STATE RESPONSES TO THE COVID-19 PANDEMIC AND THEIR IMPACT ON HUMAN RIGHTS IN SOUTH AFRICA

JOHN MUKUM MBAKU*

ABSTRACT

The COVID-19 pandemic came to South Africa in early 2020 and the country chose to rely on existing laws, which included its national constitution, statutory laws, and the country's obligations under international and regional human rights instruments, to provide the government with the tools to fight the spread of the virus and protect public health. However, civil society and its organizations became worried that the interpretation of existing laws might offer the government the opportunity to act opportunistically and violate citizens' human rights. South Africa declared a state of disaster in May 2020 to enhance the government's ability to minimize the spread of the virus and its impact on people's health. The state of disaster was followed by lockdowns, which severely restricted South Africans' ability to exercise their right to freedom of movement and of association. In addition, schools and businesses were closed. School closures made it extremely difficult for learners, including especially those with disabilities, to exercise their right to basic education. Citizens and non-governmental organizations challenged various COVID-19-related measures and their enforcement in court, arguing that they infringed on the human rights of various individuals within the country's jurisdiction. In their decisions in these cases, the courts held that in all its activities, the government must ensure that the rights of learners with disabilities are safeguarded and enforced. In addition, the courts affirmed the democratic dispensation established by South Africa's 1996 Constitution and held that the law is supreme and that all state functionaries, including members of the executive, must perform their functions in conformity with the law and that they must respect and uphold the constitution, even during officially declared emergencies.

I. OVERVIEW OF AFRICA'S RESPONSES TO PUBLIC HEALTH EMERGENCIES

In the summer of 2020, Human Rights Watch (HRW) issued a report in which it stated that the COVID-19 pandemic had exposed significant gaps in the provision of healthcare services in many African countries.[1] HRW advised

*_John Mukum Mbaku_ is an Attorney and Counselor at Law (licensed in the State of Utah) and Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, USA). He is also a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C. He received the J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor of the _Utah Environmental Law Review_, and the Ph.D. (economics) from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

1. HUM. RTS. WATCH, _Africa: Covid-19 Exposes Healthcare Shortfalls_, (June 8, 2020), https://www.hrw.org/news/2020/06/08/africa-covid-19-exposes-healthcare-shortfalls.

African governments to "urgently address [their] healthcare deficiencies [in order] to meet the demands of the COVID-19 pandemic and ongoing healthcare needs of their populations."[2] In addition, HRW advised African governments to act urgently to ensure that all the people under their jurisdictions are able to realize their right to health as enshrined in various international and regional human rights instruments, including the African Charter on Human and Peoples' Rights (Banjul Charter).[3] At the time, Carine Kaneza Nantulya, the Africa advocacy director for HRW, had advised member states of the African Union (AU) "to carefully analyze the current state of their healthcare infrastructure and make meaningful investments to improve access to quality health care."[4]

Human Rights Watch interviewed many African healthcare experts as well as human rights defenders.[5] From these interviews, HRW learned that "a chronic lack of investment in healthcare infrastructure and equipment has made it harder for African nations to retain skilled healthcare workers, provide essential medicines, and reduce the mortality rates of perennial diseases like malaria."[6] Solomon Dersso, chairperson of the African Commission on Human and Peoples' Rights (African Commission), the entity tasked with "promoting and protecting human rights on the continent," has "said that the COVID-19 pandemic underscores the fact that health is a fundamental human right and that its realization and fulfillment is not just for the health of individuals but for the society as a whole."[7] He added that "[u]ltimately, the right to health is a policy choice" and that "[g]overnments have the primary responsibility to be at the forefront of preventive and palliative measures."[8]

Article 16 of the Banjul Charter guarantees the right of every individual "to enjoy the best attainable state of physical and mental health."[9] In addition to the fact that this is a fundamental right under international human rights law, it is also an important part of the U.N. Sustainable Development Goals (SDGs).[10] The right to health which has also been recognized by the constitutions of many African countries, is a key goal of the African Union's Agenda 2063.[11]

In its 2020/2021 annual report, Amnesty International noted that the COVID-19 pandemic had exposed many African countries' "terrible legacy of deliberately divisive and destructive policies that have perpetuated inequality,

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. African Charter on Human and Peoples' Rights art. 16, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereinafter "Banjul Charter").
10. HUM. RTS. WATCH, *supra* note 1.
11. *Id.*

discrimination, and oppression" across the continent.[12] Throughout the continent, the impacts of violent armed conflicts in countries, such as Ethiopia, Mozambique, Cameroon, and Nigeria, were exacerbated by the pandemic.[13] This was due to the fact that many countries in the region had "weaponized" the pandemic in order to "crack down on human rights," particularly those of members of opposition political parties and historically marginalized individuals and groups (e.g., women and girls, older persons, persons with disabilities, refugees, asylum seekers, and migrants, and ethnic and religious minorities).[14]

In addition to the fact that the COVID-19 pandemic hit "those shackled by oppression hardest thanks to decades of inequalities, neglect and abuse," it also created opportunities for opportunistic political leaders to oppress their citizens and violate their human rights and fundamental freedoms.[15] Since March 2020, 46 African countries have enacted legislation to respond to the COVID-19 pandemic and this includes 41 countries, which have "either fully or partially prohibited gatherings."[16] The International Center for Not-for-Profit Law (ICNL) identified "187 new measures by governments responding to the COVID-19 pandemic in 46 African countries" and "[t]hese include legislative action (passage of laws and regulations, orders/decrees), executive orders/decrees, and other practices that have not been codified."[17] The ICNL also determined that there were "at least 189 extensions of various measures, as well as a further 67 actions taken to ease measures."[18]

Unfortunately, some of these legislative responses to the COVID-19 pandemic actually enhanced the ability of incumbent regimes in these countries to entrench themselves and continue to monopolize power.[19] ICNL found that, under the pretext of managing the pandemic, many African governments enacted legislation or implemented policies that actually enhanced the ability of the incumbent government to violate the rights of their citizens. For example, ICNL found 39 declarations of a state of emergency, a national health emergency, a state of national disaster or calamity, or a state of health alert in

12. AMNESTY INT'L, *Sub-Saharan Africa: The devastating impact of conflicts compounded by COVID-19*, (April 7, 2021), https://www.amnesty.org/en/latest/news/2021/04/subsaharan-africa-the-devastating-impact-of-conflicts-compounded/ [https://perma.cc/JPV6-UGAM].

13. *Id.*

14. *Id.*

15. AMNESTY INT'L, *COVID-19 hits those shackled by oppression hardest thanks to decades of inequalities*, *neglect and abuse*, (Apr. 7, 2021), https://www.amnesty.org/en/latest/press-release/2021/04/annual-report-covid19-decades-of-oppression-inequality-abuse/ [https://perma.cc/2HUS-G9LF].

16. INT'L CTR. FOR NOT-FOR-PROFIT L., *African Government Responses to COVID-19*, https://www.icnl.org/post/analysis/african-government-response-to-covid-19 [https://perma.cc/9F8T-6TLE] (last visited Feb. 12, 2025).

17. *Id.*

18. *Id.*

19. *Id.*

31 countries that significantly increased the power of incumbent regimes.[20] These states of emergency negatively affected the rights to freedom of assembly and of association of individuals living in these countries. For example, in an open letter (hereinafter "Freedom House Joint Statement") to the Southern Africa Development Community (SADC), several organizations expressed "their concern about restrictive government measures in response to COVID-19," which they argued, were having "a significant impact on citizens' rights and livelihood" and called all the governments of SADC "to adhere to applicable human rights standards in addressing crisis."[21]

The Freedom House Joint Statement (FHJS) noted that states of emergency were declared in Angola, Botswana, Eswatini, Lesotho, Mozambique, and Namibia.[22] It stated that it was quite concerning that "unduly prolonged periods or extensions of states of emergency [had] been declared in some countries where parliamentary oversight is not guaranteed without providing reasons to justify the length."[23] The FHJS indicated that during the period of these pandemic-induced emergencies, only Botswana and Namibia had subjected their declarations of states of emergency to parliamentary oversight.[24] Article 4 of the International Covenant on Civil and Political Rights (ICCPR) states that:

> [i]n 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 obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[25]

States Parties, however, are not allowed to derogate from articles 6, 7, 8 (¶¶ 1 & 2), 11, 15, 16 and 18 of the ICCPR.[26] Article 6 guarantees the right to life.[27] Article 7 prohibits torture, cruel, inhuman or degrading treatment or

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20. *Id.*

21. The organizations were Advancing Rights in Southern Africa (ARISA); Southern Africa Human Rights Defenders Network (SAHRDN); Southern Africa Litigation Centre (SALC); Amnesty International (AI); and Freedom House. *See SADC: Restrictive COVID-19 Regulations Presenting Concerning Ramifications for Enjoyment of Human Rights, Including Livelihoods*, FREEDOMHOUSE (May 27, 2020), https://freedomhouse.org/article/sadc-restrictive-covid-19-regulations-presenting-concerning-ramifications-enjoyment-human [https://perma.cc/23S8-YD6R] (hereinafter "Freedom House Joint Statement").

22. *Id.*

23. *Id.*

24. *Id.*

25. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 1057 (hereinafter "ICCPR").

26. *Id.* at art. 4(2).

27. *Id.* at art. 6(1).

punishment.[28] Article 8 prohibits slavery and the slave trade in all their forms as well as servitude.[29] Article 11 prohibits sending people to prison for failing to meet their contractual obligations.[30] Article 15 prohibits *ex post facto* laws or retroactive punishment.[31] Article 16 guarantees everyone "the right to recognition everywhere as a person before the law."[32] Finally, Article 18 guarantees everyone "the right to freedom of thought, conscience and religion."[33] According to Article 4(2), none of the rights guaranteed in Articles 6, 7, 8 (paragraphs 1&2), 11, 15, 16, and 18 shall be derogated from, even in times of national emergencies or states of disaster.[34]

When African countries declared states of emergency as a way to respond to the COVID-19 pandemic, they were not supposed to violate any of the rights enshrined in the ICCPR or derogate from the articles mentioned in Article 4(2).[35] Research has determined that lockdown measures taken by some African countries to minimize the spread of the pandemic "often resulted in increased levels of domestic violence against women and girls, leading UN Women to coin a new term—'shadow pandemic'—to refer to the severe intensification of all forms of gender-based violence that occurred during the pandemic."[36]

The right to life (Article 6(1) of the ICCPR) and the prohibition against torture or cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR) together constitute what has been codified in international human rights law as the right to the integrity of the person. This right, which is considered a fundamental human right protected by international human rights law, protects an individual's mental and physical well-being and, according to the ICCPR, and cannot be derogated from or restricted in times of a public emergency, even if that emergency is legally declared. In its comments on the non-derogable

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28. *Id.* at art. 7 ("[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

29. *Id.* at art. 8 (1&2).

30. *Id.* at art. 11.

31. Article 15 states that "[n]o one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision was made by law for the imposition of the lighter penalty, the offender shall benefit thereby." *See id*. at art. 15.

32. *See id.* at art. 16.

33. *See id*. at art. 18.

34. *See id*. at art. 4(2); *see also* Hum. Rts. Comm., General Comment No. 29, U.N. Doc. CCPR/C/21/Rev/1/Add.11 (Aug. 31, 2001).

35. These articles are 6, 7, 8, (¶¶ 1 & 2), 11, 15, 16 and 18. *See* ICCPR, *supra* note 25, at art. 4(2).

36. Valentina Carraro, *The effects of the COVID-19 pandemic on violations of the right to integrity of the person*, 9 J. INT'L HUM. ACTION 5, 6 (2024); *see also About us*, UN WOMEN, https://www.unwomen.org/en/about-us [https://perma.cc/XYW7-H5NV] (last visited Sept. 19, 2024) (explaining that U.N. Women is the U.N. Entity for Gender Equality and the Empowerment of Women; it is a U.N. entity charged with working for gender equality and the empowerment of women).

rights in the ICCPR, the U.N. Commission on Human Rights stated as follows:

> No State [P]arty shall, even in time of emergency threatening the life of the nation, derogate from the [ICCPR]'s guarantees of the right to life, freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.[37]

Elements of the right to integrity of the person include protection from torture and ill-treatment, protection from arbitrary detention, protection from medical experiments, respect for bodily integrity, and respect for free and informed consent.[38] Unfortunately, the COVID-19 pandemic provided opportunities for opportunistic politicians to enact new laws or interpret existing ones to enhance their ability to monopolize power and, at the same time, violate the rights of their citizens, as well as for non-state actors to engage in various forms of human rights violations. For example, there was a significant rise in "intimate partner violence" during the COVID-19 pandemic.[39] Although domestic violence had been a major problem in many countries in Africa before the COVID-19 pandemic, it was significantly exacerbated by mandatory lockdown laws. In Ethiopia, for example, it was determined that just in two months during COVID-19 lockdowns, over 100 girls were raped, many of them by close family members.[40]

But why did the COVID-19 pandemic and associated lockdowns create a significantly heightened risk for victims of domestic violence? It has been argued that these mandatory lockdown regulations or laws forced many people to spend more time at home, significantly increasing their vulnerability to abuse

37. Hum. Rts. Comm., Status of the International Covenants on Human Rights, U.N. Doc. E/CN.4/1985/4, ¶ 58 (Sept. 28, 1984).

38. These rights are enshrined in major international and regional human rights instruments, including the ICCPR, the Banjul Charter, the European Convention on Human Rights, and the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

39. Mearg Eyasu Kifle, Setongnal Birar Aychiluhm & Etsay Woldu Anbesu, *Global prevalence of intimate partner violence during the COVID-19 pandemic among women: systematic review and meta-analysis*, 24 BMC WOMEN'S HEALTH 127, 128 (2024).

40. *Id.*

by relatives and other family members.[41] The U.N. Office on Drugs and Crime determined that restricting the mobility of women and girls, as COVID-19 regulations did, significantly increases their "risk of victimization by intimate partners or family members."[42] The UNODC study determined that

> [l]ockdown measures can potentially affect violence against women in two conflicting ways: by increasing strain in the home (as women spend more time in isolation with violent partners and family members they are more exposed to domestic violence); and by reducing exposure to crime committed outside the home (as social interaction is reduced, women have less exposure to the interpersonal violence that affects them).[43]

In many African countries, violations of the physical integrity of the individual also occurred while state security officers were enforcing public health measures that had been imposed to minimize the spread of COVID-19 virus.[44] For example, in April 2020, the BBC reported that Nigeria's security forces, which were enforcing lockdown measures in several parts of the country, had killed more people than the COVID-19 virus itself.[45] In order to "ensure strict implementation of containment measures" designed to minimize the spread of COVID-19, some law enforcement officials had engaged in behaviors that involved "the perpetration of torture and ill-treatment or even deprivation of the right to life of civilians."[46]

Second, research by Amnesty International (AI) determined that in many countries in Africa, "[a]busive policing and excessive reliance on law enforcement to implement COVID-19 response measures have violated human

41. *Id.*; *see also* U.N. OFFICE ON DRUGS AND CRIME (UNODC), RESEARCH BRIEF: WHAT CRIME AND HELPLINE DATA SAY ABOUT THE IMPACT OF THE COVID-19 PANDEMIC ON REPORTED VIOLENCE AGAINST WOMEN AND GIRLS, 1 (Nov. 20, 2020), https://reliefweb.int/report/world/research-brief-what-crime-and-helpline-data-say-about-impact-covid-19-pandemic-reported [https://perma.cc/GFP4-CZ85].

42. *Id.*

43. *Id.* at 2.

44. Sophia A. Zweig, et al., *Ensuring Rights while Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to COVID-19*, 23 HEALTH & HUM. RTS. J. 173, 173 (2021).

45. *Coronavirus: Security forces kill more Nigerians than Covid-19*, BBC NEWS (Apr. 16, 2020), https://www.bbc.com/news/world-africa-52317196 [https://perma.cc/NKS8-UTLB]; *see also UN raises alarm about police brutality in COVID-19 lockdowns*, ALJAZEERA (Apr. 18, 2020), https://www.aljazeera.com/news/2020/4/28/un-raises-alarm-about-police-brutality-in-covid-19-lockdowns [https://perma.cc/K5Q6-TFQK] (noting that the U.N. had raised the alarm that many countries, including Nigeria, South Africa, and Morocco, were "flouting the rule of law in the name of fighting coronavirus" and that these countries "risk sparking a 'human rights disaster'").

46. Carraro, *supra* note 36, at 10.

rights and in some instances made the health crisis worse."[47] In a briefing which AI released in December 2020, it noted that it had "documented cases of human rights violations related to law enforcement and the COVID-19 pandemic in 60 countries in all regions of the world."[48] This, according to AI, includes "cases where people were killed or severely injured for allegedly breaching restrictions, or for protesting against detention conditions."[49] In the first five days of Kenya's COVID-19-related curfew, noted AI, "at least seven people were killed and 16 hospitalized as a result of police operations" related to the enforcement of lockdown restrictions.[50]

AI determined that throughout many countries, security forces were involved in violating international law during the pandemic by using excessive, unnecessary, and disproportionate force to implement government mandated lockdowns and curfews.[51] In doing so, security forces committed "horrific abuses" under the pretext of "fighting the spread of COVID-19" and these abuses include, for example, "Angolan police shooting a teenage boy in the face for allegedly breaking curfew."[52] AI also found that "[i]n South Africa, police [had] fired rubber bullets at people 'loitering' on the streets on the first day of lockdown" and that "at least 16 people were killed by security forces in Wolaita Zone in Ethiopia in August 2020 following protests against the arrests of local leaders and activists, allegedly for holding a meeting in contravention of COVID-19 restrictions."[53]

Although under international human rights law States can lawfully place certain restrictions on the right to freedom of peaceful assembly in order to protect public health or other legitimate interests, these restrictions "must be provided by law and [they must] be necessary and proportionate to a specific aim."[54] However, AI has determined that some States were imposing "blanket bans on protests, prohibiting or restricting protests where other public gatherings of similar sizes remained unaffected; or using force against peaceful protesters."[55] Thus, in enacting legislation or interpreting existing laws to protect public health during the COVID-19 pandemic, States were required to be mindful of the non-derogable nature of certain human rights enshrined in the ICCPR and to place "human rights at the centre of all considerations."[56]

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47. AMNESTY INT'L, *Governments and police must stop using pandemic as pretext for abuse*, (Dec. 17, 2020), https://www.amnesty.org/en/latest/press-release/2020/12/governments-and-police-must-stop-using-pandemic-as-pretext-for-abuse/ [https://perma.cc/2RAA-QRCB].

48. AMNESTY INT'L, *COVID-19 crackdowns: Police abuse and the global pandemic*, (Dec. 17, 2020), https://www.amnesty.org/en/documents/act30/3443/2020/en/ [https://perma.cc/6HTR-933T].

