Pan African Lawyers Union (PALU) (Advisory Opinion) (2020) 4 AfCLR 874

Application 001/2018, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU)*

Advisory Opinion, 4 December 2020. Done in English and French, the English text being authoritative.

This request for advisory opinion was brought by the Pan African Lawyers Union to seek the Court's views on vagrancy laws across Africa. The Court held that vagrancy laws violate a range of rights guaranteed in several instruments.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Jurisdiction (personal jurisdiction, 20-21; African organisation, 22; recognition by AU, 24; material jurisdiction, 26; access 37)

Admissibility (pendency before the African Commission, 30, 32)

Advisory Opinion (nature of proceedings, 36)

Equality, equal protection of law and non-discrimination (interconnected, 66; 'any other status', 66; unlawful differentiation, 67; criminalisation of economic status, 72-74)

Dignity (non-derogable nature 77; inherent nature 78; labelling 79, 81; interference with pursuit of decent living, 80-81)

Liberty (arbitrary arrest and detention, 84; pretexual and illegal pre-detention arrest 85; broad, imprecise and unclear criminal law, 86)

Fair trial (presumption of innocence, 89; protection against self-incrimination, 90; implicit protection, 90; interpretative guides, 90-91)

Freedom of movement (scope, 96; limitation of, 92, 98-101)

Protection of family life (State responsibility, 100; impact on family life, 101, 102)

Children's rights (non-discrimination 116-118; indirect impact, 119; best interest of the child, 122; fair trial, 124-127)

Women's rights (State obligations in respect of disadvantaged women, 137-138)

Separate Opinion: TCHIKAYA

Advisory Opinion (conditions for admissibility, 28-29)

I. The Author

1. This Request for Advisory Opinion (hereinafter referred to as "the Request") was filed by the Pan African Lawyers Union (hereinafter referred to as "PALU").

2. PALU states that it is an African organisation based in Arusha, United Republic of Tanzania and that it is recognised by the African Union (hereinafter referred to as "the AU"). In support of this assertion, PALU has provided the Court with a copy of the Memorandum of Understanding (hereinafter referred to as "MoU") signed between itself and the AU dated 8 May 2006.

II. Subject of the Request

3. PALU submits that a number of AU Member States retain laws which criminalise the status of individuals as being poor, homeless or unemployed as opposed to specific reprehensible acts. PALU has generically termed these laws as "vagrancy laws".

4. According to PALU "[m]any countries abuse [vagrancy laws] to arrest and detain persons where there has been no proof of a criminal act." PALU submits, therefore, that these laws are overly broad and confer too wide a discretion on law enforcement agencies to decide who to arrest which impacts disproportionately on vulnerable individuals in society. PALU also submits that arrests for violation of vagrancy laws contribute to congestion in police cells and prison overcrowding. It is PALU's further submission that the manner in which vagrancy offences are enforced is contrary to the basic principles of criminal law i.e. it undermines the presumption of innocence and thereby threatens the rule of law.

5. PALU, therefore, requests for an opinion from the Court on the following questions:

a. Whether vagrancy laws and by-laws, including but not limited to: those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have a visible means of subsistence and cannot give good account of him or herself, violate: [Articles 2, 3, 5, 6 ,7, 12 and 18 of the African Charter on Human and Peoples' Rights].

b. Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's deportation to another area, violate: [Articles 5, 12, 18 of the African Charter on Human and Peoples' Rights and Articles 2, 4(1) and 17 of the African Charter on the Rights and Welfare of the Child].

c. Whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without warrant simply

because the person has no 'means of subsistence and cannot give a satisfactory account' of him or herself, violate [Articles 2, 3, 5, 6, 7 of the African Charter on Human and Peoples' Rights, Articles 3, 4(1), 17 of the African Charter on the Rights and Welfare of the Child and Article 24 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa].

d. Whether State Parties to the African Charter on Human and Peoples' Rights have positive obligations to repeal or amend their vagrancy laws and/or by-laws to conform with the rights protected by the [African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa] and in the affirmative, determine what these obligations are.

III. Summary of the Procedure before the Court

6. The Request was filed at the Registry of the Court on 11 May 2018.

7. On 13 August 2018, the Registry requested the African Commission on Human and Peoples' Rights (hereinafter referred to as the "Commission.") to confirm that the subject matter of the Request was not related to any matter pending before it. On the same day, the Registry wrote to the AU Commission's Legal Counsel to confirm PALU's claim that it has an MoU with the AU.

8. By a letter dated 26 October 2018, the AU Commission's Legal Counsel confirmed that the AU has a subsisting MoU with PALU.

9. On 8 November 2018, the Registry notified the following entities of the filing of the Request: AU Member States; the Commission; the AU Commission; the African Committee of Experts on the Rights and Welfare of the Child; the Pan African Parliament; the Economic, Social and Cultural Council of the AU; the AU Commission on International Law; the Directorate of Women, Gender and Development of the AU; the African Institute of International Law; and the Centre for Human Rights, University of Pretoria. The Court set a ninety (90) day limit for receiving observations on the Request.

10. On 18 December 2018 the Court received a letter from the Commission in which it advised the Court that it had, in 2017, adopted Principles on Decriminalisation of Petty Offences in Africa and that these Principles ably captured its position on the subject matter of the Request.

11. On 18 June 2019 the Court received a submission from Burkina Faso.

12. On divers dates, the following entities filed their *amicus curiae* briefs pursuant to the Court's grant of leave: the Network of

African National Human Rights Institutions (hereinafter referred to as "the NANHRI"); the International Commission of Jurists, Kenyan Section (hereinafter referred to as " the ICJ-Kenya"); the Centre for Human Rights, University of Pretoria and the Dullah Omar Institute for Constitutional Law Governance and Human Rights, University of Western Cape (hereinafter referred to as "the CHR and DOI"); the Human Rights Clinic, University of Miami and Lawyers Alert, Nigeria (hereinafter referred to as "the HRC-Miami and Lawyers Alert") and the Open Society Justice Initiative (hereinafter referred to as "the OSJI").

13. On 10 October 2020 PALU and all entities that had filed observations on the Request were notified of the close of pleadings.

IV. Jurisdiction

14. Article 4(1) of the Protocol to the African Charter on Human and People' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), whose provisions are reiterated in Rule 82(1) of the Rules of Court (hereinafter referred to as "the Rules"),[1] provides as follows:

> At the request of a Member State of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

15. The Court observes that Rule 87 of the Rules provides that "[t]he Court shall apply, *mutatis mutandis*, the provisions of Part V of [the Rules] to the extent that it deems appropriate, to advisory procedure/proceedings." [2] In line with the edict in Rule 87 of the Rules, the Court further notes that Rule 49(1) of the Rules stipulates that "the Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules." [3]

16. Following from the provisions of Rule 49(1) of the Rules, therefore, in all advisory proceedings, the Court must, ascertain

1 Formerly Rule 68, Rules of Court 2010.

2 Formerly Rule 72, Rules of Court 2010.

3 Formerly Rule 39(1), Rules of Court 2010.

its jurisdiction.

17. PALU submits that the Request is made under Article 4(1) of the Protocol and Rule 68 of the Rules.[4] It also avers that the Request is on a legal matter as to whether vagrancy laws, as applied by some Member States of the AU, violate the African Charter on Human and Peoples' Rights (hereinafter "the Charter"), the African Charter on the Rights and Welfare of the Child (hereinafter the Children's Rights Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "the Women's Rights Protocol").

18. PALU further submits that its standing to make this Request, under Article 4(1) of the Protocol, is established by virtue of its MoU with the AU and also by its Observer Status with the Commission.

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19. The Court recalls that in advisory opinions, given that such requests do not involve contestation of facts between opposing parties, it need not consider its, territorial and temporal jurisdiction.[5] For this reason, therefore, the Court will only interrogate whether the Request satisfies the requirements for personal and material jurisdiction.

A. Personal jurisdiction

20. To determine whether it has personal jurisdiction, the Court must satisfy itself that the Request has been filed by one of the entities contemplated under Article 4(1) of the Protocol, to request for an advisory opinion.[6]

21. Focusing on the entities listed in Article 4(1) of the Protocol, the Court observes that PALU does not belong to the first three categories mentioned in Article 4(1) of the Protocol i.e. it is not a member state of the AU, it is not the AU and it is also not an organ of the AU. In the circumstances, therefore, the question

4 Currently Rule 82, Rules of Court 2020.

5 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (5 December 2014) 1 AfCLR 725 § 38.

6 *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (Advisory Opinion) (26 May 2017) 2 AfCLR 572 § 38.

that arises is whether PALU falls under the fourth category, that is, whether it is an "African organization" and also one that is recognised by the AU.

22. As the Court has held, "an organisation may be considered as 'African' if it is registered in an African country and has branches at the sub-regional, regional or continental levels, and if it carries out activities beyond the country where it is registered."[7]

23. In respect of the Request, the Court notes that PALU is registered in a Member State of the AU, to wit, the United Republic of Tanzania and that it has structures at the national and regional levels as an umbrella organization of national and regional lawyers' associations. The Court also notes that PALU undertakes its activities beyond the territory where it is registered.

24. The Court recalls that, and as confirmed by the AU Commission's Legal Counsel, on 8 May 2006 PALU and the AU signed an MoU to co-operate in undertaking activities concerning the rule of law, promoting peace and integration, and protecting human rights across the continent. The signing of an MoU is an accepted way by which the AU recognises non-governmental organisations.[8] The Court finds, therefore, that PALU is an organization recognised by the AU within the meaning of Article 4(1) of the Protocol.

25. Given the above, the Court concludes that it has personal jurisdiction to deal with the Request.

B. Material jurisdiction

26. In terms of its material jurisdiction, the Court recalls that under Article 4(1) of the Protocol, whose provisions are reiterated in Rule 82(2) of the Rules,[9] it may provide an advisory opinion on "any legal matter relating to the Charter or any other relevant human rights instrument …."

27. The Court observes that PALU has requested it to interpret specific provisions of the Charter, the Children's Rights Charter and the Women's Rights Protocol. The Request, therefore, is on legal matters relating to the enjoyment of human rights guaranteed in

7 *Request for Advisory Opinion by L'Association Africaine de Defense des Droits de l'Homme* (Advisory Opinion) (28 September 2017) 2 AfCLR 637 § 27.

