

Amicus Curiae Submission by the SOAS Centre for Human Rights Law

In the Matter of a Request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Guarantees for the Effective Protection of the Right to Participate in Government in Africa, in the Context of the COVID-19 Pandemic and Crisis

Advisory Opinion No 001/2020

I. Introduction

1. The SOAS Centre for Human Rights Law makes this submission pursuant to the invitation extended by the African Court on Human and Peoples' Rights, by an email communication received on 3 March 2021, to submit an Amicus Curiae in the Matter of a Request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Guarantees for the Effective Protection of the Right to Participate in Government in Africa, in the Context of the COVID-19 Pandemic and Crisis, Advisory Opinion No 001/2020.
2. The submission focuses on the issues for determination set out in paragraph 30 of the aforementioned Matter of a Request by the Pan African Lawyers Union (PALU) for an advisory opinion, dated 2 May 2020.

II. Responses to the challenges posed by holding elections during COVID-19

3. Following the outbreak of COVID-19 in December 2019, the World Health Organisation (WHO) declared a public health emergency of international concern on 30 January 2020.¹ On 11 March 2020, its Director-General Tedros Adhanom Ghebreyesus declared COVID-19 a global pandemic.² States worldwide responded to the pandemic by taking a series of measures, including the adoption of emergencies, which were aimed at limiting the spread and adverse health impacts of COVID-19.³ The measures taken to protect the right to health have affected the panoply of internationally recognised human rights, from economic, social and cultural

¹ WHO, 'Statement of the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCov)' (30 January 2020) <[www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](http://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))> accessed 16 April 2021. Hereafter, all websites referenced in this Amicus Brief have been accessed at this date.

² WHO, 'WHO Director General's opening remarks at the media briefing on COVID-19' (11 March 2020) <www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

³ In the African context, see African Peer Review Mechanism, 'Africa's Governance Response to COVID-19, Preliminary Report 2020' (June 2020) <https://au.int/sites/default/files/documents/38893-doc-covid_19_final_english.pdf>. Further, the International Centre for Not-for-Profit Law (ICNL) 'COVID-19 Civic Freedom Tracker' (2021) <www.icnl.org/covid19tracker/>, which has separate entries for several regions worldwide.

rights to civil and political rights and collective rights.⁴ This includes the right to participate in government, particularly the right to have free and fair elections and the right to vote.

4. States in which elections at the national or subnational level had been scheduled since February 2020 have been confronted with several interrelated challenges arising from this situation. They must decide whether to hold elections as scheduled, including who should make such a decision following which process. If elections are to be held, the authorities must decide how they should be conducted in response to the threat posed by COVID-19. In case of a postponement of elections, it needs to be determined who has the authority to decide on a new date, in what process and based on what criteria. These decisions are complex. They have to take into consideration public health imperatives, the legal framework governing elections in the country concerned, political, operational and financial factors, and States' regional and international human rights obligations.⁵ Such decisions have profound implications for democracy, the rule of law and human rights in the country concerned, and for the state of governance across the continent.
5. The regularly updated database of the International Institute for Democracy and Electoral Assistance (IDEA) has charted responses for the period from 21 February 2020 to 17 April 2021. It states that "at least 78 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19".⁶ Further, "at least 116 countries and territories have decided to hold national or subnational elections despite concerns related to COVID-19."⁷ Notably, "at least, 52 countries and territories have held elections that were initially postponed due to concerns related to COVID."⁸ In Africa, countries where elections have been held include: Algeria, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Côte d'Ivoire, Egypt, Ghana, Guinea, Guinea Bissau, Kenya, Liberia, Malawi, Mali, Niger, Nigeria, Seychelles, Tanzania, Togo and Uganda at the national level.⁹ This data shows that most States have opted to hold elections, albeit in several instances with varying degrees of delays. In several countries where elections were held, observers raised a series of concerns regarding the electoral process. These included restrictions pertaining to campaigning, the adverse impact on voter registration, the inability of members of vulnerable groups to effectively participate in the process, impediments faced by impartial election observers and the risk of heightened insecurity.¹⁰

⁴ United Nations High Commissioner for Human Rights, 'Impact of the coronavirus disease (COVID-19) pandemic on the enjoyment of human rights around the world, including good practices and areas of concern' UN doc A/HRC/46/19 (18 January 2021).

⁵ The Commonwealth, 'Managing Elections in the Context of COVID-19: Perspectives from the Commonwealth, Commonwealth Elections and COVID-19 Briefing Paper' Issue 1 (2020)

<<https://thecommonwealth.org/sites/default/files/inline/Elections%20and%20C19%20-%20Perspectives%20from%20CW%201.pdf>>.

⁶ International IDEA, 'Global overview of COVID-19: Impact on elections' (9 April 2021) <www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ HÉla Slim, 'Electoral process in Africa: The impact of COVID-19 and the challenges for the EU' (2020) *European View* <<https://journals.sagepub.com/doi/full/10.1177/1781685820971223>>. See also E. Gyimah Boadi and Carolyn Logan, 'Global response to COVID-19 in Africa must protect lives, livelihoods, and freedoms' (*Afrobarometer*, 10 April 2020) <<https://afrobarometer.org/blogs/global-response-covid-19-africa-must-protect-lives-livelihoods-and-freedoms>> (raising concerns regarding the trust deficit in many African countries in respect of government protection of the right to health (access to medical care) and fundamental freedoms since the outbreak of COVID-19).

6. Available data indicates that States have taken decisions primarily based on specific local or national contexts. National elections were postponed in Chad, Ethiopia, Gabon, Gambia, Kenya, Liberia, Nigeria, Somalia, with subnational elections postponed in Botswana, Libya, South Africa, Tunisia and Zimbabwe.¹¹ Postponements varied considerably, from a one month delay to allow for adjustments made in Liberia to a delay of around ten months in Chad and Ethiopia.¹² The decision to postpone elections has been made by executive bodies, parliaments and electoral bodies.¹³ Election experts have raised concerns about the lack of consultation with relevant actors and transparency in taking such decisions.¹⁴ Judicial challenges have been brought in several countries in relation to elections during the COVID-19 period.¹⁵ Legislative approval for public health measures and election schedules has been deemed crucial in countries such as Malawi (*Kathumba and Others v. President of Malawi*), the United States of America (U.S.) (*Wisconsin Legislature v. Palm; Republican National Committee v. Democratic National Committee*) and Singapore (*Daniel De Costa Augustin v. Attorney General*).¹⁶

7. Election experts have recognised the rationale of ensuring the protection of public health as a ground for certain health related restrictions and a limited postponement of elections in particular circumstances.¹⁷ They have, however, identified executive decision-making and political manipulation of elections, as well as electoral misinformation and disinformation, as posing serious risks to democratic processes and the exercise of the right to participate in government.¹⁸ This is particularly the case where they are combined with other restrictive measures, such as internet shutdowns, bans on protests, and restrictions of freedom of expression that have led to a shrinking of civil space and curtailment of civil and political rights.¹⁹ In several instances, armed conflict, coups and political unrest have been attributed

¹¹ International IDEA, 'Global overview of COVID-19' (n 6).