49. AMNESTY INT'L, *Governments and police must stop*, *supra* note 47.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

In many African countries, public health emergencies and natural disasters have often provided incumbent governments with the opportunity to either interpret existing laws or enact new ones to enhance their ability to oppress citizens and violate their human rights. For example, the outbreak of Ebola in Guinea, Liberia, and Sierra Leone in 2014 led to quarantines, which significantly affected the people's rights to freedom of assembly and of association. Governments in all three States imposed lockdowns on homes, neighborhoods, villages, and even entire administrative regions.[57] Responding to Ebola quarantines and lockdowns in Guinea, Liberia, and Sierra Leone at the beginning of the pandemic in 2014, Human Rights Watch declared as follows:

> International human rights law requires that restrictions on human rights in the name of public health or public emergency meet requirements of legality, evidence-based necessity, and proportionality. Restrictions such as quarantine or isolation of symptomatic individuals must, at a minimum, be provided for and carried out in accordance with the law. They must be strictly necessary to achieve a legitimate objective, the least intrusive and restrictive available to reach the objective, based on scientific evidence, neither arbitrary nor discriminatory in application, of limited duration, respectful of human dignity, and subject to review. When quarantines are imposed, governments have absolute obligations to ensure access to food, water, and health care.[58]

Thus, while States may be able to impose restrictions on the exercise of human rights in order to deal with public health and other public emergencies, the measures that they employ must be legal, necessary, and proportional. In 2020, for example, U.N. experts indicated that they were alarmed that the government of Uganda was using "COVID-19 emergency laws to target gay, lesbian, bisexual[,] and transgender people and urged the government to strictly limit the use of emergency power to public health issues."[59] The U.N.'s group of experts reported that they had learned that local government authorities had raided an LGBT shelter in Kyengera, a small town in the Wakiso District of Uganda, just 10 kilometers from Kampala, the country's capital.[60] The raid of the shelter, the experts learned, was "based on the perceived sexual orientation or gender identity of the residents, who were then charged for allegedly

57. *West Africa: Respect Rights in Ebola Response*, HUM. RTS. WATCH (Sept. 15, 2014), https://www.hrw.org/news/2014/09/15/west-africa-respect-rights-ebola-response?gad_source=1&gclid=Cj0KCQjwurS3BhCGARIsADdUH53n22VyOHIcEewSfKNffh9TTyQN0RdpvhQjb116yelc3zjwkE2HWT8aAknNEALw_wcB [https://perma.cc/QL37-YPQL].

58. *Id.*

59. Press Release, Office of the U.N. High Commissioner for Human Rights, UN rights experts fear Uganda is using COVID-19 emergency powers to target LGBT people (Apr. 27, 2020), https://www.ohchr.org/en/press-releases/2020/04/un-rights-experts-fear-uganda-using-covid-19-emergency-powers-target-lgbt [https://perma.cc/FC2T-FWJL].

60. *Id.*

disobeying coronavirus regulations on physical distancing."[61]

The U.N. experts explained that pursuant to international human rights law, "[e]mergency powers to combat crises, such as COVID-19, derive their strength and legitimacy from strict adherence to their object and purpose" and that "[a]ny emergency powers linked to COVID-19 must be proportionate, necessary and non-discriminatory."[62] When governments misuse emergency powers, for example, to target their perceived political enemies or competitors, instead of protecting public health or other public interests, they undermine their democratic institutions, threaten the rule of law, and create opportunities for state and non-state agents to violate human rights.

Government responses to the COVID-19 pandemic "generated common challenges and tensions, particularly concerning the relationship between public health measures on the one hand and the need to protect human rights and secure livelihoods on the other."[63] For example, the decision of many African governments to "resort to lockdowns" in order to minimize the spread of the pandemic "jeopardized the protection of human rights, including the right to life, dignity, liberty, freedom of assembly and privacy."[64] It was reported in 2022 that in Kenya, the police had taken the COVID-19 lockdown "as an opportunity to increase violent harassment of [Nairobi's] citizens" and that since 2020, police had "killed more than 326 people," including 13-year-old Yassin Moyo.[65] Similarly, in April 2020, Reuters reported that security forces in Nigeria had killed "18 people in two weeks while enforcing lockdowns imposed to halt the spread of the new coronavirus."[66] The pandemic had significant impact on the "social and economic well-being" of many Africans, particularly "vulnerable and marginalized groups," and pushed the latter deeper into poverty.[67]

Legal scholars and human rights defenders have argued that "these challenges have played out in distinctive local, national and transnational settings in which developments have been shaped by underlying structural factors and situation-specific dynamics and responses."[68] The responses of various actors, including especially governments, to the COVID-19 pandemic, have been undergirded by both national and international law.[69] Outside national

61. *Id.*

62. *Id.*

63. Ebenezer Durojaye et al., *Introduction: COVID-19 and the Law in Africa*, 65 J. AFR. L. 173, 173–74 (2021).

64. *Id.* at 174.

65. Jaclynn Ashly, *Kenyan Police Have Killed Hundreds During the Pandemic. Yassin Moyo Was One of Them*, JACOBIN (Jan. 19, 2022), https://jacobin.com/2022/01/nairobi-covid-19-brutality-murder-duncan-ndiema [https://perma.cc/H465-SRES].

66. *Nigerian security forces killed 18 people during lockdowns—rights panel*, REUTERS (Apr. 16, 2020), https://www.reuters.com/article/world/nigerian-security-forces-killed-18-people-during-lockdowns-rights-panel-idUSKCN21Y266/ [https://perma.cc/3TY8-QQJ6].

67. Durojaye et al., *supra* note 63, at 174.

68. *Id.*

69. *Id.*

constitutional law, regional and international human rights instruments have framed the various legal issues that have arisen from responses to the COVID-19 pandemic, including the need for States to be cognizant of their obligations under international law.[70]

Thus, the measures that African countries take to deal with public health emergencies must not violate the State's obligations under international and regional human rights instruments. One way to determine the nature of the legal frameworks through which African countries responded to COVID-19 is to examine the experiences of individual countries. In the next section, this article will provide a brief overview of the legal framework for the Republic of South Africa's response to COVID-19.

II. THE LEGAL FRAMEWORK FOR SOUTH AFRICA'S RESPONSE TO COVID-19

South Africa's response to the COVID-19 pandemic was couched in terms of its obligations under national constitutional law and international human rights law. The discussion begins with an overview of how international law is given effect in South Africa's courts. With respect to how international law is given effect in its domestic courts, the Republic of South Africa is generally considered a dualist country. According to § 231(2) of the Constitution of the Republic of South Africa, "[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."[71] However, pursuant to § 231(4), "a self-executing provision of an agreement that has been approved by Parliament is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament."[72]

Further, Section 234(4) makes clear that in order for an international agreement to create rights that are justiciable in South Africa's domestic courts, it must be domesticated by national legislation.[73] Unless it is inconsistent with the Constitution or an Act of Parliament, customary international law is law in South Africa.[74] With respect to the interpretation of legislation, the Constitution of the Republic of South Africa prescribes that when interpreting any legislation, "every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[75]

While South Africa's Bill of Rights, enumerated in Chapter 2 of the Constitution,[76] guarantees such fundamental rights as freedom and security of

70. *Id.*
71. S. AFR. CONST., 1996 § 231(2).
72. *Id.* at § 231 (4).
73. *Id.*
74. *Id.* at § 232.
75. *Id.* at § 233.
76. *Id.* at ch. 2.

the person,[77] as well as freedom of movement,[78] it also enshrines justiciable socioeconomic rights, such as access to adequate housing, access to healthcare services, and access to social security.[79] With respect to the interpretation of Chapter 2 provisions, a court, tribunal, or forum "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom"; "*must* consider international law"; and "*may* consider foreign law."[80]

Section 36 of South Africa's Constitution regulates how the rights in the Bill of Rights can be *limited* and states that these rights may be limited:

> only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose and the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.[81]

The declaration of states of emergency is governed by the provisions in § 37.[82] Section 37 also covers the derogation of rights, provides a table of non-derogable rights and judicial overview of states of emergency.[83] Section 37 provides that a state of emergency may be declared only "in terms of an Act of Parliament" and only "when the life of the nation is threatened by war, general insurrection, disorder, natural disaster or other public emergency" and "the declaration is necessary to restore peace and order."[84] Some rights are specifically listed as rights that cannot be derogated from, even when a state of emergency has been legally declared.[85] In 1997, South Africa enacted the State of Emergency Act (64 of 1997) to supplement the provisions provided in the Constitution.[86]

The first case of COVID-19 was reported in South Africa on March 5, 2020.[87] Unlike many other countries in Africa, South Africa chose not to declare a state of emergency to grant the government the powers to manage the

77. *Id.* at § 12.
78. *Id.* at § 21.
79. *Id.* at § 27.
80. *Id.* at § 39(1)(a–c) (emphasis added).
81. *Id.* at § 36(1).
82. *Id.* at § 37.
83. *Id.*
84. *Id.* at § 37(1).
85. *Id.* at § 37 (Table of Non-Derogable Rights).
86. State of Emergency Act 64 of 1997.
87. *COVID-19 Response in South Africa: Country Brief*, WORLD HEALTH ORG. (Sept. 21, 2024), https://www.afro.who.int/countries/south-africa/publication/covid-19-response-south-africa-country-brief [https://perma.cc/9GF3-5DYT].

pandemic.[88] Instead, the South African government opted to respond to the pandemic under a legal framework for disaster management undergirded by existing law, including the Bill of Rights and other constitutional provisions. Under this legal framework, certain rights may not be derogated from as made clear in § 37 of the Constitution in the course of the government's response to the pandemic and, in addition, any limitation of rights in the Bill of Rights during this period must comply with the provisions of § 36 of the Constitution.[89]

Although South Africa did not introduce any general law to provide emergency powers to the government to respond to COVID-19, there existed at the time the first case was reported in March 2020, a basic legal framework that could be utilized to deal with the pandemic. This was the Disaster Management Act (57 of 2002), which was designed to provide for "an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centers; disaster management volunteers; and matters incidental thereto."[90]

In 2015, South Africa amended the Disaster Management Act (2002) through the Disaster Management Amendment Act (16 of 2015).[91] Among other things, the amended Act provided for the South African National Defense Force (SANDF), the South African Police Service (SAPS), and any other organ of the State to participate in and assist the various disaster management structures.[92] A disaster is defined as "a progressive or sudden, widespread or localized, natural or human-caused occurrence which—(a) causes or threatens to cause—(i) death, injury or disease; (ii) damage to property, infrastructure or environment; or (iii) disruption of the life of a community."[93] Although it does not specifically mention COVID-19 or provide for the management and control of infectious diseases, "disaster" as defined in the Disaster Management Act (2002) can be applied to the pandemic.[94] The Act, however, can be seen as providing "a broad framework and conferring the executive powers necessary for the coordination and management of a wide range of natural and man-made disasters."[95] Although infectious diseases in South Africa are controlled and managed by Regulations Pertaining to the Surveillance and Control of Notifiable Medical

88. Petronell Kruger et al., *Republic of South Africa: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2023), https://oxcon.ouplaw.com/display/10.1093/law-occ19/law-occ19-e6?rskey=CBXjHY&result=1&prd=OXCON [https://perma.cc/F8UN-A3CU].

89. S. AFR. CONST., 1996 § 36.

90. Disaster Management Act 57 of 2002 pmbl. (S. Afr.); *see also* Kruger et al., *supra* note 88, at para. 19.

91. Disaster Management Amendment Act 16 of 2015 (S. Afr.).

92. *Id.* at pmbl.

93. Disaster Management Act 57 of 2002 art. 1(a)(i-iii) (S. Afr.).

94. *Id.*

95. Kruger et al., *supra* note 88, at para. 20.

Conditions, which were promulgated "pursuant to section 90 of the National Health Act (61 of 2003)," the latter regulations did not play a significant role in South Africa's management of COVID-19.[96]

Pursuant to the Disaster Management Act (2002), states of disaster can be declared to the national, provincial, and municipal levels by the relevant designated official (minister of the national government; premier of the province; or a leader of the municipality).[97] With respect to a national state of disaster, it must be declared "where a disaster involves more than one province or cannot be managed effectively by a single province."[98] Section 27(5) of the Act provides that once a state of disaster has been declared, it "lapses three months after it has been declared;"[99] it "may be terminated by the relevant Minister through a notice in the Government Gazette before it lapses or it may be extended by the Minister for 30 days at a time."[100]

On March 15, 2020, South African President Cyril Ramaphosa announced that the country's "Minister of Cooperative Governance and Traditional Affairs had declared a national state of disaster, across the entire Republic, in terms of section 27(1) of the Disaster Management Act 2002" to respond to the COVID-19 pandemic.[101] South Africa's initial state of disaster lapsed on June 15, 2020 and it was subsequently "repeatedly extended" for 30 days until midnight on April 4, 2022 when the final state of disaster came to an end.[102] Section 27 also empowers the relevant Minister to make regulations, issue directions, or authorize the issuing of directions concerning various aspects of the national state of disaster.[103] In carrying out this duty, the Minister is expected to consult with other relevant members of the Cabinet.[104]

In South Africa, all law and executive action, including that dealing with the management of the COVID-19 pandemic, are subject to judicial review to determine their compliance with the provisions of the constitution and the principle of legality. In fact, as will be made clear later in this article, some of the regulations and executive actions that were implemented to provide the government with the tools to manage the COVID-19 pandemic were challenged in the courts for allegedly infringing rights in the Bill of Rights and also for allegedly failing to meet the requirement of rationality.[105] To ensure the proper and effective management of the pandemic nationally and in various provinces

96. *Id.*

97. *Id.* at para. 21.

98. *Id.* at para. 22.

99. Disaster Management Act 57 of 2002 art. 27(5)(a) (S. Afr.).

100. Kruger et al., *supra* note 88, at para. 23.

101. *Id.* at para. 24; *see also* Wendell Roelf, *South Africa's Ramaphosa declares state of disaster over COVID-19*, REUTERS (Mar. 15, 2020), https://www.reuters.com/article/world/south-africas-ramaphosa-declares-state-of-disaster-over-covid-19-idUSKBN21214A/ [https://perma.cc/9DAZ-ZRH7].

102. Kruger et al., *supra* note 88, at para. 24.

103. *Id.* at para. 27.

104. *Id.* at para. 29.

105. *Id.*

and municipalities throughout South Africa, various government departments "published guidelines on the implementation of Covid-19 related executive regulations."[106] These guidelines, however, were only "advisory in nature" and did not have "the force of law, though their implementation [constituted] administrative action" and hence, could "be subjected to judicial review."[107]

At the behest of President Ramaphosa, the government of South Africa established the National Coronavirus Command Council (NCCC) in March 2020 to serve as a "centre for decision making in government's response to curb the spread of Covid-19 and to deal with the consequences of the pandemic."[108] Although the NCCC was expected to serve as a "consultative and coordinating forum to ensure effective communication over the national response to Covid-19," it appeared to be duplicating "the functions intended for the [National Disaster Management Centre] in terms of the Disaster Management Act 2002."[109] Doubts about its "legality, legitimacy, and accountability" emerged shortly after its creation.[110] Its constitutionality was eventually challenged before the High Court of South Africa (Western Cape Division, Cape Town) in *Esau and Others v. Minister of Co-operative Governance and Traditional Affairs and Others*.[111]

Before the Court, the Applicants had argued that the establishment of the NCCC was outside the President's constitutional powers and that the NCCC had "no legal validity and no decision-making" authority even though it had "seemingly managed and made decisions affecting all South Africans' rights."[112] In addition, the Applicants averred that "the President and the National Executive [had] usurped Parliament's powers unlawfully by establishing and granting powers to the National Coronavirus Command Council ('NCCC') that ought to vest with the National Disaster Management Centre."[113] The Court dismissed the constitutional challenge and upheld the argument by the President that § 85 of the Constitution "grants Cabinet the power to regulate its own process as it does not prescribe how Cabinet can arrange itself, meet and determine their *modus operandi*" and that the NCCC was a legitimate committee of the Cabinet and hence, could be held

106. *Id.* at para. 31.

107. *Id.*

108. Qaanitah Hunter, *What exactly is the National Coronavirus Command Council?*, NEWS24 (May 13, 2020), https://www.news24.com/news24/explainer-what-exactly-is-the-national-coronavirus-command-council-20200513 [https://perma.cc/GR5A-9Q3Y]. Membership in the NCCC initially consisted of the President and a few members of his cabinet. Eventually, however, the NCCC came to be staffed by all members of the President's cabinet. *See* Kruger et al., *supra* note 88, at para. 32.

109. Kruger et al., *supra* note 88, at para. 32.

110. *Id*.

111. *Esau and Others v. Minister of Coop. Governance and Traditional Affs. and Others* 2020 (11) BCLR 1371 (WCC) (S. Afr.).

112. *Id*. at para. 4.