8 *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria & ors* (Advisory Opinion) (28 September 2017) 2 AfCLR 622 § 49.

9 Formerly Rule 68(2), Rules of Court 2010.

the aforementioned instruments.

28. In the circumstances, the Court holds that it has material jurisdiction in respect of the Request.

V. Admissibility

29. According to PALU, the Request is admissible since it does not relate to any application pending before the Commission.

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30. The Court observes that Article 4(1) of the Protocol, the provisions of which are restated in Rule 82(3) of the Rules, [10] provides that it may provide an advisory opinion "provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

31. The Court recalls that by a letter dated 13 August 2018 it requested the Commission to advise on whether the Request, as filed by the PALU, was related to any matter pending before it. In its response, dated 18 December 2018, the Commission informed the Court that it had, in 2017, developed Principles on the Decriminalisation of Petty Offences in Africa. According to the Commission, the said principles well articulate its position on the subject matter of the Request. The Commission, however, did not expressly state whether the Request related to any matter pending before it but simply urged the Court to consider the Principles on the Decriminalisation of Petty Offences in Africa in dealing with the Request.

32. Given the Commission's response, the Court infers, therefore, that no matter related to this Request is pending before the Commission. The Court also confirms that PALU has provided the context within which the Request arises as well as the address of its representatives. The Court thus finds that the Request is admissible.

10 Formerly Rule 68(3), Rules of Court 2010.

VI. On the questions presented

33. In paragraph 5 above, the Court reproduced verbatim all the questions on which PALU seeks its opinion. In respect of these questions, the Court notes that PALU, essentially, questions the compatibility of vagrancy laws with the Charter, the Children's Rights Charter and the Women's Rights Protocol. Given the preceding, and without in any way undermining the four questions as framed by PALU, the Court will, sequentially, assess vagrancy laws as against the standards in the three aforementioned instruments. Thereafter it will separately address the fourth question posed by PALU which seeks the Court's opinion on the obligations of State's parties under the Charter, the Children's Rights Charter and the Women's Rights Protocol in respect of the vagrancy laws.

34. In relation to the instruments invoked by PALU, the Court notes as follows: the Charter has been ratified by fifty-four (54) of the fifty-five (55) Member States of the AU;[11] the Children's Rights Charter has been ratified by forty-nine (49) Member States;[12] and the Women's Rights Protocol by forty-two (42) Member States.[13] The Court observes that although none of the three instruments has universal Pan-African ratification, the rate of ratification remains high. More pointedly, the Court notes that all fifty-five (55) Member States of the AU have ratified the Constitutive Act of the AU.[14]

35. The Court remains alive to the fact that some Member States of the AU have not ratified the instruments that PALU has invited it to employ in assessing the compatibility of vagrancy laws with human rights standards. Nevertheless, the Court understands that all Members States of the AU have undertaken to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human

11 https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 10 November 2020).

12 https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf

13 https://au.int/sites/default/files/treaties/37077-sl- (accessed 10 November 2020).PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf (accessed 10 November 2020) .

14 https://au.int/sites/default/files/treaties/7758-sl-constitutive_act_of_the_african_union_2.pdf (accessed 10 November 2020).

rights instruments."[15] By making this commitment, Member States have assumed the obligation to uphold human rights in respect of all persons within their jurisdiction.

36. In connection to its jurisdiction to render advisory opinions, the Court bears in mind the fact that it does not resolve factual disputes as between opposing parties during advisory proceedings. Its main duty is to provide "an opinion on any legal matter relating to the Charter or any other relevant human rights instruments."[16] In doing this, the Court principally assesses the compatibility of the matters raised in a request for an opinion with the Charter and other applicable human rights standards. Any use of examples/ illustrations, in the course of an advisory opinion, therefore, simply serves to highlight the practical dimensions of the opinion and does not amount to a decision on any factual situation. [17]

37. The Court further recalls that its jurisdiction to render an advisory opinion can be invoked by any Member State of the AU and is not limited to those States that have ratified the Protocol or any other AU human rights instruments. Equally, therefore, the Court understands that its advisory opinions provide guidance to all Member States of the AU.

A. Compatibility of vagrancy laws and the Charter

38. Specifically in relation to vagrancy laws and Charter, PALU has requested the Court to provide an opinion on:

Whether vagrancy laws and by-laws, including but not limited to, those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have visible means of subsistence and cannot give good account of him or herself violate [Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter].

39. PALU has also requested the Court to advise on:

Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant

15 Article 3(h) of the Constitutive Act of the AU.

16 Article 4(1) of the Protocol.

17 Cf. Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 of September 17, 2003 Requested by the United Mexican States, Juridical condition and rights of undocumented migrants* §§ 63-65.

or rogue and vagabond, summarily orders such person's deportation to another area, violate Articles 5, 12, 18 of the Charter.

40. PALU has further requested the Court to provide an opinion on:
Whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without a warrant simply because the person has no "means of subsistence and cannot give a satisfactory account" of him or herself, violate Articles 2, 3, 5, 6 and 7 of the Charter.

i. PALU's position

41. PALU argues that vagrancy laws and by-laws criminalize poverty and are inconsistent with the right to dignity, equality before the law and non-discrimination. According to PALU, vagrancy laws do not punish specific acts of individuals but a status that individuals involuntarily entered into and cannot or easily be changed. PALU also argues that these laws either target or have a disproportionate impact on poor and vulnerable persons

42. According to the PALU:
[Vagrancy laws] afford police justification which otherwise would not be present under prevailing constitutional and statutory limitations; that is to arrest, search, question and detain persons solely based on suspicions that they have committed or may commit a crime. [Vagrancy laws] are also used by police to clear the streets of 'undesirables', to harass persons believed to be engaged in crime, and to investigate unclear offences.

43. PALU argues that such an application of vagrancy laws is prevalent across Africa despite the lack of evidence of correlation between vagrancy and criminality. Vagrancy laws, PALU points out, are unnecessary for the legitimate purpose of crime prevention since:
Most Penal Codes allow police to arrest a person without a warrant based on a suspicion on reasonable grounds that an offence has been committed. The requirement of reasonable cause is an important safeguard from improper police invasions of constitutionally protected rights. These criminal procedure provisions ought to be sufficient without the need for vagrancy laws to be used as catch-all provisions to prevent crime.

44. PALU also points out that "[v]agrancy laws are applied in a manner where a person is arrested without evidence and where the police seldom attempt to provide evidence." PALU contends that vagrancy laws are used by the police to clear the streets of people who are deemed undesirable, to harass persons who the police suspect to have engaged in criminal activities and to investigate unclear offences.

45. PALU submits that prison conditions, across Africa, are often appalling and thus any detention results in serious violations

of the detainee's human rights. Detention facilities are "often unhygienic and hazardous" and insufficient food is provided to detainees. According to PALU, the common practice by the police, across Africa, is to mount sweeping operations under vagrancy laws resulting in mass arrests and guilty pleas which exacerbates the living conditions of detainees by overcrowding detention facilities. PALU further submits that such arrests and detentions also burden a suspect's family members, who must bring food and pay for bail, among other things.

46. According to PALU vagrancy laws often do not have the clarity, accessibility and precision required under section 2(a) of the Commission's Guidelines on the Use and Conditions of Arrest, Police and Pre-trial Detention in Africa, which provide that:[18]

> Persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.

47. PALU argues that the phrases such as "known or reputed thief", "having no visible means of support" and "give no good account of themselves" are imprecise and thus give neither fair nor adequate notice to those who might come within their scope nor sufficient guidelines to those empowered to enforce them. PALU thus submits that the ambiguity in vagrancy laws gives overly broad discretion to law enforcement officers, which results in arbitrary and discriminatory enforcement based on the police's prejudice and social stigma which disproportionately targets poor and marginalized populations.

48. PALU also argues that because the police's suspicion is the foundation in the enforcement of vagrancy laws, the principle that an individual is presumed innocent until proven guilty is negated when applying vagrancy laws.

49. PALU also points out that "[i]n many countries, once declared a vagrant, a person can also be banned from [an] area, sent back to his or her place of origin, or otherwise deported, if the person is not a citizen." It thus submits that this is a violation of Articles 5, 12 and 18 of the Charter.

18 See, https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrs/guidelines_on_arrest_police_custody_detention_final_en_fr_po_ar.pdf (accessed 16 October 2020).

ii. Observations by AU Member States and *amici curiae*

50. Burkina Faso, in its submission, points out that many of the vagrancy offences require social rather than penal responses. It also submits that vagrancy offences tend to perpetrate discrimination and also effect violation of the freedom of movement and choice of residence which are guaranteed in Article 12 of the Charter. It further submits that vagrancy laws violate the right to liberty and impede the right to a fair trial especially by diluting the presumption of innocence

51. The NANHRI observes that enforcement of vagrancy laws often leads to the exacerbation of prison overcrowding and thus worsens the conditions of incarceration. It submits that vagrancy laws and by-laws that criminalise the status of a person as being without a fixed home, employment or means of subsistence are, therefore, contrary to the rights entrenched in the Charter. It further submits that arrests and detention for vagrancy-related offences are a disproportionate response to unemployment, poverty and homelessness that may result in significant harm to the individual and his or her family. The essence of the NAHRI submission is also reflected in the observations filed by the OSJI.

52. The ICJ-Kenya observes that vagrancy laws have a net effect of targeting the poor and the marginalized, especially women, victims of domestic violence and sex workers It submits that the continued enforcement of vagrancy laws has resulted in unparalleled human rights violations suffered by alleged petty offenders at the point of arrest, detention before trial, trial and post-trial periods and hence is incompatible with the principles of international human rights law, including the prohibition of arbitrary arrest and detention.

