

Before the African Court on Human and Peoples' Rights

Advisory Opinion No. 001/2018

Application for Leave to Participate as *Amicus Curiae*

(Made under Articles 3, 26 & 33 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 1998; Rules 19, 27, 45 & 53 of the Rules of Procedure of the African Court, 2010; Paragraphs 42 & 47 of this Court's Practice Directions; and the inherent powers of the Court).

1. The Open Society Justice Initiative ("Justice Initiative" or "Applicant") respectfully seeks the Court's leave to submit an *amicus curiae* intervention in Application No. 001/2018 in terms of the document hereto attached and marked and identified as "Appendix 1".

About Open Society Justice Initiative:

2. The Justice Initiative is an operational program of the Open Society Institute ("OSI"), a New York State charitable trust and nonprofit organization. Justice Initiative committed to promoting open society values through advocacy, research, strategic litigation, and technical assistance. Our lawyers have represented scores of individuals and groups before domestic and international courts and tribunals around the world.

Address for Service:

3. The addresses for service of the *amicus curiae* Applicant shall be care of:

[REDACTED]

Statement of Interest:

4. The case at hand seeks this Court's opinion on the compatibility of vagrancy laws with obligations states assumed under the African Charter on Human and Peoples' Rights. It also specifically advocates the decriminalization of petty offences created by colonial era vagrancy laws.
5. The Justice Initiative wishes to share information and provide evidence that makes the connection between these vagrancy laws, congestion in prisons, and the novel corona virus. We seek to provide this information and evidence with a view to bolstering the case for decriminalization of petty offences and inviting this Court to render its opinion

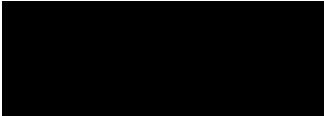
on states' obligations with respect to the health rights of detainees, particularly during and shortly after a pandemic.

6. The Justice Initiative believes that the information and evidence referenced in paragraph 5 will assist the Court in fulfilling its role under Article 10 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, namely to interpret, provide guidance, and protect rights guaranteed under the African Charter on Human and Peoples' Rights.
7. If admitted as *amicus curiae*, the Applicant shall join the proceedings at the phase or stage in which it finds the proceedings.

Statement of Independence and Impartiality

8. The Justice Initiative shall provide the submission in writing and on voluntary basis.
9. In expressing its opinions, assertions, and statements, the Justice Initiative shall remain neutral and impartial as a friend of the court and not of the parties in this case.

Signed in New York, New York, USA and filed this 31st day of August 2020.



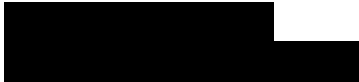
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Lodged in the registry on theday of.....2020.

Registrar

Drawn and filed by

Open Society Justice Initiative



African Court on Human and Peoples' Rights

Submission of Written Observations on the Request for Advisory Opinion No. 001/2018

31 August 2020

I. INTRODUCTION

1. The Open Society Justice Initiative (the “Justice Initiative” or the “Intervener”) submits this *amicus curiae* brief on the request filed by The Pan African Lawyers Union (PALU) for an advisory opinion on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights (“African Charter”) and other human rights instruments applicable in Africa.
2. PALU has requested this honourable Court to provide an advisory opinion on, *inter alia*, whether States Parties “have positive obligations to repeal or amend their vagrancy laws and/or by-laws to conform with the rights protected by the African Charter, the Child Rights Charter and the Women’s Protocol, and if in the affirmative, determine what these obligations are.”¹
3. Addressing the existence of vagrancy laws is especially timely in the present moment because of the dangers posed by the COVID-19 pandemic to prison populations, including both pre-trial detainees and convicts.² As the Applicant has demonstrated, criminalizing vagrancy needlessly burdens detention facilities. COVID-19 is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The virus can spread through droplets from nose or mouth when people cough, sneeze, or speak and can reach people within close proximity.³ Prisoners are especially vulnerable to this virulent pandemic given the overcrowding that characterizes many prisons and the resultant difficulty maintaining physical distance.⁴ Moreover, people in detention often have underlying health conditions that make them more vulnerable to diseases and medical conditions.⁵ The

¹ Pan African Lawyers Union, Request for Advisory Opinion No. 001/2018, p. 6.

² The term “prison”, as used in this brief, refers to all types of detention facilities, whether for pre-trial detainees or those who are serving post-conviction sentences. The term “prisoners” similarly refers to all categories of detained individuals.

³ World Health Organization, *Q&As on COVID-19 and related health topics: Q&A on coronaviruses (COVID-19)*, 17 April 2020, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>.

⁴ World Health Organization, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, 15 March 2020, p. 1, https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1.

⁵ *Ibid.*, p. 2.