113. *Id*. at para. 5.

accountable.[114]

During the period of March 26, 2020, to April 5, 2022, South Africa's response to the COVID-19 pandemic was based on and undergirded by "a risk-adjusted approach" or "alert system" in which "the reach of restrictive public health measures was graded according to the spread of Covid-19 and the 'readiness' of the health system."[115] Five alert levels were employed, "with Alert Level 5 representing a high Covid-19 spread and low health system readiness (high risk)," while Alert Level 1 represented "a low Covid-19 spread with high health system readiness (low risk)."[116] While alert levels were determined by the Minister of Health pursuant to advice from the Ministerial Advisory Committee on Coronavirus Disease 2019 ("MAC"), the government did acknowledge, however, that other factors, which included the economic and social impact of the pandemic, "also impacted on the determination of alert levels."[117]

South Africa's COVID-19 alert system was designed to operate at the national, provincial and municipal levels.[118] On April 5, 2022, South Africa officially terminated its state of disaster and put in place transitional regulations which elapsed without further legislation on May 5, 2022.[119] However, some public health measures, which included the mandatory wearing of masks in public, were retained pursuant to an amendment to the Regulations Relating to the Surveillance and Control of Notifiable Medical Conditions, which had been promulgated under the National Health Act (61 of 2003).[120] These measures remained in effect until June 22, 2022.[121]

In South Africa, as was the case with other countries around the world, a major and extremely controversial part of the government's response to the COVID-19 pandemic was the mandatory or "hard lockdown[s]," which were in effect from March 26 to April 31, 2020, and in which "all persons throughout the country were fully confined to their places of residence, except for providing or obtaining essential services or goods, collecting a social grant, seeking emergency medical treatment, or obtaining chronic medication."[122] On May 1, 2020, the restrictions on the movement of persons were relaxed slightly and people were allowed, for example, "to walk, run, or cycle within kilometres of their place of residence from 06:00 to 09:00 daily."[123] Then, on June 1, 2020, the government relaxed restrictions on movement of persons significantly and extended the times people could engage in exercise to "between 06:00 and 18:00

114. *Id*. at paras. 62–64.
115. Kruger et al., *supra* note 88, at para. 62.
116. *Id.* at para. 62.
117. *Id.*
118. *Id.* at para. 63.
119. *Id.* at para. 66.
120. *Id*.
121. *Id*.
122. *Id.* at para. 67.
123. *Id.* at para. 68.

daily, with no specific geographic restriction."[124] On December 30, 2021, the government lifted the national curfew and did not reinstate it.[125]

Many of South Africa's restrictions on the movement of persons during the COVID-19 pandemic were eventually challenged in court. However, the courts, including the Constitutional Court, the country's highest court, upheld and enforced them.[126] Nevertheless, the constitutional challenge to restrictions

> associated with Alert Levels 3 and 4 was initially upheld in *De Beer N.O. and Others v. Minister of Cooperative Governance and Traditional Affairs*, where the Pretoria High Court found that an unspecified number of restrictions were irrational and accordingly fell afoul of the constitutional requirements for the reasonable and justifiable limitation of rights under Section 36 of the 1996 Constitution.[127]

However, this judgment was eventually overturned by the South African Supreme Court of Appeal.[128] Nevertheless, its effects were "soon to be rendered moot" when the government relaxed restrictions "in accordance with a reduction in alert level, to Level 2."[129]

In general, South Africa's system for the management of COVID-19 involved restrictions on individual mobility, international or internal travel, public and private gatherings and events, and the opening of schools, shops, parks, churches, and sports facilities.[130] The regulations also dealt with physical distancing, the use of face coverings or personal protective equipment, isolation of infected persons and quarantine of individuals who were suspected of having been infected, testing, treatment, and vaccination, and contact tracing.[131]

In responding to COVID-19, South Africa did not introduce any new general law to grant the government emergency powers. Instead, the government relied on its existing constitutional law (e.g., the Bill of Rights) and statutes (e.g., the Disaster Management Act (57 of 2002)), as well on international human rights law to guide its decision making. In carrying out its functions in response to the pandemic, the government was expected to respect all its obligations under national and international law and refrain from violating the rights of all individuals within South Africa's jurisdiction—that is, the rights enshrined in the Constitution and those guaranteed by international and regional human rights instruments to which South Africa is a State Party. One way to

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124. *Id.* at para. 69.
125. *Id.* at para. 72.
126. *Id.* at para. 73.
127. *Id*. at para. 73. *See also De Beer N.O. and Others v. Minister of Coop. Governance and Traditional Affs.* 2021 ZAGPPHC 67 (Gauteng Division, Pretoria) (S. Afr.).
128. *Id.*
129. *Id.*
130. *Id.* at paras. 74–87.
131. *Id.* at paras. 88–108.

determine how and the extent to which the government's COVID-19 response impacted human rights is to examine cases that were brought by human rights-defending institutions and individuals against the government's various pandemic measures. In the section that follows, this article will examine some of South Africa's jurisprudence on government responses to the COVID-19 pandemic and how measures designed to help the State manage and control the spread of the virus impacted human rights.

III. South African Jurisprudence on Government Response to the COVID-19 Pandemic

A. Introduction

After the government began taking measures to manage the COVID-19 pandemic and minimize its spread, as well as its impact on the people and on the economy, human rights defenders became worried that some of the measures were violating human rights. In addition, human rights defenders feared that anti-COVID-19 measures were creating conditions within which both state- and non-state actors were violating human rights and subsequently sought the intervention of the courts. For example, in the case of *Community of Hangberg and Another v. City of Cape Town*, the High Court of South Africa (Western Cape Division, Cape Town) ordered the City of Cape Town to rebuild an informal home that it had destroyed "in contravention of the prohibition of evictions."[132] In *South African Human Rights Commission v. City of Cape Town*, the South African Human Rights Commission was granted an interdict effectively restraining the City of Cape Town from evicting people living in informal settlements, "in compliance with the Covid-19 regulations."[133] In *Centre for Child Law v. The Minister for Basic Education and Others*, the Centre for Child Law approached the High Court and requested that the Court invalidate "regulations that allowed for [COVID-19-related] school closures as they failed to cater for the needs of learners with disabilities" and "[t]he Court granted the order and instructed [the] government to include arrangements for these [vulnerable] learners in amended regulations."[134]

In another case, *C D and Another v. Department of Social Development*, divorced parents of two children obtained an order from the High Court of South Africa (Western Cape Division, Cape Town) "allowing their children, who were visiting their grandparents in another province when the COVID-19-related

132. *Id.* at para. 130. *See also Community of Hangberg and Another v. City of Cape Town* 2020 ZAWCHC 66 (Western Cape High Court) at para. 14 (S. Afr.).

133. Kruger et al., *supra* note 88, at para. 130. *See also City of Cape Town v. South African Human Rights Comm'n* 2021 ZASCA 182 (SCA) at para. 13 (S. Afr.).

134. Kruger et al., *supra* note 88, at para. 170. *See also Ctr. for Child L. v. The Minister of Basic Educ. And Others* 2020 ZAGPPHC (Gauteng Division, Pretoria) (S. Afr.).

lockdown was implemented, to return home."[135] In *Skole-Ondersteuningsentrum NPC and Others v. Minister of Social Development and Others*, the High Court of South Africa (Gauteng Division, Pretoria) held "that the blanket closure of Early Education Centers was unlawful."[136] In addition, "[a] subsequent challenge against provincial Departments of Social Development's withholding of subsidies to Early Education Centers also succeeded, thereby enabling them to reopen."[137]

There were also other challenges to the government's lockdown policies. For example, "[i]n *Khosa and Ors v. Minister of Defence and Military Defence and Military Veterans and Others*, the applicants approached the Pretorial High Court for a declaration of rights stipulating that all law enforcement agencies had to respect the constitutional rights to dignity, life, and not to be tortured or punished in a degrading manner, during the enforcement of COVID-19 lockdown regulations."[138] *Khosa and Othe*rs "was brought [before the Pretoria High Court] after the death of Collins Khosa, who was assaulted by members of the South African National Defence Force (SANDF) when they found (prohibited) alcohol on his premises."[139] In addition, "[t]he applicants also requested that there should be an easily accessible mechanism through which to report abuse by law enforcement authorities during the lockdown period."[140] After the Court granted the applicants' request, "the South African Police Service added extra capacity to the National Service Complaints Centre, to enable the public to report any allegations of wrongdoing against law enforcement officials."[141]

In the sub-section that follows, this article will examine some of these cases to provide greater insight into how South African courts provided the guidance that the executive branch of government needed to avoid acting illegally or unconstitutionally in its measures to deal with the pandemic. Where human rights defenders believed that the government's actions and measures violated human rights, they were able to call upon the courts to intervene and rule on the constitutionality of the measures in question. The first case that this article will examine is *C D and Another v. Department of Social Development*.

B. C D and Another v. Department of Social Development

Writing for the Cape Town High Court, Justice Meer explained that on April

135. Kruger et al., *supra* note 88, at para. 173. *See also C D and Another v. Dep't of Social Dev.* 2020 HIPR 129 (WCC) (S. Afr.).

136. Kruger et al., *supra* note 88, at para. 172. *See also Skole-Ondersteuningsentrum NPC and Others v. Minister of Social Dev. And Other* 2020 (4) All SA 285 (GP) (S. Afr.).

137. Kruger et al., *supra* note 88, at para. 172.

138. *Id.* at para. 148.

139. *Id*.

140. *Id*.

141. *Id.* at para. 148. *See also Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) at para. 144 (S. Afr.).

6, 2020, the Applicants, C D and M D, applied to the Court, "for the Regulations published by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27 (2) of the Disaster Management Act no 57 of 2002 ('the Act') on 2 April 2020, prohibiting the movement of persons between the provinces during the Lockdown, to be dispensed with."[142] Justice Meer explained further that the main purpose of the application was to "enable the First or the Second Applicant to travel from Cape Town to Bloemfontein and back, to fetch their children L D aged 10 and M D aged 7 ('the children') from their grandparents' home."[143]

The children were on holiday and had travelled from Cape Town (Western Cape Province) to Bloemfontein (Free State Province) on March 22, 2020 for a brief visit to their grandparents and "were expected to return to Cape Town before the start of the school term on 31 March 2020."[144] However, the government's mandatory Lockdown "intervened at midnight on 26 March 2020 and the children found themselves locked down with their grandparents in Bloemfontein."[145] The parents of the two children, C D and M D, who were divorced, had devised a parenting plan that allowed the children to move between the two parents.[146] Justice Meer then provided an overview of the relevant regulations governing the movement of persons during COVID-19 lockdowns.[147] According to these regulations, "[f]or the period of lockdown—(i) every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving or chronic medical attention."[148]

Justice Meer noted that "[t]he movement of children between holders of parental responsibilities during the Lockdown was specifically regulated by Directions in terms of the Act emanating from the Minister of Social Development."[149] In a first set of directions issued by the Minister on March 30, 2020, the movement of children between co-holders of parental responsibilities during the lockdown period had been prohibited.[150] However, on April 7, 2020, the directions were amended, permitting the movement of children in certain circumstances.[151] Specifically, the amended directions read as follows:

> (i) Movement of children between co-holders of parental responsibilities and rights or a caregiver as defined in Section 1(i) of the

142. *C D and Another* 2020 HIPR 129 at para. 1.
143. *Id.*
144. *Id.* at para. 2.
145. *Id.*
146. *Id.*
147. *Id.* at para. 3.
148. *Id.*
149. *Id.* at para. 4.
150. *Id.*
151. *Id.*

> Children's Act is prohibited, except where arrangements are in place for a child to move from one parent to another in terms of, of, (aa) a court order; or (bb) where a responsibilities and rights agreement or parenting plan, registered with the family advocate is in existence, provided that, in the household to which the child is to move, there is no person who is known to have come in contact with, or is reasonably suspected to have come into contact with, a person known to have contracted, or reasonably suspected to have contracted, COVID-19; (ii) the parent or caregiver transporting the child concerned must have in his possession, the court order or the agreement referred to in sub-items (aa) and (bb), respectively, or a certified copy thereof.[152]

These regulations and directions, concluded Justice Meer, are the legal context within which the matter before the Court will be decided.[153] In an opposing submission, the Respondent, Department of Social Development, argued that the "Amended Direction does not create an exception relating to movement of children from a parent to a caregiver or vice versa" and that "between 3 and 27 March 2020, no arrangements were made to move the children, and that the application was only launched on 6 April."[154] Justice Meer explained that she had heard the application on April 8, 2020 and she had determined that "there was no prohibition on the movement of the children as they fell within the exception of the Amended Direction, given that there is a court order with arrangements in place for their movement, as per the decree of divorce referred to above."[155] Subsequently, she granted "an order in terms of the exception authorising *inter alia* the First Applicant to travel to Bloemfontein to fetch his children and return to Cape Town with them."[156]

In her order, Justice Meer also held that "[t]he children will subsequently only be allowed to travel from the First Applicant's address to the Second Applicant in the event that the Second Applicant is in possession of a certificate by an independent medical practitioner indicating that she has tested negative for the Covid-19 virus."[157] She also ordered the Applicants to "comply with the current provisions of the current Regulations and Directions that have been issued by the Minister of Transport . . . pertaining to the transportation of persons in private vehicles," as well as "the provisions of any Regulations and/or Directions that may be issued by the Minister of Transport during the period of the lockdown."[158] Finally, she ordered the Applicants to "undertake to ensure the safety of the children at all times and to ensure, in the event of either of them working at any time, to follow the relevant health guidelines upon their return

152. *Id*.
153. *Id*.
154. *Id*. at para. 5.
155. *Id*. at para. 6.
156. *Id*.
157. *Id*.
158. *Id*.

home to minimize the risk of exposing the children to the COVID-19 virus."[159]

Justice Meer then proceeded to explain the reasons for her order. First, she explained, the Applicants are the biological parents of the children and that pursuant to the divorce order that terminated their marriage, "arrangements and a parenting plan are in place as envisaged in the Amended Direction, for the children to move between the Applicants."[160] Second, while the Applicants and the children live in Cape Town, the First Applicant's parents (i.e., the grandparents of the children) live in Bloemfontein.[161] Third, in his founding affidavit, the First Applicant explained that his parents, the children's paternal grandparents, are not equipped to take care of the children during long periods of time and that should they fall sick of COVID-19, they would not be able to look after the children, supervise them, ensure that they complete their school work, and generally provide for their needs.[162] The First Applicant, who is a medical doctor, expressed concern for the children's health and well-being and noted that he was better equipped to deal with the children's needs than his parents.[163] Also, averred the First Applicant, "even though the Applicants [had] heard of the Lockdown travel ban, they were under the impression that they would be permitted to travel to Bloemfontein to fetch the children and were not aware of the strict extent to which the travel ban would be enforced."[164]

Fourth, a memorandum written by the Family Advocate on April 7, 2020, to support the movement of the children from Bloemfontein to Cape Town pointed out that there had not been any mention of whether the grandparents were taking the necessary precautionary measures to keep themselves or the children safe from contracting COVID-19 and that the children needed regular monitoring to ensure that they were "abiding by the precautionary requirements of Covid-19 relating to good hygiene, regular sanitizing and social distancing."[165] Fifth, a report produced by Laura Baartman, who had conducted a video conference interview with the children and their grandparents at the request of the Respondent, urged that the children should be returned to their parents in Cape Town.[166]

Through the interview, Ms. Baartman had learned that the grandmother was afflicted with chronic ailments, including arthritis and backpain, which made it difficult for her to take proper care of the children.[167] In addition, the Lockdown had prevented her "daily house help" from coming to work, the grandfather could only provide limited support, and that the grandmother was physically

159. *Id*.
160. *Id*. at para. 7.
161. *Id*.
162. *Id*. at para. 8.
163. *Id*.
164. *Id*.
165. *Id*. at para. 9.
166. *Id*.
167. *Id*. at para. 9.1.

exhausted and could no longer adequately take care of the children.[168] Finally, Ms. Baartman's interview with the children revealed that they had become "heartbroken for not being with their parents" and looked forward to going home to Cape Town.[169] Ms. Baartman, however, was not able to determine whether the children were "at risk in terms of hygiene or that their levels of hygiene [were] optimal as required."[170]

After this critical and informative overview, Justice Meer then proceeded to determine whether the movement of the children from Bloemfontein to Cape Town was permitted in terms of the Amended Direction 1(c)(i).[171] First, she cited § 39(2) of the Constitution, which provides that "[w]hen interpreting any legislation, . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[172] She then noted that the relevant section of the Constitution that the Court had to interpret in regards to the case at bar was § 28(2), which provides that "[a] child's best interests are of paramount importance in every matter concerning the child."[173] Second, she explained that the Amended Direction did not specify "that movement of children can only take place in terms of a pre-existing court order as alluded to by the Respondent" and that her "reading of the direction does not prevent a court from making an order as required, presumably in circumstances of urgency, and for movement of children to take place in accordance with arrangements put in place by such an order."[174] Finally, in granting permission for the children to travel from Bloemfontein back to their parents in Cape Town, she explained that they would only be "permitted to travel to the Second Applicant on proof being provided that she has tested negative for COVID-19."[175]

Justice Meer then remarked that there was "unrefuted evidence" that the grandparents were already having difficulties taking care of the children and that this problem would only get worse in the long run.[176] Under these circumstances the "well-being and physical health of the children" were being put at risk.[177] The situation with the children was getting worse and required urgent action by the court.[178] Justice Meer then concluded that "[t]he best interests of the children would undoubtedly be served if permission were to be granted for them to be fetched to travel from Bloemfontein to Cape Town."[179]

In *C D and Another*, the Court made clear that the measures taken by the

168. *Id*.
169. *Id*. at para. 9.1-9.3.
170. *Id*. at para. 9.3.
171. *Id*. at para. 10.
172. *Id.* at para. 11.1; S. AFR. CONST., 1996 § 39(2).
173. *Id*. at para. 11.1; S. AFR. CONST., 1996 § 28(2).
174. *Id.* at para. 11.2.
175. *Id*. at para. 12.
176. *Id*. at para. 13.
177. *Id*.
178. *Id*.
179. *Id*.

government to respond to COVID-19, which included forcing children to remain in situations where their well-being and physical health was threatened, created an untenable situation. Citing §§ 39(2) and 28(2) of the Constitution, Justice Meer then held that allowing the children to return to their parents would be in their best interests. As made clear in this judgment, ensuring that people's rights, especially those of vulnerable groups, such as children, are adequately protected in times of emergencies, is an important function for the State.

The rights of vulnerable groups (e.g., children, women, and persons with disabilities) are usually at risk of being violated. However, in situations of public emergencies (such as the COVID-19 pandemic), threats to the rights of these individuals and groups increase significantly and exponentially. In these situations, governments are expected to be extremely vigilant in order to ensure that the rights of these vulnerable groups are not trampled either by measures that the government takes to deal with the emergency or by those enforcing these measures. In the subsection that follows, this article will examine a case from the High Court of South Africa, Gauteng Division, Pretoria, that deals with the violation of the rights of learners with disabilities during the implementation of lockdown measures to tackle the spread of the COVID-19 virus.

C. Centre for Child Law v. Minister for Basic Education

This case, *Centre for Child Law v. Minister for Basic Education*, was brought before the High Court of South Africa, Gauteng Division, Pretoria, by the Centre for Child Law (CCL) (the Applicant), a registered law clinic based in the Law Faculty at the University of Pretoria.[180] In *Centre for Child Law*, the CCL approached the High Court and requested that the Court invalidate regulations that allowed for school closures as they failed to cater to the needs of learners with disabilities. Specifically, the CCL was requesting the Court to declare invalid "the directions published on 23 June 2020 in terms of Regulation 4(5) of the Regulations made under the Disaster Management Act 57 of 2002" to the extent that "[t]he Directions fail to provide guidelines for learners with physical disabilities, intellectual disabilities, epilepsy, and severe to profound intellectual disabilities."[181] In the Notice of Motion, it was indicated that an affidavit presented by Anjuli Leila Maistry, an admitted attorney of the High Court of South Africa, who was practicing at the CCL, was duly authorized "to depose to [the] [founding affidavit] and to bring [the] application on the CCL's behalf" and that the founding affidavit would be used to support the CCL's

180. *Centre for Child Law v. Minister for Basic Educ.*, Case No. 31213/20 (Pretoria High Court), at para. 22 (S. Afr.). The Court noted that "the CCL works towards the realisation of democratic and human rights values as enshrined in the Constitution" and that its main objective is "to contribute within its means to establish and promote the constitutional rights of children in the South African community, more particularly to use the law as an instrument to advance such rights." *Id*. at para. 23.