¹² Ibid.

¹³ See e.g announcement of the National Electoral Board of Ethiopia (NEBE) of 31 March 2020 to postpone elections. Embassy of the Federal Democratic Republic of Ethiopia London UK, 'Press Statement by NEBE on the postponement of Ethiopia's 2020 elections' <www.ethioembassy.org.uk/press-statement-by-nebe-on-the-postponement-of-ethiopia-2020-elections/>.

¹⁴ See further Toby S. James and Sead Alihodzic, 'When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations' (2020) 3 *Election Law Journal: Rules, Politics and Policy* 344 <<https://www.liebertpub.com/doi/10.1089/ELJ.2020.0642>>.

¹⁵ In some instances, such as in Ethiopia, the issue was the subject of a special procedure, see The Federal Democratic Republic of Ethiopia (FDRE) Council of Constitutional Inquiry, 'Recommendation on the Request of the FDRE House of Peoples' Representatives for Constitutional Interpretation Submitted to the Council of Constitutional Inquiry Regarding the Impact of the COVID-19 Pandemic on the 6th General National Election' (29 May 2020) File No: 5216/2012 <<https://www.cci.gov.et/ከኢ-ፌ-ዲ-ሪ-ሕገ-መንግሥት-መሰረታዊ-መርሆች/?lang=en>>. In the European context, see Council of Europe, 'Interim Report on the measures taken in the EU member States as a result of the COVID-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights' (Interim Report), adopted by the Venice Commission at its 124th Plenary Session (Online, 8-9 October 2020) CDL-AD(2020)018-e, para 125, <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)018-e)>.

¹⁶ *Kathumba and Others v. President of Malawi* Constitutional Reference No. 1 of 2020; *Wisconsin Legislature v. Palm* 2020 WI 42, Case No: 2020AP765-OA; *Republican National Committee v. Democratic National Committee* 5. 140 S. Ct. 1205 (2020) (*per curiam*); *Daniel De Costa Augustin v. Attorney General* [2020] SGCA 60 Civil Appeal No 101 of 202.

¹⁷ James and Alihodzic (n 14) 348-350, including, at 349, with reference to the postponement of elections, "for public health reasons [which] include those in light of the Ebola crisis in West Africa (2013-2016)."

¹⁸ Kevin Casas-Zamora, Sarah Cliffe and Nendirmwa Noel, 'COVID-19, Election Governance, and Preventing Electoral Violence' (*Center on International Cooperation*, October 2020) <https://cic.nyu.edu/sites/default/files/cic-idea_covid-19_election_governance_and_preventing_electoral_violence.pdf>.

¹⁹ See CIVICUS, 'Civic Freedoms and the COVID-19 Pandemic: A Snapshot of Restrictions and Attacks' (4 May 2020) <<https://civicus.contentfiles.net/media/assets/file/COVID19April2020.pdf>> and CIVICUS, 'Civic space backsliding ahead of elections in Francophone West Africa, Case studies: Benin, Côte d'Ivoire, Guinea, Niger and Togo' (October 2020) <https://civicus.org/documents/reports-and-publications/eena-reports/west-africa-report-2020_en.pdf>. See further UN

to decisions pertaining to the holding or postponement of elections, in which the exercise of democratic rights was severely restricted on grounds related to COVID-19.²⁰

8. The following components for democratic processes and elections have been identified as key factors to be considered when deciding whether to hold or postpone scheduled elections:²¹

a. Opportunities for deliberation. A free and fair election requires that voters have the opportunity to deliberate over the issues at stake in the election and time to formulate preferences in response to individual and collective concerns. Democratic deliberation requires both that voters are able to meet and discuss and debate these issues as well as have access to independent media outlets that provide coverage of political platforms and positions. During the COVID-19 pandemic, several countries have restricted the possibilities for campaigning and media outlets have been reduced to skeletal staff. In these circumstances, opportunities for deliberation become much more limited. Postponement may therefore be justified on the grounds that voters require more time to deliberate over the candidates and parties seeking election.²²

b. Equality of contestation. Elections should ensure that candidates are operating on a level playing field. Emergencies can exacerbate the tensions between existing candidates (usually better resourced) and incumbents (who may, however, have more media influence) by enabling parties to exploit their strengths. In Poland, for example, President Andrzej Duda was found to be able to exploit connections with the media to make “television appearances at border check-points, hospitals, food banks, and new production lines of hand sanitiser during the early campaign of the 2020 presidential election, while opposition parties were unable to canvass.”²³ Assessing the extent to which an election can be contested, in light of the situation faced by the electorate under COVID-19, is therefore an important factor to consider.

c. Inclusivity in, and equality of, participation. A third factor to be considered is the extent to which particular groups may be affected by COVID-19 and the likelihood of their participation, in light of the additional responsibilities they may be required to undertake or the burden placed upon them in giving effect to their right to vote. Many of the elections held to date during COVID-19 have resulted in voter turnout drops.²⁴ In addition to these quantitative indicators, it is important to consider qualitatively who is likely to be able to vote during periods such as the pandemic. Specifically, women may be disproportionately disadvantaged in the exercise of their right, guaranteed under article 9 of the Protocol to the African Charter on Human and Peoples’ Rights on the Right of Women in Africa (Maputo Protocol) (2003)²⁵ and article

Office of the High Commissioner for Human Rights (OHCHR) ‘Civic Space and COVID-19: Guidance’ (4 May 2020) <<https://www.ohchr.org/Documents/Issues/CivicSpace/CivicSpaceandCovid.pdf>>, and African Commission on Human and Peoples’ Rights, *Resolution on the need to protect civic space and freedom of association and assembly*, ACHPR/Res. 475 (EXT.OS/ XXXI) 2021.

²⁰ Slim (n 10).

²¹ See in particular James and Alihodzic (n 14) and Slim (n 10).

²² See further Slim, *ibid.*

²³ James and Alihodzic (n 14) 352.

²⁴ See with particular reference to Mali, *ibid.*, 353.

²⁵ African Union (AU), Protocol to the African Charter on Human and Peoples’ Rights on the Right of Women in Africa (adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique 11th July 2003, entered into force 25th November 2005).

