

**Guidelines on adhering to human and peoples'
rights under the African Charter in the context of
states of emergency or disaster**

Draft for consultation

September 2022

PREAMBLE

The African Commission on Human and Peoples' Rights (the African Commission) meeting at its [#] Ordinary Session, held from [date] to [date] in [place]:

Recalling Resolution ACHPR/Res.447 (LXVI) 2020 on upholding human and peoples' rights during situations of emergency and in other exceptional circumstances, which tasked the Focal Point on Human Rights in Conflict Situations in Africa to develop a normative framework in the form of Guidelines on adhering to human and peoples' rights standards under the African Charter when declaring states of emergency and disaster;

Further recalling Resolution ACHPR/Res.449 (LXVI) 2020 on human and peoples' rights as a central pillar of a successful response to COVID-19 and recovery from its socio-political impacts;

Concerned that there is no guidance on derogation from social, economic and cultural rights in international human and peoples' rights law in relation to cases of emergency and disaster;

Bearing in mind the recommendations in the ACHPR/Res.332(EXT.OS/XIX) 2016 on Human Rights in Conflict Situations, and the Study entitled "Addressing Human Rights Issues in Conflict Situations: Towards a more systematic and effective role for the African Commission on Human and Peoples' Rights" adopted during its 64th Ordinary Session, which among others assigns the Focal Point on Human Rights in Conflict Situations in Africa the responsibility for monitoring the state of emergency laws and practices in Africa, and to review the Commission's position on derogation from Charter rights under states of emergency;

Recognising the obligations, and guiding law and principles, contained in the legal instruments, general comments, guidelines, principles, declarations, resolutions and other normative documents of the African Commission on the protection and promotion of human and people' rights, and the need to consider their application in situations of emergency or disaster;

Considering the seriousness of the human rights issues arising from formal declarations of states of emergency or of disaster and the implementation of *de facto* emergency powers across the continent, as witnessed in the context of the health emergency relating to the novel corona virus (COVID-19);

Considering Article 60(2) of the African Charter, which mandates the African Commission to draw inspiration from international law, and the relevance in this respect of applicable international human rights and international humanitarian law norms and Article 4 of the United Nations Human Rights Committee General Comment No. 29 on Derogations during a State of Emergency, which affirms that States' measures of derogation from treaty obligations should be in accordance with humanitarian law;

Recognising that the rights enshrined in the African Charter are indivisible, interdependent and interrelated and apply in all times, and reiterating the need for emergency and disaster measures to recognise human and peoples' rights as mutually reinforcing;

Recalling its mandate of promotion and protection of human and peoples' rights pursuant to Article 45 of the African Charter on Human and Peoples' Rights (the African Charter), and the need to formulate and lay down principles and guidelines to strengthen the promotion, protection and fulfilment of human and peoples' rights in the context of emergencies or disasters;

Hereby adopt the following Guidelines on adhering to human and peoples' rights standards under the African Charter when declaring states of emergency and disaster

DEFINITIONS

Accountability means that the duties, powers and performance standards that apply to State officials during situations of emergency and disaster are clearly defined and comply with human rights standards (including these Guidelines) and the general principles of international law; that monitoring and assessment of decisions and actions by State officials is undertaken by formal oversight mechanisms, including the judiciary, parliament and civil society; and that enforceable corrective and remedial measures are taken when decisions and actions are assessed as non-compliant with standards.

Child refers to every human being below the age of 18 years pursuant to Article 2 of the African Charter on the Rights and Welfare of the Child.

Derogation refers to the temporary suspension of rights when a State limits or prohibits by law the exercise of certain rights as a necessary, proportionate and legitimate measure to ensure the protection of other human and peoples' rights from the threats of conditions of

emergency or disaster. While the African Charter does not contain a clause that expressly empowers States to derogate from their human rights obligations, even during emergency or disaster conditions, it envisages limitations of rights under specified circumstances, and are used for formulating the Guidelines on suspension of rights in situations of emergency or disaster.

Disaster refers to a serious natural or human-caused occurrence, having a significant impact on the environment, the human person and infrastructure, thereby disrupting the normal conditions of existence and the capacity of adjustment of the affected community using measures that are applied in ordinary circumstances.

Disinformation is information that is false or manipulated and which is knowingly and intentionally shared both in person and electronically, to cause harm or which entails gross negligence in underestimating the likely harm.

Doctrine of non-retrogression refers to the obligation on States to take steps to progressively achieve economic, social and cultural rights within the maximum of their available resources, and to refrain from taking retrogressive steps in terms of fulfilling rights.ⁱ

Emergency refers to an exceptional situation of crisis which constitutes an extraordinary threat to the organised life of a State party to the African Charter in part or as a whole or otherwise severely disrupts the normal conditions of existence and capacity to cope using ordinary measures, and requires immediate action,ⁱⁱ taking the form of emergency measures.

Emergency and disaster measures refer to: federal, regional, municipal, and local governmental plans, legislation, policy and executive action that seek to address emergency and disaster situations and which may grant extraordinary powers to the executive. Examples of emergency and disaster measures include (1) formal emergency and disaster powers granted through legislative, constitutional, or other applicable processes; (2) *de facto* emergency powers; (3) exceptional emergency powers; and (4) repurposed emergency powers, such as the use of counter-terrorism and security powers to regulate emergencies and disasters.