181. *Centre for Child Law v. Minister for Basic Educ.: Notice of Motion*, Case No. 31213/20, at para. 2 (hereinafter "*Centre for Child Law Notice of Motion*").

application.[182]

In the founding affidavit, the CCL noted that, over the previous months, its personnel had been in regular contact with "a number of organisations for persons with disabilities (OPDs) in order to seek their assistance in understanding the impact of the COVID-19 lockdown on learners with disabilities."[183] As part of the overview of the case, the CCL noted in the founding affidavit that the COVID-19 pandemic had "inspired drastic and unprecedented action by countries around the world," including South Africa, which had invoked "emergency powers under section 27 of the Disaster Management Act 57 of 2002" and that the government had passed laws and implemented policies that had "made unprecedented inroads into the fundamental rights and economic freedoms of ordinary South Africans in an attempt to address the pandemic."[184]

The CCL noted that in efforts to "curb the spread of the pandemic," the government had not spared the right to basic education, which is "associated with the paramountcy of the best interests of the child."[185] As part of its response to the COVID-19 pandemic, the CCL explained in the founding affidavit, the government of South Africa ordered that all schools in the country be closed.[186] The government's closure order, which applied to all schools, including "special schools," was expected to last for a period of just under twelve weeks.[187] The CCL noted, however, that this 12-week period would include two weeks that would have "constituted the normal closure of schools for the Easter holidays."[188] The mandatory school closures, the CCL explained, meant that "millions of learners' access to teaching and learning had been suspended during this period."[189]

South Africa's learners with disabilities do not attend regular schools. They, however, attend special schools where, in addition to having access to "teaching and learning," they can be provided with the "specialised care and support services" that are only available at "special schools and special school hostels" and which learners with disabilities need.[190] The CCL noted further that the specialized services provided to learners with disabilities at the special schools include "a range of therapies, access to assistive devices and technology, school feeding schemes, and access to personal care items" and that these form "an essential component of learning and development for learners with disabilities"

182. *Id.* at 3–4; *see also Centre for Child Law v. Minister for Basic Education: Founding Affidavit*, Case No. 31213/20, at paras. 1-2 (hereinafter "*Centre for Child Law Founding Affidavit"*).

183. *Centre for Child Law Founding Affidavit*, Case No. 31213/20, at para. 5.

184. *Id*. at para. 10.

185. *Id*. at para. 11.

186. *Id*. at para. 12.

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*. at para. 13.

in South Africa.[191]

Thus, the CCL concluded, it was incumbent upon the Minister for Basic Education not only "to prioritise and plan for the provision of continued learning and support for learners with disabilities remaining at home," but also to put in place adequate plans for these learners to return to school and for the government to resume providing them with necessary services.[192] The safe reopening of schools would "require mitigation, prevention, adaptation and measures to specifically address learners with disabilities within the context of a declared National Disaster" and that "[t]his requires practical, feasible guidelines to provide for amongst others, sanitation, personal protective equipment (*PPE*) and social distancing measures unique to the context of various disabilities."[193]

In the government's response to the COVID-19 pandemic, the CCL noted in its founding affidavit, "learners with disabilities—a particularly marginalised and vulnerable group—were disproportionately affected" and that they "should have been afforded considerable and meaningful support."[194] The CCL declared that in its observations, it had found that the Minister for Basic Education had "provided inadequate support for learners with disabilities during this period and continued to neglect them during the planning for the phased re-opening of schools."[195] Although the Department of Basic Education (DBE) had developed, published and disseminated various directions and guidelines, which "generally regulated the phased re-opening of schools," the "DBE [had] failed to develop adjusted (and specialised) guidelines that provide for all learners with disabilities."[196]

The government, the CCL noted, developed guidelines for only three categories of disability and excluded others.[197] It was on this basis, stated CCL, that it brought action to have the High Court "review and set aside or declare invalid" several of the directions that had been published in terms of regulations that were made under the Disaster Management Act 57 of 2002 and then remitting the directions to the Minister for Basic Education "to cure these defects."[198] The relief that CCL was praying for was "aimed at ensuring that the Minister [for Basic Education] complies with her constitutional obligations to ensure the safe return to schools of *all* learners with disabilities in the wake of the COVID-19 pandemic."[199]

The Respondent in this action is the Minister for Basic Education (MBE) who, in her capacity as a member of the national executive, has responsibility

191. *Id*.
192. *Id*. at para. 14.
193. *Id*. at para. 15.
194. *Id*. at para. 16.
195. *Id*.
196. *Id*. at para. 17.
197. *Id*.
198. *Id*. at para. 18.
199. *Id*. at para. 19 (emphasis in original).

for the promulgation of the Directions that were impugned in the CCL's application to the Court.[200] In promulgating the Directions, noted the CCL, the MBE "exercised a public power in terms of the regime for disaster management prescribed in the Disaster Management Act 57 of 2002."[201] These Directions, asserted the CCL, "have directly and adversely affected the rights of learners with disabilities to basic education and to have their best interests taken into account in all matters concerning them."[202] The CCL concluded that the Directions constituted "administrative action under the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*)" and that they also "governed the principle of legality" and that the CCL was bringing its application to the Court "both in terms of the provisions of PAJA and the principle of legality."[203]

The application before the High Court, the CCL declared, was being brought "in terms of section 38(b) of the Constitution on behalf of all learners with disabilities whose rights to basic education (under section 29(1)(b) of the Constitution), and to have their best interests taken into account in matters concerning them (under section 28(2) of the Constitution) have been violated by the Directions that have been promulgated."[204] Children with disabilities, noted the CCL, "are a particularly marginalised and vulnerable group that require[s] a high degree of protection" and that the plight of this group, "particularly in the context of COVID-19, has recently been confirmed by [UNESCO]."[205] The CCL also noted that similar conclusions, as those of UNESCO, have been reached by the Global Action on Disability network and the World Health Organization.[206]

As part of the measures taken to combat COVID-19, South Africa's President announced that "all schools, including ordinary, full service and special schools, would close on 18 March 2020" and that they would remain closed for 12 weeks with two of those twelve weeks falling during scheduled school holidays.[207] The school closure meant that learners were no longer able to "access or continue formal education in the classroom environment" but were now encouraged to learn remotely.[208] Although the Department of Basic Education (DBE) provided materials to enhance remote learning, the CCL explained that those materials were "not adapted to provide adequate resources for learners with disabilities."[209] As an example, the CCL cited visual materials

200. *Id*. at para. 27.
201. *Id*. at para. 28.
202. *Id*.
203. *Id*. at para. 29.
204. *Id*. at para. 33.
205. *Id*. at para. 34. The CCL quoted UNESCO as saying that "[t]he COVID-19 pandemic is having a disproportionate impact on learners with disabilities who were already experiencing social and educational disadvantage." *Id*.
206. *Id*. at paras. 35–36.
207. *Id*. at paras. 38–39.
208. *Id*. at para. 41.
209. *Id*.

which, it argued, were not adapted for use by "blind and partially sighted learners" and, in addition, "no subtitles or sign language interpretation was added to audio visual materials for the benefit of Deaf learners."[210] The CCL reiterated that the DBE did not provide alternative forms of support for learners with disabilities.[211]

The CCL noted that the school closure did not only suspend teaching and learning, but also disrupted the supply of "all the additional support services normally provided by special schools, special school hostels and special care centers."[212] Learners with disabilities usually attend special schools where they are provided the "specialized care and support" that they need to enhance their "well-being and full development."[213] However, during the government-mandated school closures, they were no longer able to have access to these critical and important support services and, as a consequence, their well-being and development were "gravely affected by the interruption of these [support] services."[214] These learners with disabilities were forced to return to environments where there were no specialist teachers and therapists to cater to their special needs.[215]

The CCL noted that in exercising her power under the Disaster Management Act to deal with the impact of COVID-19 on teaching and learning, the Minister for Basic Education (MBE) should have developed and implemented programs to address the special needs of learners with disabilities during the lockdown and afterwards when schools were finally re-opened.[216] The CCL concluded that the MBE had "failed to meet either of these obligations."[217]

An important concern of the CCL was to ensure that the rights of learners with disabilities were adequately protected during the lockdown. During the lockdown period, "learners with disabilities remained without access to adequately adapted materials and without access to any other forms of necessary support"[218] and, as the DBE prepared for schools to re-open and for learners to return to school, there still were no concrete measures to address "the different circumstances of learners with disabilities."[219] For example, the CCL noted that:

> [a]lthough [the directions for re-opening schools issued by the DBE] contained a tabulated schedule for returning learners which differentiated between schools of skills, schools for learners with severe intellectual disabilities, and special care centres for learners with severe

210. *Id*.
211. *Id*.
212. *Id*. at para. 42.
213. *Id*. at para. 43.
214. *Id*.
215. *Id*.
216. *Id*. at para. 44.
217. *Id*. at para. 45.
218. *Id*. at para. 50.
219. *Id*. at paras. 57–58.

> and profound intellectual disabilities, [these directions] failed to outline measures to protect learners with disabilities who were returning to school, and to support those who still remained at home.[220]

The CCL explained that the DBE's omission was particularly evident in the provisions that dealt with the wearing of face coverings (e.g., masks).[221] Educators and school officials had been provided with "cloth masks" and in doing so, the government had not taken into account the specific needs of deaf learners "who lip read and for whom cloth face masks would make it impossible for them to communicate."[222] Thus, in approaching the Court, the CCL was "gravely concerned that the particular needs of [learners with disabilities] had not been adequately addressed in the May [2020] Directions."[223] The CCL noted that although the DBE had published amended Directions on June 1, 2020, these modified directions "failed to include any further measures tailored to assist learners with disabilities" and that these omissions "again demonstrated the DBE's continued failure to adequately plan for learners with disabilities during the lockdown as well as during the phased re-opening of schools which cater for these learners."[224]

On June 23, 2020, the DBE published a new set of Directions, which form the subject matter of the CCL's application to the Court.[225] The CCL noted that while the new Directions addressed some of the issues that the CCL had raised with the DBE regarding the rights of persons with disabilities, they "failed to address the full spectrum of disabilities faced by learners."[226] The CCL noted that on the same day, the Minister for Basic Education held a virtual meeting with "representatives of schools with learners with special education needs ahead of the learners' return to school during level 3 of the national lockdown."[227] The CCL had determined that "[t]he national state of readiness was, however, incomplete because it still failed to account for the full spectrum of disabilities and the different approaches that must be taken to cater for learners with different disabilities."[228]

The CCL indicated that despite its many requests to the Minister for Basic Education to directly and specifically address issues related to the failure of the DBE to provide measures that were tailored to meet the needs of learners with all types of disabilities, the adjusted or specialized guidelines had not been

220. *Id*. at para. 58.
221. *Id*. at para. 59.
222. *Id.*
223. *Id.* at para. 60.
224. *Id.* at paras. 63–64.
225. *Id.* at para. 73. The Directions promulgated on June 23, 2020, replaced those published in May 2020 and the amended Directions promulgated on June 9, 2020. *See id.* at paras. 69 & 73.
226. *Id.* at para. 73.
227. *Id.* at para. 74.
228. *Id.*

developed to "cater to other categories of disability."[229] Despite the Minister for Basic Education's public declarations that the DBE's directions were "mindful of the needs of learners with disabilities," the CCL determined that these directions were not actually mindful of the "plight of *learners with physical disability, intellectual disability, epilepsy, and severe to profound intellectual disability*."[230]

The CCL concluded that the failure of these directions to address the needs of "these excluded group of learners"[231] "is irrational" and "is unlawful, and otherwise unconstitutional, in that it contravenes the protection given to such children in terms of their rights to receive basic education (under section 29(1)(b) of the Constitution, and to have their best interests taken into account in matters concerning them (under section 28(2) of the Constitution)."[232] Finally, the CCL prayed the Court to review the Directions and "set them aside or declare[] them invalid to the extent that they fail to cater for the needs of the excluded categories of learners with disabilities under: the principle of legality which requires all exercises of public power to be lawful and rational; and sections 6(2)f)(i), 6(2)(f)(ii), 6(2)(h) and 6(2)(i) of PAJA."[233]

The CCL noted that in South Africa, some learners with disabilities, particularly in rural areas, live in hostels (or boarding houses) owned by their schools during the school term.[234] The CCL explained that these hostels "assume responsibility for the complete care of learners, including, homework support, feeding, personal care (bathing, toileting, teeth cleaning, where necessary), administration of medication, supervision and accommodation."[235] However, the CCL noted that given the fact that the DBE Guidelines do not cover "the excluded categories of learners with disabilities," if these hostels are allowed to open, "this poses a direct and imminent danger to the health and well-being of the learners in the excluded categories because they require different and specialised guidelines in order to make education possible for them under a COVID-19 pandemic situation."[236]

A major challenge faced by hostels is that they would not be able to accommodate all learners with disabilities if they must adhere to rules on social distancing.[237] Given that the DBE had not made provision for additional infrastructure to accommodate all learners with disabilities while adhering to

229. *Id.* at para. 81.

230. *Id.* at para. 84 (emphasis added).

231. The excluded learners are those with *physical disability, intellectual disability, epilepsy, and severe to profound intellectual disability*. *See id.* at para. 89 (emphasis added).

232. *Centre for Child Law Founding Affidavit*, Case No. 31213/20, at para. 91 (sub-paras. 91.1 & 91.2).

233. *Id.* at para. 92 (sub-paras. 92.1 & 92.2). PAJA refers to the Promotion of Administrative Justice Act 3 of 2000 (S. Afr.).

234. *Id.* at para. 93.

235. *Id.*

236. *Id.* at para. 96.

237. *Id.* at para. 98.

the COVID-19 social distancing requirements, the CCL prayed the Court review and set aside as invalid under the principle of legality the DBE's Directions.[238] Learners with disabilities, the CCL noted, require much higher sanitation requirements—for example, "all personal and shared assistive devices, wheelchairs, crutches, etc., need to be sanitised."[239] In addition, schools and hostels for learners with disabilities require "additional communication devices, therapy equipment, and specialised seating, etc.[,] in order to minimize the sharing of these as much as reasonably possible in a learning environment catering for learners with disabilities."[240]

The CCL noted that since the DBE's Guidelines were designed to provide "the requirements to enable schools to maintain hygiene during the COVID-19 pandemic," failing to provide guidelines that specifically cater to the special needs of learners with disabilities is not rational.[241] For example, guidelines for hand washing are not appropriate for certain categories of learners with disabilities who are physically incapable of actually washing their owns hands "in the manner detailed in the DBE Guidelines because they are unable to turn on and off taps, unable to rub palms together or between fingers."[242] Thus, the DBE should have developed "specific guidelines for how hand washing for these learners [with disabilities] should take place."[243] The CCL concluded that failing to cater for the "specific and different needs of learners with disabilities also violates their rights to receive basic education and to have their best interests taken into account in all matters concerning them."[244] Thus,

> [t]o the extent that the Directions refer to and incorporate the DBE Guidelines to set the standards for hygiene at schools, hostels and offices, but fail to provide measures designed to ensure the health and safety of learners with disabilities, they fall to be reviewed and set aside or declared invalid under the principle of legality.[245]

With respect to the reliefs prayed for, the CCL explained that "[w]hen courts review unlawful administrative action or find that conduct is in conflict with the principle of legality, they exercise a broad remedial discretion under section 172(1)(b) of the Constitution (and section 8(2) of PAJA) to grant a remedy that is just and equitable in the circumstances."[246] The CCL then proceeded to list the reliefs prayed for, which included asking the Court to, "in respect of each ground of invalidity," set aside or declare the impugned Directions invalid and

238. *Id*. at para. 101.
239. *Id.* at para. 106.
240. *Id.* at para. 108.
241. *Id.* at para. 111.
242. *Id.* at para. 112.
243. *Id.*
244. *Id.* at para. 113.
245. *Id.* at para. 114.
246. *Id.* at para. 126.

remit them to the Minister of Justice "to cure the defects in them within a period of three weeks."[247] In doing so, the CCL reminded the Court of the urgency of the matter. Specifically, the CCL told the Court that "[t]he harm that learners with disabilities will suffer if the adjusted (and specialised) safety measures are not put in place is acute," especially given the fact that by July 8, 2020, "South Africa's COVID-19 infection rate [had] surpassed that of countries such as France and Germany, with South Africa recording in excess of 10 000 new infections over a 24 hour period."[248]

On August 4, 2020, Judge Fourie (High Court of South Africa, Gauteng Division, Pretoria) issued the Court's order. He declared that after "[h]aving read the papers filed," he had made the order "by agreement between the parties."[249] First, the Court ordered the Respondent, the Minister for Basic Education, to revise the Directions that had been provided to guide school operations during the COVID-19 pandemic in order to provide more specific and carefully tailored "guidelines for learners with physical disabilities, intellectual disabilities, epilepsy and severe to profound intellectual disabilities"—these were what the CCL referred to as the "excluded categories" of learners.[250]

Second, the Court ordered the MBE to prepare a draft amendment to paragraph 9 of the Directions in order to address issues of readiness of the special school hostels to open and receive learners (these are the facilities which take care of the excluded categories of learners), ridding the Directions of the requirement that special school hostels must close in their entirety once they have reached the limit of the number of learners who can be accommodated "while observing the social distancing rules."[251] The MBE was also ordered to "make provision for additional infrastructure capacity to be provided to special school hostels where alternatives do not provide for the reasonable accommodation needs of learners with disabilities residing in school hostels."[252]

Third, the Court ordered the MBE to prepare a draft amendment to the DBE Guidelines for Schools on Maintaining Hygiene during the COVID-19 Pandemic in order to provide measures that will ensure the health and safety of learners with disabilities at schools, hostels and offices.[253] Fourth, the Court ordered the MBE to prepare a draft amendment to subparagraph 8(8) of the Directions. The purpose of this amendment was "to provide guidance to Heads of Department to ensure that learners with disabilities who are not able to return to school are provided with appropriate learning and teaching support material, assistive (i.e.[,] education-specific) devices and therapeutic services to access

247. *Id.* at para. 127 (sub-para. 127.1).
248. *Id.* at para. 128.
249. *Centre for Child Law v. Minister for Basic Education*, Case No. 3123/2020: Order (Aug. 4, 2020), at pmbl (hereinafter "*Centre for Child Law: Order"*).
250. *Id.* at para. 1.1.
251. *Id.* at para. 1.2.
252. *Id.* at para. 1.2.3.
253. *Id.* at para. 1.3.

basic education while they remain at home."[254]

Finally, the Court ordered the MBE to publish all the "draft amended Directions and DBE Guidelines" for public comments within 10 days and then issue the final amended Directions and DBE Guidelines within six weeks of the day the Court's order was issued.[255] The Court's order was issued on August 4, 2020.[256]

In addition to the fact that governments may use public emergencies to directly abuse their powers and violate the rights and fundamental freedoms of their citizens, they may also do so by omission. As made clear in *Centre for Child Law*, South Africa had decided not to enact new legislation to manage the COVID-19 pandemic. Instead, the government chose to rely on existing law—Disaster Management Act 57 of 2002, as well as other laws, including the Bill of Rights. Thus, on March 15, 2020, South Africa's "government declared a national state of disaster in terms of the Disaster Management Act 57 of 2002."[257]

As part of measures taken to manage teaching and learning during the COVID-19 pandemic and pursuant to the national state of disaster, the MBE had issued Directives and Guidelines, which were supposed to help teachers and school administrators function legally during the state of disaster, respect the rights of their learners, minimize their learners' exposure to COVID-19, and ensure that learners continued to have access to basic education. However, as made clear by *Centre for Child Law*, the MBE's measures failed to include guidelines for safely educating the group of learners with disabilities who were referred to in this case as "the excluded categories"—learners with physical disabilities, intellectual disabilities, epilepsy and severe to profound intellectual disabilities.[258] By failing to include guidelines specifically directed at this extremely vulnerable group of learners, the MBE had inadvertently created a situation in which the rights of these learners could be violated.