Intervener will argue that vagrancy laws are incompatible with the African Charter because they significantly contribute to overpopulation in prisons and represent a vestige of structural racism in post-colonial Africa. In particular, the Intervener will seek to demonstrate that:

- (a) Vagrancy laws disproportionately impact prison populations in the States Parties, and are a major cause of prison congestion. Decriminalizing vagrancy laws will therefore substantially reduce prison populations, thereby improving conditions and enhancing health in prisons, during the COVID-19 pandemic and beyond.
- (b) The existence of vagrancy laws is a major contributing factor to ongoing violations of prisoners' right to health in a manner that is incompatible with Article 16 of the African Charter, especially in the context of the COVID-19 pandemic;
- (c) By targeting poor people who, due to the cost of legal services, are effectively excluded from seeking remedies, vagrancy laws disproportionately affect prison populations in the territories of the States Parties;
- (d) Vagrancy laws reinforce patterns of structural racism instituted by colonial regimes, and are, and were always, incompatible with the explicit prohibition against discrimination in Article 2 of the African Charter, and the obligation to uphold equality before the law under Article 3.

4. This brief consists of five sections:

- (a) Section II submits that the right to health for prisoners is well-founded in the African Charter.
- (b) Section III establishes that vagrancy laws disproportionately affect poor people, railroading them into pre-trial detention and prisons, in a manner incompatible both with the prohibition against discrimination in Article 2 and the guarantee of equality in Article 3 of the African Charter.
- (c) Section IV establishes the rational and disproportionate connection between vagrancy laws and congestion in prisons.
- (d) Section V establishes that prison congestion (itself caused substantially by vagrancy laws or traceable thereto) is a vector for infectious diseases in prisons, and even more so in the context of the COVID-19 pandemic.

(e) Section VI demonstrates that vagrancy laws are foundational to structural racism in the States Parties and incompatible with the prohibition against discrimination in Article 2 and the guarantee of equality in Article 3 of the African Charter.

II. PRISONERS AND DETAINEES IN THE STATES PARTIES, INCLUDING THOSE CONVICTED OR DETAINED FOR VAGRANCY CRIMES, HAVE A RIGHT TO HEALTH UNDER ARTICLE 16 OF THE AFRICAN CHARTER.

5. Article 16 of the African Charter recognizes the right of every individual to “enjoy the best attainable state of physical and mental health.” It also enjoins States Parties to the African Charter to take steps to “protect the health of their people” and to “ensure they receive medical attention when they are sick.” Notably, this right applies to all individuals, irrespective of whether they are arrested or otherwise detained.
6. The African Commission on Human and Peoples’ Rights (the Commission) has had occasion to expound on this right in the case of *COHRE v The Sudan*.⁶ Relying on the interpretation of General Comment No. 14⁷ by the UN Committee on Economic, Social & Cultural Rights, the Commission identified four components in the right to health – availability, accessibility, acceptability and quality.
7. By virtue of General Comment No. 14, the right to health is a fundamental right available to all persons, including prisoners.⁸
8. For the prisoner, there is a logical and organic connection between the right to life,⁹ right to health, and the prohibition against cruel, inhuman and degrading treatment or punishment,

⁶ Communication 296/2005 available at <https://www.escr-net.org/caselaw/2010/centre-housing-rights-and-evictions-cohre-v-sudan-communication-2962005> (last accessed on 9 August 2020).

⁷ Document No: E/C.12/2000/4 on the substantive issues arising in the implementation of the International Covenant on Economic, Social & Cultural Rights. CESCR – 22nd Session, 25 April – 12 May 2000 available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhOY65auTFbQRPWNDxL> (last accessed on 9 August 2020).

⁸ Rule 24 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* mandates compulsory medical examination for every prisoner upon admission and whenever necessary with a view to the “discovery of physical and mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions....” See https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf (last accessed on 9 August 2020). Similarly, articles 20 & 31 of the *Robben Island Guidelines* also make provisions for a right to independent medical examination and access to legal and medical services and assistance respectively. See https://tortureprevention.ch/content/files_res/RobbenIsland_ENG.pdf (last accessed on 9 August 2020).

⁹ Article 4 of the African Charter on Human and Peoples’ Rights acknowledges that human rights are inviolable and mandates states not to “arbitrarily deprive” anyone of the right to life.

which is prohibited under Article 5 of the Charter.¹⁰ The denial of a prisoner’s right to health would amount to cruel, inhuman or degrading treatment or punishment.¹¹ As a corollary, arbitrary exposure of any person to detention or imprisonment, under conditions where they are likely to suffer deterioration of healthcare or endangerment of life as a result should also be considered a violation of both the right to life and the prohibition against cruel, inhuman and degrading treatment or punishment. The risk to health and life makes detention or imprisonment based on vagrancy laws disproportionate and unjustifiable.