Essential and emergency services providers: essential service providers are those whose roles are essential to maintaining the essential functioning of the state, in accordance with safety and security and human rights obligations. Examples of essential service providers include health care workers, clinics providing harm prevention for drug users, employees at

supermarkets who provide access to necessary essentials, such as food and water, sanitation workers, law enforcement, lawyers and civil society organisations that provide support for affected communities, courts, parliament, the media, National Human Rights Institutions (NHRIs), National Preventive Mechanisms and entities providing essential social services, such as health clinics, shelters, food banks and social grant offices.

Indivisibility of rights has the same meaning as envisaged in the preamble to the African Charter, which is that the right to development and civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee and requirement for the enjoyment of civil and political rights.

Non-discrimination includes equal enjoyment of rights and freedoms, equal treatment, equality before the law and equal protection of the law as guaranteed by Articles 2 and 3 of the African Charter, without distinction of any kind relating to race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.ⁱⁱⁱ The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has practical dimension in that individuals should in fact be able to enjoy the rights enshrined in the Charter.^{iv}

Older persons means those persons aged sixty (60) years and above, as defined pursuant to Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons.^v

Oversight refers to the monitoring of decisions and actions of State officials during situations of emergency and disaster by oversight mechanisms, which can include a combination of constitutional or statutory oversight authorities, the judiciary, parliamentary oversight bodies, international and regional human rights treaty reporting mechanisms, in addition to civil society.

Participation^{vi} refers to the right of all people to participate in and access information relating to the decision-making processes concerning emergencies and disasters that affect their lives and well-being.

Peoples refers to a group of individuals having a common identity on account of objective markers of shared language, racial or ethnic makeup, historical experience, religious, cultural or ideological affinity, connection to a particular territory and covers minorities and indigenous

populations/communities as elaborated in the work and jurisprudence of the African Commission.

Persons with Disabilities includes those who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others.^{vii}

Status includes, but is not limited to, race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, economic status, fortune, birth, disability, sexual orientation and gender identity.

Sunset clauses are provisions within legal instruments which provide that a particular rule or statute automatically terminates at the end of a fixed date, unless it is formally extended in accordance with the law.

Vulnerable groups are segments of society that face significant impediments to their capacity to enjoy their rights on an equal basis.^{viii} This vulnerability is due to these groups having specific characteristics that make them more susceptible to discrimination and disadvantage and which require positive measures to ensure they are able to enjoy their fundamental rights on an equal basis. Examples of vulnerable groups include older persons, women and girls, children, persons living with disabilities, minorities, indigenous peoples, refugees, asylum seekers, and migrants, persons deprived of their liberty, including children or juveniles deprived of their liberty, homeless persons, people living in poverty and peoples struggling for their dignity and genuine independence. Additional axes of vulnerability include race, ethnicity, colour, language, religion or political opinions.^{ix}

PART 1: GENERAL PRINCIPLES GOVERNING EMERGENCY AND DISASTER MEASURES

1. Exceptionality and preparedness for emergency and disasters

- 1.1. States must only declare a state of emergency or disaster when absolutely necessary, and in circumstances where such declaration is an exceptional measure of last resort.
- 1.2. In accordance with the obligation under Article 1 of the African Charter to give effect to the rights enshrined therein, States should prepare for situations of emergency and disaster, including through investment in early warning capabilities, emergency response reserves, emergency services capacity and development.^x States should also include emergency preparedness in their national planning on health care, access to food, water, education, social security, and housing.
- 1.3. Emergency plans, including mitigation measures that are consistent with the rights to non-discrimination and equality enshrined in Article 2 of the Charter,^{xi} should be put in place for sectors of society who are particularly vulnerable to the effects of states of emergency and disaster.
- 1.4. States should as part of their preparedness to ensure protection of rights in situations of emergency and disaster establish in clear terms the legal procedure to be followed and the conditions under which state of emergency and disasters would be declared.

2. Conditions for limitations on human and peoples' rights in emergencies or disasters

- 2.1. Under the African Charter, States are not permitted to derogate^{xii} from their human and peoples' rights obligations, including during situations of emergency and disaster.^{xiii}
- 2.2. Limitations on human and peoples' rights as part of emergency and disaster measures are permitted, provided that they meet the following criteria:
 - 2.2.1. Comply with the principles of legality^{xiv} and the rule of law.^{xv} For limitations of rights from declaration of states of emergency or disaster to be justifiable under the African Charter, it is a requirement of the principles of legality and rule of law

that any declaration of state of emergency or disaster is formally promulgated law^{xvi} that it is equally enforced, independently adjudicated, and is consistent with international and regional human rights principles, including these Guidelines;^{xvii} and

- 2.2.2. Be in pursuit of a legitimate interest as defined by regional and international human rights instruments.^{xviii} The only legitimate ground for the adoption of emergency measures is to assist the State in overcoming an exceptional situation that is a threat to the life of the State in whole or in part. The only legitimate ground for the adoption of disaster measures is to assist a State in dealing with an occurrence that is severely disrupting the normal conditions of existence and the capacity of the state to adapt and recover.
- 2.2.3. Be a necessary and proportionate measure to achieve that end within a democratic society.^{xix} The State must demonstrate that the restriction is necessary to protect one of the permissible grounds stated in the African Charter including those envisaged in Article 27, and that the measure is proportionate and the least intrusive option to achieve the legitimate aim.^{xx} The assessment of measures as being necessary and proportionate should be continuous throughout the duration of the emergency.
- 2.2.4. Respect the core essence of the right. Limitations should never render the right itself illusory.^{xxi} Even in an emergency or a disaster, where a right may be subject to strict limitations, such limitations must never go so far as to annihilate the substance of the right inherent in the human person. In effect, there must be a presumption in favour of the legally protected substance of the right.^{xxii} The measures must be carefully tailored to recognise and guarantee respect of the right.
- 2.2.5. Adhere to the rights of freedom from discrimination and equality before the law.^{xxiii} In particular, emergency and disaster measures must comply with the requirements of non-discrimination and substantive equality, enshrined in Articles 2, 3 and 19 of the African Charter. This includes the implementation of positive measures designed to respect and protect the rights of persons with special needs, or persons who are particularly vulnerable to the adverse consequences of limitations of their rights in emergencies or disasters on the basis of their status.

