

**Your REF: TBA**

**Our REF: COVID-19 RBA**

**Date: 27 April 2020**

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**NAIROBI.**

**Dear Sir,**

**RE: OPEN LETTER AND REQUEST FOR INFORMATION ON USE OF QUARANTINE AS A FORM OF PUNISHMENT AND CRIMINALIZATION OF COVID-19 RESPONSE**

We, the undersigned organizations and associations, are representatives of health and human rights, civil society and non-governmental organizations, community-based organizations and representatives of professional bodies, informal sector actors, economic, and governance experts. We write this open letter to express our concern with the criminalization of the COVID-19 response and with the inappropriate use of quarantine as punishment.

## A. Prior Communications

We refer to our previous advisory note on [ensuring a rights-based response to curb the spread of COVID-19](#) where we advised against the use of punitive measures or criminal sanctions in the current pandemic. This was in the backdrop of the [government's communication](#) that "all persons who violate the self-quarantine requirement will be forcefully quarantined for a full period of 14 days at their cost, and thereafter arrested and charged under the Public Health Act."

We also refer to our subsequent open letter and [request for information letter on the implementation of mandatory quarantine in the COVID-19 response in Kenya](#). In this request, we urged the government to diligently undertake its obligation under Section 27 of the Public Health Act of isolating people who may have been exposed to COVID-19, support such persons to self-quarantine in the comfort of their homes; and where this may not be possible, provide safe, clean and hygienic quarantine facilities; meet the costs of such facilities; monitor the health including the mental health of those in quarantine and promptly discharge those who test negative. We also refer to the [numerous letters](#) written by persons in quarantine to the Ministry of Health and copied to Kenya National Commission on Human Rights and other stakeholders pointing out their plight, the risk of infection they face and acts of corruption taking place.

Both advisories and letters for request of information to the Ministry of Health by those in quarantine, have urged relevant government agencies to ensure that the public health objective of quarantine is not lost.

## B. International Standards

[As per the World Health Organization](#), quarantine involves the restriction of activities of or the separation of persons who are not ill but who may have been exposed to an infectious agent or disease, with the objective of monitoring their symptoms and ensuring the early detection of cases. It is recommended that mandatory quarantine should only be implemented as part of a comprehensive package of public health responses and containment measures and, in accordance with Article 3 of the [International Health Regulations \(2005\)](#), be fully respectful of the dignity, human rights and fundamental freedoms of persons.

We also bring to your attention the [Siracusa Principles on the Limitation and Derogation Provisions](#) in the International Covenant on Civil and Political Rights, that Kenya has signed and ratified, that require certain criteria are met when rights are restricted, including the right to freedom of movement. In the context of the COVID-19 response, these principles include:

- That the restriction is provided for and carried out in accordance with the law;
- That the restriction pursues a legitimate objective of pressing public need;
- That the restriction is proportionate and strictly necessary in a democratic society to achieve the objective;
- That there are no less intrusive and restrictive means available to reach the same objective;
- That the limitation is not applied for any other purpose than the prescribed objective;
- That the restriction is based on scientific evidence and not drafted or imposed

arbitrarily i.e. in an unreasonable or otherwise discriminatory manner.

We acknowledge that the emergence of COVID-19 brings with it unprecedented challenges nationally and globally.

We further understand that current human rights standards do not necessarily preclude the reasonable and proportionate use of criminal law as a measure of last resort in public health matters.

However, we remain gravely concerned with the application and increased use of criminal law and punitive measures in the COVID-19 response in Kenya. We have observed these punitive measures being abused, misapplied and exploited. This threatens constitutional rights, democratic culture, and the very public health objectives that these measures purport to achieve.

### C. Misuse of Quarantine

Mandatory quarantine is being used inappropriately as a punitive measure.

This is despite the fact that quarantine is not, and may not by law be used as a form of punishment. Its purpose is strictly to prevent disease and provide care for the sick as a public health measure.