9. Four principles undergird the provision of healthcare in prisons: equivalence of care; necessity to take into account specific needs of the prison population; medical confidentiality; and the principle of non-discrimination.¹²
10. The United Nations has set forth the basis for the principle of equivalence of care in the *Nelson Mandela Rules* (hereinafter “*Mandela Rules*”).¹³ Rule 24 reiterates States’ responsibility to provide health care for prisoners at the same standard available in the community. This is particularly critical in view of the COVID-19 pandemic. Equivalence of care should apply with respect to diagnosing and treatment of persons as well as proactive action to prevent and contain any outbreak.¹⁴
11. The prison population is particularly vulnerable to the spread of infectious disease. In addition to the overcrowding and congestion that characterizes a large number of prisons, many prisoners often have underlying health conditions upon entry.¹⁵ These conditions are then exacerbated by their imprisonment due to the shock of incarceration and the unhealthy

¹⁰ Article 5 of the African Charter on Human and Peoples’ Rights prohibits “all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.”

¹¹ Article 16(1) United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN-CAT) available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (last accessed on 18 August 2020).

¹² *The Right to Healthcare in Prison during the COVID-19 Pandemic*. A legal brief prepared by the Open Society Justice Initiative to assist legal practitioners in advocating and litigating prisoners right to access healthcare during the COVID-19 pandemic (New York: July 2020) available at <https://www.justiceinitiative.org/uploads/7696dcfd-12e1-4ace-8f28-2a37f4a3c26b/brief-access-to-health-care-in-prisons-07082020.pdf> (last accessed on 9 August 2020).

¹³ United Nations General Assembly Resolution 70/175 of 17 December 2015 – *UN Standard Minimum Rules for the Treatment of Prisoners* available at <https://undocs.org/A/RES/70/175> (last accessed on 10 August 2020).

¹⁴ *Coronavirus: Preventing Harm and Human Rights Violations in Criminal Justice Systems*. A briefing note prepared by Penal Reform International (London: July 2020), p.6 available at <https://cdn.penalreform.org/wp-content/uploads/2020/07/Coronavirus-briefing-July-2020.pdf> (last accessed on 10 August 2020).

¹⁵ Prison Reform International, *Health in prisons: realising the right to health*, Penal Reform Briefing No. 2, 2007, p. 2, available at https://cdn.penalreform.org/wp-content/uploads/2013/06/brf-02-2007-health-in-prisons-en_01.pdf.

conditions of the facilities.¹⁶ Prisoners are also unlikely to receive the best possible healthcare because of a lack of resources.¹⁷ Prevention and mitigation measures, such as social distancing and even hand-washing, are unworkable in prisons in the States Parties. Prisoners arguably deserve care that is suitable to their peculiar circumstances, but the Penal Reform International (PRI) reports, regrettably, that States Parties, such as Kenya, Sierra Leone, and The Gambia have made no effort to provide essentials besides soap and water, such as masks and other personal protective equipment. Even worse, PRI reports that States Parties, such as Malawi and Sierra Leone, have not changed search protocols, and searches are still conducted in close proximity and with skin-to-skin contact.¹⁸ This is a recipe for mass infection.

12. Rule 32 of the *Mandela Rules* demands that the relationship between physicians and other healthcare professionals and their prisoner-patients “shall be governed by the same ethical and professional standards as those applicable to patients in the community.”¹⁹ Again, some equivalence is required here. This means that doctors and healthcare professionals should examine prisoners individually and out of sight and hearing of prison officers.²⁰ It also means that the results of such medical examinations should be treated with the utmost confidentiality.²¹ This is particularly important with respect to COVID-19 because of the stigma that some sections of society often attach to victims and survivors.²²
13. Rules 2(1) and 2(2) of the *Mandela Rules* introduce the principle of non-discrimination. This principle enjoins states to apply the rules impartially and with due regard to the individual needs of prisoners, particularly those with special needs. Given that COVID-19 tends to deepen pre-existing inequalities and expose vulnerabilities,²³ we urge this honourable Court

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ *Coronavirus: Preventing Harm and Human Rights Violations in Criminal Justice Systems*. A briefing note prepared by Penal Reform International (London: July 2020), p.7 available at <https://cdn.penalreform.org/wp-content/uploads/2020/07/Coronavirus-briefing-July-2020.pdf> (last accessed on 10 August 2020).

¹⁹ United Nations General Assembly Resolution 70/175 of 17 December 2015 – *UN Standard Minimum Rules for the Treatment of Prisoners* available at <https://undocs.org/A/RES/70/175> (last accessed on 10 August 2020).

²⁰ The Right to Healthcare in Prison during COVID-19 Pandemic (n.7), p. 8, para. 14.

²¹ Ibid.

²² IFRC, UNICEF & WHO, Social Stigma associated with COVID-19: A Guide to Preventing & Addressing Social Stigma. Updated 24 February 2020 available at <https://www.who.int/docs/default-source/coronaviruse/covid19-stigma-guide.pdf?ua=1> (last accessed on 24 August 2020).