7 of the Convention on the Elimination of All Forms of Discrimination against Women (ratified by all African States except Sudan and Somalia).²⁶ Ethnic and racial minorities may be disproportionately affected, prohibiting them from fully exercising their right to vote, guaranteed under article 5(c) of the International Convention on the Elimination of all Forms of Racial Discrimination (ratified by all African States except South Sudan).²⁷ In the United States of America, for instance, commentators have argued that the COVID-19 pandemic influenced the 2020 electoral campaigns in numerous ways, including highlighting structural racism in the U.S. election process in the manner the management of the pandemic disproportionately negatively affected black persons and persons of colour.²⁸

d. Robust electoral management. COVID-19 is likely to place a far heavier burden on administrative processes, forcing parties to engage in compromises which may jeopardize the fairness of any election. Countries may rely on volunteer or temporary workforces to administer the election and the hours worked can be both very lengthy and required at short notice.²⁹ Ensuring the proper management of the electoral process may be an additional challenge and factor to be considered in relevant decision-making processes.

e. Institutionalisation. Setting a timetable for new elections provides a potential advantage for incumbents and opens the scope for political manipulation. In Hungary, for example, emergency laws were passed to allow the government to issue decrees for the duration of the emergency, which included that no elections were to be held during that period.³⁰ Institutional clarity is therefore considered essential to ensure trust in the system and to prevent any undemocratic power grabs.³¹

9. Electoral expert bodies have emphasised that States deciding to hold elections must create the conditions for the effective exercise of electoral rights. COVID-19 measures imposed by governments “that restrict movement and social gatherings significantly hinder election preparations and delivery, and risk reducing scrutiny, transparency and participation in the electoral process.”³² In the electoral process, measures imposed to combat COVID-19 risk undermining electoral principles such as accurate voter registration or effective (safe) campaigning.³³ To counter these risks, restrictions to the rights to freedom of expression, information, privacy, assembly and association must be kept to the absolute minimum necessary.³⁴ Campaigning methods that involve physical proximity such as door-to-door visits

²⁶ United Nations General Assembly (UNGA), Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

²⁷ UNGA, Convention on the Elimination of All Forms of Racial Discrimination (adopted 20 November 1963, entered into force 4 January 1969) 660 UNTS 195 (CERD).

²⁸ Keith Norris and Cynthia Gonzalez, ‘COVID-19, health disparities and the US election’ (2020) 28 (1) *EClinicalMedicine*100617 <[https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(20\)30361-8/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30361-8/fulltext)>.

²⁹ James and Alihodzic (n 14) 356.

³⁰ Ibid.

³¹ Ibid.

³² The Commonwealth, ‘COVID-19 and Election Management in Africa: Challenges, Innovations and Opportunities, Commonwealth Elections and COVID-19 Briefing Paper’ Issue 1 (2021) 5.

<<https://thecommonwealth.org/sites/default/files/inline/CW%20Elections%20and%20C19%20Africa%20FN.pdf>>.

³³ Ibid.

³⁴ See e.g. in Ethiopia the 6 point agenda issued by the Ethiopian Human Rights Commission ‘EHRC Issues “Human Rights Agenda for the 2021 Election”’ *Ethiopian News Agency (ENA)* (Addis Ababa 23 February 2021) <<https://www.ena.et/en/?p=21903>>.

may be limited. Ensuring “the freedom of voters to form an opinion” must in such circumstances be made through alternative campaigning methods,³⁵ including by taking into consideration how changes made impact the overall playing field.³⁶

10. Elections themselves must be organised to enable voters to cast their ballots without increasing the risk of infection and enhanced community transmission of COVID-19. States have taken a series of health and safety measures during elections, typically on the basis of health and safety guidelines adopted by Ministries of Health, electoral management bodies (EMBs) and other institutions.³⁷ The WHO has also issued interim guidance on public health considerations for elections during the pandemic.³⁸ International IDEA identified the following common measures used worldwide, which have been adopted by several African countries in their electoral processes:

Social distancing; personal protective equipment for polling station staff; masks mandatory for voters entering polling stations; mandatory use of hand sanitizers; sanitation of electoral materials/periodic cleaning of polling station/vent polling stations; masks for voters provided by election commission; reduced number of people allowed in polling stations; voter recommended bringing pens; optional use of hand sanitizer; masks recommended for voters entering polling stations; posters outside polling stations warning voter to take precaution against COVID-19.³⁹

In other countries, additional measures taken have included:

temperature checks; disposable gloves mandatory for voters; extra polling station staff; increased number of polling stations; special accommodation and priorities in queues; gloves provided by EMBs; EMBs provided disposable pens; floor markings and barriers; queue control; extended working hours of polling stations; mock pools; restrictions on commercial activities close to polling stations; sanitizing of hands upon entering the polling station; extension of election-day from one day to several days - multi date voting; voters recommended to use national COVID-19 tracing app; limitations on celebratory gatherings during result announcements; voting personnel selected from outside risk groups; size of polling stations increased; delineation of voting times; delineating polling booths for persons with respiratory symptoms.⁴⁰

11. African political and human rights bodies have offered guidance on elections during COVID-19.⁴¹ EMBs across the continent have taken a series of measures in relation to pre-election operations, voter registration, stakeholder coordination, public communication, as well as

³⁵Venice Commission, Interim Report (n 15) para 102.

³⁶ Council of Europe and Congress of Local And Regional Authorities ‘Local and regional elections in major crisis situations’ Report CG-Forum (2020) 01-05 (22 September 2020) para 82 <<https://rm.coe.int/local-and-regional-elections-in-major-crisis-situations-monitoring-com/16809fa82f>>.

³⁷ Erik Asplund et al., ‘Elections and COVID-19: Health and safety in polling stations’ *International IDEA* (Stockholm 5 February 2021) <<https://www.idea.int/news-media/news/elections-and-covid-19-health-and-safety-polling-stations>>.

³⁸ World Health Organisation, ‘Public health considerations for elections and related activities in the context of the COVID-19 pandemic: Interim guidance’ (10 December 2020) <<https://apps.who.int/iris/handle/10665/337570?locale-attribute=fr>>.

³⁹ Asplund et al. (n 37).

⁴⁰ Ibid.

⁴¹ See in particular statements and resolutions issued by the African Union Peace and Security Council and the African Commission on Human and Peoples’ Rights discussed below at II.

campaigning, voting and post-election activities.⁴² However, the practice of putting in place health and safety measures has not been uniform or consistent. Reports on the electoral processes in individual countries indicate *ad hoc* decision making, limited guidance, a lack of respect for restrictions, poor enforcement, and a significant decrease in voter turnout in several countries.⁴³

12. Regional human rights bodies from the Americas and Europe have similarly offered guidance to States. In the Americas,⁴⁴ the Inter-American Commission on Human Rights (IACHR) has created a Rapid Integrated Response Coordination Unit, or SACROI, to deal with the public health emergency and ensure the protection of human rights.⁴⁵ Resolution 1/2020 of IACHR notes that States should:

“Ensure that any and all restrictions or limitations placed on human rights to protect health in the context of the COVID-19 pandemic comply with the requirements of international human rights law. In particular, such restrictions must comply with the principle of legality, be necessary for a democratic society and therefore be strictly proportionate to achieving the legitimate purpose of protecting health.”⁴⁶

13. Resolution 1/2020 further declares that States must refrain from suspending all non-derogable rights as set out in the American Convention on Human Rights, including ‘political rights’.⁴⁷ However, because article 23(b) of the Convention does not provide a specific guarantee as to the conduct or timing of an election, the limitations permitted by this resolution regarding a state of emergency may provide States with the flexibility to undertake unprecedented exceptional measures in response to COVID-19 that impinge upon the proper exercise of this right.⁴⁸ States are, however, strongly encouraged to adhere to the principles of legality and proportionality and to ensure any measures undertaken are in accordance with their obligations under international human rights law.⁴⁹

14. During the pandemic at least 27 States and overseas territories in the Americas held elections (presidential, municipal, by-elections, district) with additional health and safety measures in place.⁵⁰ These measures included, inter alia, that voters who had tested positive could attend a polling station from private transportation; mail ballots; home-delivered “extraordinary

⁴² African Union Commission, ‘Report of the Virtual Peer-learning Consultative Meeting of African EMBs on COVID-19 and Elections in Africa held on 27 May 2020’ (June 2020) <<https://au.int/en/documents/20200921/report-african-election-management-bodies-covid-19-and-elections-africa>>; the Commonwealth, ‘COVID-19 and Election Management in Africa’ (n 32) 11-21.