For instance, the [government has resorted to using quarantine](#) as form of detention for people who are alleged to have flouted curfew rules, travel restrictions, directives on wearing of masks, and [social gathering restrictions](#), among others.

We have seen this practice of forcefully placing people who breach curfew in quarantine being applied in a number of counties including

Siaya, [Uasin Gichu](#), Nakuru, [Nyandarua](#), [Kirinyaga](#), [Isiolo](#), and Murang'a.

This has been done without following due process by ensuring a right to fair hearing. Further, the recently developed COVID -19 Rules, nowhere provide for mandatory quarantine as a penalty. We are concerned that quarantine facilities are being misused at a time when the appropriate use of these facilities are crucial to efficacy of the COVID-19 response.

### D. Criminalization and the punitive response

Enforcement of infection-prevention measures has taken a punitive instead of supportive approach. For example, people have been arrested for [not wearing masks](#) in public. This is despite the fact that the government has not provided the public with free masks. In contrast, we have observed the positive approaches of some County Governments, for instance [Mombasa County](#), where the [Governor has partnered with the police to distribute masks at police roadblocks instead of arresting those without](#).

Enforcement of curfew regulations and travel restrictions have also seen increased reports of police brutality, violence, extortion and corruption. The police have even brutalized [health care workers](#) when in the line of duty.

Criminalization of COVID-19 is further manifested in the regulations. For instance, the Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020 inappropriately criminalize the coronavirus response with penal sanctions and use stigmatizing language such as 'carriers of the disease'.

These regulations are not evidence-based. These hastily-gazetted regulations further ignored legitimate [concerns from the public](#) (with gazettelement happening on the same day that the public was supposed to provide input).

The enforcement of the criminal sanctions is now being abused by the Police who have brutalized, extorted, and arbitrarily arrested poor, vulnerable and marginalized people in Kenya. Further, detention, particularly in quarantine facilities, is placing Kenyans at a higher risk of COVID-19 infection with overcrowding in these facilities, and mixing of new entrants with those already there.

In addition, the quarantine centres themselves are not designed to meet the basic requirements, which is to keep the exposed persons separated from other people. Instead, as we have seen in some quarantine centres, these persons quarantined are in open halls with congested beds in close contact with each other.

#### **E. Public health and human rights dangers of this approach**

With this punitive and criminalized approach to COVID-19, stigma, fear and avoidance of testing and health services is bound to increase. The [undignified burial of the late James Oyugi in Siaya County](#) is testament to the growing stigma around COVID-19.

Drawing from remarks of the Health Cabinet Secretary on 22 April, 2020, we can learn from the Kenyan and international experiences in the HIV and TB responses. In these contexts, we have learnt of the dangers of applying criminal sanctions as public health measures, as they are counterproductive, stigmatize

people, dissuade people from getting tested and destroy trust. In addition, criminal sanctions disproportionately impact already marginalized groups and lead to increased violations of rights and discrimination in the community.

The [HIV Justice Network who in advising that communicable diseases are public health issues, not criminal issues](#) notes that: *“criminalisation is not an evidence-based response to public health issues. In fact, the use of the criminal law most often undermines public health by creating barriers to prevention, testing, care, and treatment – for example, people may not disclose their status or access treatment for fear of being criminalized.”* Further, that criminal *“measures can be expected to have a devastating impact on the most vulnerable in society, including those who are homeless and/or living in poverty, as well as individuals from marginalised and already stigmatised or criminalised communities – especially where no economic and social support is provided to allow people to protect themselves and others, including through self-isolation.”*

In its advisory, [Rights in the time of COVID -19](#), UNAIDS rightfully cautions against “use of criminal laws in a public health emergency” noting that such use “is often broad-sweeping and vague and they run the risk of being deployed in an arbitrary or discriminatory manner,” something we are witnessing in the Kenyan context. Instead, the best approach is to empower and enable people and communities to protect themselves and others.