Measures should not lead to the discrimination or stigmatisation of any person or vulnerable group.^{xxiv}

2.2.6. Consider the particular socio-economic conditions of the targeted population or group while also considering the potential socio-economic impact of emergency or disaster measures, particularly measures that impose criminal penalty.

2.2.7. Effective remedies for violations must be ensured. Any limitation imposed during emergency or disaster situations shall be subject to the possibility of challenge to, and remedy against, its abusive application.^{xxv} Therefore, States must provide an effective remedy for violations of the rights and freedoms, including providing access to judicial procedures and other remedial measures.

2.3. In designing measures that limit rights in accordance with regional and international human rights standards, States should ensure that:

2.3.1. Measures are designed to strike a balance between the interests of the State and societies, peoples' and individuals, and rights and duties,^{xxvi} and respect the rights of others, collective security, morality and common interest;^{xxvii}

2.3.2. Selected measures entail the least restrictive option available, when infringing upon the enjoyment of human and peoples' rights;^{xxviii}

2.3.3. Measures are based on the best scientific evidence available and having due regard to the needs of vulnerable groups with special needs as recognised under international and regional law, or who are particularly vulnerable to human rights violations in the context of emergencies and disasters on the basis of their status.^{xxix}

3. Public participation relating to the design and implementation of emergency and disaster measures

3.1. States should facilitate an ongoing, meaningful and effective consultation process before and after an official decision on states of emergency or disaster, and associated measures, are made to enable the active participation of interested or affected people, civil society organisations and government actors are involved in policy-making both.

- 3.2. In accordance with the rights to participatory democracy as enshrined under Article 13 of the African Charter^{xxx} and without prejudice to the justifiable limitations that result from the declaration of the state of emergency or disaster, States should facilitate ongoing, meaningful and effective participation for a broad range of stakeholders – including civil society, legal experts, human rights organisations, vulnerable groups, women, children, persons with disabilities and older persons, in the design and implementation of emergency and disaster measures.
- 3.3. Emergency should not lead to the disregard of effective and meaningful participation. Where in-person participation and consultation are not possible, States should consider alternative measures for achieving meaningful and effective participation, such as online platforms.
- 3.4. All laws, regulatory instruments and information relating to the design, declaration, implementation, and oversight of emergency and disaster measures must be made publicly and readily available and accessible, in accordance with the right of access to information as expressed in Article 9 of the African Charter and other regional and international human rights standards. Information includes records held by a public body at any level or by a private body performing a public function.

PART 2: DECLARATIONS OF STATES OF EMERGENCY AND DISASTER

4. Legal frameworks

- 4.1. States must not enter into *de facto* states of emergency and disaster.^{xxxii} Measures introduced to deal with a state of emergency and disaster must be based on a duly promulgated and effectively communicated law of general application^{xxxiii} adopted in accordance with constitutional procedures acceptable in democratic societies.
- 4.2. States must develop or update, and regularly review, legal frameworks that govern emergency and disaster situations to ensure that they are consistent with regional and international law, including the provisions of these Guidelines.
- 4.3. The scope of powers under emergency and disaster measures must be defined, and States must limit the exercise of those powers to the extent strictly required by the exigencies of the situation, in accordance with the principles set out in Guideline 2.
- 4.4. Legal frameworks and rules on the declaration and implementation of states of emergency and disaster should be disseminated to all members of the public by States.
- 4.5. States must ensure that measures intended to have the effect of providing emergency and disaster powers to the executive are formally declared through constitutionally valid legal instruments and regulated in accordance with these Guidelines, and
- 4.6. States must ensure that measures intended to have the effect of providing emergency and disaster powers to the executive are not embedded within legislative or regulatory instruments that do not contain the mechanisms for oversight of emergency and disaster powers as set out in this Guideline, and in compliance with regional and international norms.

5. Emergency and disaster measures implementation plans

- 5.1. By virtue of the obligation, they assumed under Article 1 of the African Charter, States have the responsibility to put in place a robust system for effective risk assessment and contingency planning to assist with the development of plans for the implementation of emergency and disaster measures. The conduct of risk assessments and contingency planning should be:

- 5.1.1. Guided by principles of openness, transparency, inclusivity and non-discrimination, while recognising different community dynamics^{xxxiii};
 - 5.1.2. Identify emerging concerns and trends and determine appropriate measures and level of attention required to provide effective, rights-based, inclusive and holistic response mechanisms to situations of emergency and disaster;
 - 5.1.3. Prepare and enable authorities to deploy targeted and differentiated responses, which also encompasses competing rights and interests, in respect of each specific set of circumstances and challenges.
 - 5.1.4. Designed to be evidence-based, informed by scientific analysis and human rights compliant. Plans should take into account issues of socio-economic marginalisation and inequality, while adopting an intersectional lens in understanding how different aspects of an individual's identity can compound existing levels of vulnerability.
- 5.2. States should prioritise the implementation of measures that enhance the capacity of affected persons to comply with emergency and disaster measures, rather than adopting criminal law consequences for non-compliance.
 - 5.3. Emergency and disaster management officials should collect accurate information and utilise this information to conduct risk assessments and contingency planning, and to plan for the necessary and proportionate deployment of support and emergency services. The collection, use and storage of information must comply with the right to privacy, including the right of all persons to confidentiality of communications and protection of personal information.^{xxxiv}
 - 5.4. States should develop communication strategies, that ensure all information related to situations of emergency and disaster is accessible in accordance with access to information under Article 9 of the African Charter, and Guideline 9.4 of these Guidelines. The communication strategy should provide information about the laws, policies and other instruments relevant to the situation of emergency or disaster, and the consequences of non-compliance with the legal provisions.

6. Official declarations of states of emergency and disaster

- 6.1. When States determine that emergency and disaster measures will be adopted, this must be officially declared in accordance with a legal framework that is consistent with regional and international human rights standards.^{xxxv}
- 6.2. The declaration of the state of emergency and disaster, and the reasons for the declaration, must be published in a government gazette, be available in all official languages, made publicly accessible to all, with particular focus on facilitating access for those with limited internet access or for those where disability poses challenges to access.^{xxxvi}
- 6.3. A copy of the declaration must also be provided to the African Commission.
- 6.4. The reason for a declaration of a state of emergency and disaster must clearly serve one of the prescribed purposes listed in Article 27(2) of the African Charter, or one of the other rights listed in the African Charter. The reasons and factors justifying a state of emergency must be openly discussed, debated, recorded and shared with the public.

7. Temporality of states of emergency and disaster

- 7.1. A state of emergency and disaster must be a temporary measure with an ongoing review process and an explicit termination date while being subject to a sunset clause.
- 7.2. Sunset clauses should apply to all emergency and disaster measures, which guarantee enforceable legislative and judicial oversight of extensions or renewals by the executive.^{xxxvii}
- 7.3. The declaration of a state of emergency and disaster should be subject to immediate and ongoing parliamentary approval at regular intervals. States should also provide for judicial oversight of legal procedures and any violations of human and peoples' rights,
- 7.4. Without prejudice to oversight through parliamentary and judicial oversight, declarations of states of emergency and disaster should provide for a mechanism made up of expertise with the requisite competence for continuously reviewing the

condition of emergency and disaster, reporting on and recommending the necessary adjustments or reviews to the declaration of states of emergency and disaster.

7.5. The process for review of extensions or renewals of states of emergency and disaster should comply with the principle of participatory democracy as provided for under Article 13 of the African Charter, and include consultation, as protected under the right to express opinions in Article 9 of the African Charter, with stakeholders on the effectiveness of emergency and disaster measures in achieving their objectives, and the human and peoples' rights implications of such measures.^{xxxviii}

8. Review of the declaration of emergency and disaster

8.1. By law, declarations of emergency and disaster must be independently reviewable by the legislature and the judiciary.

8.2. Given the important role of NHRIs and civil society in ensuring accessibility, transparency and accountability, these stakeholders should be given a clear role in assisting state institutions in fulfilling their oversight role.

8.3. The legal framework governing states of emergency and disaster should set out the procedural and substantive requirements for a valid declaration of emergency to enable scrutiny of both procedural and substantive compliance.

8.4. In cases where the nature of the restrictions affects the proper functioning of state and non-state institutions, declarations of states of emergency and disaster should provide for exceptions that enable the functioning of essential institutions including the judiciary, parliament, the media, lawyers, and civil society organisations, such as human rights defenders delivering essential services, as defined under essential service providers.

PART 3: PROTECTING RIGHTS UNDER EMERGENCY OR DISASTER MEASURES

9. Emergency or disaster measures must comply with regional and international human rights standards, including the provisions of these Guidelines and use the least punitive and restrictive measures, while refraining from exacerbating disadvantage experienced by groups vulnerable to human and peoples' rights abuses.^{xxxix}
10. Emergency or disaster measures must also comply with the principles of legality and the rule of law while satisfying a legitimate interest grounded in human rights, which identifies the type of emergency or disaster situation to which measures are a response. Measures that limit human and peoples' rights must be necessary, proportionate in relation to the underlying legitimate interest, non-discriminatory, applied with precaution to avoid unnecessary foreseeable violations and subject to oversight.
11. States are strongly discouraged from taking emergency and disaster measures that are retrogressive, and must make full use of the maximum available resources to ensure the protection and promotion of human and peoples' rights in emergency and disaster situations.^{xl} Where retrogressive measures apply, they must be limited to the minimum extent possible. Where measures lead to the reversal of progresses made in the enjoyment of human and peoples' rights, States must adopt mitigation measures. Retrogressive measures must be exceptional and must not defeat the overarching purpose of the African Charter.
12. During emergencies and disasters, States must take measures to ensure respect for Article 9 of the African Charter on the right of access to information. This includes the right of every person to receive factual, regular, intelligible and science-based information on the threats the State is facing and how this has been translated into emergency and disaster measures that limit rights. The public must be informed with sufficient notice, of the consequences of non-compliance.^{xli}
13. Emergency and disaster responses must provide for the collection, analysis and dissemination of disaggregated data, to ensure that measures are responsive to the needs of all persons, including those vulnerable to human and peoples' rights violations in the context of emergency and disaster measures.^{xlii}