⁴³ International IDEA (n 6) ‘Featured Cases of Risk Mitigation Measures during COVID-19’ (9 April 2021) <www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

⁴⁴ In addition, the Organization of American States (OAS) on 9 July 2020 released ‘Guide to Organizing Elections During a Pandemic’ OEA/Ser.D/XX SG/SFD/III <www.oas.org/en/media_center/press_release.asp?sCodigo=E-073/20>.

⁴⁵ Organization of American States (OAS) ‘SACROI COVID-19’ (2021) <www.oas.org/en/IACHR/jsForm/?File=/en/iachr/sacroi_covid19/default.asp>.

⁴⁶ IACHR, ‘Pandemic and Human Rights in the Americas’, Resolution 1/2020 (10 April 2020) para 20 <www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

⁴⁷ *Ibid.*, para 23. Compare with article 27(2) of the American Convention on Human Rights (adopted on 22 November, entered into force on 18 July 1978) 1144 UNTS 123.

⁴⁸ *Ibid.*, paras 21-22.

⁴⁹ *Ibid.*

⁵⁰ Anguilla, American Samoa, Argentina, Belize, Bermuda, Bolivia, Brazil, Cape Verde, Canada, Chile, Curaçao, Dominican Republic, Ecuador, El Salvador, Guyana, Guam, Jamaica, Mexico, Micronesia, Paraguay, Peru, Puerto Rico, Falkland Islands/Las Islas Malvinas, Saint Kitts and Nevis, Suriname, Trinidad and Tobago, Turks and Caicos Islands, Uruguay, the United States of America (U.S), and Venezuela. See International IDEA (n 6).

voting ballot kit”; trials of electronic voting; and the use of chemical disinfectant. In some countries the “elections had to be postponed” more than once.⁵¹ All countries in Latin America and the Caribbean declared states of emergency other than Cuba, Nicaragua and Trinidad and Tobago.⁵²

15. In Europe, the Council of Europe (including the Venice Commission of the Council) and also the European Parliament Research Service have issued guidance for member States on COVID-19, states of emergency and elections. The guidance makes clear that the principle of legality continues to apply and that States must respect international law and their own national constitutions when determining how to respond to the pandemic.⁵³ According to the Venice Commission, granting emergency powers to the executive to legislate via decree is permissible. However, the emergency powers and the emergency legislation must be limited in duration;⁵⁴ the Parliament must continue working throughout the state of emergency and must be in a position to control emergency measures and courts must be in a position to examine the most serious restrictions imposed on human rights.⁵⁵ In this respect, restrictions on civil rights linked to the effective participation in public life (freedom of assembly, expression, conscience, private life, articles 8-11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)⁵⁶), also in a state of emergency, need to be established by law, and be compliant with the constitution and be proportionate.⁵⁷ Postponement of elections for humanitarian reasons can be justifiable in international law when they are limited in time;⁵⁸ a postponement is a restriction to the periodicity of elections under article 3 of the Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁹ that has to be foreseen by law, be necessary and proportionate.⁶⁰ The decision of postponement for a short period of time (less than two months) can be taken by the election administration or the government, longer postponements over 6 months should be decided by the legislative body.⁶¹

⁵¹ Ibid; Luis Felipe López-Calva, ‘The Virus and the Votes: How Is COVID-19 Changing Voter Turnout in LAC?’ *United Nations Development Programme (UNDP) Latin America and the Caribbean* (17 February 2021) <www.latinamerica.undp.org/content/rblac/en/home/presscenter/director-s-graph-for-thought/the-virus-and-the-votes--how-is-covid-19-changing-voter-turnout-.html>.

⁵² International IDEA & The Global State of Democracy Indices ‘Latin America and the Caribbean (COVID-19)’ (Global Monitor website, 7 April 2021) <www.idea.int/gsod-indices/profile/covid19/latin-america-and-the-caribbean>.

⁵³ Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, A toolkit for member states’ (7 April 2020) SG/Inf(2020)11 para 2.1 <<https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>>; European Commission for Democracy through Law (Venice Commission) ‘Respect for Democracy, Human Rights and the Rule of Law during States of Emergency – Reflections’ (26 May 2020) CDL-PI(2020)005rev, para 9 <<https://rm.coe.int/respect-for-democracy-human-rights-and-rule-of-law-during-states-of-e/16809e82c0>>

⁵⁴ Council of Europe (n 53) para 2.2.

⁵⁵ Ibid., para 2.4. See also Ana Jabauri, ‘State of Emergency: A Shortcut to Authoritarianism’ (2020) 1 *Journal of Constitutional Law* 121, 138-139.

⁵⁶ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005 (adopted on 4 November 1950, entered into force on 3 September 1953).

⁵⁷ Council of Europe (n 53) para 3.3; also “temporary, limited in scope, nondiscriminatory” Katherine Ellena, ‘IFES COVID-19 Briefing Series: Legal Considerations When Delaying or Adapting Elections’, *International Foundation for Electoral Systems (IFES)* <www.ifes.org/publications/ifes-covid-19-briefing-series-legal-considerations-when-delaying-or-adapting-elections>; Venice Commission, ‘Respect for Democracy’ (n 53) para 6.

⁵⁸ Venice Commission ‘Respect for Democracy’ (n 53); IFES (n 57) 6.

⁵⁹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 009, adopted on 20 March 1952, entered into force on 18 May 1954.

⁶⁰ Venice Commission ‘Respect for Democracy’ (n 53) para 92.

⁶¹ Venice Commission ‘Respect for Democracy’ (n 53) para 118.

