



Africa Criminal Justice Reform  
Organisation pour la Réforme de la Justice Pénale en Afrique  
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# Criminal justice, human rights and COVID-19 - a comparative study of measures taken in five African countries

Impact on civil and political rights, including fair trial rights

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# Civil and political rights

- Civil and political rights probably find their best universal expression in the International Covenant on Civil and Political Rights (ICCPR).
- All five countries under review are state parties to the ICCPR.
- The impact of COVID-19 restrictions on these rights will be briefly reviewed, with a particular focus on fair trial rights.

# Overview of rights affected

- In all the countries surveyed, the restrictions imposed affected civil and political rights, including the right to life (people were reportedly killed by police enforcing Covid-19 restrictions in South Africa, Kenya, Mozambique, and Zambia ),
- The right not to be subject to torture or cruel inhuman or degrading treatment or punishment (evidence of police subjecting people to summary punishments in South Africa, Malawi, and Kenya )
- The right to liberty and security of the person (people were arrested in relation to infringements of restrictions in all the countries), and
- The right to freedom of movement (all of the countries imposed curfews or other restrictions on free movement).
- Fair trial rights

# Fair trial rights affected

- The right to have adequate time and facilities for the preparation of defence
- The right to communicate with counsel of own choosing
- The right to be tried without undue delay
- The right of the accused to be tried in his or her presence

# Limiting measures introduced

- Most courts were restricted to hearing ‘urgent’ matters, leading to delay – particularly in initial most restrictive period
  - Temporary closures of courts and reduced access continues to date
- Backlogs are likely to persist and worsen under continuing restrictions, unless extraordinary measures are taken
- Convicted persons were released early under measures to reduce overcrowding to reduce the spread of Covid-19,
  - Yet detention of persons on remand is likely to have increased

# Limits on oversight and lawyers

- In Kenya, lawyers were not initially listed as essential services; they were classified as such only after legal action.
- In Mozambique, all visits to prisons were suspended.
- In South Africa, visits to prison, including by lawyers were suspended. This also meant families and prison oversight visitors could not make prison visits. In particular the Office of the Inspecting Judge could not visit prisons.
- In Malawi, female prisoners were removed to another location, affecting their ability to see family and legal representatives.

# Measures to ameliorate restrictions 1

- Telephonic consultations with lawyers
  - Insufficient privacy
- Court video-conferencing
  - It is argued that video-remand does not meet the requirements of in-person hearings and the safeguard provided by a detainee appearing physically in court.
  - The safeguard against torture and ill-treatment of regular physical appearances in court is one of the primary underlying reasons that most common-law countries require remand warrants to be renewed regularly (in many jurisdictions every fortnight).
  - Extending remand warrants via video-conferencing does not provide the same degree of protection

## Measures to ameliorate restrictions 2

- Mozambique released pre-trial detainees under its Amnesty Law if charged with crimes punishable by up to one year imprisonment.
- In Kenya, the National Council on the Administration of Justice required that judges release all petty and traffic pre-trial detainees on cash bail or free police bond instead of remanding them in custody.

## Limitations: Article 4

- In a 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.”

# Limitations: Syracuse Principles

## ICCPR Syracuse Principles

- In accordance with the law; based on a legitimate objective;
- strictly necessary in a democratic society;
- the least restrictive and intrusive means available; and
- not arbitrary, unreasonable, or discriminatory.

# No derogation

- Article 4(2) provides that no derogation from
- articles 6 (right to life), 7 (prohibition of torture), (paragraphs 1 and 2) (prohibition of slavery and servitude), 11 (prohibition against imprisonment for civil debt), 15 (prohibition of retrospective criminalisation), 16 (recognition as a person) and 18 (freedom of thought, conscience and religion) may be made under this provision.
  - The killings and torture meted out by police and military in the countries under review in enforcing COVID-19 restrictions clearly constituted unjustifiable limitations of the rights to life and the prohibition of torture

# Limits on fair trial justifiable?

- Whether these limitations and the attempts at amelioration rendered the limitations reasonable, justifiable, will only clearly be seen with the passage of time.
- The safeguard against torture and ill-treatment of regular physical appearances in court cannot simply be dismissed and probably constitute the most serious limitation.
- In the African context technological solutions seldom meet their promise in the long-term, and hold a great deal of risk in relation to persons deprived of their liberty.
- While measures have been taken to reduce the sentenced prison population, the remand population is likely to have been bolstered by both delays and persons arrested for violations of COVID-19 restrictions, despite some measures taken in some countries to encourage remand releases.
- What seems notable is that in many of the countries under review, the most restrictive measures were applied in March and April of 2020, when there were relatively few cases of COVID-19 in the countries under review.
- Furthermore, the measures taken have had long-term impacts in the sense of permanently increased backlogs and delays. Ongoing closures of courts and other limitations are likely to exacerbate the situation.