²³ United Nations, Policy Brief: The Impact of COVID-19 on Women, 9 April 2020, p.2 available at <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf> (last accessed on 24 August 2020).

to hold that States should take steps to release all prisoners (at minimum the vulnerable ones²⁴) who are detained on account of vagrancy provisions in domestic legislation, as this is the only way to achieve compliance in the circumstance with Article 16 of the African Charter

14. The African Charter and the *Mandela Rules* clearly recognize the health rights of prisoners. In particular, the *Mandela Rules* provide guidance to States as to how they can operationalise this right with respect to prisoners. The principles of equivalence of care, specific needs, medical confidentiality, and non-discrimination are crucial to guaranteeing the health rights of all prisoners. Consequently, we urge this honourable Court to hold that States Parties have an obligation to adopt and use these principles, particularly within the framework of the current COVID-19 pandemic. In addition, we urge this honourable Court to hold that States Parties have an obligation to reduce the population in prisons by adopting alternatives to imprisonment and swiftly releasing prisoners who pose little or no threat to society, as is the case with those imprisoned for vagrancy, as explained further in Section V below.

III. VAGRANCY LAWS DISPROPORTIONATELY AFFECT POOR PEOPLE IN VIOLATION OF THE PROHIBITION AGAINST DISCRIMINATION IN ARTICLE 2 AND THE GUARANTEE OF EQUALITY IN ARTICLE 3 OF THE AFRICAN CHARTER.

15. At least 35 of the 55 (63 per cent)²⁵ State Parties to the African Charter criminalize being “a vagrant,”²⁶ which is characterized as “a suspected person or reputable thief who has no visible means of livelihood,” “idle and disorderly, including loitering and idleness,” or “a person without ostensible means of subsistence.”²⁷

²⁴ Including children, persons above 60 years, persons with underlying health conditions. *COVID-19: vulnerable and high risk groups*, World Health Organization <https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups> (last visited 20 August 2020).

²⁵ Algeria, Mauritania, Morocco, Burkina Faso, Cote d’Ivoire, The Gambia, Guinea, Mali, Liberia, Niger, Nigeria, Senegal, Sierra Leone, Togo, Cameroon, Democratic Republic of the Congo, Congo Brazaville, Gabon, Comoros, Eritrea, Ethiopia, Kenya, Madagascar, Mauritius, Rwanda, Seychelles, South Sudan, Tanzania, Uganda, Angola, Botswana, Malawi, Namibia, Zambia and Chad.

²⁶ A person who does not have a fixed abode, a means of livelihood or practice a trade or profession.

²⁷ See annexure to PALU Request for Advisory Opinion No. 001/2018.

16. Vagrancy laws primarily target poor and marginalized people.²⁸ There is no other way to describe provisions that seek to punish people because they have no visible means of livelihood.
17. Globally, studies show that those in pretrial detention are among “the poorest and most marginalized echelons of society.”²⁹ These poor and marginalized people are disproportionately convicted under vagrancy laws and constitute the majority of people who are held in prolonged pretrial detention, contributing significantly to prison congestion.³⁰
18. Article 2 of the African Charter prohibits distinctions of any kind, including status in the application and enjoyment of the rights guaranteed under it. Accordingly, the prohibition against discrimination is fundamental to the enjoyment of all other rights under the Charter.
19. The African Court on Human and Peoples’ Rights (hereafter “African Court”) has clarified that a distinction may not always be discriminatory. In a prior decision,³¹ this court held that: “A distinction or differential treatment becomes discrimination and hence, contrary to Article 2, when it does not have objective and reasonable justification and, in the circumstances where it is not necessary and proportional.”³²
20. Vagrancy laws do not have objective and reasonable justification. Indeed, the element of “visible means of livelihood” fails to pass muster for vagueness. Great Britain and other colonial powers designed these laws to control and subjugate often poor and powerless

²⁸ Meerkotter, A, “Litigating to Protect the Rights of the Poor and Marginalized Groups in Urban Spaces.” *University of Miami Law Review* (2019) Vol. 74, pp. 1-36, 2 & 5 available at <https://lawreview.law.miami.edu/wp-content/uploads/2020/01/Litigating-to-Protect-Anneke-Meerkotter.pdf> (last accessed on 11 August 2020).

²⁹ *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2011), p. 22 referencing Salla, F & Ballesteros, P. R, *Democracy, Human Rights & Prison Conditions in South America* (Sao Paulo: Centre for the Study of Violence, University of Sao Paulo, 2008). See also *Prison Conditions in Africa* (London: Penal Reform International & African Centre for Democracy and Human Rights, 1993).

³⁰ In a statement to the UN General Assembly, Maria Magdalena Sepulveda Carmona, then UN Special Rapporteur on Extreme Poverty and Human Rights observed that: “Because law enforcement officials often use “poverty,” “homelessness,” or “disadvantage” as an indicator of criminality, persons living in poverty come into contact with the criminal justice system with a disproportionately high frequency. They also encounter considerable obstacles manoeuvring within or exiting the system. As a result, disproportionately high numbers of the poorest and most excluded are arrested, detained and imprisoned.” See Carmona, M.S, “Statement of the Special Rapporteur on Extreme Poverty and Human Rights to the 66th Session of the General Assembly,” 25 October 2011, p. 19, para. 65 available at <https://www.ohchr.org/EN/Issues/Poverty/Pages/reportsbypreviousSpecialRapporteur.aspx> (accessed on 26 August 2020).