António Guterres, the Secretary-General of the United Nations, [in his statement of 23<sup>rd</sup> April, 2020](#), has also rightly advised that, *“the threat is the virus, not people. We must ensure that any emergency measures – including states of emergency – are legal, proportionate, necessary*



*and non-discriminatory, have a specific focus and duration, and take the least intrusive approach possible to protect public health. The best response is one that responds proportionately to immediate threats while protecting human rights and the rule of law.”*

As a country we would do well to also learn from Ebola, a far deadlier disease than COVID-19. [Médecins sans Frontières](#) has documented in its work following the 2014-2015 West African Ebola epidemic, how deadly, dangerous and disruptive the use of force and the climate of fear were to the critical need for community-trust and cooperation in responding effectively to the epidemic.

In the current epidemic in the Democratic Republic of Congo, it appears that interventions have been handled in a more rational manner that has sought to preserve the dignity of the patients, the contacts and the community at large, encouraging the community to implement quarantine measures down to the individual level, without the need to criminalize the process.

#### **F. Requests and recommendations**

In light of the concerns above, we seek the following urgent actions and access to information:

1. The **Ministry of Health** to urgently:
  - a. ensure that only public health measures that are evidence-based are implemented to prevent and manage the spread of COVID-19;
  - b. take charge of the quarantine process and strictly utilize the facilities for the purpose of separating only people who may have been exposed to the virus, in line with its protocols, the National TB Isolation Policy and WHO guidelines and Constitution.
2. The Ministry of Health to provide us with information on the following:
  - a. whether the Ministry supports the use of quarantine facilities as punitive measures in the COVID-19 response;
  - b. the justification, legal, scientific or otherwise, for the use of mandatory quarantine as a punitive measure for people who breach curfew;
  - c. what actions, if any, the Ministry is undertaking to ensure the public health objectives of quarantine are met in line with human rights standards.
3. The **Kenya Medical Practitioners and Dentists Council** to urgently provide us with:
  - a. Information on the criteria that was used to select hotels and facilities as quarantine centers.
  - b. As the body mandated to inspect and approve these quarantine facilities, to share the check list used in selection and approval of the facilities.
  - c. The list of all places certified as quarantines facilities both at the national and county level as from 23<sup>rd</sup> March 2020 to date.
  - d. The approved standard operating procedures of the quarantine facilities.
  - e. The designated medical personnel responsible for oversight at each quarantine center.
4. The **Council of Governors and all the 47 Governors** urgently share information on:
  - a. The number of people currently in quarantine in each of their respective counties.
  - b. The number of people who have been tested in the various quarantine facilities in the counties.
  - c. The testing schedule of the people in county quarantine.
  - d. The number of people in quarantine because of breach of curfew and other COVID-19 rules.
  - e. The number of people in quarantine because they are close contacts of COVID-19 patients.

- f. The welfare measures taken to ensure the physical and mental health and well-being of the persons in quarantine.
5. The **National Police Service** urgently deal with errant police officers who have been extorting, brutalizing and arbitrarily arresting [essential workers](#) and, poor and vulnerable people in the pretext of enforcing COVID-19 restrictions and make publicly available a list of police officers who are being investigated or prosecuted for breaking the law and the status of the disciplinary process.
6. The National Police Service to further provide the following information:
  - a. Whether police are being used to screen and decide who is considered to be a suspected COVID-19 patient and, if so –
    - i. what training these officers have been given to undertake the role of medical experts;
    - ii. what infection prevention and control protocols they follow; and
    - iii. whether they have the right equipment e.g. thermometers & PPE.
7. **The Independent Policing Oversight Authority (IPOA)** to exercise its mandate and take action against the numerous complaints on police excesses in enforcing curfew rules and other COVID-19 restrictions and to make publicly available any actions that the IPOA has already taken on its own motion to address the concerns raised.
8. The **Kenya National Commission on Human Rights (KNCHR)** to urgently investigate reports of human rights violations emanating from the enforcement of the COVID-19 restrictions and make publicly available information on any actions it has taken with regard to the human rights violations raised by individuals in mandatory quarantine, as well

as in enforcement of other government directives.

