



STATEMENT BY THE CENTRE FOR HUMAN RIGHTS AT THE 66TH ORDINARY SESSION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Human rights situation in Africa

15 July 2020

Chairperson of the Commission, Commissioners, and welcoming in particular the newly inaugurated Commissioners,

COVID-19

The Centre for Human Rights, Faculty of Law, University of Pretoria, commends the Commission for acting with energy and thoughtfulness in response to the COVID-19 pandemic. The measures adopted by the Commission include statements and urgent appeals. The Commission correctly focuses on the disproportionate effect that the pandemic has on those in our societies who had already been most marginalised.

We however urge the Commission to follow up and to ensure that states report on the implementation of the recommendations contained in these statements, and to develop and maintain a publicly accessible database on COVID-19 related follow-up and implementation to this effect.

We note the Commission's urgent appeal to South Africa regarding enforcement of lockdown measures by security forces, the protection of women and girls during the lockdown, the socio-economic hardships facing large number of South Africans and the protection of the rights of vulnerable groups including refugees, asylum seekers and migrants in the context of the lockdown measures in force. We further note the concerns raised by the Commission through its Working Group on Extractive Industries, Environment and Human Rights about regulations in South Africa particularly as these relate to mining operations, mine workers and mining affected communities.

The Centre for Human Rights remains gravely concerned about the use of excessive force during the lockdown due to COVID-19 in South Africa and elsewhere on the continent. The well-publicised death of Collins Khosa at the hands of security forces is only emblematic of a much more pervasive issue. The South African Independent Police Investigative Directorate on 8 June 2020 reported to Parliament that 10 people died as a result of police action during the enforcement of the lockdown. Others who met their death in these circumstances include Sibusiso Amos, from Volsoorus, was allegedly fatally shot on the veranda of his home; Petrus Miggels, from Ravensmead, who died after allegedly after being assaulted by the police; Adane Emmanuel, who was allegedly assaulted by the police, taken to the police station, and subsequently died in hospital; Elma Robyn Montsumi, who allegedly hanged herself after arrest by the police; and Ntando Elias Sigasa, who allegedly died as a result of assault by the police. At the same hearing, IPID reported that it is investigating a total of 376 cases arising from the lockdown period. To these should be added the cases submitted against the South African National Defence Force (SANDF), under investigation with the Military Ombud.

The Centre therefore calls on the government to communicate unequivocally and continuously its abhorrence of excessive violence by law enforcement and to take all necessary measures to stop and eradicate excessive violence by law enforcement. We also urge IPID, the Military Ombud, the South African Police Service and SANDF to fully and expeditiously investigate all acts of policy killing and other forms of brutality speedily and impartially, and bring the perpetrators to justice. We also demand that all governmental entities provide full and easily accessible information about all reported, investigated and concluded cases of lockdown excesses.

New Rules of Procedure

We commend and congratulate the Commission for the adoption of its revised 2020 Rules of Procedure. We note that the seizure process has become largely the responsibility of the Secretariat, and the fusion of the seizure and admissibility phases.

We in particular commend the Commission for formalising a process for inviting and admitting requests from amici curiae under the new Rule 104 (Rule 104(1) reads: 'At any moment after the respondent State has been requested to make its submissions on a Communication the Commission may decide to invite or grant leave to an amicus curiae to intervene in the case by making written or oral submissions in order to assist the Commission in determining a factual or legal issue.'). We urge the Commission to, from now on, make use of its competence to invite amicus curiae briefs in respect of communications pending before it. The Centre for Human Rights avails itself to assist the Commission in this regard.

An important aspect that needs to be regulated in the Commission's Rules is the referral of cases to the African Court on Human and Peoples' Rights (Court). It is regretted that only 3 cases have made their way from the Commission to a judgment by the Court. We note that no cases has ever been referred under the Commission's current Rule 118(1), which allows the Commission to refer to the Court cases in which the Commission has found states in violation of the Charter. The note that the new Rule 130 explicitly allows for referral by the Commission to the Court in instances when the Commission has not yet made a determination on the admissibility of the Communication. While this is commendable, the Commission should further develop transparent guidelines on the circumstances under which such cases will be referred to the Court. These factors should relate to why a binding judicial decision (by the African Court, rather than a finding by the Commission) is required, and may include: the nature and urgency of the case; and the record of non-compliance with the Commission's decisions by the state complained against.

The need to underscore that these referrals will be limited and based on clearly defined and justified criteria is all the more pronounced in the light of the risk to the authority and legitimacy posed to the African Union human rights system due to the withdrawal of article 34(6) declarations (accepting the direct access of individuals and NGOs enjoying observer status with the Commission to the African Court on Human and Peoples' Rights) by Benin and Côte d'Ivoire, following the earlier withdrawals by Tanzania and Rwanda. The diminishing prospect of direct access to the Court (which is able to make unequivocally binding judgments in respect of the obligations of state parties to the African Charter on Human and Peoples' Rights and other AU treaties) highlights the importance of referrals by the Commission of appropriate cases to the Court. The Commission should in this regard develop clear guidelines for referral of cases under article 5(1)(a) of the Protocol to the African Charter on the Establishment of an African Court (Court Protocol). The Commission should clarify that, when required, cases may also be referred at *other stages* of the proceedings, including after a decision has been taken on the merits, and a state refuses to comply with the Commission's recommendations.

Sexual orientation, gender identity and sex characteristics

The Centre for Human Rights is pleased to report recent developments by the Gabonese Republic to decriminalise same-sex relationships and by the Republic of South Africa to prohibit marriage officers from objecting to marrying same-sex couples. These legislative changes are a step towards reducing discrimination and violence against persons in Africa on the basis of their sexual orientation, gender identity or sex characteristics.

Nevertheless, we note the continuing widespread criminalisation of same-sex relationships in African countries and, in a few places, with the threat of the death penalty. Across Africa, LGBTIQ+ persons continue to experience discrimination based on the law, including in the provision of health and other social services.

We also call the attention of the Commission to the evidence from media reports and NGO statements around the world that LGBTIQ+ persons, who are typically vulnerable and marginalised even in ordinary times, are affected disproportionately during the global COVID-19 pandemic. The usual threats to the rights of LGBTIQ+ persons combined with the impact of the pandemic means that there is also a disproportionate socio-economic and health impact on LGBTIQ+ communities in Africa.

The Centre for Human Rights urges the Commission to call on state parties to the African Charter that maintain laws criminalising consensual same-sex relations between adults in private to follow the example of Gabon to abolish these laws.

We further call on all state parties to the Charter to

- (i) recognise the dangers of violence and other forms of discrimination against persons based on their real or imputed sexual orientation and gender identity and to institute laws that protect LGBTIQ+ persons from violence and discrimination as members of a vulnerable category as called upon in Resolution 275 of the African Commission;
- (ii) refrain from criminalising the work of human rights defenders and service providers working for the protection and well-being of LGBTIQ+ persons; and
- (iii) work towards the education and sensitisation of their citizens to respect the rights of all persons including LGBTIQ+ persons.

Thank you.

For more information, please contact:

Prof Frans Viljoen

Director

Centre for Human Rights, University of Pretoria

Tel: +27 (0) 12 420 3228 or Mobile: +27 (0) 73 3934181

frans.viljoen@up.ac.za

www.chr.up.ac.za