³¹ *African Commission on Human and Peoples’ Rights v Republic of Kenya* (n. 2).

³² *Ibid.*, p. 40-41, para. 139.

natives under its colonial administration.³³ In the post-colonial era, African states have not only maintained these laws, but have transferred the stigma to fellow citizens of limited means.

21. The prohibition against discrimination is central to the attainment of the right to equality before the law and right to equal protection of the law, and both rights undergird a functional justice system.
22. Where there is discrimination without an objective and reasonable justification, laws become tools of control and injustice. Not only are poor people disproportionately targeted by vagrancy laws, they are more likely to be subjected to detention and therefore indiscriminately subjected to higher likelihood of contracting COVID-19 in prison— where health is notoriously poor, as described in Section II above—all because of their social status.

IV. THE EXISTENCE OF VAGRANCY LAWS IS A MAJOR CONTRIBUTING FACTOR TO PRISON CONGESTION.

23. In 2019, African countries constituted 30% of the top 100 countries in the world with prison occupancy rates of 110.8% or more. The Republic of Congo, a State Party, was recorded as having an occupancy rate of 616% – the highest in the world in 2019.³⁴ This suggests at least a strong correlation between prison over-population or congestion and vagrancy laws.
24. 18 of the 30 African states (60%) in the top 100 countries with prison occupancy rates of 110.8% or more have vagrancy-related provisions in their laws.³⁵ The relationship between the existence of vagrancy laws and prison congestion is arguably stronger than mere correlation. If arrested, for instance, the poor are less likely to be able to hire a lawyer or to be granted bail.³⁶ Therefore, the poor are imprisoned at higher rates than those with means, and often for prolonged periods. This clearly adds to the congestion crisis on the continent.
25. In 2003, the *Ouagadougou Declaration & Plan of Action on Accelerating Prisons & Penal Reforms in Africa* (Ouagadougou Declaration) explicitly acknowledged that vagrancy laws,

³³ *A Short History of English Vagrancy Laws*. A Report of the Southern African Litigation Centre (SALC). Pp. 15-16 available at https://www.southernafricanlitigationcentre.org/wp-content/uploads/2017/08/04_SALC-NoJustice-Report_A-Short-History-of-English-Vagrancy-Laws.pdf (last accessed on 24 August 2020).

³⁴ World Prison Brief available at https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All (last accessed on 4 August 2020).

³⁵ The states are Congo Brazzaville, Uganda, Zambia, Chad, Mali, Liberia, Sierra Leone, Malawi, Cote d'ivoire, Togo, Kenya, Burkina Faso, Gambia, Cameroon, Guinea, Nigeria, Morocco, and Senegal.

³⁶ *The Socioeconomic Impact of Pretrial Detention* (n. 12), pp. 11-12.

which criminalize petty offences, contribute to congestion in prisons and invited State Parties to decriminalize “some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents.”³⁷

26. Given the salience of the problem of congestion and the impact of petty offences on the numbers, the African Commission on Human and Peoples’ Rights adopted the *Principles on the Decriminalization of Petty Offences in Africa* in 2017³⁸ to “guide states on the decriminalization of petty offences . . . in terms of Articles 2, 3, 5 and 6 of the African Charter.”³⁹
27. Decriminalizing vagrancy would significantly reduce prison populations. As an illustration, after Finland decriminalized petty offences such as public drunkenness in 1969, and simultaneously reduced default imprisonment for non-payment of fines, the prison population in the country fell by almost one third.⁴⁰
28. We urge this honourable Court to find that there is a clear connection between the existence of vagrancy-related provisions in domestic laws and congestion in prisons. States with the top 30 prison congestion rates in Africa also have vagrancy-related provisions in their laws.⁴¹ As detailed in Section V below, prison congestion has clear detrimental health implications for prisoners as well as prison staff, and by extension, the wider community, which adversely impacts the capacity of States Parties to comply with their obligations under Article 16 of the African Charter.

V. CONGESTION IN PRISONS IS A HARMFUL VECTOR OF INFECTIOUS DISEASES, AND EVEN MORE SO IN THE CONTEXT OF COVID-19.

29. The previous section established that there is a relationship of both correlation and causation between vagrancy laws and prison congestion in the States Parties.

³⁷ Adopted at the 2nd Pan African Conference on Prisons and Penal Reform in Africa held in Ouagadougou, Burkina Faso between 18-20 September 2002. The text of the declaration is available at <https://www.achpr.org/legalinstruments/detail?id=42> (last accessed on 8 August 2020).

³⁸ <https://www.achpr.org/legalinstruments/detail?id=2> (last accessed on 4 August 2020).

³⁹ *Ibid.*, 11.

⁴⁰ Lappi-Seppala, T, “Causes of Prison Overcrowding.” Workshop on Strategies to Reduce Overcrowding in Correctional Facilities at the 12th UN Crime Prevention and Criminal Justice Congress, Salvador, Brazil, 12-19 April 2010.