The second lesson that can be gleaned from this case concerns the role that civil society organizations, such as the Centre for Child Law at the University of Pretoria, can play in ensuring that the rights of all citizens, including especially those of vulnerable groups (e.g., children in general and children with disabilities in particular) are not violated, either by state- or non-state actors, in normal times or in times of public emergencies. It was the CCL that brought this matter to the Court, allowing it to craft an order that led to amendments to the DBE's Directions and Guidelines. Finally, the courts, which have powers to determine the constitutionality of laws and regulations, must ensure that teachers, administrators, and other staff members at South Africa's schools did

254. *Id.* at para. 1.4.

255. *Id.* at para. 2.

256. *Id.* at pmbl.

257. Geo Quinot, *Justification, Integration, and Expertise: South Africa's Regulatory Response to Covid-19*, 73 ADMIN. L. REV. 105, 110 (2021). *See also* DECLARATION OF A NATIONAL STATE OF DISASTER, GN 313 OF GG 43096 (March 15, 2020) (S. Afr.).

258. *Centre for Child Law: Order,* Case No. 3123/2020, at para. 1.1.

not continue to violate the rights of learners with disabilities through measures designed to help manage the pandemic and minimize the spread of the virus.

In many countries throughout Africa, "while governments in the region have declared restrictions on social gathering, in a bid to upend the deadly contagion, rights violations of vulnerable groups by law enforcement officials are on the increase."[259] In South Africa, members of the SAPS, the SANDF, and various Metropolitan Police Departments ("MPDs") were alleged to have failed to respect South Africans' constitutional rights to dignity, life, and not to be tortured or punished in a degrading manner, during efforts to enforce COVID-19-related lockdown regulations. These allegations were officially revealed in *Khosa and Others v. Minister of Defence and Military Veterans and Others*,[260] a case that was brought before the High Court of South Africa, Gauteng Division, Pretoria. Below, this article will examine that case.

C. Khosa and Others v. Minister of Defence and Military Veterans and Others *(High Court of South Africa, Gauteng Division, Pretoria)*

Writing for the High Court, Judge Fabricius began the analysis of the case by providing an overview of the "social contract" between the people and a "legitimate government."[261] After making reference to several scholars of legal philosophy, such as Bentham and Rawls, Judge Fabricius then explained that the social contract that exists between the South African people and its government was established by and defined in the Constitution, which came into force in 1994.[262] He cites § 1, which defines the Republic of South Africa as "one, sovereign, democratic state," which is founded on, inter alia, values, such as "human dignity, the achievement of equality and the advancement of human rights and freedoms."[263] Judge Fabricius explained that the Bill of Rights is the "cornerstone of democracy" in South Africa and "enshrines the rights of all people and affirms its democratic values of human dignity, equality and freedom which must be respected, protected, promoted and fulfilled by the state and all organs of state."[264] He then noted that the application before him "is of an unusual nature in as much as on a first reading it only seeks me to restate the law" and that the law in this context "would be the relevant provisions of the said Constitution, the Disaster Management Act 57 of 2002."[265]

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259. Solomon Amadasun, *COVID-19 palaver: Ending rights violations of vulnerable groups in Africa*, 134 WORLD DEV. 105054, 105054 (2020).

260. *Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) at para. 144 (S. Afr.).

261. *Id.* at para. 1.

262. *Id.* (This was the interim Constitution. The permanent Constitution came into force in 1996. *See* S. AFR. (INTERIM) CONST., 1993 and S. AFR. CONST., 1996. The latter is the permanent constitution).

263. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (NO. 108 OF 1996), at § 1(a).

264. *Khosa and Others* 2020 (5) SA 490 at para. 1; *see also* S. AFR. CONST., 1996.

265. *Khosa and Others* 2020 (5) SA 490 at para. 2.

In the context of § 39(1)(b), which provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum—(b) must consider international law,"[266] the following international instruments are relevant: the UDHR, the ICCPR, the U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), as well as the South African Police Act 68 of 1995, the Defence Act 1942 of 2002, the Criminal Procedure Act 51 of 1977, the Military Ombud Act 4 of 2012, and the Independent Police Investigative Directorate Act of 2011.[267]

With respect to the application before the High Court, Judge Fabricius explained that the application before the Court consisted of 1,300 pages and that these were delivered to him on the afternoon of May 2, 2020 for a hearing that was scheduled for May 5, 2020.[268] After concluding that the process "is not the usual one as envisaged by the Rules of Court relating to urgency and the particular Practice Manual of this division pertaining to the same topic," he decided to "condone all non-compliance because of the nature of the application and the relief sought," which, in his view, "had to be considered carefully and properly and urgently in the context of the state of affairs that now exists under the Disaster Management Act 57 of 2002, as well as the state of the South African economy" as it existed before and during the measures taken to fight the COVID-19 pandemic.[269]

Judge Fabricius stated that during the immediate past, international rating agencies had downgraded South Africa's investment grade to junk and severely disrupted its financial markets.[270] In addition to negatively affecting the Rand (the country's currency), the downgrade made it very difficult and costly for the country to access international money markets.[271] In addition, these events had caused significant unemployment in the country, "substantial inequality between various groups of [the country's] population, lack of basic facilities such as electricity and water, the supply of electricity, and very little foreign investment which could have alleviated the situation."[272] He noted further that before COVID-19 and the problems that accompanied its appearance in South Africa, the economy had problems (e.g., the insolvency of many parastatals), which were exacerbated by the downgrading of South Africa's investment rating to junk.[273]

Judge Fabricius then explained that the case before the Court did not concern the question "whether or not any of the Regulations promulgated are

266. S. AFR. CONST., 1996.

267. Judge Fabricius noted that South Africa had ratified and domesticated the ICCPR, and the Torture Convention and hence, their provisions were thus part of South African law. *See Khosa and Others* 2020 (5) SA 490 at para. 2.

268. *Id.* at para. 3.

269. *Id.*

270. *Id.* at para. 4.

271. *Id.*

272. *Id.*

273. *Id*. at para. 4.

unlawful and thus invalid because they are not rationally related to their purpose," which was to arrest the "spread of the coronavirus."[274] As part of the analysis of the case, he stated that "[t]he populace must be able to trust the government to abide by the rule of law and to make rational Regulations to promote their stated purpose."[275] He explained that these regulations can violate the rights of natural and legal persons, and that if they do, the government should seek the least restrictive measures and communicate them to the public. In return, the government can "justifiably expect the citizens to co-operate for the common goal, take responsibility to ensure their own safety and that of others."[276]

With respect to the social contract that Judge Fabricius had mentioned in his introductory remarks to the Court, he stated that it "will then take its rightful constitutional place for the benefit of the nation and the State" and that if "such community of interest" cannot be achieved, then "the whole exercise and purpose of a lock-down will fail and a waste land and social unrest awaits" all South Africans.[277] While exercising his or her right to freedom to choose, each citizen must take the responsibility to achieve the common goal of fighting the COVID-19 pandemic and minimizing its spread.[278]

Judge Fabricius explained that the founding values of South Africa's post-apartheid Constitution "include a democratic government based on the principles of accountability, responsiveness and openness."[279] Public administration, then, "must be accountable and transparency must be fostered by providing the public with timely, accessible, accountable and accurate information."[280] He noted, however, that if the government of South Africa is held to these constitutional obligations and the trust of citizens in their government and institutions is restored, and, in addition, "lawful rational Regulations are obeyed," then "the expected flood of litigation will retreat and the spread of the virus will be contained until the appropriate vaccine is found."[281]

With respect to *Khosa*, the case before the Court, Judge Fabricius provided information on the ten respondents, the nature of their duties and constitutional responsibilities, as defined by South African laws. These respondents included the Minister of Cooperative Governance and Traditional Affairs, who, pursuant to the Disaster Management Act No. 57 of 2002, had declared the national state of disaster in South Africa in response to the COVID-19 pandemic.[282] He noted that the Socio-Economic Rights Institute of South Africa (SERI)—a non-profit

274. *Id.* at para. 5.
275. *Id.* at para. 7.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at para. 8.
280. *Id.*
281. *Id.* at para. 9.
282. *Id.* at para. 16.

human rights organization that works "with communities, social movements, individuals and other non-profit organisations in South Africa and beyond to develop and implement strategies to challenge inequality and realise socio-economic rights"[283]—was admitted as amicus curiae.[284] Judge Fabricius indicated that in his consideration of the merits of the case, he considered the "written heads of argument" given to the Court by SERI and that no oral arguments were necessary.[285] The Fair and Equality Society of South Africa also applied to be admitted as an applicant but, for a variety of reasons, was not successful.[286]

As he proceeded with an examination of the merits of the case, Judge Fabricius reiterated his earlier views on the significant levels of distrust among South Africans in the government, particularly with respect to the "functions of the respondents and how they treat the persons throughout South Africa in the context of the Regulations made under the Disaster Management Act" and that fear among South Africans at the time was not just due to the heightened probability of being infected with the COVID-19 virus, but what would happen to them "after the national lockdown is called off."[287] For example, he explained that there was great fear among South Africans that the country's lockdown measures would cause "massive unemployment" resulting in the inability of many people to provide basic "sustenance and income" to their families.[288]

He also noted that the lockdown would most likely cause many of the country's small businesses to fail and never to become viable again.[289] In addition to the high level of insecurity and despair created among South Africans by the COVID-19 pandemic and the issuing lockdown measures, the government had told the people that the lockdown had significantly reduced public revenue collections.[290] Such reductions were expected to negatively affect the government's ability to provide critical public services to the people.[291] While agreeing with counsel for both parties before the Court that a lockdown was necessary as one of the tools to fight the spread of COVID-19, he, nevertheless, added that the public was entitled to be treated with dignity and respect, and their rights—which are enshrined in the Bill of Rights—were not to be violated.[292]

Judge Fabricius then provided an overview of some of the rights enshrined in Chapter 2 of the Constitution (Bill of Rights), as well as § 36 of the

283. *About Us*, SOCIO-ECON. RTS. INST. OF S. AFR., https://www.seri-sa.org/ [https://perma.cc/XV6M-W7YJ] (last visited Oct. 2, 2024).

284. *Khosa and Others* 2020 (5) SA 490 at para. 18.

285. *Id.*

286. *Id.*

287. *Id.* at para. 19.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

Constitution, which states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,"[293] the most important of which, for the case at bar, "is the question whether or not the State has introduced less restrictive means to achieve the purpose of any particular Regulation made in terms of the management of the Disaster Act (Section 36(1)(e))."[294] According to the Bill of Rights, "the right to equality, human dignity, life, freedom of security of the person and arrested and accused and detained persons, may not be derogated from even in a state of emergency."[295]

Judge Fabricius explained that these rights,

> may be enforced by anyone in their own interest or acting on behalf of another who cannot act in their own name, or acting as a member of, or in the interest of group or class of persons or acting in the public interest by approaching a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may then grant appropriate relief including a declaration of rights.[296]

Declaratory orders, which can serve as a "flexible remedy" that assists "in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values," are "discretionary and flexible" and in issuing them, courts must consider all relevant circumstances.[297] The remedy is flexible as it "can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values."[298] South African courts are granted the power to rule on constitutional issues and in carrying out this function, they are bounded by § 172(1). According to this section, "[w]hen deciding a constitutional matter within its power, a court—(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable."[299]

Further, the relief sought by the applicants concerns the need for the government to respect the rights of South Africans, even during a declared national emergency.[300] Some of these rights include the right to human

293. *Id.*
294. *Id.*; *see also* S. AFR. CONST., 1996.
295. *Khosa and Others* 2020 (5) SA 490 at para. 19.
296. *Id.* at para. 20.
297. *Id.*
298. *Id.*
299. S. AFR. CONST., 1996, ch. 8 § 172(1)(a & b).
300. *Khosa and Others* 2020 (5) SA 490, at para. 23.

dignity,[301] the right to life,[302] the right not to be tortured in any way,[303] and the right not to be treated or punished in a cruel, inhuman or degrading way.[304] He also noted that certain sections of the Constitution of South Africa also require that security forces "must act, and must instruct their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa]."[305]

Judge Fabricius thoroughly reviewed the reliefs prayed for by the applicants and then explained that the case before the Court concerns the alleged violation of the rights of citizens by members of South Africa's security forces who were tasked with enforcing "restrictions on civilian movement and activity, imposed by Government to combat the spread of the COVID-19 Coronavirus pandemic."[306] He also noted that the case was brought by the family of an individual named Mr. Khosa, "who was brutalized, tortured and murdered by members of the security forces, at his home, on 10 April 2020" and that "[t]wo of the applicants were themselves also brutalized and tortured on the same occasion."[307]

The learned judge explained that the rights mentioned had been significancy reduced and adversely impacted nearly "every business, every private household and every person whilst it is a trite law that when rights are restricted or derogated from it should happen within the confines of section 36(1)(e) which provides, for a less restrictive means enquiry to achieve the stated purpose."[308] The Disaster Management Act created "offences and penalties" and that on Day 42 of the lockdown, as many as 20,000 persons had been made criminals.[309] The applicants did not seek to have the Court strike down any "particular Statute or Regulation . . . as being invalid on grounds of irrationality."[310]

The first case of COVID-19 was confirmed in South Africa on March 5, 2020.[311] The World Health Organization (WHO) declared COVID-19 to be a public health emergency of international concern on January 30, 2020 and on March 15, 2020, the South African government declared "a state of national disaster and announced measures to combat the spread of this virus."[312] On March 25, 2020, South Africa's Minister of Cooperative Governance and Traditional Affairs, acting pursuant to § 3 of the Disaster Management Act No. 57 of 2002, issued regulations "implementing measures where movement would

301. S. AFR. CONST., 1996, at ch. 2 § 10.
302. S. AFR. CONST., 1996, at ch. 2 § 11.
303. S. AFR. CONST., 1996, at ch. 2 § 12(1)(d).
304. S. AFR. CONST., 1996, at ch. 2 § 12(1)(e).
305. *Khosa and Others* 2020 (5) SA 490 at para. 23.
306. *Id.* at para. 24(1).
307. *Id*. at para. 24(5).
308. *Id.* at para. 25.
309. *Id.*
310. *Id.*
311. M. Modisenyane et al., *COVID-19 response in South African communities: Screening, testing, tracing and movement modelling*, 112 S. AFR. MED. J. 366, 366 (2022).
312. *Khosa and Others* 2020 (5) SA 490 at paras. 26, 28.

be severely restricted through a 'lock-down.'"[313] These measures were based on "justified concerns about the growing spread of COVID-19 infections in South Africa since the first notification of a positive case."[314]

On March 25, 2020, after the lockdown was declared, South African President Cyril Ramaphosa, issued the President's Minute 78 of 2002 authorizing the SANDF to be deployed to assist the SAPS to enforce the lockdown regulations.[315] He set the period of deployment as March 26, 2020 to June 26, 2020.[316] That same day, the President also informed the Chairperson of the Joint Standing Committee on Defence, Parliament of the Republic of South Africa, about the deployment.[317] The second applicant, who was authorized "to make the founding affidavit on behalf of the other applicants[,] described the torture and murder of Mr. Khosa."[318]

In their Founding Affidavit, the applicants had adduced that had the "Commanding Officers . . . responded promptly and effectively to the incidents of lock-down brutality" and expeditiously developed and implemented an appropriate "Code of Conduct" and removed the security officers implicated in the violence from the scene and thus, reminding the security forces of their legal obligations, "the deponent's life-partner might still be alive and his children might not [be] orphaned."[319] The deponent had stated that the Minister of Police (MOP) and the Minister of Defense (MOD), who both have "executive authority over the security forces" had failed to take appropriate and effective steps to stop the forces' extralegal behavior and actions.[320] Judge Fabricius stated that after the death of Mr. Khosa, the Minister of Defense's response to the violation of the deceased's right to life was that "the public should not 'provoke' the soldiers."[321]

The deponent had adduced that the MOD had made public statements that implied that in enforcing the lockdown, the security forces would not hesitate to violate the rights of South Africans. [322] In addition, the deponent had also concluded that such statements from the MOD do not support the unconditional condemnation of "police and military brutality" that should come from a member of the government nor do they "promote the spirit and purport of the Bill of Rights and the Constitution in general."[323] According to the MOD, South Africa's is a democratic dispensation until a member of the public provokes the

313. *Id.* at para 28.
314. *Id.*
315. *Id.* at para. 29.
316. *Id.*
317. *Id.* at para. 30.
318. *See id.* at para. 34.
319. *Id.* at para. 35.
320. *Id.* at para. 36.
321. *Id.*
322. *Id.* at para. 37.
323. *Id.* at para. 38.

security forces.[324] In other words, there would be circumstances in which the security forces could brutalize South Africans with impunity.[325] Lastly, the deponent argued that the MOD granted the security forces powers to punish alleged violators of the law instead of allowing the courts to do so after conviction through a fair trial.[326]

Judge Fabricius then explained that the deponent quite correctly stated that the lock-down regulations did not grant permission or authorize "law enforcement officials to cause damage to property owned or occupied by civilians."[327] On April 16, 2020, the MOD mentioned that Mr. Khosa's death was being investigated.[328] However, she later told South Africans "not to venture out of their homes to check what soldiers and law enforcement were doing 'or even provoke them.'"[329] The MOD added that the measures that the government was taking with respect to the lockdown did not imply that theirs was a "mean government" or that it was "being insensitive."[330] Instead, the MOD argued that the government had taken those decisions because it had become necessary for public officials to do so in order to arrest the spread of the COVID-19 pandemic.[331] Judge Fabricius concluded that the MOD's statements clearly indicated she was blaming "civilians for 'provoking' the soldiers," and that she was either unwilling or unable to "make unequivocal statements condemning violence," while also failing to condemn "the lock-down brutality."[332]Before the present application was brought before the Pretoria High Court, counsel for the applicants had written to the MOD demanding that the SANDF and the Johannesburg Metropolitan Police Department (JMPD) provide the applicants with "full details of the particular incident including the names of the members [of the security forces] who were present and also involved in the assault."[333] In the letter, the counsel also demanded that the President of South Africa, the MOD, and the Chief of the JMPD publicly condemn the actions of the security forces.[334] The applicants also demanded that the SANDF and the JMPD reveal to the public what steps these government institutions had taken to discipline their members who were implicated in the brutalization of civilians, including the killing of Mr. Khosa.[335] With respect to Mr. Khosa's minor children, they sought financial and psychological support for them, including money to pay their medical expenses for treatment related to the injuries that

324. *Id*.
325. *Id.*
326. *Id.*
327. *Id*. at para. 43.
328. *Id.* at para. 44.
329. *Id*.
330. *Id*. at para. 44.
331. *Id*.
332. *Id*. at para. 46.
333. *Id*. at para. 50.
334. *Id*.
335. *Id*.

they had incurred during the enforcement of the lockdown measures, which included the killing of their father.[336]

The next issue the Court examined was South Africa's obligations under the U.N. Convention against the Torture Convention, which South Africa ratified on December 10, 1998.[337] Article 2(1) of the Torture Convention imposes an obligation on the State to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[338] Article 12 requires South Africa, as a State Party to the Torture Convention, to "ensure that its competent authorities proceed to a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."[339] Finally, Judge Fabricius explained that Article 13 requires South Africa to "ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."[340]

Article 2(2) of the Torture Convention states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[341] Judge Fabricius explained that "[i]t is clear from section 12(1)(c), (d) and (e) of the Constitution [of South Africa], interpreted in the light of international law, especially the Torture Convention and the Torture Act that State brutality is juridically regarded as especially egregious form of harm." [342] When state brutality "takes the form torture, cruel or inhuman treatment or punishment," it is legally singular for two specific reasons: (i) it is committed by a public official; and (ii) it is committed for "'purposes' ulterior to legitimate law enforcement, such as to 'punish' people, who have not been afforded a fair trial before a competent and independent tribunal or indeed any trial at all."[343]

The next issue examined by the Court was the relationship between domestic laws and the limits of the use of force. Judge Fabricius noted that the constitutional guarantee of freedom from brutality perpetuated by the State is "also given effect to by the provisions of [] the [] Defence Act, the SAPS Act and the Criminal Procedure Act."[344] Specifically, he examined the Criminal

336. *Id*.