53. According to the Principles on the Decriminalisation of Petty Offences in Africa, which were submitted by the Commission, laws that create petty offences are inconsistent with the principles of equality before the law and non-discrimination in that they either target or have a disproportionate impact on the poor and vulnerable and perpetrate gender-based discrimination. The enforcement of petty offences, it is argued, has the effect of punishing, segregating, controlling and undermining the dignity of individuals on account of their socioeconomic status thereby perpetuating the stigmatisation of poverty

54. The CHR and DOI observe that arrests and detentions under vagrancy laws are often not for prosecuting the suspects but for intimidating and removing them from the streets. Such arrests are not supported by law enforcement officers' reasonable suspicion

that an offence has been or is about to be committed. They further submit that vagrancy laws violate key human rights in the Charter which also results in an adverse socio-economic impact on those that are arrested or detained. According to CHR and DOI, such an infringement of the ability of individuals to be agents of their own development is only justified if it is within the ambit of democratic and rights-respecting laws.

55. The submission by HRC-Miami and Lawyers Alert reiterates the points made by the ICJ-Kenya, the NAHRI and also the CHR and DOI. Additionally, the HRC-Miami and Lawyers Alert point out that vagrancy is the principal crime in which the offence consists of being a certain kind of person rather than in having done or failed to do certain acts thereby violating Articles 2, 3, 5 and 6 of the Charter.

56. The OSJI submits that vagrancy laws are a colonial relic that work to reinforce patterns of discrimination instituted by colonial regimes contrary to Article 2 of the Charter.

iii. The Court's position

57. According to the Black's Law Dictionary, a vagrant is anyone belonging to the several classes of idle or disorderly persons, rogues and vagabonds.[19] This includes anyone who, not having a settled habitation, strolls from place to place; a homeless, idle wanderer. Vagrancy, generally, is the state or condition of wandering from place to place without a home, job or means of support. Vagrancy is thus considered a course of conduct or a manner of living, rather than a single act.[20] The term "vagrancy" is generic. It refers to misconduct brought about by a perceived socially harmful condition or mode of life. The misconduct itself takes many forms.

58. Although many countries have had vagrancy laws on their statute books, there have always been nuances across legal systems in terms of the formulation of the offences and the manner of enforcement.[21] In this Advisory Opinion, therefore, the Court remains alive to the fact that the term "vagrancy" is often used in a generic sense to allude to various offences commonly grouped under this umbrella including but not limited to: being idle and

19 B Gardener (Ed) *Black's law dictionary* (2009) 1689.

20 *Ibid*.

21 J Lisle "Vagrancy law: Its faults and their remedy" (1915) 5(4) *Journal of Criminal Law and Criminology* 498-513.

disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer.

59. From a sociological perspective, it has been suggested that there were three main reasons that motivated the adoption of vagrancy laws.[22] First, to curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labour to land owners and industrialists whilst limiting the presence of undesirable persons in the cities; second, to reduce the costs incurred by local municipalities and parishes to look after the poor; lastly, and to prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials. These justifications, the Court observes, have not remained stagnant in time or place. At different points in time, various countries have emphasised different justifications for maintaining vagrancy offences. Definitions of conduct caught by vagrancy laws, therefore, have also varied from one country to the other.

60. With regard to the prevailing situation in Africa, the Court notes that several countries still have laws containing vagrancy offences. For example, in the Penal Codes of at least eighteen (18) African countries,[23] a vagrant is defined as any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession. In at least eight (8) African countries;[24] a "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account" of him or herself commits an offence of being a "rogue" or a "vagabond". The Court also notes that in South Africa, for instance, by-laws prohibit a person without a fixed abode from loitering or sleeping in a public amenity, public space or in the beach.[25] The Court further notes that in at least three (3) African

22 W Chambliss "A Sociological Analysis of the Law of Vagrancy" (1960) 12 *Social Problems* 67-77.

23 Algeria, Burundi, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo, Cote d'Ivoire, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Sahrawi Arab Democratic Republic, Senegal and Togo. A list of countries with vagrancy related provisions in their criminal laws has been compiled by the Southern Africa Litigation Centre and can be accessed at: https://icj-kenya.org/e-library/papers/send/4-papers/171-vagrancy-related-provisions-in-various-criminal-laws-and-criminal-procedure-laws-in-africa.

24 Botswana, Gambia, Malawi, Nigeria, Seychelles, Tanzania, Uganda and Zambia.

25 See, Ubuhlebezwe Local Municipality Public Amenities By-Law, Municipal Notice No. 139 of 2009. It should be noted that some municipalities have removed these offences post-Apartheid.

countries,[26] the offence of being an idle and disorderly person is defined to include someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself.

61. At the same time, however, the Court observes that other African countries, for example, Angola, Cape Verde, Kenya, Lesotho, Mozambique, Rwanda and Zimbabwe have repealed some of their vagrancy laws. The Court further observes that courts, in some African countries, have also nullified some vagrancy laws for being unconstitutional. For example, in *Mayeso Gwanda v The State*, the High Court of Malawi ruled that the offence of "being a rogue and vagabond" was a violation of human rights and unconstitutional.[27]

62. At the regional level, the Court also takes judicial notice of the judgment of the Court of Justice of the Economic Community of West African States (hereinafter referred to as "the ECOWAS Court") in *Dorothy Njemanze & ors v Federal Republic of Nigeria.*[28] In this case, the applicants, all women, were arrested and detained on suspicion of engaging in prostitution simply because they were found on the streets at night. The Court held that the arrest of the applicants was unlawful and that it violated their right to freedom of liberty, as the Respondent State had submitted no proof that the applicants were indeed prostitutes. The Court also found that branding the women prostitutes constituted verbal abuse, which violated their right to dignity. Further, the Court held that the arrest violated the applicants' right to be free from cruel, inhuman or degrading treatment; and also constituted gender-based discrimination. Among others, the ECOWAS Court found that there were multiple violations of articles 1, 2, 3 and 18 (3) of the Charter; articles 2, 3, 4, 5, 8 and 25 of the Women's Protocol); and articles 2, 3, 5 (a) and 15(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

63. The Court will now consider whether vagrancy laws are compatible with Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter. In its consideration, the Court will sequentially deal with each of the

26 Mauritius, Namibia and Sierra Leone.

27 [2017] MWHC 23. Available at: https://malawilii.org/mw/judgment/high-court-general-division/2017/23 (accessed 10 September 2020).

28 Available at: http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_08_17-1.pdf (accessed 12 September 2020).

Articles pleaded by PALU.

a. Vagrancy laws and the right to non-discrimination and equality

64. The Court recalls that Article 2 of the Charter provides that:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

65. The Court also recalls that Article 3 of the Charter provides that:
1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

66. As the Court has noted, the right to non-discrimination under Article 2 of the Charter, is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3. [29] It is for this reason that the Court is analysing the compatibility of vagrancy laws with Articles 2 and 3 of the Charter at the same time. Admittedly, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.[30] The expression "any other status" in Article 2 of the Charter encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter

67. Although Articles 2 and 3 of the Charter are unequivocal in their proscription of discrimination not all forms of differentiation or distinction are unlawful.[31] Differentiation and distinction amounts to discrimination if it does not have an "objective and reasonable justification" and "where it is not necessary and proportional."[32] Nevertheless, the Court reiterates its position that Article 2 is imperative for the respect and enjoyment of all other rights and

29 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) AfCLR 9 § 138. *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v United Republic of Tanzania* (14 June 2013) 1 AfCLR 34 § 119.

30 *Jebra Kambole v United Republic of Tanzania,* ACtHPR, Application 018/2018, Judgment of 15 July 2020 §§ 71-72.

31 *Ibid*.

32 See, *Mtikila v Tanzania* (Merits) §§ 105.1 and 105.2.

freedoms protected in the Charter.[33]

68. The Court recalls that the Commission has held that: [34]

> Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.

69. The Court observes that vagrancy laws, in several African countries, criminalize the status of an individual being a "vagrant," often defined as "any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession," a "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself" or "someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself."

70. Against the above background, the Court notes that vagrancy laws, effectively, punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. Notably, however, individuals under such difficult circumstances are already challenged in enjoying their other rights including more specifically their socio-economic rights. Vagrancy laws, therefore, serve to exacerbate their situation by further depriving them of their right to be treated equally before the law.

71. The Court also notes that while an eternal attribute of all good laws is that they must always be clear and precise, vagrancy laws often employ vague, unclear and imprecise language. Common terminology used in framing vagrancy offences include expressions such as "loitering", "having no visible means of support" and "failing to give a good account of oneself". Such language does not provide sufficient indication to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws. This, automatically, makes vagrancy laws prone

33 *Jebra Kambole v Tanzania* § 71.

34 *Purohit and Moore v The Gambia*, Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII § 49.

to abuse, often to the detriment of the marginalized sections of society.

72. The Court recalls that the status of an individual is one of the prohibited grounds for discrimination under Article 2 of the Charter. In relation to the application of vagrancy laws, no reasonable justification exists for the distinction that the law imposes between those classified as vagrants and the rest of the population except their economic status. The individual classified as a vagrant will, often times, have no connection to the commission of any criminal offence hence making any consequential arrest and detention unnecessary. The arrest of persons classified as vagrants, clearly, is largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets.

73. The Court further recalls that the right to equality before the law requires that "all persons shall be equal before the courts and tribunals".[35] Equal protection of the law, the Court observes, presupposes that the law protects everyone, without discrimination. Where different treatment is meted to individuals based on their status, as is the case with the application of vagrancy laws, it is clear that those individuals are denied the equal protection of the law. The Court, therefore, agrees with the Commission that laws with discriminatory effects towards the marginalized sections of society are not compatible with both Articles 2 and 3 of the Charter. [36]

74. The Court also recalls that any arrest without a warrant requires reasonable suspicion or grounds that an offence has been committed or is about to be committed. Notably, where vagrancy-related offences are concerned, most arrests are made on the basis of an individual's underprivileged status and the inability to give an account of oneself. In this context, therefore, arrests are substantially connected to the status of the individual who is being arrested and would not be undertaken but for the status of the individual. Arrests without a warrant for vagrancy offences, therefore, are also incompatible with Articles 2 and 3 of the Charter.

75. In light of the above, the Court holds that vagrancy laws, both in their formulation as well as in their application, by, among other things, criminalizing the status of an individual, enabling the

35 *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 85 and *George Maili Kemboge v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 369 § 49.