⁴¹ Para. 24 of this submission.

30. By virtue of the fact that prisons and detention centres are closed spaces and often congested, they serve as virulent vectors of infectious diseases, such as the COVID-19. In a joint statement on 13 May 2020, the United Nations Office on Drugs and Crime (UNODC), World Health Organization (WHO), United Nations Programme on HIV/AIDS (UNAIDS), and Office of the High Commissioner on Human Rights (OHCHR) referenced the “heightened vulnerability of prisoners and other people deprived of liberty to the COVID-19 pandemic.”⁴² It spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes. There are currently no therapeutics or vaccines for the virus. As of 31 August 2020, Africa had 1,245,230 cases, 29,589 deaths, and 975,643 recoveries.⁴³
31. In the absence of a vaccine, the global community only has recourse through preventive and mitigation measures. The World Health Organization (WHO) recommends physical distancing;⁴⁴ good hand and respiratory hygiene; use of facemasks and hand sanitizers; avoidance of crowded places; and staying home (and contacting a doctor) if any of the known symptoms materialize i.e. cough, headache/general body aches, fever and difficulty breathing.⁴⁵
32. For the prevention of COVID-19, the WHO recommendations make clear that prisons are particularly susceptible to the spread of the disease because they are often crowded,⁴⁶ making it difficult to follow the protocols to stem contraction.

⁴² UNODC, WHO, UNAIDS & OHCHR Joint Statement on COVID-19 in Prisons & other Closed Settings, available at <https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings> (last accessed on 12 August 2020).

⁴³ Coronavirus Disease 2019 (COVID-19): Latest updates on the COVID-19 crisis from Africa CDC, Africa Centre for Diseases Control & Prevention, <https://africacdc.org/covid-19/> (last accessed 31 August 2020).

⁴⁴ The WHO advises people to maintain a distance of one meter (three feet) from one another. *Coronavirus (COVID-19) advice for the public*, World Health Organization, 29 April 2020, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>.

⁴⁵ https://www.who.int/health-topics/coronavirus#tab=tab_1 (last accessed on 5 August 2020).

⁴⁶ World Health Organization, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention. Interim guidance*, 15 March 2020, p. 1 available at https://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1 (last accessed on 5 August 2020).

33. Indeed, three highly regarded medical experts concluded that people incarcerated in prisons live in close quarters and cannot adhere to the physical distancing required to prevent the spread of the novel coronavirus.⁴⁷
34. The medical experts based their conclusion on a number of factors, including poor sanitation and ventilation. Specifically, they highlight that prisoners share toilets, sinks, and showers without regular disinfection between uses. In addition, food preparation and food service is communal, with little opportunity for frequent surface disinfection. Crucially, ventilation is often very poor in prisons. This inevitably promotes highly efficient spread of diseases through droplets.⁴⁸
35. Physical distancing is difficult to achieve in any prison, but especially in Africa's prisons, which are highly congested (see Section IV above).⁴⁹
36. COVID-19 not only threatens the well-being of incarcerated individuals, it constitutes a public health concern for the public at large. Congested prisons make detainees susceptible to infectious diseases such as COVID-19. Once the disease is present in a prison, staff and visitors are also susceptible to infection. Infected staff and visitors in turn transmit the disease to the public.⁵⁰
37. Rapid turnover of prisoners also means that infections can quickly jump from already detained persons to incoming detainees, and spread further while they travel to and from courts to attend proceedings. Inadequate medical care within most prisons invariably means that already weak public health systems will be under increased strain.⁵¹

⁴⁷ Gonsalves G, Heisler M, Mishori R, "Report of Medical Experts regarding Prisons Situation in Mexico." May 2020, available at <https://www.justiceinitiative.org/uploads/9d8e1658-c4a9-4da2-8548-83490de79b1a/expert-opinion-medical-en-06202020.pdf>.

⁴⁸ Ibid., p. 10, para. 43.

⁴⁹ Chambliss, W.J, "A Sociological Analysis of the Law of Vagrancy." *Social Problems*. Vol. 12, No. 1 (Summer 1964), 67-77, 69 available at https://www.jstor.org/stable/798699?read-now=1&seq=5#page_scan_tab_contents (last accessed on 8 August 2020).

⁵⁰ Jones, C & Tulloch, O *COVID-19: Why Are Prisons a Particular Risk & What Can be Done to Mitigate This* Social Science in Humanitarian Action (SSHAP) (2020) available at https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15285/SSHAP_COVID-19_Brief_Prisons_2.pdf?sequence=3&isAllowed=y (last accessed on 6 August 2020).

⁵¹ UNODC Position Paper, "COVID-19 Preparedness and Responses in Prisons." 31 March 2020 available at https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Position_paper_COVID-19_in_prisons.pdf p.2 (last accessed on 6 August 2020).