14. Emergency and disaster measures must respect the inherent dignity of all persons and not result in direct or indirect discrimination or stigmatisation of persons or groups on the basis of their status.^{xliii}
15. States should ensure that the conceptualisation, planning and implementation of emergency and disaster measures protect the rights of women and girls, children, persons with disabilities, older persons, and all other persons and groups with protected status under the African Charter, or vulnerable to human rights abuses in an emergency or disaster context. Such measures should be designed and implemented in consultation with affected persons and groups.
16. If the situation of emergency or disaster also amounts to an armed conflict,^{xliv} international humanitarian law applies,^{xlv} while also respecting the parallel application, and mutually supporting nature, of international human rights law.^{xlvi}

PART 4: OVERSIGHT AND ACCOUNTABILITY DURING STATES OF EMERGENCY AND DISASTER

- 17. Protected status of oversight and accountability mechanisms during states of emergency and disaster**
 - 17.1. Oversight and accountability mechanisms enjoy special measures of protection during states of emergency and disaster and should be afforded the institutional guarantees necessary for their more efficient functioning given the heightened risk of non-compliance with minimum standards during emergencies on account of the extraordinary power invested in the executive arm of government.
 - 17.2. States must ensure that state organs and mechanisms responsible for oversight and accountability are in place and effectively functioning to receive, investigate and make determinations on complaints of human and peoples' rights abuses during emergency and disaster measures.
 - 17.3. States should ensure that oversight mechanisms, such as the courts, parliament, human rights organisations and human rights lawyers, human rights defenders, National Human Rights Institutions (NHRIs), National Preventive Mechanisms (NPMs), ombudsman and other special mechanisms are recognised as emergency

service providers, adequately resourced, and are able to perform their work during emergencies or disasters.^{xlvii}

18. Training for public officials

18.1. States must ensure training and support for all public officials, and in particular law enforcement officials, on the use of force, human and peoples' rights protections during emergencies and disasters, and the rights and needs of vulnerable groups in these contexts.

18.2. Training and supportive services should be provided to ensure officials have the capacity to manage the personal impact of states of emergency or disaster while implementing mechanisms for internal and external accountability.

19. Judicial access during states of emergency and disasters

19.1. The independence of the judiciary must be guaranteed by States during emergency and disaster measures in accordance with Article 26 of the African Charter.^{xlviii}

19.2. Emergency and disaster measures must include provisions for the judiciary to make special arrangements for exercising its judicial review role on compliance of the design and implementation of emergency and disaster measures with minimum human rights and make binding orders on the design, declaration, and implementation of emergency and disaster measures.

PART 5: REMEDIES FOR HUMAN RIGHTS VIOLATIONS DURING STATES OF EMERGENCY AND DISASTER

20. Right to remedy during declarations of emergency and disaster^{xlix}

20.1. The right to redress encompasses the right to an effective remedy and to adequate, effective and comprehensive reparationⁱ with a view to fostering transitional justice through facilitating accountability, sustainable peace, healing and reconciliation.ⁱⁱ States should provide adequate resources and institutional support to ensure that all relevant State officials, including judicial officers and law enforcement officials, receive training on the protection and promotion of human and peoples' rights, and

the provision of effective remedies, during situations of states of emergency and disaster.

- 20.2. Where appropriate, States must utilise existing national human rights institutions (NHRIs) to aid in monitoring the protection of human and peoples' rights during emergencies and disasters. When there is no NHRI in place or there is a lack of capacity, States must put in place an independent special monitoring mechanism as part of the law and institutional measures for the implementation of declarations of state of emergency and disaster;
- 20.3. States must provide guarantees for ensuring that perpetrators of breaches of human rights standards are brought to justice, and appropriate reparation is provided to victims. Reparation can include compensation, restitution, rehabilitation, public apologies, just satisfaction, guarantees of non-repetition and changes in relevant law or practices.
- 20.4. Limitations on rights imposed during emergency and disaster measures should be subject to the possibility of challenge and remedy.^{lii}

21. Duty to investigate human rights violations during emergencies or disasters

- 21.1. State must carry out prompt, impartial, independent, transparent and thorough investigations when there are reasonable grounds to believe that human rights violations have occurred, including torture and other ill-treatment, States must prosecute those responsible, and provide adequate, effective and comprehensive reparation to victims. Investigations should be in line with international and regional standards.^{liii}
- 21.2. Protection of the right to life (Article 3) and to humane treatment (Article 5) entails a duty to investigate alleged or suspected violations of those rights in accordance with Guideline 36.1.
- 21.3. States must ensure that mechanisms for the effective, independent and prompt investigation of human rights violations including independent national human rights commissions are in place, and are formally recognised as emergency service providers under emergency and disaster measures.

- 21.4. The existence of a situation of emergency and disaster may impose practical limitations on the State's ability to investigate potentially unlawful deaths. Such limitations should be documented and explained. Where practicable, existing oversight and accountability mechanisms tasked with conducting such investigations should be resourced and empowered to continue their work during a situation of emergency and disaster, including by enjoying access to relevant scenes. In the aftermath of a situation of emergency and disaster, States must endeavour to establish the truth about any deaths that have occurred.
- 21.5. Where a person dies in custody, there is a presumption of State responsibility, and the burden of proof rests on the State to prove otherwise, through a prompt, impartial, thorough and transparent investigation carried out by an independent body.
- 21.6. States are encouraged to adopt and use the principle of due diligence to add value to the enjoyment, promotion, and protection of the rights of an individual. This principle is a critical pillar in the assessment of obligations of a State Party, based on result. This principle deals with aspects of prevention, protection, investigation, prosecution, punishment, and compensation. Its application will enable States Parties to mitigate human rights violations. The application of this principle shall be in line with the African Commission's using of persuasive jurisprudence from other human rights monitoring bodies.