36 *Purohit and Moore v The Gambia* §§ 50-54.

discriminatory treatment of the underprivileged and marginalized, and also by depriving individuals of their equality before the law are not compatible with Articles 2 and 3 of the Charter. The Court also finds that arrests for vagrancy-related offences, where they occur without a warrant, are not only a disproportionate response to socio-economic challenges but also discriminatory since they target individuals because of their economic status.

b. Vagrancy laws and the right to dignity

76. Under Article 5, the Charter provides as follows:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

77. The Court recalls that it has recognised three main principles for determining violations of the right to dignity as guaranteed under Article 5 of the Charter.[37] First, Article 5 has no limitation provisions and thus the prohibition of indignity manifested in cruel, inhuman and degrading treatment is absolute. Second, the prohibition in Article 5 provides the widest possible protection against both physical and mental abuse. Third, personal suffering and indignity can take various forms and the assessment of whether a specific provision of a law or policy violates Article 5 must be made on a case-by-case basis.

78. The Court reaffirms that "[h]uman dignity is an inherent basic right to which all human beings … are entitled to without discrimination."[38] The breadth of the protection offered by Article 5 entails, therefore, that the Court should remain open-minded in assessing novel allegations of violations of the Charter.

79. The Court also recalls that the Commission in *Purohit and Moore v The Gambia* concluded that the use of the words "lunatics" and "idiots" to refer to persons with mental disabilities dehumanizes and denies them their dignity.[39] In the same vein, the Court notes that vagrancy laws commonly use the terms "rogue", "vagabond", "idle" and "disorderly" to label persons deemed to be vagrants. These terms, the Court holds, are a reflection of an outdated and

37 *Lucien Ikili Rashidi v United Republic of Tanzania,* ACtHPR, Application 009/2015, Judgment of 28 March 2019 (Merits and Reparations) § 88.

38 *Ibid* § 57.

39 *Ibid* § 59.

largely colonial perception of individuals without any rights and their use dehumanizes and degrades individuals with a perceived lower status.

80. The Court also holds that the application of vagrancy laws often deprives the underprivileged and marginalized of their dignity by unlawfully interfering with their efforts to maintain or build a decent life or to enjoy a lifestyle they pursue. In this vein, the Court is particularly mindful that "all human beings have a right to enjoy a decent life … which lies at the heart of the right to human dignity."[40] Consequently, the Court finds that vagrancy laws are incompatible with the notion of human dignity as protected under Article 5 of the Charter.

81. The Court also holds that labelling an individual as a "vagrant", "vagabond", "rogue" or in any other derogatory manner and summarily ordering them to be forcefully relocated to another area denigrates the dignity of a human being. If the implementation of such order is accompanied by the use of force, it may also amount to physical abuse. The Court thus finds that the forcible removal of persons deemed to be vagrants is not compatible with Article 5 of the Charter.

82. In addition to its earlier finding, the Court reiterates the fact that arrests without a warrant for vagrancy offences are arbitrary since, often times, no rational connection exists between such arrests and the objectives of law enforcement. Practically, such warrantless arrests normally target the underprivileged only. The Court thus also holds that vagrancy laws that permit arrests without a warrant are incompatible with the right to dignity as guaranteed in Article 5 of the Charter.

c. Vagrancy laws and the right to liberty

83. The Court notes that Article 6 of the Charter provides that:

> Every individual shall have the right to liberty and the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrary arrested or detained.

84. In line with its jurisprudence, any arrest and detention is arbitrary if it has no legal basis and has not been carried out in accordance with the law.[41] In the circumstances, deprivation of liberty in line

40 *Purohit and Moore v The Gambia* § 61.

41 *Kennedy Owino Onyachi v United Republic of Tanzania* (28 September 2017) 2 AfCLR 65 § 132.

with an existing law does not of itself make the process legal. It is also important that deprivation of liberty be supported by clear and reasonable grounds.[42] Any restriction of an individual's liberty, therefore, must have a legitimate aim and must also serve a public or general interest.[43]

85. The Court notes that a major challenge with the enforcement of vagrancy laws is that, in practice, the enforcement of these laws often results in pretextual arrests, arrests without warrants and illegal pre-trial detention. This exposes vagrancy laws to constant potential abuse.

86. The Court concedes that arrests under vagrancy laws may, ostensibly, satisfy the requirement that the deprivation of freedom must be based on reasons and conditions prescribed by law. Nevertheless, the manner in which vagrancy offences are framed, in most African countries, presents a danger due to their overly broad and ambiguous nature. One of the major challenges is that vagrancy laws do not, *ex ante,* sufficiently and clearly lay down the reasons and conditions on which one can be arrested and detained to enable the public to know what is within the scope of prohibition. In practice, therefore, many arrests for vagrancy offences are arbitrary.

87. For the reasons stated above, the Court holds that arrests and detentions under vagrancy laws are incompatible with the arrestees' right to liberty and the security of their person as guaranteed under Article 6 of the Charter. This, the Court holds, is invariably the case where the arrest is without a warrant.

d. Vagrancy laws and the right to fair trial

88. Article 7 of the Charter provides, in so far as is material that:

> Every individual shall have the right to have his cause heard. This comprises:
>
> b) the right to be presumed innocent until proved guilty by a competent court or tribunal ….

89. The Court notes that the right to fair trial is a fundamental human right which is enshrined in all universal and regional human rights instruments. In Article 7(1)(b) the Charter reiterates the fundamental principle of the presumption of innocence. As the Court has held, "the essence of the right to presumption of

42 *Ibid* § 134.

43 *Anaclet Paulo v United Republic of Tanzania* (21 September 2018) 2 AfCLR 446 § 66.

innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment, and until his guilt is legally established."[44]

90. Although the Charter does not have a provision specifically dealing with the protection against self-incrimination, it is clear to the Court that the Charter's omnibus provision for fair trial includes a proscription of self-incrimination. In any event, the Court has already established that Article 7 of the Charter should be interpreted in light of article 14 International Covenant on Civil and Political Rights in order to read into the Charter fair trial protections which are not expressly provided for in Article 7.[45]

91. Additionally, the Court notes that the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 (hereinafter "the Fair Trial Principles") provide useful guidance in interpreting Article 6 of the Charter. According to the Fair Trial Principles, "[i]t shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself or to testify against any other person."[46]

92. The Court observes that because vagrancy laws often punish an individual's perceived status, such as being "idle", "disorderly" or "a reputed thief", which status does not have an objective definition, law enforcement officers can arbitrarily arrest individuals without the sufficient level of *prima facie* proof that they committed a crime. Once they are taken into custody, such arrested persons would have to explain themselves to the law enforcement officer(s) to demonstrate that, for example, they were not idle or disorderly, are not a reputed thief or that they practice a trade or profession. A failure to provide an explanation acceptable in the eyes of law enforcement officers could result in them being deemed unable to give an account of themselves and thereby, supposedly, providing justification for their further detention.

93. The Court notes, however, that forcing a suspect to explain himself/herself may be tantamount to coercing a suspect to make self-incriminating statements. Law enforcement officers may exert

44 *Ingabire Victoire Umuhoza v Republic of Rwanda* (24 November 2017) 2 AfCLR 165 § 83.

45 *Armand Guehi v United Republic of Tanzania* (7 December 2018) 2 AfCHR 477 § 73.

46 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, available at: https://www.achpr.org/legalinstruments/detail?id=38 (accessed 1 October 2020). .

undue pressure on suspected criminals by pretextually arresting them under vagrancy laws and then soliciting incriminatory evidence even in relation to crimes not connected to vagrancy.

94. Given the above, the Court holds, therefore, that arresting individuals under vagrancy laws and soliciting statements from them about their possible criminal culpability, is at variance with the presumption of innocence and is not compatible with Article 7 of the Charter.

e. Vagrancy laws and the right to freedom of movement

95. The Court recalls that Article 12 of the Charter provides, so far as is material, that:

> 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

96. The right to freedom of movement entails the right of everyone lawfully within the territory of a State to move freely and to choose his or her place of residence."[47] As noted by the Human Rights Committee in its General Comment No. 27, such freedom is "an indispensable condition for the free development of a person."[48] States must, therefore, guarantee the enjoyment of this right irrespective of the individual's purpose or reason for staying in or moving in or out of a specific place.[49]

97. The Court observes that article 12(3) of the ICCPR explicitly lays out the conditions on the basis of which the right to the freedom of movement can be restricted being "those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." Any limitations on the right, therefore, must not nullify its essential content. The freedom of movement guarantees every individual the right not only to move freely within a territory but also to choose a place of residence.

98. The Court recalls that the Charter does not have a provision comparable to article 12(3) of the ICCPR, setting out when limitations on the freedom of movement are permissible. In Article 12(1), the Charter merely provides that the enjoyment of the

47 CCPR General Comment No. 27: Article 12 on Freedom of Movement (1999) § 4, available at https://www.refworld.org/pdfid/45139c394.pdf (accessed 20 September 2020).

48 *Ibid* § 1.

49 *Ibid* § 5.

freedom of movement is subject to the condition that the individual abides by the law. It is clear from this provision that, in appropriate circumstances, the law may limit the freedom of movement under the Charter.

99. The above notwithstanding, any limitation of the freedom of movement must, firstly, be provided by law. A contrary interpretation of Article 12 would open the door to arbitrary and unpredictable interference with the right. Secondly, any such restriction must be necessary to protect national security, public order, public health or morals or the rights and freedom of others. This ensures that the restrictions are only issued for these limited reasons and not for others. Lastly, the restrictions must be consistent with the other rights recognized in the Charter. This means that a restriction on the freedom of movement must not infringe the other rights of an individual unless the restriction of those other rights is permissible under the Charter.

100. The Court observes that, in many instances, the enforcement of vagrancy laws leads to infringement limitation of the right of freedom of movement. Admittedly, such limitations are prescribed by vagrancy laws, since many African countries have laws outlawing vagrancy, thereby satisfying the first of the conditions earlier enumerated. Such conduct, however, fails to satisfy the second and third conditions. This is because vagrancy laws are not necessary for any of the purposes for which they are often cited. Notably, vagrancy laws are often employed for crime-prevention purposes, but, as the Court has earlier stated, there is no correlation between vagrancy and the criminal propensity of an individual.