38. Given this background, the WHO warns that efforts to control COVID-19 in the wider community are likely to fail unless prisons implement strong and effective measures to stem transmission of disease.⁵²
39. The evidence shows that where prisons are unable to adequately implement measures to protect against the spread of disease, decreasing the prison population is an urgent priority, particularly with respect to individuals who are more vulnerable to the disease, including those over sixty years of age and those with underlying health conditions.⁵³
40. From a public health perspective, keeping these individuals out of prisons while the risk of COVID-19 remains present will reduce the danger to them, their families, facility staff, and the community at large.⁵⁴
41. As described in Section IV.21 above, the countries with the most over-populated prisons in African have vagrancy-related provisions in their laws. In addition, twenty of the top thirty African countries (67%) with the highest proportion of pretrial detention in the world also have vagrancy-related provisions.⁵⁵ Avoiding a concomitant increase in the population of prisons will necessarily involve decriminalizing petty offences and leaning towards alternatives to imprisonment.
42. Expert evidence confirms that releasing detainees significantly benefits public health and public safety.⁵⁶ Reduction of prison populations makes physical distancing more feasible, as the prisons are often more space constraining. The higher the likelihood of physical distancing, the lower the likelihood of spreading the virus.

⁵² World Health Organization, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention. Interim guidance*, 15 March 2020, p. 1 available at https://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1 (last accessed on 5 August 2020).

⁵³ *COVID-19: vulnerable and high risk groups*, World Health Organization <https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups> (last visited 20 August 2020).

⁵⁴ *Ibid.*, 17, para. 71.

⁵⁵ Libya, Benin, Nigeria, Togo, Liberia, Chad, Guinea, Congo Brazzaville, Cameroon, Mali, Tunisia, Uganda, Burundi, Kenya, Cote d'ivoire, Senegal, Morocco, Burkina Faso, Mozambique & Sao Tome & Principe. See *World Prison Brief* available at https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All

⁵⁶ Para. 33 of this submission

43. Releasing detainees also makes it easier to introduce appropriate preventive measures such as handwashing and the use of facemasks. Lastly, releasing detainees reduces the workload on prison staff, thereby enhancing their capacity to keep detainees safe and secure.⁵⁷
44. Recognizing the public health risks posed by prisons and places of detention, the United Nations High Commissioner for Human Rights urges governments to release prisoners and detainees in order to protect their safety and as part of larger efforts to quell the spread of the virus.⁵⁸
45. We respectfully urge this honourable Court to require States Parties to adopt measures to protect the health and lives of prisoners held during the COVID-19 pandemic, including by providing soap and adequate water access, facemasks, and other personal protection equipment.⁵⁹
46. Congestion in prisons and other closed places of detention predisposes prisoners, detainees, prison staff, and the wider community to infectious diseases such as COVID-19.⁶⁰ To protect the health rights of this group, we urge this honourable Court to hold that States Parties have an obligation to release detainees held for petty offences, such as vagrancy. With reference to such offences, we further submit, States Parties are obliged to use pretrial detention as a measure of last resort, and introduce preventive measures to protect detainees from contracting and transmitting the virus.

VI. VAGRANCY LAWS ARE PART OF A HISTORY OF COLONIAL ERA STRUCTURAL RACISM IN THE STATE PARTIES AND INCOMPATIBLE WITH THE PROHIBITION AGAINST DISCRIMINATION IN ARTICLE 2 AND THE GUARANTEE OF EQUALITY IN ARTICLE 3 OF THE AFRICAN CHARTER.

⁵⁷ Ibid., 17, para. 69.

⁵⁸ Bachelet, M, *UN High Commissioner for Human Rights, Urgent Action Needed to Prevent COVID-19 “Rampaging Through Places of Detention”* (Mar. 25, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>.

⁵⁹ United Nations Office on Drugs and Crime, *COVID-19 preparedness and responses in prison*, 31 March 2020, p.1, https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Position_paper_COVID-19_in_prisons.pdf. See also Penal Reform International, *Coronavirus: Healthcare and human rights of people in prison. Briefing note* (available in 6 languages), 16 March 2020, p. 4-10.

⁶⁰ See Thomas, Naomi, *Jails can spread coronavirus to nearby communities, study finds*, CNN, 4 Aug. 2020, <https://www.cnn.com/2020/08/04/health/jails-nearby-communities-coronavirus-spread-study/index.html>.