PART 6: IMPLEMENTATION OF THESE GUIDELINES

22. Implementation measures

- 22.1. In accordance with Article 1 of the African Charter, States must adopt legislative, administrative, judicial and other measures to give effect to the Charter, and should take into account these Guidelines to ensure that the rights and obligations contained herein are guaranteed in law and practice.
- 22.2. As part of discharging their obligation under Article 1 of the Charter, States are encouraged to adopt or review existing legislative, administrative and other provisions to assess compatibility with these Guidelines, and to repeal laws that are not compatible with them with a view to ensure that the laws, administrative and other provisions are fully aligned with the rights enshrined in the African Charter.

- 22.3. State Parties are encouraged to disseminate these Guidelines to all state officials, including in particular the parliament, law enforcement officials, and other state security and justice agencies, as well as Ombudsmen, National Human Rights Institutions, National Preventative Mechanisms, statutory oversight authorities, and civil society.
- 22.4. States shall ensure training for law enforcement officials on the use of force, human rights protections during emergencies and the rights and needs of vulnerable groups.

23. Application

States remain responsible for ensuring that the provisions of the African Charter, these Guidelines, other relevant instruments developed by the African Commission pursuant to the Charter and other international human rights standards are applied during states of emergency and disaster.

24. Reporting

- 24.1. Following a declaration of a state of emergency and disaster, States must notify the African Commission of the declaration, and demonstrate to the African Commission that:
- 24.1.1. There is reasonable justification for the emergency and disaster measures;
 - 24.1.2. There is a planned duration or ongoing review of duration for the state of emergency and disaster;^{liv}
 - 24.1.3. Alternatives to the declaration of a state of emergency and disaster were comprehensively examined by the State Party;
 - 24.1.4. There was genuine participation by affected groups in examining the proposed measures and alternatives;
 - 24.1.5. The measures are not directly or indirectly discriminatory;

24.1.6. The measures will not have a sustained negative impact on the realisation of rights in the African Charter;^{iv} and

24.1.7. Provision has been made for independent reviews of measures at the national level.

24.2. States must also provide information on national compliance with these Guidelines in their periodic reports to the African Commission pursuant to Article 62 of the African Charter.

ⁱ This doctrine was first traversed in the United Nations Council on Economic, Social and Cultural Rights' General Comment No.3, which interprets Article 2(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 2(1) of the ICESCR imposes a duty on States to take steps to the maximum of their available resources to progressively achieve the full realisation of the Covenant rights by all appropriate means. The Committee clarified that "any deliberate retrogressive measures" would require "the most careful consideration and would need to be fully justified by reference to the totality of the rights in the Covenant and in the context of the full use of the maximum available resources" - UN Committee General Comment No 3 "The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)" UN doc. E/1991/23 para 9; S Liebenberg (2021) "Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression" South African Journal on Human Rights, 37:2, 181-204, DOI: 10.1080/02587203.2021.1972331.

ⁱⁱ This wording is drawn from the European Court on Human Rights "Guide on Article 15: Derogation in time of emergency" quoting the case of *Lawless v. Ireland (no. 3)*, 1961, § 28, on page 6.

ⁱⁱⁱ African Commission on Human and Peoples' Rights v the Republic of Kenya Application 006/2012 para 138.

^{iv} African Commission on Human and Peoples' Rights v the Republic of Kenya Application 006/2012 para 138.

^v African Commission on Human and Peoples' Rights Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons, Article 1.

^{vi} Commitments to democracy are found in section 4(c) of the Constitutive Act of the African Union, the 1981 African Charter on Human and Peoples' Rights; the 1990 African Charter for Popular Participation in Development; the 1990 Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World; the 1991 Treaty Establishing the African Economic Community; the 1995 Cairo Agenda for Action; the 1999 Grand Bay (Mauritius) Declaration and Plan of Action on Human Rights in Africa; the 2000 Conference on Security, Stability, Development and Cooperation (CSSDCA) Solemn Declaration; the 2002 Memorandum of Understanding of Security, Stability, Development and Cooperation in Africa (CSSDCA); the 2002 Declaration on Democracy, Political, Economic and Corporate Governance of the New Partnership for Africa's Development (NEPAD); the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the 2003 African Union Convention on Preventing and Combating Corruption; the 2004 Protocol Relating to the Establishment of the Peace and Security Council of the African Union; the 2007 African Charter on Democracy, Elections and Governance. The African Agenda 2063 also refers to the aspiration of establishing an Africa based on good governance, democracy, respect for human rights, justice and the law.

^{vii} Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, hereinafter (the Africa Disability Protocol) which aligns with the Preamble of the Convention of the Rights of Persons with disabilities.

^{viii} This wording is adapted from the African Commission's *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights* (Part 1(e) page 8.

^{ix} Preamble to the African Charter.

^x "It is a matter of human rights necessity that there must be international solidarity with the people of Africa and African Governments, and priority given to investing more in health, water and sanitation, social protection, employment and sustainable infrastructures to ensure that no one is left behind." Statement from human rights chiefs from the UN and the ACHPR: We must act now to avoid a catastrophe, say rights chiefs (2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25898&LangID=E>> (accessed 08/03/2022).