101. The Court is also mindful that even if vagrancy laws contribute to the prevention of crimes in some cases, other less-restrictive measures such as offering vocational training for the unemployed and providing shelter for the homeless adults and children are readily available for dealing with the situation of persons caught by vagrancy laws. Where policy alternatives that do not infringe on individuals' rights and freedoms exist, policies that infringe on fundamental human rights such as the right to freedom of movement are unnecessary and should be avoided.

102. The Court finds, therefore, that the enforcement of vagrancy laws, generally, is incompatible with the right to freedom of movement as guaranteed under Article 12 of the Charter. The Court also finds that forced relocation, which is permitted by vagrancy laws in some African countries, is also incompatible with Article 12 of

the Charter.

f. Vagrancy laws and the right to the protection of the family

103. Article 18 of the Charter provides that:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of rights of women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures for protection in keeping with their physical or moral needs.

104. The Court notes that underlying Article 18 of the Charter is the responsibility of Member States to take care of the physical and moral health of the family. The Court also notes that international human rights law consistently recognises the family as the fundamental group unit of society requiring protection.[50] The protection of the family includes the right to family unity which entails that members of the same family are entitled to protection against forcible separation.

105. The Court observes that arrests and detentions under vagrancy laws may result in the forcible removal of the suspected "vagrants" from their families. Due to this, other family members that rely on those arrested under vagrancy laws, most notably children, the elderly and the disabled may suffer from the deprivation of financial and emotional support. The Court is cognisant that every arrest and detention leads to the detriment of the physical and moral health of a suspect's family, irrespective of the crime at issue. For this reason, therefore, not all arrests and detentions are incompatible with Article 18 of the Charter. However, an arrest or detention carried out pursuant to the enforcement of vagrancy

50 The family is recognized as a fundamental institution in society, and as such international human rights instruments establish obligations for States to protect and assist it. Examples include the Universal Declaration of Human Rights (UDHR, Article. 16(3)); the International Covenant on Economic, Social and Cultural Rights (ICESCR, e.g., Article. 10); the International Covenant on Civil and Political Rights (ICCPR, Article 23(1)); the Convention on the Rights of the Child (CRC, e.g., preamble); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, e.g., Article 44(1)).

laws, as has been demonstrated in this Advisory Opinion, is incompatible with several rights protected under the Charter and such arrests accentuate the vulnerability of families.

106. The Court emphasises that arrests and detentions are permissible when they take place in the course of lawful law enforcement activity which is based on laws that do not violate fundamental human rights. Since vagrancy laws are incompatible with several human rights enshrined in the Charter as well as other international human rights instruments, they cannot be the basis for lawful law enforcement activity.

107. Based on the above considerations, the Court holds that arrests and detentions based on vagrancy laws are incompatible with Article 18 of the Charter. The Court, also holds that the forcible relocation of "vagrants" is incompatible with the preservation of the sanctity of the family as a basic unit of society as guaranteed in the Charter.

B. Vagrancy laws and the Children's Rights Charter

108. PALU has also invited the Court to advise on whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's relocation to another area violate Articles 3, 4(1) and 17 of the Children's Rights Charter.

109. PALU submits that vagrancy laws have often been employed to indiscriminately arrest street children thereby undermining their right to dignity and equal protection of the law. Children of parents who have been imprisoned, PALU points out, are more likely to face food insecurity or come into further conflict with the law especially when they are forcibly separated from their parents due to the application of vagrancy laws.

110. PALU also points out that "[i]n many countries, once declared a vagrant, a person can also be banned from [an] area, sent back to his or her place of origin, or otherwise deported, if the person is not a citizen." PALU submits that this is a violation of Articles 3, 4(1) and 17 of the Children's Rights Charter

i. Observations by *amicus curiae*

111. The NAHRI submits that the extent to which vagrancy laws are used to arrest and detain children who live on the streets shows criminal justice systems that ignore the fundamental principle of the best interests of the child. Street children arrested and

detained by the police, the NAHRI argues, are often subjected to "exploitation, abuse, discrimination and stigmatisation both on the streets and by law enforcement officials." The conditions which children endure when detained, the NAHRI also points out, further violate their rights. This, therefore, makes criminal justice systems complicit in the violation of children's rights.

ii. The Court's position

112. The Court notes that Article 3 of the Children's Rights Charter provides as follows:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex language, religion, political or other opinion, national and social origin, fortune, birth or other status.

113. The Court also notes that Article 4(1) of the Children's Rights Charter provides as follows:

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

114. The Court further notes that Article 17 of the Children's Rights Charter provides as follows:

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.
2. State Parties to the present Charter shall in particular:

a. ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

b. ensure that children are separated from adults in their place of detention or imprisonments;

c. ensure that every child accused of infringing the penal law: shall be presumed innocent until duly recognised guilty.

115. The Court recalls that PALU has invoked the compatibility of vagrancy laws with several rights under the Children's Rights Charter. Each of the rights invoked will now be assessed individually.

a. Vagrancy laws and children's right to non-discrimination

116. The Court acknowledges that Article 3 of the Children's Rights Charter is simply an affirmation of the application of the right to non-discrimination to all children. Specifically, Article 3 proscribes any discrimination "irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

117. The Court observes that arbitrary arrests, generally, have a disproportionate effect on impoverished and marginalized children. By way of illustration, where street children are required to give a satisfactory account of themselves to avoid arrests, such children may be left to provide statements to the police alone. In such a situation it may, practically, be very difficult for the children to establish that they should not be arrested. This predicament, however, invariably affects underprivileged and marginalised children in societies across Africa.

118. The Court further observes that children who are routinely in conflict with vagrancy laws often belong to vulnerable and disadvantaged groups in society, including but not limited to children living on the street. In the case of children living on the streets, any forcible removal may entail losing their community and means of livelihood. The treatment that children in conflict with vagrancy laws are subjected to is, therefore, less favourable than that which other children in society experience. The primary reason for the differentiated treatment is the position of marginalisation and vulnerability occupied by these children. Children in conflict with vagrancy laws, therefore, are discriminated against because of their status.

119. The Court notes that aside from the discrimination directly suffered by children who find themselves in conflict with vagrancy related laws such children's other rights are also compromised when one or more of their parents or primary caregivers are removed from the area in which they reside or work. Parental incarceration or forced relocation leads to children living separately from their parents thereby resulting to instability in family relationships and financial problems.

120. Given the above, the Court thus holds that the enforcement of vagrancy-related laws, which results in the arrests, detention and sometimes forcible relocation of children from the areas of residence, is incompatible with children's right to non-discrimination as protected under Article 3 of the Children's Rights

Charter.

b. Vagrancy laws and the best interests of the child

121. Article 4(1) of the Children's Rights Charter restates the general principle of the best interests of the child. This principle also finds expression in Article 3(1) of the United Nations Convention on the Rights of the Child, 1989.

122. In respect of Article 4(1) of the Children's Rights Charter, the Court observes that in General Comment No. 5, the African Committee of Experts on the Rights and Welfare of the Child (hereinafter "the Committee of Experts") has stated that the principle of the best interests of the child has no conditions attached to it.[51] The result is that its scope, reach and standard of application cannot be diluted. In the words of the Committee of Experts, there are "no limitations to the domains or sectors within which the best interests of the child must apply, so that its application can extend to every conceivable domain of public and private life." From the foregoing, the Court concludes that the best interests of the child is a cross-cutting principle which applies to children, irrespective of status, in diverse circumstances

123. Given that the Court has already established that vagrancy laws, *inter alia,* are incompatible with children's right to non-discrimination, it is clear that the arrest, detention and forcible relocation of children on account of vagrancy offences also infringes their best interests. Such conduct not only compromises children's fundamental rights but also exposes them to multiple other potential violations of their rights. The Court holds, therefore, that the application of vagrancy laws is incompatible with Article 4(1) of the Children's Rights Charter.

c. Vagrancy laws and children's right to fair trial

124. The Court notes that Article 17 of the Children's Rights Charter extends fair trial guarantees to all children. The provision specifically emphasises the need to accord children special treatment in a manner consistent with the "child's sense of dignity and worth". Akin to Article 3 of the Children's Rights Charter, which

51 See, African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 5 "State Obligations Under the African Charter on the Rights and Welfare of the Child (Article 1) and System Strengthening for Child Protection" - https://www.acerwc.africa/wp-content/uploads/2018/08/Website_Joint_GC_ACERWC-ACHPR_Ending_Child_Marriage_20_January_2018.pdf (accessed 12 September 2020).

simply extends the application of the right to non-discrimination so that it expressly covers children, Article 17 of the Children's Rights Charter does the same in respect of the right to fair trial. Additionally, however, Article 17 of the Children's Rights Charter spells out some protections and safeguards that are specific to children because of their unique position.

125. As the United Nations Committee on the Rights of the Child has observed, States have a duty to ensure that all necessary measures are implemented to ensure that all children in conflict with the law are treated equally.[52] This requires that particular attention must be paid to *de facto* discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law. Additionally, in all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration.

126. Children, the Court reaffirms, are entitled to all fair trial guarantees applicable to adults plus other special guarantees tailored to their special situation. Basic fair trial guarantees require that a law enforcement officer should not effect any arrest except for reasonable cause. However, the ambiguity and lack of clarity in many vagrancy offences, as earlier pointed out, entails that law enforcement officers are conferred an undue latitude in determining when to make an arrest. Just as is the case with adults, the right to fair trial requires that children's rights be upheld during arrest, detention or even trial. An arrest without a warrant, therefore, could be the precursor for further violations of the rights of children.

127. Any judicial system, therefore, must accord children in conflict with the law a treatment that is consistent with their sense of dignity and worth. This includes, among other things, treating children in a manner that accords with their age and promotes their reintegration into society.

128. As the Court has earlier observed, numerous fair trial rights are violated during the enforcement of vagrancy laws. Although these violations affect both adults and children, in response to PALU's question, the Court holds that the arrest, detention and forcible

52 General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice, available at: https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.docx (accessed 15 September 2020).

relocation of children due to vagrancy laws is incompatible with their fair trial rights as protected under Article 17 of the Children's Rights Charter.