47. Vagrancy laws in Africa owe their origins to Great Britain and its colonialization policy on the continent. The first vagrancy statute was passed in England in 1349, primarily in response to the 1348 pestilence (Black Death), which killed about 50% of the population in Britain. The 1349 Statute sought to force labourers to work on very low wages as a means of shoring up the labour force for landowners.⁶¹
48. With the invasion and colonialization of Africa, colonial powers, such as Britain, imported vagrancy laws into all their territories on the continent primarily to restrict movement except of persons under its servitude, and to perpetuate a culture of segregation and discrimination.⁶² As a response to the 1918 Influenza pandemic, for instance, imperial Britain enacted a Quarantine Ordinance in its colonial territories in Africa, which precluded Africans from going into the Government Reserved Areas (GRAs) inhabited by white colonialists, unless they possessed a Pass, which enabled the Africans to work in those places as domestics. Africans found in these GRAs without passes were vagrants who were presumed to be idle and disorderly and liable to suffer imprisonment.
49. African states have largely retained these laws post-independence, thereby penalizing poverty and deepening the gulf between the rich and the poor.⁶³
50. Vagrancy laws cast a wide net by punishing people for who they are, rather than any offence they may commit. This gives rise to an increase in prison populations and attendant congestion across the continent.⁶⁴
51. The individual is at the centre of the discussion about vagrancy laws, COVID-19 and congestion. States make or keep vagrancy laws. Institutions of state arrest people—mostly

⁶¹ Chambliss, W.J, “A Sociological Analysis of the Law of Vagrancy.” *Social Problems*. Vol. 12, No. 1 (Summer 1964), 67-77, 69 available at https://www.jstor.org/stable/798699?read-now=1&seq=5#page_scan_tab_contents (last accessed on 8 August 2020).

⁶² Meerkotter, A (n. 18), pp. 5-6.

⁶³ In a statement to the UN General Assembly, Maria Magdalena Sepulveda Carmona, then UN Special Rapporteur on Extreme Poverty and Human Rights observed: “when we penalize, rather than empower people living in poverty, we are further entrenching and exacerbating the cycle of poverty, ensuring that poverty is passed onto the next generation.” See Carmona, M.S, “Statement of the Special Rapporteur on Extreme Poverty and Human Rights to the 66th Session of the General Assembly,” 25 October 2011, p. 5 available at <https://www.ohchr.org/EN/Issues/Poverty/Pages/reportsbypreviousSpecialRapporteur.aspx> (last accessed on 8 August 2020).

⁶⁴ Article 9, *Principles on the Decriminalization of Petty Offences in Africa* available at <https://acjr.org.za/resource-centre/decriminalisation-of-petty-offences-web.pdf/view>.

poor—for violating these laws, and then keep them in prisons and other places of detention sometimes for prolonged periods before they are even tried.⁶⁵

52. Given the conditions of most prisons, these detainees become pre-disposed to COVID-19 and other infectious diseases, and consequently transmit the disease to other detainees, prison staff and potentially the wider community. This terrible cycle needs to end.
53. Under the African Charter, States have primary responsibility and obligation to break this cycle.
54. At the heart of the debate for the repeal of vagrancy laws is structural discrimination and the “penalization of poverty.”⁶⁶ Article 2 of the African Charter requires States to guarantee the enjoyment by individuals of the rights and freedoms under the Charter “without distinction of any kind.” Vagrancy laws clearly distinguish between rich and poor individuals, thereby fostering structural and historical discrimination.
55. The UN Committee on Economic, Social & Cultural Rights (CESCR) defines poverty as: “A human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.”⁶⁷
56. Violations of economic, social and cultural (ESC) and related rights often lead to poverty. This is probably the reason Professor Paul Farmer describes ESC rights as the “rights of the poor.”⁶⁸
57. That vagrancy laws disproportionately target poor people for arrest and detention, indicates that States who enforce such laws are potentially violating Articles 2 and 3 of the Charter with respect to protection against discrimination, equality before the law and equal protection

⁶⁵ Those who live in poverty are more likely to come into conflict with the law, less likely be able to afford bail, bribes or a barrister and more likely to remain in pretrial detention for prolonged periods. See Socioeconomic Impact of Pretrial Detention (n. 19), pp. 11-12.

⁶⁶ In a statement to the UN General Assembly, Maria Magdalena Sepulveda Carmona, then UN Special Rapporteur on Extreme Poverty and Human Rights observed: “when we penalize, rather than empower people living in poverty, we are further entrenching and exacerbating the cycle of poverty, ensuring that poverty is passed onto the next generation.” See Carmona, M.S, “Statement of the Special Rapporteur on Extreme Poverty and Human Rights to the 66th Session of the General Assembly,” 25 October 2011, p. 5 available at <https://www.ohchr.org/EN/Issues/Poverty/Pages/reportsbypreviousSpecialRapporteur.aspx> (last accessed on 8 August 2020).

⁶⁷ E/C.12/2001/10, paragraph 8 - CESCR, 25th Session, 23 April – 11 May 2001 available at <https://undocs.org/en/E/C.12/2001/10> (last accessed 9 August 2020).

⁶⁸ Farmer, P *Pathologies of Power: Health, Human Rights & the New War on the Poor* (California: California University Press), p. 159.

of the law. In conclusion, we urge this honourable Court to find that vagrancy laws disproportionately affect poor people and therefore violate the provisions of Articles 2 and 3 of the African Charter. We also urge this honourable Court to rule that states must take steps to repeal vagrancy laws and other laws that seek to discriminate against the poor and vulnerable across Africa.