16. As at April 2021, 10 European countries have declared a state of emergency due to the outbreak of COVID-19 under the European Convention on Human Rights.⁶² 26 countries have postponed elections (legislative, municipal, presidential) and few countries have held originally scheduled elections, all with special/extraordinary safety measures.⁶³ Measures taken to ensure the safety and security of elections have included: passing an emergency law, providing for postponement due to extraordinary circumstances; ensuring safety measures including masks, social distancing, sanitisers, cleaning and ventilating of voting booths, plexiglass, protective visors etc for election personnel; allowing vote casting over two days (resulting in voter turnout being higher than years before); and enabling people in quarantine and self-isolation to vote, through special polling stations enabling them to vote in their car.⁶⁴ All countries that postponed elections have set new dates and many countries have now held the postponed elections.⁶⁵
17. In Asia, a trend of proceeding with elections during the pandemic has been enabled by countries' rapid adoption of special voting arrangements to ensure voters' and poll workers' safety during the pandemic. Postponed elections were all rescheduled (22), except for India's subnational elections of Gandhinagar municipal corporation, which remains indefinitely postponed as at April 2021.⁶⁶

III. The right to participate in government in the context of an election and COVID-19

18. Article 13(1) of the African Charter on Human and Peoples' Rights (Charter)⁶⁷ provides that "[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law." Article 13 is a pivotal norm that forms part of the African Union (AU) objectives of promoting "democratic principles and institutions, popular participation and good governance"⁶⁸ and principles of "respect for democratic principles, human rights, the rule of law and good governance."⁶⁹ The African Charter on Democracy, Elections and Governance

⁶² Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, the Republic of Moldova, Romania, Serbia and San Marino (declaring states of emergency in March and April 2020), European Court of Human Rights, Press Unit, 'Factsheet – Derogation in time of emergency' April 2021 <www.echr.coe.int/Documents/FS_Derogation_ENG.pdf>; Sanja Jovicic, 'COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights', (2021) 21 *ERA Forum* 545, 547 <<https://link.springer.com/article/10.1007/s12027-020-00630-w>>.

⁶³ International IDEA (n 6.). According to International IDEA, British overseas territories are counted separately.

⁶⁴ Ibid.

⁶⁵ Ibid; Toby James and Erik Asplund, 'What happens after elections are postponed? Responses to postponing elections during COVID-19 vary by regime type', *International IDEA* (2 September 2020) <<https://www.idea.int/news-media/news/what-happens-after-elections-are-postponed-responses-postponing-elections-during>>.

⁶⁶ Examples of countries proceeding with elections in Asia during the pandemic include: Bangladesh, where by-elections were held in July; India, where indirect elections to the Council of States were held in June; Sri Lanka, where parliamentary elections were held in early August; Autonomous Bougainville, Papua New Guinea, where a general election was held in August (RNZ 2020); and Kyrgyzstan and New Zealand, which had parliamentary elections in October. By early October, national elections had been held on schedule in 12 countries: 5 democracies (Australia, Japan, Mongolia, South Korea and Taiwan); 4 hybrid regimes (Bangladesh, Kyrgyzstan, Myanmar and Singapore); and 1 authoritarian regime (Tajikistan). International IDEA, 'The Global State of Democracy in Focus - Taking Stock of Regional Democratic Trends in Asia and the Pacific Before and During the COVID-19 Pandemic', <<https://www.idea.int/publications/catalogue/taking-stock-regional-democratic-trends-asia-and-pacific-and-during-covid-19>>.

⁶⁷ African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM (58) [African Charter].

⁶⁸ Article 3(g) Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 [Constitutive Act of the AU].

⁶⁹ Article 4(m) Constitutive Act of the AU. See also article 4(p) thereof "condemnation and rejection of unconstitutional changes of governments."

(African Charter on Democracy)⁷⁰ includes and elaborates on the right to participate in government.

19. In interpreting article 13 of the Charter, the African Commission on Human and Peoples' Rights (African Commission) held that:

“every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2, and without unreasonable restriction, taken [sic] part in the conduct of government of his country, directly or through freely chosen representatives, which includes to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot.”⁷¹

20. The African Commission has elaborated on States parties' obligations flowing from article 13 and related Charter provisions in a series of guidelines, resolutions and statements, including following the outbreak of COVID-19.⁷² In its statement of 22 July 2020, it referred to “the right to regular, free, fair and credible election [as] the most sacred democratic norm.”⁷³ According to the Commission, “elections are the only means by which people can elect democratically the government of their choice...”⁷⁴ Governments must therefore take all necessary measures “to ensure the credibility of electoral processes”.⁷⁵ Elections must be held at regular intervals, be free, fair and transparent, and be conducted by competent, independent and impartial bodies,⁷⁶ under a system of separation of powers that ensures in particular the independence of the judiciary.⁷⁷ States parties must take specific positive measures to promote participatory governance,⁷⁸ which includes the necessary measures to preserve and protect the credibility of the electoral process, providing civic space⁷⁹ and enabling free, informed and peaceful campaigning. Independent institutions must be in charge of election management, with elections being held with the participation of election observers.⁸⁰

21. Article 1 of the Charter requires States parties to respect the rights, freedoms and duties enshrined in the Charter “and to take measures to give effect to these rights, duties and freedoms”.⁸¹ Read in conjunction with article 13 of the Charter, it obligates States parties to take the measures set out in paragraph 19 above as well as “measures to prevent, investigate and prosecute human rights violations that may occur during the election period and provide

⁷⁰ African Charter on Democracy, Elections and Governance (adopted by the Eight Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007, entered into force 15 February 2012).

⁷¹ ACHPR, Communication 246/02, *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*, Decision of 29 July 2008, para 76; Communication 335/2006, *Dabadorivhuwa Patriotic Front v the Republic of South Africa*, Decision of 23 April 2013, para 128.

⁷² See in particular ACHPR, 'Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts', ACHPR/Res.449 (LXVI) (7 August 2020).

⁷³ ACHPR Commission, 'Statement of the African Commission on Human and Peoples' Rights on Elections in Africa during the COVID-19 Pandemic' (22 July 2020) <https://www.achpr.org/pressrelease/detail?id=522>.

⁷⁴ ACHPR Commission, 'Resolution on Electoral Process and Participatory Governance', ACHPR/Res.23(XIX) (1996) para 1.

⁷⁵ ACHPR Commission, 'Resolution on the 2013 Elections in Africa', ACHPR/Res.239 (24 July 2013) para 1.

⁷⁶ ACHPR Commission, 'Resolution on Elections in Africa', ACHPR/Res.433(LXV) (10 November 2019) paras 1 and 5.

⁷⁷ AU, 'Declaration on the Principles Governing Democratic Elections in Africa', AHG/Decl.1 (XXXVIII) (8 July 2002) II, para 4 (c).

⁷⁸ ACHPR Commission, 'Resolution on Elections in Africa' (n 76) paras 2-4.

⁷⁹ ACHPR Commission, 'Resolution on the need to protect civic space and freedom of association and assembly', ACHPR/Res.475 (EXT.OS/XXXI) (25 February 2021).

⁸⁰ ACHPR Commission, 'Resolution on 2015 Elections in Africa', ACHPR/Res.293(EXT.OS/XVII) (28 February 2015).