C. Vagrancy laws and the Women's Rights Protocol

129. PALU has requested the Court to advise as to whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without a warrant simply because the person has no "means of subsistence and cannot give a satisfactory account" of him or herself, violate Article 24 of the Women's Rights Protocol

130. PALU submits that women are particularly vulnerable to arrests based on vagrancy laws because they often spend longer time in pre-trial detention due to their inability to pay fines, bail or legal representation.

131. PALU also reiterates its submission that the enforcement of vagrancy laws "further perpetuates the stigmatisation of poverty by mandating a criminal justice response to what, in actuality, are socio- economic and sustainable development issues." PALU points out that imprisonment on vagrancy-based laws "disproportionately affects people living in poverty and directly contributes to the impoverishment of the prisoner and his or her family." According to PALU, therefore, vagrancy laws reinforce discriminatory attitudes against marginalised persons.

i. Observations by *amici curiae*

132. The HRC-Miami and Lawyers Alert submit that the use of vagrancy laws to criminalize women and gender non-conforming people and deny their access to public spaces is a violation of the basic rights to liberty and security of a person. They also observe that while women targeted under vagrancy statutes in Africa are sometimes only detained overnight or released within a few days, some of them are forced to stay behind bars for indefinite periods of time causing them to lose time that could have been used to engage in productive activity. It is thus submitted that the discriminatory and arbitrary application of vagrancy laws to women may also violate their economic rights.

133. The CHR and DOI submit that women in African countries are disproportionately affected by poverty and often engage in activities such as street trading, which may put them at risk of prosecution under outdated vagrancy laws. Poorer women are, therefore, more likely to be arrested under vagrancy laws because

their attempts to earn a living often put them in conflict with the law. It is further submitted that the enforcement of vagrancy laws is used to exploit women in the informal sector. The highly discretionary nature of law enforcement for vagrancy offences presents a prime opportunity for law enforcement officials to exploit women's vulnerability and extort bribes.

134. The CHR and DOI further submit that the socio-economic consequences for the arrest and detention of women for vagrancy offences is disproportionate and more harmful to "women particularly their children than the 'crime' being committed which is not harmful to society." Women who are detained under vagrancy laws are thereby deprived of the opportunity to exercise their role as primary care givers and where their husbands or partners are detained, they bear the brunt of the household responsibilities.

ii. The Court's position

135. The Court recalls that in at least six (6) African countries, criminal procedure laws allow the police to arrest without a warrant where a person has no ostensible means of subsistence and cannot give a satisfactory account of him or herself.[53]

a. Vagrancy laws and Article 24 of the Women's Rights Protocol

136. The Court recalls that Article 24 of the Women's Rights Protocol provides as follows:

> The State Parties undertake to ensure the protection of poor women and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and their special physical, economic and social needs.

137. The Court notes that Article 24 of the Women's Rights Protocol creates a composite obligation for States in respect of poor women, women heads of families and other women from marginalised populations. This obligation requires States to create an environment where poor and marginalised women can

53 These countries are: The Gambia (Sections 167 and 168 Criminal Code, Act No. 25 of 1933), Malawi (sections 180 and 184 Penal Code Cap. 7:01 and Section 28 Criminal Procedure and Evidence Code Cap 8:01), Nigeria (Sections 249 and 250 Criminal Code Act, Cap. 77), Tanzania (section 177 Penal Code and section 28 Criminal Procedure Act), Uganda (section 168 Penal Code and Section 11 Criminal Procedure Code) and Zambia (Section 181 Penal Code and section 27 Criminal Procedure Code).

fully enjoy all their human rights.

138. Against the above background, the Court notes, for example, that vagrancy laws perpetrate multiple violations of the rights of poor and marginalised women. Some of the rights that are compromised by the application of vagrancy laws on poor and marginalised women include women's right to dignity, non-discrimination and equality.

139. The Court remains alive to the fact that many poor and marginalised women across Africa earn a living by engaging in activities that put them at constant risk of arrest under vagrancy laws. By sanctioning the arrest of poor and marginalised women on the ground that they have "no means of subsistence and cannot give a satisfactory account" of themselves, vagrancy laws undermine Article 24 of the Women's Protocol.

140. In answer to PALU's third question, therefore, the Court holds that vagrancy laws are incompatible with Article 24 of the Women's Rights Protocol for permitting the arrest without a warrant of women where they are deemed to have "no means of subsistence and cannot give a satisfactory account" of themselves.

D. The obligations of State Parties to the Charter in respect of vagrancy laws

141. In its final question, PALU has asked the Court to advise whether State Parties to the African Charter 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 Children' Rights Charter and Women's Rights Protocol, and in the affirmative, determine what these obligations are.

142. PALU points to the Commission's 2017 Principles on the Decriminalisation of Petty Offences in Africa which have emphasised that:

> Criminal laws must be a necessary and proportionate measure to achieve that legitimate objective within a democratic society, including through the prevention and detection of crime in a manner that does not impose excessive or arbitrary infringements upon individual rights and freedoms. There must be a rational connection between the law, its enforcement and the intended objectives.[54]

143. PALU draws the Court's attention to the Kampala Declaration on

54 Section 11.2.2

Prison Conditions in Africa,[55] which has called on governments to review their penal policies and reconsider the use of prisons to prevent crime. Given the inhumane conditions in prisons for both prisoners and staff, the Kampala Declaration on Prison Conditions in Africa concluded by pointing out that mass-incarceration neither serves the interests of justice nor proves to be a good use of scarce public resources

144. PALU also draws the Court's attention to the Commission's Ouagadougou Declaration and Plan of Action on Accelerating Prisons' and Penal Reforms in Africa.[56] According to this Declaration, African States were encouraged to decriminalise some petty offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents in a bid to reduce prison populations.

i. Observations by AU Member States and amici curiae

145. Burkina Faso submits that under article 151 of its Constitution of 2 June 1991 "[t]reaties and agreements that are regularly ratified or approved shall, as soon as they are published, have precedence over the laws, subject, for each agreement or treaty, to its application by the other party." In line with this constitutional obligation, it points out, it reviewed its Penal Code on 31 May 2018 to decriminalise the offence of wandering.

146. According to the ICJ-Kenya, the Ouagadougou Declaration and Plan of Action on Accelerating Prisons' and Penal Reforms in Africa called for the decriminalization of offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents. The ICJ-Kenya has also highlighted that decriminalization takes numerous forms and it can be partial or full. The distinctions between these policy choices, it has been highlighted, are enormous. The reclassification of a crime into a civil infraction means that vagrancy-related offences would no longer be criminally punishable. By contrast, under the practice of partial decriminalization, offences retain their criminal character and attendant burdens. Partial decriminalization could mean that defendants cannot be incarcerated for the offence, but it could also mean shortened or deferred sentences, supervision and

55 See, https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf (accessed 30 September 2020).

56 See, https://www.ru.nl/publish/pages/688602/ouagadougou-eng.pdf (accessed 30 September 2020)

treatment.

147. The NANHRI submits that some countries have already experimented with mechanisms aimed at reducing prison populations by releasing prisoners convicted with minor offences. The examples provided by the NAHRI include Kenya, South Africa and Egypt. The NANHRI submits that given that prison overcrowding is an imminent problem across Africa, abolishing vagrancy laws would contribute to stemming the flow of convicts to prisons. It is also submitted that abolishing vagrancy-related offences would send an important signal to law enforcement agencies that they should respect the dignity and rights of the poor and vulnerable children and women.

148. The OSJI submits that prison congestion, which results from enforcement of vagrancy laws, poses a great challenge to the right to health of prisoners especially those with underlying conditions. It further submits that given the COVID-19 Pandemic, the time may be ripe for African countries to decriminalise vagrancy offence and ease the congestion in prisons while at the same time safeguarding the right to health of prisoners.

ii. The Court's position

149. The Court notes that Article 1 of the Charter provides that:

> The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

150. The Court also notes that Article 1 of the Children's Rights Charter provides as follows:

> Member States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

151. The Court further notes that Article 1 of the Women's Rights Protocol provides thus:

1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.
2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

152. The Court observes that there are two dimensions to PALU's final question and these are, first, whether an obligation to amend vagrancy laws exist and, second, the precise nature of this obligation.

153. Given the Court's findings in this Advisory Opinion, the Court holds that Article 1 of the Charter, Article 1 of the Children's Rights Charter and Article 1 of the Women's Rights Protocol obligates all State Parties to, *inter alia*, either amend or repeal their vagrancy-laws and by-laws to bring them in conformity with these instruments. This would be in line with the obligation to take all necessary measures including the adoption of legislative or other measures in order to give full effect to the Charter, the Children's Rights Charter and the Women's Rights Protocol.

154. As to the nature of the obligation, the Court holds that this obligation requires all State Parties to amend or repeal all their vagrancy laws, related by-laws and other laws and regulations so as to bring them in conformity with the provisions of the Charter, the Children's Rights Charter and the Women's Rights Protocol.

VII. Operative part

155. For the above reasons:

The Court,

Unanimously,

On jurisdiction

i. *Finds* that it has jurisdiction to give the Advisory Opinion requested;

On admissibility

ii. *Declares* that the Request for Advisory Opinion is admissible;

On the merits

iii. *Finds* that vagrancy laws, including but not limited to those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence, as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have visible means of subsistence and cannot give good account of him or herself violate; and also those laws that order the forcible removal of any person declared to be a vagrant and laws that permit the arrest without a warrant of a person suspected of being a vagrant are incompatible with Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter;

iv. *Finds* that vagrancy laws and by-laws, including but not limited to,

those containing offences which, once a child has been declared a vagrant or rogue and vagabond, summarily orders such child's forcible relocation to another area, are incompatible with Articles 3, 4(1) and 17 of the Children's Rights Charter;

v. *Finds* that vagrancy laws, including but not limited to, those that allow for the arrest of any woman without a warrant simply because the woman has no "means of subsistence and cannot give a satisfactory account" of herself are incompatible with Article 24 of the Women's Protocol; and

vi. *Declares* that State Parties to the Charter have a positive obligation to, *inter alia*, repeal or amend their vagrancy laws and related laws to comply with the Charter, the Children's Rights Charter and the Women's Rights Protocol within reasonable time and that this obligation requires them to take all necessary measures, in the shortest possible time, to review all their laws and by-laws especially those providing for vagrancy-related offences, to amend and/or repeal any such laws and bring them in conformity with the provisions of the Charter, the Children's Rights Charter and the Women's Rights Protocol.