337. *Id.* at para. 54; *see* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1994, Dec. 10, 2984, 1465 U.N.T.S 85 (hereinafter "the Torture Convention").

338. The Torture Convention, 1465 U.N.T.S. 85 at art. 2(1).

339. *Id*. at art. 12.

340. *Id*. at art. 13.

341. *Id*. at art. 2(2).

342. *Khosa and Others* 2020 (5) SA 490 at para. 55.

343. *Id*.

344. *Id*. at para. 57. The SAPS Act governs the SAPS and Metropolitan Police Departments (MPDs) and places limits on the existence of their powers and functions. *Id*. at para. 58.

Defence Act's definition of "force" and "deadly force,"[345] and explained that the SAPS Act "does not give police officers a general license to use force in the execution of their duties."[346] Members of the SANDF "are also not exempt from these limitations on the use of force."[347]

He then summarized what the law's position is on the use of force by members of the SAPS and the SANDF, explaining that members of the SAPS and the SANDF may not use force, but if they have to,, they must use only "minimum force."[348] If a member of either of these state institutions intends to "secure the arrest of a person, force may only be used where it is reasonably necessary and proportional" and deadly force must only be used "where there is a threat to life."[349] Finally, he noted that except for these two "strict circumstances, there is no general license for the SANDF or the SAPS to use force."[350]

After this review of the law governing the use of force by state security forces in South Africa, Judge Fabricius then explained that "the applicants seek a declaratory relief notwithstanding the declaration of the State of Disaster and the lock-down under the Disaster Management Act."[351] Declaratory relief is appropriate in four instances.[352] First, "'appropriate relief' in terms of Section 38 of the Constitution."[353] Second, "where law or conduct is declared unconstitutional under Section 172(1)(a) of the Constitution."[354] Third, where declaratory relief is "just and equitable in terms of Section 172(1)(b) of the Constitution."[355] Fourth, it is "discretionary relief in terms of Section 21(1)(c) of the Superior Courts Act 10 of 2013."[356]

Judge Fabricius explained that § 38 of the Constitution contains two substantive requirements. First, an applicant must allege that a right in the Bill of Rights has been infringed or threatened with infringement. Second, a court is entitled to or may grant appropriate relief, including a declaration of rights.[357] He then concluded that the applicants in the case at bar had satisfied both

345. *Id.* at paras. 59–60.
346. *Id*. at para. 61.
347. *Id*. at para. 63.
348. *Id*. at para. 64(1).
349. *Id*. at para. 64(2).
350. *Id*. at para. 64(3).
351. *Id*. at para. 66.
352. *Id*. at 36 para. 67.
353. *Id*. at 36 para. 67. Section 38 deals with the enforcement of rights and states that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights." S. AFR. CONST., 1996, at § 38. Section 38 then provides a list of persons who can approach a court to seek relief if a right in the Bill of Rights has been infringed. *See id*.
354. *Khosa and Others* 2020 (5) SA 490 at 36 para. 67.
355. *Id*.
356. *Id*.
357. *Id*. at 37 para. 69. *See also* S. AFR. CONST., 1996 at § 38.

requirements.[358] Subsequently, Judge Fabricius cited *Fose v. Minister of Safety and Security* in which the Constitutional Court of South Africa (ZACC) held as follows:

> Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.[359]

Judge Fabricius then explained that although the ZACC made this ruling in 1997, it was still relevant 23 years later in 2020, when the case at bar was decided.[360] The ZACC's decision in *Fose* applies particularly to the case before the Court given the facts and "the state in which the society lives at present."[361] South Africa is "a democratic society under the rule of law," and the country's Bill of Rights is "a modern and effective tool and it must be used without fear or favour where appropriate within the bounds of the Constitution."[362] With respect to "appropriate relief," Judge Fabricius cited *Hoffmann v. South African Airways*, a case in which the ZACC held that "'appropriate relief' must be construed purposively, and in the light of section 172(1)(b) of the Constitution, which empowers the Court, in constitutional matters, to make 'any order that is just and equitable.'"[363] With respect to appropriate relief, the ZACC held in *Hoffmann* that it must be "fair and just in the circumstances of the particular case" and that "[a]ppropriateness . . . imports the elements of justice and fairness."[364] The Hoffmann Court also held that:

> [t]he determination of appropriate relief, therefore, calls for the

358. *Khosa and Others* 2020 (5) SA 490 at 37 para. 69.
359. *Fose v. Minister of Safety and Security* 1997 (3) SA 786, at 88 para. 69 (S. Afr.).
360. *Khosa and Others* 2020 (5) SA 490 at 37–38 para. 70.
361. *Id*.
362. *Id*.
363. *Id*. at 38 para. 71. *See also Hoffmann v. South African Airways* 2001 (1) SA 1 (CC), at 31 para. 42 (S. Afr.).
364. *Hoffmann* 2001 (1) SA 1 at 31 para. 42.

> balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case.[365]

The learned judge reiterated that security forces "are only entitled to use the *minimum* force that is reasonable to perform an official duty."[366] In addition, he noted that appropriate relief must be "future looking" and hence, must be designed to "deter future violations" of rights."[367] In addition to acknowledging the violation of rights for which the relief is being sought, declaratory relief also sets out "the obligations" and deters "future violations."[368] Noting that this is the right approach to determining and granting relief under the Constitution, Judge Fabricius concluded that he will adopt and utilize it for the case at bar.[369] Pursuant to § 38 of the Constitution, the applicants only have to "establish that their rights have been infringed or threatened with infringement."[370] After examining the facts adduced by the applicants, Judge Fabricius determined that the rights of the applicants had indeed been infringed and that their right to dignity had been "grossly infringed."[371] In addition, he explained that the applicants' right "not to be subjected to torture or cruel unusual punishment" had also "been established on the facts."[372]

Judge Fabricius then explained that the right to dignity is "a foundational right in the [Bill of Rights] which must be respected by all organs of state" and that "it is the essence of the Bill of Rights and a court should not tolerate an infringement especially not by those that are created to protect the human dignity of citizens and all persons in this country."[373] The irony is that the institutions that have been created "to safeguard and protect the population from crime and violence" are the very ones that have failed to hold accountable those individuals who have violated the rights of citizens.[374] However, those who lead these institutions "have the audacity to tell a court that it has no function in the matter and ought not even to hear" a case against alleged transgressors.[375]

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365. *Id*. at 33 para. 45.
366. *Khosa and Others* 2020 (5) SA 490 at 39 para. 74 (emphasis in original).
367. *Id*. at 40 para. 75.
368. *Id*.
369. *Id*.
370. *Id*. at 40–41 para. 76. *See also* S. AFR. CONST., 1996, at § 38.
371. *Khosa and Others* 2020 (5) SA 490 at 40–41 para. 76.
372. *Id*.
373. *Id*.
374. *Id*.
375. *Id*.

Next, he examined § 172(1) of the Constitution, which states that "[w]hen deciding a constitutional matter within its power, a court—(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable."[376] With respect to how South African courts have interpreted § 172, Judge Fabricius cited *Bengwenyama Minerals (Pty) Ltd & Others v. Genoral Resources (Pty) Ltd and Others*,[377] a case in which the ZACC stressed that § 172 is undergirded by the rule of law.[378] Writing for the ZACC in *Bengwenyama*, Justice Froneman held:

> I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent.[379]

Agreeing with the applicants that § 172(1)(b) grants courts the power to provide any relief that is just and equitable, Judge Fabricius rationalized that the order is not dependent on the finding of invalidity.[380] Judge Fabricius then cited *Corruption Watch NPC and Others v. The President of the Republic of South Africa*, a case in which the ZACC held as follows: "[t]he operative word 'any' is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity."[381] He noted that the holding in *Corruption Watch NPC* was echoed in *Economic Freedom Fighters and Others v. Speaker of the National Assembly and Others*, where the ZACC held that:

> [the] Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable.
>
> The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the

376. *Id*. at 41 para. 77; S. AFR. CONST., 1996, at § 172(1).

377. *Bengwenyama Minerals (Pty) Ltd v. Genoral Resources (Pty) Ltd* 2011 (4) SA 113 (CC) (S. Afr.).

378. *Khosa and Others* 2020 (5) SA 490, at 41 para. 78. *See also Bengwenyama Minerals* 2011 (4) SA 113 at 52 para. 85.

379. *Bengwenyama Minerals* 2011 (4) SA 113 at 52 para. 85.

380. *Khosa and Others* 2020 (5) SA 490 at 41 para. 79.

381. *Corruption Watch NPC v. The President of the Republic of South Africa; Nxasana v. Corruption Watch* 2018 (2) SA 442 (CC) (S.Afr.), at 33 para. 68.

notice of motion or some other pleading.[382]

Judge Fabricius concluded that under both §§ 38 and 172 of the Constitution, the Court can "grant an order that is appropriate or just and equitable."[383] After examining the competence of declaratory relief in terms of §§ 38 and 172 of the Constitution, he then examined it in terms of § 21(1)(c) of the Superior Courts Act 10 of 2013.[384] He began the analysis by explaining that the respondents in the case at bar appear to believe that § 21(1)(c) of the Superior Courts Act had "displaced the remedial power of this court which is contained in sections 38 and 172 of the Constitution."[385] Stating that the respondents are mistaken, he explained that § 21 is "additional and not exclusive," but it should not delay the decision in the case because the applicants did not rely on it.[386] He then cited *Competition Commission of South Africa v. Hosken Consolidated Investments Limited and Another*,[387] where the ZACC endorsed the two stage approach to determining appropriate relief.[388] According to this approach, the Court must first be "satisfied that the applicant has interest in a future, existing or contingent right or obligation," and "may then exercise its discretion either to refuse or grant the order sought."[389]

However, Judge Fabricius noted that "[t]he existence of a live dispute is not a prerequisite" for relief to be granted by the Court.[390] He explained that according to the submission to the Court, the reasons adduced to support the granting of the declaratory order include the following: "to vindicate the rule of law" and because "the conduct of the security forces threatens or has in fact violated the . . . Bill of Rights."[391] He then referred to descriptions of how the deceased, Mr. Khosa, the two applicants, and two witnesses had been subjected to "assault, torture and invasion of their bodily integrity in breach of the Constitution."[392] And given that no alternative version of the facts was tendered by the respondents, the honorable judge concluded that "there can be no doubt" that various fundamental rights had been infringed.[393]

Instead of addressing the claims made before the Court by the applicants, the Minister of Defense stated that "any answer to these [claims] will cause

382. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2018 (2) SA 571 (CC), at 87 paras. 210–211.

383. *Khosa and Others* 2020 (5) SA 490 at 42 para. 81.

384. *Id*. at 42 para. 82.

385. *Id*.

386. *Id*.

387. *Competition Commission of South Africa v. Hosken Consolidated Investments Limited,* 2019 (3) SA 1 (CC) (Feb. 1, 2019).

388. *Khosa and Others* 2020 (5) SA 490 at 43 para. 83.

389. *Id*.

390. *Id*.

391. *Id*. at 43 para. 84.

392. *Id*. at 43 para. 84(2).

393. *Id*.

prejudice to the pending investigation."[394] In a similar manner, he also noted that the Minister of Police had claimed that the matter was under investigation.[395] Judge Fabricius concluded, however, that these submissions were "legally untenable."[396]

With respect to whether any accused members of the security forces should be suspended and placed off duty while they were being investigated, Judge Fabricius noted that the respondents had claimed that any accused member of the security forces "can only be placed off duty and disarmed after they have been found guilty in a thorough investigation which," according to the respondents, was underway.[397] He disagreed with this reasoning and explained that South African courts have ordered precautionary suspensions where there existed "a prima facie case of abuse of public authority."[398] He explained further that these orders are designed "to prevent a culture which is a State's duty to prevent."[399] Finally, even though this is not "a drastic measure at all," its implementation would significantly improve public confidence in government/public institutions.[400]

With respect to "commands and warnings" to security services, Judge Fabricius then referenced § 199(5) of the Constitution, which states that "[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."[401] This, of course, is a continuous duty. The defense had already accepted that "these prayers accurately '[restate] legal obligations' but claim that these had already been fulfilled and thus the orders sought 'are not necessary.'"[402]

However, the applicants had argued to the Court that these orders were necessary for several reasons.[403] First, these commands and warnings had allegedly already been given but were not obeyed and that they were "ignored or defiled, not just by one deviant soldier acting alone, but a group acting in concert."[404] Second, the directive did not appear to have been designed "to support SAPS in policing civilians," but was written in the "form of a military combat engagement against hostile forces."[405] The directive defined the operation by expressions, such as "battle" the "enemy" until it is "defeated and

394. *Id*.
395. *Id*.
396. *Id*.
397. *Id*. at 44 para. 85.
398. *Id*. *See also South African Broad. Corp. Soc. Ltd. and Others v. Democratic All.* 2016 (2) SA 522 (SCA) (Oct. 8, 2015).
399. *Khosa and Others* 2020 (5) SA 490, at 45 para. 86. *See also Nat'l Comm'r of the SA Police Serv. v. South African Hum. Rts. Litig. Centre* 2014 (12) BCLR 1428 (CC) (Oct. 30, 2014).
400. *Khosa and Others* 2020 (5) SA 490 at 45 para. 86.
401. S. AFR. CONST., at ch. 11 § 199(5).
402. *Khosa and Others* 2020 (5) SA 490 at 45 paras. 87–88.
403. *Id*. at 45 para. 88.
404. *Id*.
405. *Id*.

neutralized."[406] Third, the directive further states that among the residents of Alexandra community, Johannesburg, where the incident took place, "there is a few that is resistant towards SANDF because of the fact that they support illicit activities within Alexandra."[407] Thus, concluded Judge Fabricius, the security forces were being instructed to go into the community, not with an open mind, but with the expectation that they would likely encounter "resistance from some residents in Alexandra" and hence, should be prepared to overcome it.[408]

Fourth, the directive instructed the security forces "to channel non-compliant [community] members and to allow harsh measures of the law to take course" and that "[c]ommanders[']s core function may be applied to find, fix and neutralize the non-compliers."[409] Judge Fabricius then noted that it was clear from this reason that when Mr. Khosa stood up for his rights and insisted on being treated "as a normal human being," he had effectively become one of the "non-compliers" that the security forces had to "neutralize."[410] Fifth, since the contents of the directive were saturated with "military language and orientated towards military combat," there was need for commanders to issue "louder" and more explicit "commands and warnings" about how the "SANDF members" were expected to deal with "civilians."[411]

Finally, the MOD had spoken with a "forked tongue" and "issued mixed messages about the use of force during the operation Notlela," and that she never explained under what circumstances members of the SANDF could use force or deadly force.[412] Judge Fabricius noted that while the MOD had expressed regret at the death of Mr. Khosa, and had "condemned unlawful conduct on the part of the SANDF," she nevertheless condemned what she referred to as "conduct that disobeys the lockdown Regulations."[413] The MOD's proclamations, he stated, appear to implicate some kind of "moral or legal equivalence between civilians disobeying, and soldiers violating constitutional, international and statutory provisions on the excessive use of force."[414] Judge Fabricius concluded that there is "no such legal or moral equivalence."[415] He explained that the MOD did not adequately instruct members of the SANDF on how to interact with and treat civilians while they perform their duties, nor did she fully condemn the SANDF units for their brutality towards civilians.[416]

With respect to the conduct of members of the SAPS during the lockdown, Judge Fabricius cited § 199(5) of the Constitution, which states that "[t]he

406. *Id*.
407. *Id*.
408. *Id*. at 45 para. 88(3).
409. *Id*. at para. 88 (3 & 4).
410. *Id*.
411. *Id*.
412. *Id*.
413. *Id*. at para. 89.
414. *Id*.
415. *Id*.
416. *Id*. at paras. 91–92.

security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."[417] In the context of the analysis of the brutal treatment of civilians by the security forces, he also stated that it would be useful "to keep in mind the founding provisions of the Constitution," especially "section 1(c) of the Constitution read with section 7(1) thereof and (2) thereof."[418] Judge Fabricius concluded that these provisions, including those in the Defence Act and the Police Act, speak clearly and explicitly to the duty of the security forces, which, in the context of the case at bar, is "to aid and assist [the] population of South Africa and of course to provide for law and order subject to its duties to act lawfully."[419]

He then considered standards set by international law that are relevant to the facts adduced in the case at bar.[420] Judge Fabricius made specific references to the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention").[421] He stated that Articles 12 and 13 "are particularly clear" in the context of the case at bar. Article 12 requires each State Party to "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."[422] Article 13 imposes an obligation on each State Party to "ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."[423] In addition, Article 13 also states that States Parties must take steps "to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."[424]

The provisions of Articles 12 and 13 of the Torture Convention, Judge Fabricius noted, were "echoed" in the Robben Island Guidelines,[425] which were adopted by the African Commission on Human and Peoples' Rights to guide

417. *Id*. at para. 118.

418. *Id*. at para. 119. Section 1(c) states that the Republic of South Africa was founded on certain values and one of them is the "supremacy of the Constitution and the rule of law." S. AFR. CONST., at § 1(c). Section 7(1) states that "[t]he Bill of Rights is a cornerstone of democracy in South Africa" and Section 7(2) states that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." *See* S. AFR. CONST., at § 7(1) & (2).

419. *Khosa and Others* 2020 (5) SA 490 at para. 119.

420. *Id*. at para. 131.

421. The Torture Convention, 1465 U.N.T.S. 85.

422. *Id*. at art. 12.

423. *Id*. at art. 13.

424. *Id*.

425. *Afr. Comm'n on Hum. and People's Rts. (Afr. Comm'n), Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, adopted by the African Commission in 2002.