⁸¹ ACPHR, Communication 319/06, *Interights & Ditshwanelo v The Republic of Botswana*, Decision of 18 November 2015, para 97.

adequate remedies to victims.”⁸² This is particularly important because of the close nexus of article 13 with other rights. The violation of article 13 may result in violations of rights such as freedom of expression and association,⁸³ or, where marred by violence, the prohibition of torture and cruel, inhuman or degrading treatment, and the right to life.⁸⁴

22. In the African human rights architecture, articles 13 and 1 of the Charter are complemented by treaty provisions designed to ensure the right to participation in the political and decision-making processes. This includes the right of “women to participate without any discrimination in all elections” and to equal and effective representation set out in article 9 of the Protocol to the African Charter on Human and Peoples’ Rights on the Right of Women in Africa, which States parties are duty bound to promote through “specific positive action”. Further, article 2 of the Charter requires that all persons can exercise their right to democratic participation without discrimination. This applies particularly to persons who are ill with, or at particularly vulnerable to serious health consequences resulting from, COVID-19. They must be able to exercise their right to vote, which obliges States to make the necessary adjustments, a principle that is particularly recognised in the widely ratified Convention on the Rights of Persons with Disabilities.⁸⁵ It also comprises the obligation to prohibit discrimination of older persons.⁸⁶
23. The importance of the right to participate in government, particularly free and fair elections, and of rights such as freedom of assembly, freedom of expression and freedom of association for the exercise of the right has been emphasised in a series of pronouncements and rulings by international and regional human rights bodies and courts, such as the UN Human Rights Committee,⁸⁷ the European Court of Human Rights⁸⁸ and the Inter-American Court of Human Rights.⁸⁹ Article 3 of the Inter-American Democratic Charter (2001) stipulates that: “Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.”⁹⁰

⁸² African Commission Statement of 22 July 2020 (n 73) para 14.

⁸³ ACHPR, Communication 212/98, *Amnesty International v Zambia*, Decision of 5 May 1999.

⁸⁴ See articles 4 and 5 of the African Charter. On post-election violence, see ACHPR, Communication 272/2003, *Association of Victims of Post Electoral Violence and Anor. v Cameroon*, Decision of 25 November 2009.

⁸⁵ See in particular article 29(a)(i) and (ii) of the Convention on the Rights of Persons with Disabilities (adopted on 13 November 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD). See further Erik Asplund, et al., ‘Elections need to be accessible for the ill during COVID-19 to avoid disenfranchisement’, 29 October 2020 at <www.idea.int/news-media/news/elections-need-be-accessible-ill-during-covid-19-avoid-disenfranchisement>.

⁸⁶ See particularly article 5(3) of the Protocol to the African Charter on Human and Peoples’ Rights of Older Persons in Africa, Adopted by the Twenty Sixth Ordinary Session of the Assembly, Addis Ababa, Ethiopia, 31 January 2016, not yet in force.

⁸⁷ UN Human Rights Committee (HRC) ‘General comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’, UN doc CCPR/C/21/Rev.1/Add.7 (12 July 1996).

⁸⁸ See European Court of Human Rights (ECtHR) ‘Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to free elections’ (Council of Europe, Updated on 31 December 2020) <www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf>.

⁸⁹ See Inter-American Court of Human Rights (IACtHR) *Case of Castañeda Gutman v Mexico* (Preliminary objections, merits, reparations and costs) Judgment of 6 August 2008, Series C No. 184.

⁹⁰ Article 3 of the Inter-American Democratic Charter (adopted 11 September 2001) 40 ILM 1289.

24. The African Charter on Democracy is the continental legal treaty that elaborates on the principles enshrined in the Constitutive Act of the African Union, which are referenced in its preamble, and in article 13 of the African Charter.⁹¹ As held by the African Court on Human and Peoples' Rights in *The Matter of Actions Pour La Protection des Droits De L'Homme (APDH) v Cote d'Ivoire*, the Charter on Democracy constitutes a human rights instrument that falls within its "jurisdiction to interpret and apply".⁹²
25. The provisions referred to in the request for an advisory opinion by PALU establish general objectives and principles, a set of specific obligations, and measures to be taken in relation to political, economic and social governance. Read in conjunction, the provisions provide for the effective participation of citizens in democratic and development processes and in the governance of public affairs, as well as the holding of regular, transparent, free and fair elections. These function as both governing principles and means through which States parties promote democracy and respect for human rights and the rule of law. Elections held in accordance with these principles are a key mechanism to ensure the constitutional transfer of power. They also prevent the unconstitutional change of government. This includes, according to article 23(5) of the African Charter on Democracy "[a]ny amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government." The illegal means of accessing or maintaining power constituting an unconstitutional change of government listed in article 23 are not exhaustive, which is indicated by the use of *inter alia* in the text. In interpreting the provision, it is appropriate to draw on article 28E1(f) of the Malabo Protocol (not yet in force),⁹³ which specifies that "any substantial modification of the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors" is considered to constitute an "unconstitutional change of government."
26. The right set out in article 13(1) of the African Charter is, in the absence of any Charter provision providing for derogation, non-derogable. It is subject to being exercised "in accordance with the provisions of the law" whereby "[t]he onus is on the state to prove that it is justified to resort to the limitation clause."⁹⁴ As a general principle, the African Commission has held that "[g]overnments should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law."⁹⁵ Any restrictions of the right must meet the principles of "legality, necessity, proportionality and non-discrimination".⁹⁶ In addition, such restrictions must "never have as a consequence that the right itself becomes illusory."⁹⁷
27. Judge Fatsah Ouguergouz, in his Separate Opinion in *Mtikila and others v The United Republic of Tanzania*, argued that the inclusion of the phrase "in conformity with the rules laid down

⁹¹ ACtHPR, *The Matter of Actions Pour La Protection des Droits De L'Homme (APDH) v Cote d'Ivoire*, Application 001/2014, Judgment of 18 November 2016, paras 59-63.

⁹² *Ibid.*, para 65.

⁹³ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), adopted by the twenty third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27 June 2014.

⁹⁴ ACHPR, Communication no 212/98, *Amnesty International v Zambia*, Decision of 5 May 1999, para 50.

⁹⁵ ACHPR, Communication 246/02, *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*, Decision of 29 July 2008, para 73.