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Separate opinion: TCHIKAYA

1. On 4 December 2020, the African Court rendered an Advisory Opinion on "*The Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other Human Rights Instruments Applicable in Africa*". The Advisory Opinion[1] was ultimately unanimously approved by members of the Court. I am nevertheless attaching a separate opinion thereto, because although I generally agree that this Request for Opinion leads to useful brainstorming and may influence some public policies, it is nevertheless to be considered that the Court could have broadened its analysis of the subject.

2. This Request for Opinion, which was received at the Registry of the

1 The requesting party, the Pan African Union Layers Association, is an African organization based in Arusha, Tanzania. This organization is recognized by the African Union through a Memorandum of Understanding signed on 8 May 2006.

Court on 10 May 2018, was examined in plenary session during the 59th session of the Court in November 2020. It was timely, as the Court had not examined a social issue of this magnitude for some time, at least in advisory matters. Pursuant to Article 4(1) of the Protocol on the Establishment of the Court and Rule 68 of the Rules of Court, the Pan African Lawyers Union (PALU) requested an Advisory Opinion from the Court on the conformity of certain laws relating to vagrancy with the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

3. In the practice of opinions issued by international institutions or courts, it has been agreed that the body to which a request is made "must ascertain what are the legal questions really in issue in questions formulated in a request".[2] This cardinal requirement is even recorded as being linked to judicial common sense in the face of a question raised, as the I.C.J. recalls in the 1980 case of *WHO-Egypt*. This should account for most of the time the Court devotes to the application submitted to it.

4. There seems to be a prerequisite to be clarified. The persons authorized to submit requests for an opinion are free to decide on the content of their request. They may submit requests without great limitation. It is up to the authority seized to say what rules apply before it in the matter. This is why the international judge has discretionary powers to refuse to rule on a request for an opinion.[3] The same position is defended, not without sarcasm, by Judge Bennouna in the *Kossovo* case. He said, regretting, that the Court could not refuse to give its opinion, that:

"if it had declined to respond to this request, the Court could have put a stop to any "frivolous" requests which political organs might be tempted

2 I.C.J., *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, Reports 1980, p. 88. The International Court emphasized that, if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue. In *Certain Expenses of the United Nations,* rendered in 1962, the ICJ also pointed out in this connection that, in replying to requests for an advisory opinion, the Permanent Court of International Justice likewise found it necessary in some cases first to ascertain what were the legal questions really in issue in the questions posed in the requests.

3 As recalled by Judge Donoghue in the *Opinion on the Legal Effects of the Separation of the Chagos Archipelago from Mauritius in 1965* (2020): Discretion is intended to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations. See also ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 (II), p. 416, para. 29.

to submit to it in future, and indeed thereby protected the integrity of its judicial function."[4]

5. Once it agrees to give its opinion, the Court must at the very least ensure: (a) that it will do so within the established legal conditions; and (b) that the rigour as to the accuracy of the opinion is included in it for the case in hand.

6. First, the status of the questions raised (I.) and then the question of State obligations (II.) will be addressed.

I. Subject of the Request

7. This part will present the points on which the Court would have advanced in view of giving an opinion. These include specifying the question raised, as well as the factual and legal bases of the subject of the opinion.

A. Status of questions raised

8. The request for an opinion to the Court presents four questions on three major instruments of the continent. The Court summarizes them as follows:

"The Court notes that although the author has asked four questions, the request is in fact for alleged violations of the African Charter on Human and Peoples' Rights,[5] the African Charter on the Rights and Welfare of the Child[6] and the Protocol to the Charter on the Rights of Women.[7]Given the preceding, and without in any way undermining the four questions as framed by PALU, the Court will, sequentially, assess vagrancy laws as against the standards in the three aforementioned instruments. Thereafter it will separately address the fourth question posed by PALU which seeks the Court's opinion on the obligations of State's parties under the Charter, the Children's Rights Charter and the Women's Rights Protocol in respect of the vagrancy laws".[8]

9. The meaning of the four questions can be clearly understood by

4 Dissenting Opinion, Judge Bennouna, in ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, p. 403.

5 27 June 1981, adopted in Nairobi, Kenya.

6 1 July 1990, adopted in Addis Ababa, Ethiopia.

7 11 July 2003, adopted in Maputo, Mozambique.

8 Request for an *Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Applicable Human Rights Instruments in Africa*, pp. 4-6

looking at the first question, which is identical to the others:
"a. Whether vagrancy laws and by-laws, including but not limited to: those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have a visible means of subsistence and cannot give good account of him or herself, violate: (i) the right not to be discriminated against, protected by Article 2 of the African Charter; (ii) the right to full equality before the law and equal protection of the law, protected by Article 3 of the African Charter; (iii) the right to dignity and freedom from cruel, inhumane or degrading treatment or punishment, protected by Article 5 of the African Charter; (iv) the right to freedom and security of person, protected by Article 6 of the African Charter; (v) the right to a fair trial, protected by Article 7 of the African Charter; (vi) the right to freedom of movement and choice of residence, protected by Article 12 of the African Charter; (vii) the right of women, children and persons with disabilities to protection, protected by Article 18 of the African Charter."

10. The nature of the questions raises the problems raised by this Advisory Opinion. The idea of the author of the request is to study three components: national vagrancy instruments (laws and regulations), the three African Union conventions mentioned above and the use that States make of them, in the light of which it is said that some provisions criminalize certain persons.

11. The second and third questions give rise to legal facts of a repressive nature, namely:
"Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's deportation to another area, violate (the right to non-discrimination; the right to equality;)".[9]

12. Similarly, the third question reads as follows:
"Whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without warrant simply because the person has no 'means of subsistence and cannot give a satisfactory account' of him or herself, violate... (the aforementioned principles)".[10]

13. The Court should be more careful to narrow the conceptual debate to which the Applicant was inviting it. For the latter:
"In Africa, many offences actually criminalize poverty. These offences were introduced during the colonial period and it is preposterous, to

9 *Idem.*, p. 4

10 *Idem.,* p. 5.

say the least, that such offences can be maintained in constitutional democracies".

14. The Court should, on the one hand, examine the content of these concepts in greater depth and, on the other hand, ensure that they have the power to clarify them. The conclusions to be drawn, which are important for the Court, will only be relevant in the light of the analysis of these concepts.

15. The panellist nature of some conclusions still requires further clarification. We are aware of the unclarified historical influences of the current exercise of criminal power and the colonial legacy,[11] which are recalled in the request for opinion, but the two difficulties which the Court does not take care to circumvent beforehand are glaring in the request made to it: the fluidity of the concept of vagrancy and the contentious shift in the subject of the request.

B. Fluidity of the concept of vagrancy

16. What would become of the advisory opinion if, moreover, its notional basis is fluid, undefined and unfocused? In the sense of the Court's advisory work, this, as stated in Rule 82 of the Rules of Court on advisory proceedings, relates to "questions of law". This implies an obligation of precision. A dual obligation for the Court. Firstly, it is obliged to accurately cover a request which the author expects, and secondly, obligation is to be understood in relation to the requirement of law which, by definition, rejects approximation.

17. The Merriam-Webster's online dictionary defines vagrancy as "the act or practice of wandering about from place to place". This fact has been socially appreciated in various ways. In some countries, it may therefore constitute a crime for people who are homeless and have no means of livelihood. As the request to the Court suggests, and no doubt rightly so, this leads to a "criminalization"

11 The text of the referral cites the experience of Tanganyika where "a magistrate declared a vagrancy law abusive in 1941 and found the administrative regulation "unfair and oppressive". The 1944 Removal of Undesirables Ordinance is said to have survived to the present day and many children and adults have been arrested and labelled as vagrants under its provisions". See*Idem*, p. 20. See "The travelling native: Vagrancy and Colonial Control in British East Africa" in, AL Beier and Paul Ocobock, *Cast Out: Vagrancy and Homelessness in Global and Historical Perspective*, 2008, 408 p.

of persons.

18. There are examples of at least 22 countries in Africa where being a vagrant is a crime:
"for example, in the penal codes of at least eighteen (18) countries, a vagrant is defined as any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession. These countries include Algeria, Angola, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo, Cote d'Ivoire, Ethiopia, Eritrea, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Rwanda, Saharawi Arab Democratic Republic, Senegal, South Sudan and Togo".[12]

19. Below is a selection of a few penal codes which give a view of the African perception of vagrancy. The Senegalese Penal Code provides as follows:
Paragraph II on Vagrancy, "Article 241: Vagrancy is an offence. Article 242: Vagrants or people without a confession are those who have no definite domicile, no means of subsistence, and who do not habitually practice a trade or profession. Article 243: Vagrants or persons without a confession who have been legally declared as such shall be punished with imprisonment for one month to three months for that fact alone. Article 244: Individuals declared to be vagrants by judgment may, if they are foreigners, be taken, by Government orders, outside the territory of the Republic. If they are claimed by their Government, this measure may be taken even before the expiry of their sentence.[13][***Translated by Registry***]

20. The Algerian Penal Code also makes vagrancy, which it associates with begging, a criminal offence:
"Section IV: Begging and vagrancy, Art. 196: Whoever, having neither a fixed domicile nor means of subsistence, does not habitually practice a trade or profession despite being fit for work and who does not justify having applied for work or who has refused the paid work offered to him shall be guilty of vagrancy and punishable with imprisonment of one (1) to six (6) months".[14] [*Translated by Registry*]

21. Mali's rules are close to the known provisions. Example:
"Art.181 - Vagrants or people without a confession who have been legally declared as such will, for this alone, be punished with imprisonment of from fifteen days to six months. They may also, in case of repeated offence, be denied residence for a minimum of two years and a maximum of five years. Art.182 - Individuals not originating from the Republic of Mali who are declared vagrants can be taken by the orders of the government outside the Republic. Vagrants born in Mali may, even after a judgement which has become final, be claimed by deliberation of the council of the

12 *Ibidem*., p. 10.