African States in giving effect to Article 5 of the Banjul Charter.[426] Noting that the Torture Convention does not provide any provisions dealing with "the lodging and investigation of complaints of torture," he explained that in South Africa, the Independent Police Investigative Directorate (IPID) is the only institution empowered to investigate torture complaints against members of the SAPS and MPD.[427] The U.N. Committee Against Torture (UNCAT), the treaty body of human rights experts that monitors the implementation of the Torture Convention by States Parties, had determined through its investigations, that "South Africa's existing investigative bodies '[had] not been performing" and that they currently did not have the capacity "to perform the 'prompt and impartial' investigation required by the Torture Convention."[428]

The case at bar, concluded the opinion, appears to support the assessment made by the UNCAT about the situation in South Africa regarding the country's failure to adequately, effectively and expeditiously investigate alleged incidents of torture.[429] For example, the applicants and the deceased, Mr. Khosa, were assaulted on April 10, 2020.[430] However, there was "no proper investigation in progress" and no one from any agency of the State had "medically examined the applicants nor interviewed the surviving victims or any witnesses until after the Court hearing."[431] Judge Fabricius noted that "[t]his alone shows that the existing investigative bodies are either not competent or not committed to comply with article 12 of the Torture Convention."[432]

He then examined what he referred to as the inadequacies of the IPID, the public institution that is empowered to investigate torture complaints against members of the SAPS and MPD.[433] First, he explained that the IPID had complained that it did not have the funding and the trained personnel to promptly and efficiently investigate complaints.[434] Second, based on affidavits presented to the Court, it was determined that the IPID, during the duration of the lockdown, did not even have a permanent executive director who could act and function independently as required by the ZACC in *McBride v. Minister of Police and Another*.[435] In *McBride*, the ZACC had declared certain provisions

426. Article 5 of the African Charter on Human and Peoples' Rights (Banjul Charter) prohibits all forms of exploitation and degradation, particularly "slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment." African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/ 3 rev. 5, 21 I.L.M. 58 (1982), at art. 5.

427. *Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) at para. 132 (S. Afr.). SAPS is South African Police Service and MPD is Metropolitan Police Department. *See id*. at pmbl.

428. *Id*. at para. 136.

429. *Id*. at para. 137.

430. *Id*.

431. *Id*.

432. *Id*.

433. *Id*. at para. 138.

434. *Id*.

435. *Id*. *See also McBride v. Minister of Police and Another* 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (S. Afr.).

of the IPID Act unconstitutional because they undermined the IPID's independence from the executive,[436] and then directed Parliament to cure those defects within 24 months of the order.[437] However, Judge Fabricius explained, 44 months later, Parliament had not yet enacted legislation to amend the IPID Act and cure the defects as directed by the ZACC and that no explanation had been given for the delay.[438]

Finally, he examined the inadequacy of the Office of the Military Ombud, which was the 8th respondent.[439] He began the analysis by noting that although no relief was sought against this respondent, there was an explanatory affidavit filed on its behalf.[440] However, there were several problems "relating to this respondent."[441] First is that the Ombud "is not empowered to investigate" members of SAPS and MPD and that this alone effectively renders these institutions incompetent to perform the relevant functions provided in the Torture Convention.[442] Second, since the Ombud is required to have at least 10 years of military experience, Judge Fabricius concluded that this was "not institutionally impartial."[443] Third, there was no procedural safeguard to prevent the premature removal of the Ombud by the President of South Africa.[444]

Fourth, the Ombud's budget was determined by the MOD and the Ombud is accountable to the MOD rather than to Parliament.[445] Fifth, the Ombud's "method and conduct of investigation are prescribed by ministerial Regulations" and as a consequence, the Ombud "cannot investigate promptly, effectively and independently" and that this is apparent from the Ombud's "own annual activity report for 2018/2019."[446] Judge Fabricius determined that the Ombud's office did not have "sufficient human resource capacity and funding to deal with the existing caseload."[447] During the lockdown in South Africa the number of armed soldiers policing South African streets was the largest deployment of the defense force in the country's post-apartheid history.[448] Unfortunately, the Ombud "simply does not have the capacity" to deal expeditiously and promptly "with the hundreds of civilian complaints that this unprecedented deployment may generate."[449] This office, Judge Fabricius concluded, is "institutionally and practically incapable of conducting the 'prompt and impartial' investigation

436. *McBride* 2016 (2) SACR 585 at para. 58(1).
437. *Khosa and Others* 2020 (5) SA 490 at para. 138 (S. Afr.); *see also McBride*, 2016 (2) SACR at para. 58(2).
438. *Khosa and Others* 2020 (5) SA 490 at para. 138.
439. *Id*. at para. 139.
440. *Id*.
441. *Id*.
442. *Id*.
443. *Id*.
444. *Id*.
445. *Id*.
446. *Id*.
447. *Id*. at para. 140.
448. *Id*.
449. *Id*.

required by the Torture Convention and thus by section 12(1)(d) and (e) of the Constitution."[450] Further, he agreed with the applicants' counsel that there was "no existing mechanism [in South Africa] capable of conducting prompt, impartial and effective investigations of lock-down brutality" and that the Court had "the duty and power to order the Defence Minister and the Police Minister to establish one urgently" and that such a mechanism must not only be independent but must also be seen by the public to be independent.[451]

With respect to the Court's order, Judge Fabricius explained that the draft order "is designed to ensure that South Africa complies with its Constitutional and international obligations."[452] With respect to the issue of separation of powers, he cited *Democratic Alliance v. South African Broadcasting Corporation Limited and Others* where the Court held that "the rule of separation of powers cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to a litigant who successfully raises a constitutional complaint."[453] In addition, similar relief as that requested by the applicants in the case at bar has been granted by courts in South Africa in several cases.[454]

Thus, Judge Fabricius explained, the applicants in *Khosa* were not requesting that he "supplant or undermine existing institutions."[455] Instead, the applicants were requesting that the Court "order the respondents to enhance the existing institutions and to give them what they currently lack but constitutionally require" and that is "the necessary competence, independence and capacity to receive and investigate complaints of torture, and brutality promptly, impartially and effectively."[456] The relief requested in *Khosa* "is competent, justified, appropriate and above all just and equitable as required by the Constitution [of South Africa]" and that "[l]ockdown brutality requires a remedy" and the order sought by the applicants represents and provides that remedy.[457]

Judge Fabricius then cited *Mahomed and Another v. The Republic of South Africa and Others*,[458] a case in which President Chaskalson, writing for the ZACC, quoted the decision of Judge Brandeis in *Olmstead et al. v. U.S*:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people

450. *Id*.
451. *Id*. at para. 141.
452. *Id*. at para. 142.
453. *Id*.; *see also Democratic Alliance v. S. African Broad. Corp. Ltd.*, 2015 (1) SA 551 (WCC) at para. 99 (S. Afr.).
454. *Khosa and Others* 2020 (5) SA 490 at para. 143.
455. *Id*. at para. 144.
456. *Id*.
457. *Id*.
458. *Mahomed v. Republic of S. Afr.*, 2001 (3) SA 893 (CC) (S. Afr.).

> by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[459]

The honorable judge then listed the reliefs granted to the applicants. First, he stated that the application "is heard as one of urgency in terms of Rule 6(12), the ordinary requirements of the Rules in respect of notice, service and time periods being dispensed with, and the applicants' departure therefrom being condoned."[460] Second, in terms of §§ 38 and 172(1)(b) of the Constitution of South Africa, read with § 21(1)(c) of the Superior Courts Act 10 of 2013, the Court declared that "during and notwithstanding the declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002: all persons present within the territory of the Republic of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency":[461]

- the right to human dignity (section 10 of the Constitution);
- the right to life (section 11 of the Constitution);
- the right not to be tortured in any way (section 12(1)(d) of the Constitution);
- the right not to be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e) of the Constitution).[462]

Third, the Court held that "under section 199(5) of the Constitution, the South African security services . . . must act, and must instruct their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa]."[463] Fourth, all organs of the State, which include the SANDF, the SAPS and any MPD, "are obliged, under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights, including those enumerated above."[464]

Fifth, security services "remain bound by section 13(3)(b) of the South African Police Service Act 68 of 1998 (read with section 20(1)(a) of the Defence Act 42 of 2002), to use only the minimum force that is reasonable to perform an official duty."[465] Sixth, "members of the SANDF, the SAPS and any MPD . . . are bound by the provisions of the Prevention and Combating of Torture of Persons Act 13 of 2013, and the United Nations Convention against Torture and

459. *Id*. at ¶ 69. *See also* Olmstead v. United States, 277 U.S. 438, 485 (1928).
460. *Khosa and Others* 2020 (5) SA 490 at ¶ 146(1).
461. *Id*. at ¶ 146(2.1).
462. *Id*. at ¶146(2.1.1–2.1.4).
463. *Id*. at ¶ 146(2.2).
464. *Id.* at ¶ 146(2.3).
465. *Id.* at ¶ 146(2.4).

Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984."[466]

The rest of the reliefs concern orders that are directed at the various respondents.[467] For example, the Court ordered the "first to fourth respondents to, within their respective areas of authority" and "within five days" of the order, and "pending the outcome of disciplinary proceedings, place on precautionary suspension, on full pay, all members of the SANDF who were present at or adjacent to 3885 Moeketsi Street, Far East Bank, Alexandra, Johannesburg on 10 April 2020."[468]

Although there are many lessons that can be gleaned from *Khosa*, the most important one is that the law is supreme. Therefore, no one, not even individuals holding important government positions, such as executive members, is above the law. In performing their jobs, civil servants and political elites must be accountable to the constitution and they must do so in an open and transparent manner. That means that in addition to respecting, protecting, promoting and fulfilling the Bill of Rights, all State agents must provide the public with timely, accessible, accountable and accurate information about their activities and actions. Most importantly, certain fundamental rights (e.g., the right to life), which are enshrined in the ICCPR and the Bill of Rights of many countries, including South Africa, cannot be derogated from, even in time of a public emergency (e.g., the COVID-19 pandemic). *Khosa* is a very important case, and the High Court of South Africa's decision represents an important addition to Africa's growing jurisprudence on the protection of human rights, especially during times of public emergencies.

When COVID-19 came to South Africa in 2020, the country opted not to enact new laws to provide the government emergency powers to manage the pandemic.[469] Instead, the government used existing constitutional law (e.g., the Bill of Rights) and statutes (e.g., the Disaster Management Act 57 of 2002), as well as binding international human rights law. In taking measures to arrest the spread of the virus and minimize its impact on the people and the economy, civil society and its organizations expected the government to respect its obligations under international law and refrain from violating the laws of South Africa, including the Bill of Rights. Civil society organizations and individuals in South Africa challenged the constitutionality of the various COVID-19-related measures and their enforcement, and argued that they infringed on the human rights and fundamental freedoms of various individuals and groups within the country.[470] These challenges provided the courts the opportunity to clarify the

466. *Id*. at ¶ 146(2.5).

467. *Id*. at ¶ 146(3–6).

468. *Id*. at para. 146(3–3.1) (This is the street in the Alexandra community where the incident took place).

469. Kruger, *supra* note 88, at para. 18.

470. Kruger, *supra* note 88, at para. 171. An example of such a legal challenge of COVID-19-related school closures is *Equal Education and Others v. The Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP)

State's obligations under international and regional human rights instruments, as well as under the national Constitution, especially as it is related to the recognition and protection of human rights and fundamental freedoms.

V. SUMMARY AND CONCLUSION

In the summer of 2020, Human Rights Watch reported that the COVID-19 pandemic exposed serious gaps and significant inequalities in access to health care services in many African countries.[471] HRW urged African governments to address these deficiencies in their healthcare systems to more effectively deal with the demands of the COVID-19 pandemic and the on-going healthcare needs of residents of African countries.[472] HRW also urged African governments to ensure that all the people within their jurisdictions realize their right to health that is enshrined in various international and regional human rights instruments, including the Banjul Charter.[473]

Article 16 of the Banjul Charter guarantees the right of every person "to enjoy the best attainable state of physical and mental health."[474] The right to health is a fundamental right under international human rights law, it is an important part of the U.N. Sustainable Development Goals, and it is guaranteed as part of the bills of rights of many countries, including those in Africa.[475] For example, § 27(1)(a) of the Constitution of the Republic of South Africa states that "[e]veryone has the right to have access to—(a) health care services."[476] The right to health is also a key goal of the African Union's Agenda 2063.[477]

In its 2020/2021 annual report, Amnesty International explained that COVID-19 exposed the legacy of extremely "destructive policies," which "perpetuated inequality, discrimination, and oppression" in many countries throughout the continent.[478] In many African countries, governments "weaponized" the pandemic in an effort to "crackdown on human rights."[479] Particularly at risk during this period were members of opposition political parties and of vulnerable groups (e.g., women and girls; persons with disabilities; refugees, particularly refugee children; and ethnic and religious

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(July 17, 2020). In this case, three civil society organizations asked the High Court of South Africa, Gauteng Division, Pretoria, to order South Africa's Minister for Basic Education and several provincial ministries of education to provide "a daily meal to all qualifying learners whether they are attending school or studying away from school as a result of the Covid-19 pandemic." *See id*. at para. 1.

471. HUMAN RTS WATCH, *supra* note 1.

472. *Id*.

473. *Id*.

474. Banjul Charter, *supra* note 9, at art. 16.

475. HUMAN RTS WATCH, *supra* note 1.

476. S. AFR. CONST., 1996 at ch. 2, § 27.

477. AFRICAN UNION, AGENDA 2063: THE AFRICA WE WANT 2 (2015), https://au.int/en/agenda2063/overview [https://perma.cc/3ZC4-HHH5].

478. AMNESTY INT'L, *Sub-Saharan Africa*, *supra* note 12.

479. *Id*.

minorities).[480] AI determined that the COVID-19 pandemic hit Africans who had been "shackled by oppression hardest thanks to decades of inequalities, neglect and abuse."[481] However, the pandemic also created the wherewithal for opportunistic political elites to oppress their citizens and violate their human rights and fundamental freedoms.[482]

Article 4 of the ICCPR provides that "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," States Parties may take measures "derogating from their obligations under the [ICCPR] to the extent strictly required by the exigencies of the situation."[483] However, these measures must conform or be consistent with each State Party's "obligations under international law" and must not be discriminatory.[484]

In addition, States Parties must not derogate from articles 6, 7, 8 (¶¶ 1 & 2), 11, 15, 16 and 18.[485] When countries in Africa declared states of emergency or states of disaster in response to COVID-19, they were not supposed to interfere with or violate their people's human rights and fundamental freedoms.[486] However, research has determined that lockdown measures implemented in some African countries to arrest the spread of the virus contributed to an increase in levels of domestic violence against women and girls.[487] Certain rights were especially susceptible to being negatively affected by measures taken to manage COVID-19. Among these are the right to freedom of movement and of association, the right to life, and the right to be free from torture, cruel, inhuman or degrading treatment or punishment.[488]

COVID-19 pandemic lockdowns significantly heightened the risk of domestic violence because the mandatory lockdown regulations or laws forced many people to spend more time at home, significantly increasing their vulnerability to abuse by relatives and other family members.[489] In addition, the violation of the physical integrity of the individual also occurred when the police

480. *Id*.

481. AMNESTY INT'L, *COVID-19*, *supra* note 15.

482. *Id*.

483. ICCPR, *supra* note 25, at art. 4(1).

484. *Id*.

485. *Id.* at art. 4(2).

486. *See, e.g.*, OFFICE OF THE U.N. COMM. HUM. RTS, *COVID-19: States should not abuse emergency measures to suppress human rights—UN experts,* (March 16, 2020), https://www.ohchr.org/en/press-releases/2020/03/covid-19-states-should-not-abuse-emergency-measures-suppress-human-rights-un [https://perma.cc/2UBX-46Z7] (stating that "emergency declarations based on the Covid-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals" or "as a cover for repressive action under the guise of protecting health nor should it be used to silence the work of human rights defenders").

487. Carraro, *supra* note 36.

488. U.N. Comm'n Hum. Rts., *supra* note 37. *See also* OFF. OF THE U.N. COMM. HUM. RTS, *supra* note 485 (noting that "[t]he use of emergency powers must be publicly declared and should be notified to the relevant treaty bodies when fundamental rights including movement, family life and assembly are being significantly limited").

489. U.N. OFF. DRUGS & CRIME, *supra* note 41.

and other state security officers were enforcing public health measures that were implemented to minimize the spread of the COVID-19 virus.[490] Amnesty International also determined that in many African countries, security forces were involved in the violation of international human rights during the pandemic by employing excessive, unnecessary and disproportionate force to implement government mandated lockdowns and curfews.[491]

Although international law allows States to place certain restrictions on the rights to freedom of movement and of peaceful assembly in order to protect public health or other legitimate interests, these restrictions must be provided by law and they must be necessary and proportionate to a specific aim or purpose.[492] However, it was determined that some African States were using excessive force against peaceful protesters and allowing their security forces to violate, with impunity, the human rights of their citizens.[493] Thus, in passing laws or interpreting existing ones to enhance the ability of governments to deal with the COVID-19 pandemic, States were expected to be mindful of the non-derogable nature of certain human rights enshrined in the ICCPR and to place "human rights at the center of all considerations."[494]

One way to understand how African countries responded to the COVID-19 pandemic is to examine the experiences of individual African countries. One such country that was examined in this article is the Republic of South Africa, which couched its pandemic response in terms of its obligations under national constitutional law and international human rights law. [495] The first case of COVID-19 was reported in South Africa on March 5, 2020.[496] However, South African authorities chose not to enact new legislation to empower the government to deal with the virus.[497] Instead, the country chose to respond to the COVID-19 pandemic within a legal framework for the managing of disasters that was undergirded by existing law, which consisted of the national constitution, particularly, the Bill of Rights, and international and regional human rights instruments, which were binding on South Africa.[498] With respect to the declaration of a state of disaster, South African authorities relied on the Disaster Management Act 57 of 2002, a law that was designed to provide for "an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters," as well as mitigating their

490. Zweig et al., *supra* note 44.

491. AMNESTY INT'L, *Governments*, *supra* note 47.

492. *Id*.

493. *Id*.

494. *Id*.

495. Kruger, *supra* note 88, at Section II: Applicable Legal Framework.

496. NAT'L INST. FOR COMMUNICABLE DISEASES, *First Case of Covid-19 Coronavirus Reported in SA*, https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/ [https://perma.cc/9VZ5-64FK] (being an address to the public by Dr. Zweli Mkhize, Minister of Health, declaring that a case of COVID-19 has been detected in South Africa that day, March 5, 2020).