⁹⁶ ACHPR, *Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts* (n 72) preamble

⁹⁷ ACHPR, Communication Nos 105/93, 128/94, 130/94 and 152/96 (1998) *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, Decision of 31 October 1998, para 70.

by law” in article 13(1) of the Charter should be interpreted in the same spirit as article 25 of the International Covenant on Civil and Political Rights which requires that the right be exercised “without discrimination and unreasonable restrictions”.⁹⁸ Interpreting the drawback clause in article 13(1) in light of article 27(2), Judge Ouguergouz argued that “[t]he only limitations to the exercise of ... the rights of citizens to freely participate in the government of their countries would consequently be those required to ensure ‘respect for the right of others, collective security, morality and common interest’.”⁹⁹

28. As recognised by the African Commission in its statement of 22 July 2020, “public health measures ... can result in, and justifiably necessitate limiting the exercise of various civil and political rights including freedom of movement, freedom of assembly and freedom of association, which are key to the implementation of free, fair and credible elections.”¹⁰⁰

29. In circumstances where the exercise of such rights is justifiably limited, it needs to be determined whether elections held on schedule would be “free, fair and transparent” based on a credible electoral process (see above at paragraph 20), taking into consideration arrangements that can be put in place. The African Commission has set out the following conditions for States to consider in the pre-election period:

(1) The decision for convening elections according to the constitutional timeline should ensure that the conditions for upholding the public health requirements for protecting candidates and voters from COVID-19 can be adequately guaranteed;

(2) Updating the electoral calendar based on inclusive consultations and transparent processes with a view to ensure that more time than usual is allocated for the electoral process for enabling the conduct of electoral preparations such as voter registrations in full compliance with physical distancing protocols and where possible, allowing electronic registration;

(3) Electoral gatherings and campaigns, which should preferably be held in open spaces, strictly comply with the public health measures in place, including most notably social distancing, sanitization and hand washing, and the mandatory wearing of masks;

(4) As far as possible, training for staff of relevant electoral agencies and all other electoral officials and agents should be conducted virtually, and they should be screened/tested for COVID-19 before taking up their duties;

(5) Ensure that the public health measures in place are enforced without discrimination and are not abused to frustrate opposition candidates and the free exercise of voting by the electorate.¹⁰¹

30. The onus is on the State to demonstrate that the necessity for restrictions persists, or is likely to persist, and that adequate arrangements cannot be made in time for the scheduled elections to allow all voters to participate effectively in exercising their right to participate in government. The African Commission has set out the following test: “Where it is clear, based on objective assessment of public health officials including representatives of the World

⁹⁸ African Court on Human and Peoples’ Rights, In the *Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre, and Reverend Christopher R. Mtikila v United Republic of Tanzania*, App. No. 009/2011 and 011/2011, Separate Opinion of Vice-President Fatsah Ouguergouz, 14 June 2013, para 30.

⁹⁹ *Ibid.*, para 31.

¹⁰⁰ African Commission Statement of 22 July 2020 (n 73).

¹⁰¹ *Ibid.*

Health Organization, that it will not be possible to protect the lives and health of citizens who decide to vote, election management bodies should strongly advise postponing the elections until all the necessary measures can be put in place.”¹⁰²

31. It is generally recognised that “[t]he decision whether to hold or postpone elections and referendums during a pandemic requires a difficult balancing exercise.”¹⁰³ With particular reference to emergency situations, which applies *mutatis mutandis* to a considerable extent to situations where COVID-19 restrictions are in place without an emergency being declared, the Council of Europe Venice Commission has identified the rights implications of both scenarios, that is holding elections as planned or postponing them:

“Holding elections in emergency situations may be problematic from the point of view of free suffrage, and in particular in view of the freedom of voters to form an opinion, as well as with regards to the respect for human rights during the electoral process – notably during campaigns. Respect for universal suffrage may also be questionable where voters are prevented from voting for security reasons, for instance for reasons of health risks. ... Not holding elections may be problematic from the point of view of the right to periodic elections: the application of emergency regulations could be a way to keep the incumbents in power... The principle of proportionality is therefore the key: apart from respecting the principles of legality and public interest, restrictions should be proportionate to their objective. In particular, any restriction aimed at ensuring the holding of elections on time should be balanced with the limitation of the right to free elections due to the emergency situation, and, *vice versa*, the postponement of elections should be balanced with the risk of holding them during the emergency situation. Measures taken should also be aimed at ensuring trust in democratic institutions... ”¹⁰⁴

Furthermore, the Venice Commission,

“recommended that the decision to postpone elections be decided by parliament, if it exceeds a certain duration. ... Different stakeholders, including political parties, election management bodies and experts (e.g. in a pandemic, health authorities) have to be consulted beforehand. ... These decisions, and all those that affect these extraordinary electoral processes, must be adopted in a transparent and, where possible, consensual way, taking into account the exact circumstances thoroughly (for an epidemic: health information, the country’s capacity, the levels of expansion of the disease...). They must be open to independent review, preferably before a court of law. ... The principle of proportionality requires that the duration of a postponement be as short as possible.”¹⁰⁵

32. The African Commission, in its resolution 449(LXVI) 2020, similarly called

“on States Parties within the framework of the right to participation under Article 13 of the African Charter to ensure that:

¹⁰² Ibid., ‘Pre-Election’, para 6.

¹⁰³ Council of Europe, ‘Report on Democratic Governance and COVID-19’ (2020) CDDG(2020)20, 29, <<https://rm.coe.int/cddg-2020-20e-final-reportdemocraticgovernancecovid19-for-publication-/1680a0beed>>.

¹⁰⁴ Venice Commission, Interim Report (n 15) paras 102, 103, 106.

¹⁰⁵ Ibid., paras 123, 124, 126.

a. Avenues are put in place for consultation with and participation of people in decision-making and implementation of public health measures including through community leaders, civil society organizations, women groups, and religious organizations;

b. Decisions relating to the holding of elections are made based on consultations, in compliance with the processes provided for in national Constitutions, and without creating conditions that lead to electoral disputes or endanger public health as envisaged in the statement of the Commission on Human and Peoples Rights on Elections in Africa in the context of the COVID-19 pandemic.”¹⁰⁶

33. The requirement to undertake consultations, with other political actors and the public at large is an inherent element of the democratic process. It is based on the principle of “[e]ffective participation of citizens in democratic and development processes and in governance of public affairs” enunciated in article 3(7) of the African Charter on Democracy. Consultations constitute “measures to ensure and maintain political and social dialogue” pursuant to article 13 thereof, which is of particular importance when a public health crisis threatens political stability.¹⁰⁷ It also forms part of ‘Political, Economic and Social Governance’ as set out in Chapter 9 of the Charter on Democracy. The AU Peace and Security Council highlighted the link between the decision-making process pertaining to election and stability in its communique of January 2021, in which it emphasised “**the importance** for the Member States to always ensure that such critical decisions [whether or not to proceed with organization of elections during this COVID-19 context] are arrived at through consultative, transparent and consensual processes, involving all relevant stakeholders, with a view to preserving and promoting peace and stability in their countries.”¹⁰⁸
34. The requirement of a consultative decision-making process also serves to forestall the abuse of the public health crisis for political purposes resulting in an unconstitutional change in government by means of manipulating or postponing elections to remain in power. This principle is reflected in article 2(1) of the ECOWAS Protocol on Democracy and Governance, Supplementary to the Protocol relating to the mechanism for conflict prevention, management, resolution, peacekeeping and security (2001), which stipulates that “[n]o substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors.”¹⁰⁹
35. Consultation and political participation are not to be confined to a narrow group of political actors and does not justify the restrictions of civil and political rights beyond what is necessary and proportionate to combat the pandemic. The African Commission, the African Union, UN human rights bodies and regional human rights bodies have all emphasised the importance of civic space and public participation in terms of access to information and the exercise of such rights as freedom of expression, freedom of assembly and freedom of association as integral components of a human rights-based approach to responding to the worldwide public health

¹⁰⁶ ACHPR (n 72) para 3.