9. The **Attorney General** to abide by the Constitution and provide sound legal advice to the government against enacting and enforcing hasty, disproportionate, and non-evidence based punitive regulations in this pandemic, that flout the requirement for public participation.
10. The **WHO Country Office in Kenya**, as it offers technical support, to promote a rights based approach in the response to this public health pandemic and moreover, to provide information on whether it has provided technical guidance such as the National TB Isolation Policy and the Siracusa Principles to the government.

As law abiding citizens and noting H.E President Uhuru Kenyatta's remarks on 1<sup>st</sup> April, 2020 and 16<sup>th</sup> April, 2020 where he asked all officers dealing with COVID-19 to abide by the law, we refer you to Article 35 of the Constitution that gives every citizen the right to access information held by the State; sections 4 and 9(2) of the Access to Information Act, 2016; section 18 of the Access to Information Act that criminalizes public bodies non-response to access to information requests; and section 8 of the Public Service (Values and Principles) Act that requires transparency and provision of timely and accurate information to the public, and trust that you shall abide by them. Further noting the president's remarks on 25<sup>th</sup> April 2020 we trust that you shall be guided by sound medical expertise and science in making an informed decision to stop using quarantine as a punitive measure.

**Endorsed by:**

1. Bodaboda Association of Kenya
2. Community Initiative Action Group Kenya
3. COFAS
4. Dandora Communitrt AIDS Support Association (DACASA)
5. The East African Centre for Human Rights (EACHRights)
6. Good Health Community Programme
7. HAPA Kenya
8. Happy Life For Development Community Based Organization
9. Health Rights Advocacy Forum
10. International Commission of Jurists (ICJ- Kenya Section)
11. Kamkunji Paralegal Trust (KAPLET)
12. Kenya Legal & Ethical Issues Network on HIV & AIDS (KELIN)
13. Kenya Female Advisory Organization
14. Mbita Suba Paralegal Network
15. Mumbo International
16. Movement of Men Against AIDS in Kenya (MMAAK)
17. National Association of Clinical Officer Anaesthetists- Kenya (NACOA- K)
18. Nelson Mandela TB HIV Community Information and Resource Center CBO Kisumu
19. Next Generation of Kenya Lawyers Project
20. National Nurses Association of Kenya
21. Nyarkwek
22. Pamoja TB Group
23. People's Health Movement - PHM Kenya
24. SHAPE Kenya
25. The Network on Food and Nutrition Security (NFNS)
26. Transparency International
27. Wote Youth Development Projects (WOYDEP)

**Signed by:**

1. Allan Maleche on my own behalf and on behalf of Kenya Legal & Ethical Issues Network on HIV & AIDS KELIN
2. Caroline Oyumbo on my own behalf and on behalf of Mbita Suba paralegal network
3. Chris Owalla on my own behalf and on behalf of Community Initiative action group Kenya (CIAGK)
4. Catherine Mumma on my own behalf and on behalf of The Network on Food and Nutrition Security (NFNS)
5. David Makori on my own behalf and on behalf of Society of Development and Care (SODECA)
6. Denis Gaturuku
7. Easter Achieng Okech on my own behalf and on behalf of Kenya Female Advisory Organization Organization
8. Elizabeth Mökkönen on my own behalf and on behalf of COFAS (Community Forum For Advanced and Sustainable Development )
9. Enosh Abuya on my own behalf and on behalf of The Eagles For life (TEFL)
10. Erick Owuor on my own behalf and on behalf of KAPLET
11. Erick Okioma on my own behalf and on behalf of Nelson Mandela TB HIV Community Information and Resource Center CBO Kisumu
12. Esther Nelima on my own behalf and on behalf of Coast Advocacy Network
13. Fenwick Muthangya on my own behalf and on behalf of National Association of Clinical Officer Anaesthetists- Kenya (NACOA- K)
14. Francis George Apina on my own behalf and on behalf of COPFAM



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24. Peter Owiti on my own behalf and on behalf of  
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25. Philip Nyakwana on my own behalf and on  
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27. Vexinah Muindi on my own behalf and on  
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