497. Kruger, *supra* note 88, at para. 18.

498. *Id*. at Sections I & II.

severity.[499]

South Africa declared a national state of disaster across the entire country in terms of § 27(1) of the Disaster Management Act 57 of 2002 on March 15, 2020.[500] That initial declaration lapsed on June 15, 2020.[501] However, this was repeatedly extended for 30 days until midnight on April 4, 2022, when the final state of disaster came to an end.[502] After the government of South Africa began implementing measures to manage COVID-19 and minimize its spread and its impact on the people and the economy, human rights defenders became worried that some of these measures and the way they were being implemented were violating human rights and fundamental freedoms, and subsequently sought the intervention of the courts. For example, in *Community of Hangberg and Another v. City of Cape Town*, the High Court of South Africa (Western Cape Division) ordered the City of Cape Town to rebuild an informal home that it had destroyed in contravention of the prohibition of evictions.[503] In another case, *C D and Another v. Department of Social Development*, the divorced parents of two children obtained an order from the High Court allowing their children, who were visiting their grandparents in Bloemfontein (Free State Province) when the lockdown was implemented, to return to their parents in Cape Town (Western Cape) (Cape Town High Court).[504]

C D and Another is one of the three South African cases that were examined in this article. In this case, the applicants, C D and M D, parents of two minor children, had approached the Cape Town High Court on an urgent basis to seek permission from the Court to allow either the first or second applicant to travel from Cape Town to Bloemfontein and back so as to fetch their children from their grandparents' home.[505] The two children, who were on holiday, had travelled from Cape Town to Bloemfontein on March 22, 2020, to visit their grandparents and were expected to return to Cape Town on March 31, 2020.[506] However, the government's mandatory lockdown intervened, and the children were effectively locked down with their grandparents in Bloemfontein and could not return home.[507]

The main issue that the Court was called upon to decide was whether the movement of the children from Bloemfontein to Cape Town was permitted in

499. Disaster Management Act 57 of 2002 at pmbl. (S. Afr.).

500. Kruger et al., *supra* note 88, at para. 24.

501. *Id.*

502. *Id. See also* S. Afr. Gov't, *President Cyril Ramaphosa: South Africa's response to Coronavirus COVID-19 pandemic*, (April 4, 2022) https://www.gov.za/news/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-04-apr [https://perma.cc/FWJ8-DXJW], being a speech to the nation by South African President Cyril Ramaphosa announcing an end to the declaration of a state of disaster on April 4, 2022.

503. *Cmty. of Hangberg v. City of Cape Town* 2020 SA 66 (ZAWCHC) at para. 14 (S. Afr.).

504. *C D v. Dep't of Soc. Dev.* 2020 SA 25 (ZAWCHC) at para. 1–2 (S. Afr.).

505. *Id.*

506. *Id*.

507. *Id*.

terms of the government's Amended Direction 1(c)(i).[508] Writing for the Court, Justice Meer cited § 39(2) of the Constitution, which states that "[w]hen interpreting any legislation, . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[509] With regards to the case at bar, Justice Meer explained that the relevant section of the Constitution that the Court had to interpret was § 28(2), which enshrines the child's best interests as the standard for dealing with all issues pertaining to children.[510] Second, Justice Meer explained that the Amended Direction did not specify that "movement of children can only take place in terms of pre-existing court order as alluded to by the Respondent."[511] In addition, she noted that her "reading of the direction does not prevent a court from making an order as required, presumably in circumstances of urgency, and for movement of children to take place in accordance with arrangements put in place by such an order."[512]

Finally, Justice Meer explained that in granting permission to the children to travel from Bloemfontein to Cape Town, the children would only be permitted to go to the home of the Second Applicant (M D, the children's mother) if it is proven to the Court that M D has tested negative for COVID-19.[513] She then held that the best interests of the children would be properly served if the they were permitted to travel from Bloemfontein to Cape Town to be with their parents.[514] In *C D and Another*, the Court made clear that any measures taken by the government to respond to COVID-19, which include restricting children's right to freedom of movement, including remaining in situations where their well-being and physical health are threatened, is not tenable. Thus, according to the High Court's judgment in *C D and Another*, it is the function of the State to ensure that the rights of all people under a State's jurisdiction, including those of vulnerable groups, such as children, are adequately protected in times of public emergencies. A State, then, must not use states of emergency or disaster as a pretext to violate the rights of its citizens.

The second case examined in this article is *Centre for Child Law v. Minister for Basic Education*. This case was brought before the High Court of South Africa, Gauteng Division, Pretoria, by the Centre for Child Law (CCL) at the Law Faculty at the University of Pretoria. The CCL had prayed the High Court to invalidate regulations that allowed for school closures as they failed to meet the needs of learners with disabilities.[515] They had alleged that the government's Directions, which had been issued pursuant to the Disaster Management Act 57 of 2002 to provide the tools to manage the pandemic, had failed to provide

508. *Id*. at para. 11.

509. *Id.* at para. 11.1; S. AFR. CONST., § 39(2).

510. *C D v. Dep't of Soc. Dev.,* 2020 SA 25 (ZAWCHC) at para. 11.1; S. AFR. CONST., § 28(2).

511. *C D v. Dep't of Soc. Dev.*, 2020 SA 25 (ZAWCHC) at para. 11.2.

512. *Id.*

513. *Id.* at para. 12.

514. *Id.* at para. 13.

515. *Centre for Child Law Notice of Motion,* Case No. 31213/2, *supra* note 181, at para. 2.

"guidelines for learners with physical disabilities, intellectual disabilities, epilepsy, and severe to profound intellectual disabilities."[516]

The CCL noted that in an effort to minimize the spread of COVID-19, the government of South Africa had ordered that all schools in the country should be closed.[517] The order to close all schools, included the country's "special schools," which catered to learners with special needs.[518] The school closures, the CCL explained, meant that millions of South Africa's learners would be unable to have access to "teaching and learning."[519] South Africa's learners with disabilities do not attend regular schools; instead, they attend special schools, where they are provided access to *teaching and learning* and, in addition, they are also provided with *specialized care and support services*, which significantly enhance their ability to learn.[520] These specialized care and support services can only be found and are only available at special schools and special school hostels and which are critical to the effective education of learners with disabilities.[521]

The services that the specialized schools offer learners with disabilities include "a range of therapies, access to assistive devices and technology, school feeding schemes, and access to personal care items."[522] These services form an essential and critical "component of learning and development for learners with disabilities" in South Africa.[523] The CCL concluded its presentation to the Court by stating that it was critical for the Minister for Basic Education to prioritize learning, not just for all learners, but this must be done especially for learners with disabilities who were forced to remain home because of the COVID-19 lockdown.[524] The safe reopening of schools, the CCL noted, would require the government to address the special needs of learners with disabilities within the context of the declared National Disaster.[525] This, the CCL explained, requires that the government provide "practical, feasible guidelines to provide for amongst others, sanitation, personal protective equipment (*PPE*) and social distancing measures unique to the context of various disabilities."[526]

The Court noted that the matter before it would be analyzed and decided in terms of § 38(b) of the Constitution on behalf of all learners with disabilities whose right to access basic education ([§ 29(1)(a)] of the Constitution of South Africa), as well as their right to have their best interests taken into account in

516. *Id.* at para. 2.1.
517. *Centre for Child Law Founding Affidavit*, Case No. 31213/2, *supra* note 182, at para. 12.
518. *Id.*
519. *Id.*
520. *Id.* at para. 13.
521. *Id.*
522. *Id.*
523. *Id.*
524. *Id.* at para. 14.
525. *Id.* at para. 15.
526. *Id.*

matters concerning them (§ 28(2) of the Constitution) have been violated by the Directions that were promulgated by the government to deal with the COVID-19 pandemic.[527] Children with disabilities, the CCL noted, are "a particularly marginalized and vulnerable group that require[s] a high degree of protection" and that their level of suffering, "particularly in the context of COVID-19, has recently been confirmed by [UNESCO]."[528]

The CCL argued that the failure of the government's directions for dealing with the COVID-19 pandemic to address the needs of "these excluded group of learners" is totally "irrational, because the Directions aim to address, prevent and combat the spread of COVID-19 and yet do not cater for categories of learners who are most at risk of contracting the disease."[529] Also, the failure or inability of the Directions

> to address the position of these excluded categories of learners . . . is unlawful, and otherwise unconstitutional, in that it contravenes the protection given to such children in terms of their rights to receive basic education (under section [29(1)(a)] of the Constitution, and to have their best interests taken into account in matters concerning them (under section 28(2) of the Constitution).[530]

The CCL then prayed the Court to review the Directions and "set them aside or declare[] them invalid to the extent that they fail to cater for the needs of the excluded categories of learners with disabilities under: the principle of legality."[531]

The Court's order in this case was issued on August 4, 2020, and in it, Judge Fourie declared that after having reviewed the evidence adduced by both parties, the Court ordered the Respondent, the MBE, to revise the Directions it had promulgated to guide school operations during the COVID-19 pandemic and provide more carefully tailored guidelines for learners with various types of disabilities—physical disabilities, intellectual disabilities, epilepsy, and severe to profound intellectual disabilities.[532] An important lesson from this case is that by failing to include guidelines specifically designed to protect the rights and meet the needs of *the excluded categories* of learners, the MBE had inadvertently created a situation in which the rights of these learners could be violated.

Another lesson that can be gleaned from this case is that civil society organizations, such as the Centre for Child Law, can play a very important role in ensuring that the rights of citizens, including especially those of extremely

527. *Id.* at para. 33.
528. *Id.* at para. 34.
529. *Id*. at para. 91(91.1–.2).
530. *Id.*
531. *Id*. at para. 92 (92.1 & 92.2).
532. These were the learners that the CCL had referred to as the "excluded categories." *See id.* at para. 2.1.

vulnerable groups (e.g., children in general and children with disabilities in particular) are recognized and protected, even in times of public emergencies. The courts, of course, are also an important mechanism to protect human rights. Courts are constitutionally empowered to adjudicate cases, peacefully resolve various conflicts, and determine the constitutionality of legislative enactments. It was these courts that ensured that teachers, administrators, and other staff members at South Africa's schools did not continue to violate the rights of learners with disabilities through measures designed to help manage the COVID-19 pandemic and minimize the spread of the virus.

The third case examined in this article was also from South Africa and it is *Khosa and Others v. Minister of Defence and Military Veterans and Others*.[533] Writing for the High Court of South Africa, Gauteng Division, Pretoria, Judge Fabricius explained that the case before the Court did not concern the question "whether or not any of the Regulations promulgated [by the government] are unlawful and thus invalid because they are not rationally related to their purpose," which is to minimize the spread of the COVID-19 virus.[534] He then explained that if government regulations violate the rights of citizens, the government should seek the least restrictive measures and communicate them to the populace.[535] In return, the government can expect that citizens will cooperate for the maximization of common goals and objectives, and take responsibility to ensure their own safety and that of other individuals and groups.[536]

After explaining that the founding values of post-apartheid South Africa include a democratic government that is based on the "principles of accountability, responsiveness and openness," Judge Fabricius then concluded that public administration in South Africa "must be accountable" and that "transparency must be fostered by providing the public with timely, accessible, accountable and accurate information."[537] In addition, he stated that if South Africa's government is held to these constitutional obligations, the trust of citizens in their government and institutions is restored, and "lawful rational Regulations are obeyed [by the people], then the expected flood of litigation will retreat and the spread of the virus will be contained until the appropriate vaccine is found."[538]

As part of the examination of the merits of *Khosa*, Judge Fabricius provided an overview of some rights enshrined in South Africa's Bill of Rights, as well as § 36, which deals with limitation of these rights.[539] After explaining the relief that was sought by the applicants and that it concerned the need for the

533. *Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) (S. Afr.).
534. *Id*. at para. 5.
535. *Id*. at para. 7.
536. *Id*.
537. *Id*. at para. 8.
538. *Id*. at para. 9.
539. *Id*. at para. 19.

government to respect the rights of South Africans, even during a declared national emergency or state of disaster, Judge Fabricius then noted that certain provisions of the Constitution of South Africa also require that the country's security forces, while performing their functions, "must act, and must instruct their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa]."[540]

After providing an overview of the reliefs prayed for by the applicants, Judge Fabricius then examined their heads of argument and noted that the case at bar concerned "torture and brutality committed against civilians by members of the South African security forces, in the course of the nationwide joint operation to enforce the unprecedented restrictions on civilian movement and activity" and which had been imposed by the government to provide the legal framework within which to combat the spread of the COVID-19 pandemic.[541] In addition, noted Judge Fabricius, the case was brought by the family of Mr. Collins Khosa, who was alleged to have been "brutalised, tortured and murdered by members of the security forces, at his home, on 10 April 2020."[542]

After citing the U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Judge Fabricius then summarized what the law's position is on the use of force by members of the SAPS and SANDF.[543] In general, he explained that members of the SAPS and SANDF may not use force but that if they must do, they must use only "minimum force."[544] If it becomes necessary for a member of either of these institutions to "secure the arrest of a person," deadly force must only be used "where there is a threat to life."[545] In addition, except for these two "strict circumstances, there is no general license for the SANDF or the SAPS to use force."[546] After examining the law regulating the use of force by state security forces in South Africa, Judge Fabricius explained that the applicants seek "a declaratory relief notwithstanding the declaration of the State of Disaster and the lock-down under the Disaster Management Act."[547]

Then Judge Fabricius cited § 38 of the Constitution and explained that it contains two substantive requirements, namely, that *the applicant must allege that a right in the Bill of Rights has been infringed or threatened to be infringed* and second, that *a court is entitled to or may grant appropriate relief, including a declaration of rights*.[548] Finally, he concluded that the applicants had met or satisfied both requirements and the relief prayed for by the applicants "is

540. *Id.* at para. 23.
541. *Id*. at para. 24(1).
542. *Id*. at para. 24(5).
543. *Id*. at para. 64(1).
544. *Id*.
545. *Id*. at para. 64(2).
546. *Id*. at para. 64(3).
547. *Id*. at para. 66.
548. *Id*. at para. 69.

competent, justified, appropriate and above all just and equitable as required by the Constitution" and that "[l]ockdown brutality requires a remedy."[549]

Specifically, Judge Fabricius noted that the Court had considered the application as "one of urgency" and held that in terms of §§ 38 and 172(1)(b) of the Constitution of South Africa, read with § 21(1)(c) of the Superior Courts Act 10 of 2013,

> during and notwithstanding the declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002: all persons present within the territory of the Republic of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency: including the right to human dignity[], the right to life[], the right not to be tortured in any way[], and the right not to be treated or punished in a cruel, inhuman or degrading way[].[550]

The Court also held that § 199(5) of the Constitution of South Africa mandates that "[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa]."[551] The Court reiterated that all organs of the State are "obliged, under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights."[552] While the Court granted the applicants in *Khosa* several reliefs, the overall lesson from this case is that the law, as enshrined in the constitution, is supreme and that no one, not even those who hold important positions in the government, and that includes members of the executive, is above the law.[553] Thus, in performing their jobs, political elites and civil servants, such as members of the SAPS, SANDF, and all MPDs, must be accountable to the constitution and they must do so in an open and transparent manner. That implies that in addition to respecting, protecting, promoting and enhancing the realization of the rights enshrined in the Bill of Rights, all State agents must provide the public with timely, accessible, accountable, and accurate information about their activities and actions.[554] The Court also made clear that fundamental rights (e.g., the right to life), which are enshrined in the Bill of Rights and various international and regional human rights instruments (e.g., ICCPR and the Banjul Charter), must not be derogated from, even in time

549. *Id*. at para. 144.

550. *Id*. at para. 146(2.1–2.2).

551. These security forces include the SAPS, all Metropolitan Police Departments, and the SANDF. *See* S. AFR. CONST. 1996, at para 199(5).

552. *Khosa and Others* 2020 (5) SA 490 at para. 146(2.3).

553. *Id*. at para. 146(2).

554. *See, e.g*., John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law,* 38 BROOK. J. INT'L L. 959, 993–1000, 1011–22 (2013).

of a public emergency.[555]

When COVID-19 pandemic came to South Africa, the country chose to rely on existing laws and its obligations under international and regional human rights instruments to provide the government with the legal tools to fight the spread of this virus. However, civil society, generally, and human rights defenders, in particular, worried that the interpretation of existing laws might offer the incumbent government the wherewithal to act opportunistically and violate the human rights and fundamental freedoms of South Africans. An important measure that South Africa took to minimize the spread of the virus and its impact on the health of its citizens was to declare a state of disaster, which was then followed by lockdowns that restricted citizens' ability to exercise their right to freedom of movement and of association. Subsequently, schools and businesses were closed, making it extremely difficult for learners, especially those with disabilities, to exercise their right to basic education.

Individuals and civil society organizations challenged the constitutionality of the various COVID-19-related measures and their enforcement, arguing that they infringed on the human rights and fundamental freedoms of various individuals and groups within the country. For example, in *C D and Another*, the Court made clear that in enforcing COVID-19-related measures, such as lockdowns, the government must make the best interests of the child a paramount consideration. The rights of child learners, particularly those of learners with disabilities, were under consideration in *Centre for Child Law v. Minister for Basic Education*. These children are especially vulnerable to exploitation and neglect and hence in *Centre for Child Law*, the Court instructed the government to make certain that in all public policies, especially those that affect learners with disabilities (e.g., the closing of schools in response to the COVID-19 pandemic), special attention must be paid to ensuring that the rights of this extremely vulnerable group are not violated. Finally in *Khosa*, the Court reminded South Africans that the political dispensation introduced by the 1996 Constitution is democratic and undergirded by the rule of law and respect for and the protection of human rights. Hence, the law is supreme and all state functionaries, including members of the executive, must perform their functions in conformity with the law and, in addition, they must respect and uphold the constitution.

International and regional human rights instruments, as well as the Constitution of South Africa, enshrine various protections for the human rights and fundamental freedoms of citizens. These legal instruments also impose obligations on the government to ensure that these rights are not violated with impunity. While both international law (e.g., the ICCPR) and national constitutional law permit the limitation of rights, this can only be done in "terms of law of general application to the extent that the limitation is reasonable and

555. Rights that cannot be derogated from, even in a state of emergency, include the right to equality, human dignity, life, freedom of security of the person and arrested and detained and accused persons. *Khosa and Others* 2020 (5) SA 490 at para. 19.

justifiable in an open democratic society."[556] With respect to public emergencies that threaten the life of the nation "and the existence of which is officially proclaimed," the State may "take measures derogating from [its] obligations under [international law] to the extent strictly required by the exigencies of the situation."[557] However, the measures taken must not be "inconsistent with [the State's] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion and social origin."[558] Nevertheless, even in situations of a public emergency, the State must not derogate from protecting certain rights (e.g., the right to life and the prohibition against being subjected to torture or to cruel, inhuman or degrading treatment or punishment).[559]

As the discussion in this article has made clear, States must not use law designed to deal with public emergencies to violate human rights. Hence, in all their activities, civil servants, political elites, and other state functionaries must respect and uphold the constitution, the country's obligations under international law, as well as promote and protect human rights and fundamental freedoms, even in situations of public emergencies.

556. S. AFR. CONST., 1996 at para. 36(1).

557. ICCPR, *supra* note 25, at art. 4(1).

558. *Id*.

559. A full list of rights that States cannot derogate from is given in article 4 of the ICCPR. *See* ICCPR, *supra* note 25, at art. 4(2).