¹⁰⁷ Ibid; See in this regard also the recommendation by participants at the AU Commission meeting (n 42) 21: “AU Member States considering postponing their elections should engage in broad-based consultation with all electoral stakeholders to prevention [sic] political instability.”

¹⁰⁸ *Communique of the 976th meeting of the African Union Peace and Security Council, on AU Guidelines on Elections in Africa in the Context of the Novel Coronavirus (COVID-19) Pandemic and Other Public Health Emergencies* (29 January 2021) para 2 (emphasis in original).

¹⁰⁹ ECOWAS, Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Mechanism for Conflict Prevention, Management, Peacekeeping and Security (21 December 2001).

crisis occasioned by COVID-19.¹¹⁰ States must in particular guarantee the right to democratic participation of groups with particular characteristics, especially where the group members are rights-holders under African human rights instruments, as set out above in paragraph 22.

36. Consultation and political participation do not provide States with unfettered discretion on what steps to take should they opt to postpone elections. As set out by the African Commission, States:

“should ensure that: ... Applicable constitutional procedures, including judicial certification or review are complied with; ... Clear procedures are established on the basis of consultations with and full participation of all stakeholders for determining the new electoral calendar in compliance with applicable constitutional standards; ... Clear and equitable interim provisions and consultative decision-making arrangements are made for the exercise of government power to prevent abuse of power or a violation of constitutional provisions and/or applicable international human rights standards; and ... Constitutional term limits are observed and the extension of terms limits under questionable circumstances contrary to the African Charter on Democracy, Elections and Governance, are avoided.”¹¹¹

IV. Holding human rights-compliant elections during a pandemic

37. Holding elections during the COVID-19 pandemic requires the competent authorities to ensure that the health of those who exercise their right to vote and/or are otherwise engaged in the electoral process is protected through adopting adequate measures. Such measures seek to protect both the right to health and the right to participate in government. In the absence of adequate measures being put in place, the right to participate in government is not adequately ensured. Many right-holders are likely to decide that they cannot exercise their right without jeopardising their health. States have an obligation to protect the right to life and physical security of voters and therefore have to take appropriate measures to protect anyone within their jurisdiction from the pandemic, containing the outbreak (anti-contagion policies, social distancing, quarantines etc).¹¹² This includes a duty to adopt special measures aimed at ensuring participation by vulnerable members of society.¹¹³
38. Several international bodies and organisations specialising in the exercise of democratic rights have developed standards and identified good practices pertaining to holding elections during the pandemic.¹¹⁴ States should be cognisant of the latest standards and guidelines issued by relevant international and regional bodies and consult health organisations for specific guidance.
39. In the African context, this includes the AU Guidelines on Elections in Africa in the Context of the Novel Coronavirus (COVID-19) Pandemic and Other Public Health Emergencies presently

¹¹⁰ See in particular OHCHR and ACHPR (n 19); IACHR Resolution 1/2020 (n 46); Venice Commission, Interim Report (n 15).

¹¹¹ African Commission Statement of 22 July 2020 (n 73) paras 15-18 (numbers omitted in text quoted).

¹¹² Council of Europe and Congress of Local And Regional Authorities, (n 36) ‘Local and regional elections in major crisis situations’ paras 17-19 <https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809fa82f>.

¹¹³ African Commission Statement of 22 July 2020 (n 73).

¹¹⁴ See in particular the African Commission, the Council of Europe, and the United Nations (n 110).

under consideration,¹¹⁵ and the standards set out by the African Commission in its statement of 22 July on elections in Africa during the COVID-19 Pandemic.

40. For the time being, until being further updated or replaced, and pending the adoption of the AU guidelines mentioned in the preceding paragraph, States parties to the Charter should adhere, as a minimum, to the standards set out by the African Commission as a means to comply with their obligations under articles 13 and 1 of the African Charter and, where applicable, the various provisions of the African Charter on Democracy. This entails a duty to:

“Ensure that all relevant measures are put in place to ensure that voters, officials, observers and all other persons involved in the election process maintain physical distancing and hygiene protocols. This could include staggered voting times extended beyond the normal number of voting days and setting up more polling stations than usual, in order to limit the number of people that would congregate in one area;

...Further ensure that polling stations are thoroughly sanitized before, during and after the elections, that the wearing of masks at all times is mandatory and that sanitizers are available to voters before and after voting, and also to those counting the votes. Ensure the appointment of Health and Safety officers to monitor compliance at all polling stations;

... Be cognisant of the higher vulnerability of older persons and persons with co-morbidities to contracting and suffering serious health consequences from COVID-19, and take extra precautions to ensure that such persons are able to vote in a manner which does not subject them to unnecessary risk, including advance voting or voting by proxy;

... Consider adopting alternative forms of voting, so that voters do not have to physically visit polling stations, including online or postal voting, where this is a viable option;... While the current ban on travel to most countries makes it impossible for independent observers to observe elections, measures should be put in place to mediate this challenge, including allowing more local election observers and possible innovations around virtual election observation using available ICT technology; and...

Ensure that all precautions are put in place to ensure that COVID-19 related measures are not abused to prevent anyone from exercising their right to vote.”¹¹⁶

V. Summary

41. States must determine whether elections can be held on schedule, taking into consideration: (a) the prevalence of COVID-19; (b) the State’s capacity to ensure a safe electoral process and elections in light thereof; (c) the extent to which holding an election or elections in the circumstances may disproportionately limit civil and political rights essential to the right to participate in government and democratic governance; and (d) whether the holding of any such election might have discriminatory impacts.

The decision whether to hold or postpone elections should, other than in cases of short postponements, be made by legislatures following a broad-based consultation of relevant actors. Any consultations held for this purpose or legislation passed to this effect should consider, and make particular reference to, how any measures imposed may impact the

¹¹⁵ Communiqué of the 976th meeting of the African Union Peace and Security Council (n 108).

¹¹⁶ African Commission Statement of 22 July 2020 (n 73) paras 7-12 (numbers omitted in text quoted).

exercise of the right to participate in government, including any impact upon members of vulnerable and marginalised groups in society and what measures will be taken to enable the State to fulfil its obligation to uphold this right.

42. Elections held during the COVID-19 pandemic must be organised by taking measures to minimise the risk of spreading or contracting COVID-19, including targeted measures for particular at-risk groups. These measures must be such as to provide opportunities for deliberation, equality of contestation, inclusive participation and robust election management through the exercise of civil and political rights and the right to participate in government, which may only be limited to the extent absolutely necessary.
43. States may seek external technical and financial assistance to discharge their obligations to hold elections during COVID-19 in compliance with their regional and international human rights obligations. In the spirit of international cooperation and solidarity, other States and regional and international bodies should provide the requisite support to guarantee the exercise of the pivotal right to participate in government across the continent, and thereby to contribute to the advancement of the AU's objectives of promoting human and peoples' rights; peace, security and stability; as well as democratic principles and institutions, popular participation and good governance.