^{xi} As enshrined in Article 2 of the African Charter and Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

^{xii} Certain International law instruments do provide for derogations, such as the International Covenant on Civil and Political Rights (1966) 999 UNTS 171 ("the ICCPR"), the American Convention on Human Rights (1969) O.A.S.Treaty Series No. 36, 1144 UNTS 123 ("American Convention") and the European Convention on Human

Rights (“the European Convention”). It is clear that these systems constitute a derogation regime based on necessity, proportionality and temporality. For example, Article 4 of the ICCPR provides that: “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, colour, sex, language, religion or social origin.”

^{xiii} Derogation entails the suspension of rights when the state has no choice other than to suspend rights to protect more fundamental rights.

^{xiv} See, *African Charter on Human and Peoples’ Rights*, Article 7(2); throughout the *African Charter on Human and Peoples’ Rights*, States may only restrict the rights and freedoms of individuals when provided for by law as found in Articles 6, 7, 8, 10, 11, 12, and 14; *International Covenant on Civil and Political Rights* (ICCPR), Article 15(1); Comms. 48/90-50/91-52/91-89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* (November 1999), para. 59; *United Nations Human Rights Committee*, General Comment 29, para. 7; *United Nations Human Rights Committee*, General Comment 27, para. 13; and the Principles and guidelines on human and peoples’ rights while countering terrorism in Africa, Explanatory Note to Principle 1(G), *Prohibition of Discrimination*

^{xv} Protocol Relating to the Establishment of the Peace and Security Council of the African Union. Para 13 of the Preamble provides that African leaders are aware ‘of the fact that the development of strong democratic institutions and culture, observance of human rights and the rule of law ... are essential for the promotion of collective security, durable peace and stability, as well as for the prevention of conflicts’. Art 3(f) provides that one of the objectives of the Peace and Security Council of the African Union is to ‘promote and encourage ... the rule of law ... as part of efforts for preventing conflicts’. According to the Universal Declaration of Human Rights, 1948 (Universal Declaration) ‘it is essential, if a man is not to be compelled to have recourse ... to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’.

^{xvi} Under Article 4 (1) , the ICCPR states that: “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, colour, sex, language, religion or social origin.” Under Article 4(3) the ICCPR goes on to provide that “states are also required to declare a public emergency and to inform the United Nations Secretary General when derogating from the requirements of the Covenant.”

^{xvii} UN Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16; As confirmed in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and decisions on communications: “[n]o circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial’ African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003. R. Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, 26th Ordinary Session, 1-15 November 1999; Communication 218/98 Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria; Communication 301/05 Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue officials) v. Ethiopia, 7 November 2011, para 239. See also UN Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 6; Article 7 of the Charter.

^{xviii} Ibid paras 41 and 54.

^{xix} ACHPR: *Constitutional Rights Project v Nigeria*, para 69. The African Charter was influenced by the International Covenant on Economic, Social and Cultural Rights (ICESCR) which does not contain a derogation clause. It is not necessary to suspend economic, social and cultural rights as such suspension does not help States to cope with public emergencies; See the 66th ordinary session of the ACHPR dedicated to human rights and the COVID-19 pandemic, <<https://au.int/sw/node/39107>> (accessed 1 December 2021). These principles are also reflected in the International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (“the ICCPR”), the American Convention on Human Rights (1969) O.A.S.Treaty Series No. 36, 1144 UNTS 123 (“American Convention”) and the European Convention on Human Rights (“the European Convention”).

^{xx} In *Media Rights Agenda and Others v. Nigeria* (2000), para 69.

^{xxi} *Media Rights Agenda and Others v. Nigeria* (2000), Ibid, para 70.

^{xxii} Principle (i) of the African Commission’s *Guidelines on Freedom of Association and Assembly in Africa*, *ibid*, states that there must be a presumption in favour of the exercise of the right to freedom of association. See also, OHCHR Training Handbook on Human Rights in the Administration of Justice, Chapter 16 on derogations during states of emergencies p 814.

^{xxiii} The African Charter specifically enshrines the principle of non-discrimination on the grounds of race, ethnicity, colour, sex, language, religion and national and social origin, to name a few (under article 2). Article 3 provides that everyone is equal before the law. Article 18 (3) of the African Charter calls on all States Parties to eliminate every form of discrimination against women, while ensuring the protection of the rights of the woman and the child as stipulated in international declarations and conventions. See also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Article 18(4) further provides that "the aged and the disabled shall have the right to special measures of protection in keeping with their physical or moral needs." See also the Protocol on the Rights of Persons with Disabilities. This was further emphasised in the African Commission's 449 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. Section 5 underscored that when dealing with COVID-19, states must "ensure that COVID-19 response measures are applied in strict compliance with the principle of equality before the law and mechanisms are put in place for preventing and remedying abusive and discriminatory applications of pandemic regulation measures".

^{xxiv} ACHPR (2020) "Press Statement on human rights based effective response to the novel COVID-19 virus in Africa" <https://www.achpr.org/pressrelease/detail?id=483>. (accessed 03/03/2022).

^{xxv} See, Part 1 principle E of the Principles and guidelines on human and peoples' rights while countering terrorism in Africa,

^{xxvi} O Okafor & G Dzah "The African human rights system as a 'norm leader': Three case studies" (2021) 21 *African Human Rights Law Journal* pages 669 - 698 https://www.ahrlj.up.ac.za/images/ahrlj/2021/volume_2/AHRLJ%202021%20Okafor.pdf.

