/UNODC\\_Position\\_paper\\_COVID-19\\_in\\_prisons.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Position_paper_COVID-19_in_prisons.pdf)

<sup>39</sup> See Freedom House Joint Statement No.19 supra.

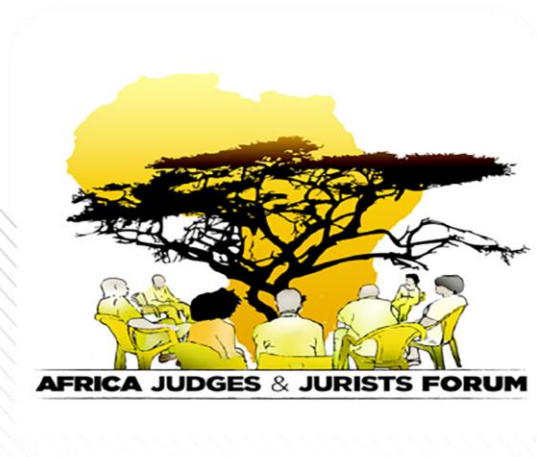
<sup>40</sup> See African Commission Press Statement, guideline 12, no.7 supra.

<sup>41</sup> See African Commission Press Statement, guideline 1, no.7 supra.

<sup>42</sup> See Lexis Nexis, Covid-19 pushes courts to new era <https://www.lexisnexis.co.za/news-and-insights/virtual-working/covid-19-pushes-courts-to-new-era>

There should be a prioritization of cases guided by the seriousness of the charge and the length of delay that would otherwise result. In all such cases, the rights to prepare a defense, access the charge sheet and legal counsel must all be respected.





The Africa Judges & Jurists Forum (AJJF)  
158 Jan Smuts Avenue, Rosebank  
Johannesburg  
South Africa

E-mail: [info@africajurists.org](mailto:info@africajurists.org)

[www.africajurists.org](http://www.africajurists.org)

ISBN 978-9970-695-04-1