^{xxvii} Article 27(2) of the African Charter; *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria* (2000) AHRLR 227 (ACHPR 1999).

^{xxviii} Human Rights Committee Statement on derogations from the Covenant in connection with the COVID-19 pandemic.

^{xxix} African Commission's 449 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; Pandemic and Human Rights in the Americas - Resolution 1/2020, para 27.

^{xxx} See also Article 21 of the Universal Declaration of Human Rights.

^{xxxi} Where emergency powers are assumed outside of a constitutional or legislative framework, there is less scope for legislatures and courts to limit the activities of the executive; ACHPR (2020) "Press Statement on human rights based effective response to the novel COVID-19 virus in Africa" <https://www.achpr.org/pressrelease/detail?id=483>. (accessed 03/03/2022).

^{xxxii} ACHPR (2020) "Press Statement on human rights based effective response to the novel COVID-19 virus in Africa" <https://www.achpr.org/pressrelease/detail?id=483>. (accessed 03/03/2022).

^{xxxiii} In light of the fact that there are inevitable power imbalances within groups and in society, "states should recognise, protect and implement the rights to equality and non-discrimination, and ensure inclusiveness in the exercise of the right to participate in public affairs". UN Guidelines for States on the effective implementation of the right to participate in public affairs- page 7. States must take steps to include all voices and to guard against "those with the sharpest elbows" taking precedence.

^{xxxiv} See, Principle 40, Declaration of Principles on Freedom of Expression and Access to Information, African Commission on Human and Peoples' Rights, 2019.

^{xxxv} In the case of *Media Rights Agenda and Constitutional Rights Project V. Nigeria*,^{xxxv} the Commission held that allowing national laws to take precedence over state obligations to the African Charter will defeat the purpose of the rights enshrined in the Charter, which is why international law standards must always continue to prevail over national laws, and limitations on rights contained in the Charter must be according to the provisions of the Charter.

^{xxxvi} Office of the High Commission on Human Rights (2020) "COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International experts" < <https://www.ohchr.org/en/press-releases/2020/03/covid-19-governments-must-promote-and-protect-access-and-free-flow> > (accessed 12/07/2022).

^{xxxvii} Kouroutakis, Antonios and Ranchordás, Sofia, "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies" (2016) *Minnesota Journal of International Law* 264. <https://scholarship.law.umn.edu/mjil/264>.

^{xxxviii} See, for example, Nicola McGarrity, Rishi Gulati and George Williams (2012), 'Sunset Clauses in Australian Anti-Terror Laws', *Adelaide Law Review* 33(2), at 320.

^{xxxix} UNAIDS (2020) "Rights in the time of COVID-19: Lessons from HIV for an effective, community-led response." https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf (accessed 10/03/2022). Bearing in mind that Article 6 of the African Charter permits arrests only in the exercise of powers normally granted to the security forces in a democratic society;

^{xl} See UN Committee General Comment No 3 "The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)" UN doc. E/1991/23, para 9.

^{xli} ACHPR, *Press Statement on human rights based effective response to the novel COVID-19 virus in Africa*, 24 March 2020, <https://www.achpr.org/pressrelease/detail?id=483>. (accessed 03/03/2022).

^{xlii} The United Nations Economic Commission for Europe (2020) "UNECE Policy Brief on Aging No.25" < https://reliefweb.int/sites/reliefweb.int/files/resources/ECE_WG1_36_PB25.pdf > (accessed 05/03/2022).

^{xliii} These guidelines should be read in conjunction with the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Global Principles on National Security and the Right to Information (“Global Principles” or “Tshwane Principles”),

^{xliiv} In armed conflict, what constitutes an ‘arbitrary’ deprivation of life during the conduct of hostilities is to be determined by reference to international humanitarian law. International humanitarian law on the conduct of hostilities must only be applied during an armed conflict and where the use of force is part of the armed conflict. In all other situations of violence, including internal disturbances, tensions or riots, international human rights rules governing law enforcement operations apply. Paras 32 and 33 of the African Commission’s General Comment No 3 on the Right to life.

^{xliiv} Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

^{xlivi} In principle, the right to not arbitrarily be deprived of one’s life applies also in hostilities, tension and strife. In armed conflict, what constitutes an ‘arbitrary’ deprivation of life during the conduct of hostilities is to be determined by reference to international humanitarian law: Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. This includes including the core principles of military necessity, distinction, proportionality and precautions attack

^{xliiii} 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. Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa - ACHPR/Res.370(LX)2017.

^{xliiii} Article 26 of the African Charter has been interpreted as including that the judiciary should be ‘independent of external, especially executive influence’ Comms. 143/95-150/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (November 1999), East Africa Court of Justice, *James Katabazi & 21 Others v Secretary General of EAC & Another*, 01/2007, November 2007; and *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (November 1999).

^{xlix} Article 7 (1) of the African Charter provides that “every individual shall have the right to have his cause heard.”

ⁱ General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) para 8.

ⁱⁱ General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) para 66.

ⁱⁱⁱ See, Part 1 principle E of the Principles and guidelines on human and peoples’ rights while countering terrorism in Africa,

ⁱⁱⁱⁱ General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) para 25. See also, standards enshrined in the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)

^{liv} *Aksoy v Turkey* 1996, para 68.

^{lv} Article 1 of the African Charter.