13 Penal Code of Senegal, 2020.

14 Algerian Penal Code, 2015.

commune or village where they were born or guaranteed by a solvent citizen...."[15] [*Translated by Registry*]

22. Section 5 of the Ivorian Penal Code,[16] which deals with vagrancy and begging - virtually assimilates them -, states in Article 189 that:

"Anyone who has no definite domicile, no means of subsistence and who does not habitually carry out a trade or profession shall be punished with a sentence of three to six months' imprisonment and may be banned from residing in the territory of the Republic, or banned from appearing in certain places, for a period of five years. [*Translated by Registry*]

23. In addition to this definition, the vagrant is further at risk in the event of an offence. This is set out in Article 193:

"Any beggar or vagrant who uses violence against persons shall be punished with imprisonment of two to five years. If the violence is accompanied by one of the circumstances mentioned in Article 192, the penalties shall be doubled". [*Translated by Registry*]

24. The complexity of the issue requires consideration of the approach adopted in other countries. France, one of the countries that used the concept in its colonial model, has, because of the vagueness of the term, banned it from any criminal law approach since 1992. It is attributed another term that is close to it, "begging".[17]

25. It must be considered that while the concept of vagrant propounds, without actually saying so, a state of being a subject, it does not specify an act or commission. The criminal sanction will have to await the wrongful act, as long as it is accepted that being a beggar, poor or wandering cannot in themselves constitute offences.

26. The Court's Opinion agrees with the above when it states that one of the constant features of criminal law is that it must always be clear and the criminalization precise. However, it goes on to state that:

"vagrancy laws often employ vague, unclear and imprecise language. Common terminology used in framing vagrancy offences include expressions such as "loitering", "having no visible means of support" and "failing to give a good account of oneself". Such language does not provide sufficient indication to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws" (note).

27. The regime to which the vagrant is liable calls for an in-depth

15 Malian Penal Code, 2001.

16 Law No. 95-522 of 6 July 1995.

17 See Section 2 ter of the Penal Code which deals with the exploitation of begging 225-12-5 Law No. 2003-239 of 18 March 2003, Article 64, JORF 19 March 2003.

analysis of the nexus between the economic situation of the subjects and the rules of law to which they are liable. It should be recalled that in one of its earliest formations,[18] the Court dismissed a request for advisory opinion submitted by the Socio-Economic Rights and Accountability Project (SERAP).[19] The question raised in the request was not totally devoid of meaning or interest. The Court was to give its opinion on "the legal and human rights consequences of systematic and widespread poverty in Nigeria", and whether it "constitutes a violation of certain provisions of the African Charter ...". After acknowledging receipt of the request, the Registry of the Court sent an e-mail inviting SERAP to inform it of the legal basis of its request and by a subsequent decision sent to SERAP, stated that the request did not meet the requirements of the Rules of Court, in particular Rule 68(2).

28. This requirement is also found throughout the development of international advisory jurisprudence. The Permanent Court of International Justice, for example, which laid the foundations thereof, was seized by the League of Nations. The advisory referral concerned the question as to whether "the Workers' Delegate for the Netherlands at the third Session of the International Labour Conference was nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles. The Court posed the following methodological principles:

"Since the Netherlands Workers' Delegate to the Third Session of the International Labour Conference was admitted by the Conference, the Court is of opinion that, the sole object of the question submitted to it is to obtain an interpretation of the provisions of paragraph 3 of Article, 389. Though, according to the form given to the question by the Council of the League of Nations, the method of procedure adopted by the Government of the Netherlands for the nomination of the Workers' Delegate forms the subject of the question, this is solely in order to fix clearly the state of facts to which the interpretation has application".[20]

29. One of the eminent former Judges of this Court, Ouguergouz (F.), stressed in his Opinion that requests presented to the plenary should be only those

"meeting the conditions of formal validity provided for in the Protocol and the Rules of Court. Only applications that contain all the information necessary to determine the Court's jurisdiction to hear them meet these

18 It included Judge Akuffo and Judges Ouguergouz, Ngoepe, Niyungueko, Ramadhani, Tambala, Thompson, Oré, Guissé, Kioko and Aba, in 2013.

19 Request filed with the Registry on 1 March 2012 by *Socio-Economic Rights & Accountability Project* (SERAP).

20 *CPJI, A.C., Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, 31 July 1922.*

conditions. According to Article 4(1) of the Protocol and Article 68 of the Rules of Court, the advisory jurisdiction of the Court is subject to four conditions: (1) the request for an opinion must be made by an entity authorized to do so, (2) it must concern a legal question, (3) the question must relate to the African Charter or any other relevant human rights instrument, and (4) its subject matter must not relate to an application pending before the African Commission".[21]

30. It can be argued that, in the end, the Court was right to admit the request. Its contours remained to be explored in greater depth, including its main question on the positive obligations of the States concerned.

II. States' positive obligations

31. This question calls on the Court to state whether "States Parties to the African Charter have positive obligations to repeal or amend their vagrancy laws and regulations to conform with the rights protected ..." by international instruments and, in the affirmative, determine what these obligations are.

32. There are two aspects to the question: (i) the first is whether States, duly identified, have positive obligations to repeal obsolete rules of their domestic law, in particular those criminalizing so-called vagrancy practices; (ii) the second concerns the nature of such obligation, as the request prays the Court to determine what these obligations are. On this point, it would be natural to consider the corollary of the international obligation, i.e. the responsibility of those States.

A. Positive obligations to repeal obsolete rules criminalizing vagrancy practices

33. The question thus raised is a classic one in the law of international relations, whether related to the protection of human rights or not.[22] It presupposes the relationship of the State with its international normative context. Member States of the African

21 The Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC) requested an advisory opinion on whether *obligations under AU decisions take precedence over obligations under the Statute of the International Criminal Court*, 29 November 2015.

22 These decisions adequately formulate this normative obligation of the States, PCIJ, *Chorzow Factory, Germany v Poland,* Jurisdiction, Determination of Compensation and Merits, 26 July 1927, 16 December 1927 and 13 September 1928.

Union have a legal obligation to apply the rules deriving from the three instruments in question. Somehow, the continental organization[23] in this case the African Union, can contribute to the effectiveness of this obligation and its fulfilment. This obligation is general; it derives from the law of treaties. It is the famous *Pacta sunt servanda* which binds States whatever the matter. Article 26 of the Vienna Convention on the Law of Treaties states to this effect that:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

34. In this connection, it is worth recalling the second paragraph of Article 46 of the same Convention, which, not without anticipation, deals with an essential point in the application of international conventions:

"A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".

35. This dimension relating to manifestly and objectively obvious violation is relevant to the sociologically practical area of vagrancy. The State concerned must respond to a situation of social proximity.

36. The Member States of the African Union that have subscribed to the two Charters - Human, Peoples' and Children's Rights - and the Protocol on the Rights of Women are bound by them. However, a specific issue arises. Since it is accepted that much of the legislation on vagrancy stems from colonial law, is there a particularism?

37. In this regard, the Court was informed of developments in some countries, and of the changes and decriminalization in some States, such as Tunisia, Burkina Faso and Kenya. Burkina Faso, in particular, under Article 151 of its Constitution of 2 June 1991, from which stems the constitutional obligation to comply with its international commitments, decriminalized the crime of

23 One of the disturbing aspects of the doctrine, see Zoller (E.), *La bonne foi en droit international public*, Pedone, 1977, XXVIII-395 p.; see also the article by Voirovich (S.A.), "*The Law-Implementing Functions of International Economic Organizations*", GYBIL, 1994, p. 230-258; Malenovsky (J.), "*Suivi des engagements des Etats membres du Conseil de l'Europe par son Assemblée parlementaire*", AFDI, 1997, p. 656; *La travail à l'Académie de Crawford* (J.), *Multilateral Rights and Obligations in International Law*, RCADI, 2006, vol. 319, p.325-482. See also Colloquium, *The Effectiveness of International Organisations: Monitoring and Control Mechanisms*, Sakkoulas/Pedone, Athens/Paris, 2000, 338 p.; Alvarez (E.), *International Organizations as Law-Makers*, Oxford UP, 2005, XLVIII- 660 p. ;Sarooshi (D.), *International Organizations and Their Exercise of Sovereign Powers*, Oxford UP, 2005, XVII-143 p. ; Bastid-Burdeau (G.), Q*uelques remarques sur la notion de droit derive en droit international*, Mélanges Salmon, 2007, pp. 161-175.

vagrancy on 31 May 2018. Thus, while some African countries still maintain vagrancy laws, others such as Angola, Cape Verde, Kenya, Lesotho, Mozambique, Rwanda and Zimbabwe have repealed them. Courts have struck off vagrancy laws on grounds of unconstitutionality. An example is the case of *Mayeso Gwanda v the State.*[24] The High Court of Malawi held that the offence of "lazing about and being vagrant was contrary to human rights and unconstitutional".[25]

B. Regime of internal vagrancy rules inconsistent with continental law

38. Domestic rules inconsistent with continental law or its trends must be repealed, otherwise they will fall into disuse. It is contrary to the legal order for old rules to be perpetuated while new ones are adopted and ratified.

39. Many African multilateral provisions deal with vagrancy or similar phenomena. Examples include the Action Plan for the Implementation of the Kadoma Declaration on Community Service; ECOSOC Resolutions 1998/23 and 1999/27; the Arusha Declaration on Good Prison Practice; the Kampala Declaration on Prison Health in Africa; and the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa; the Ouagadougou Plan of Action for Accelerating Penal and Prison Reform in Africa; the Lilongwe Declaration on Access to Legal Aid in the Penal System in Africa; the Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines); also, the Guidelines and Principles on the Right to a Fair Trial and Legal Aid in Africa.[26]

40. Another example is the *Commission's 2017 Principles on the Decriminalization of Petty Offences in Africa*,[27] which highlights

24 *Mayeso Gwanda v State MWHC* 23 (2017) v https ://pocketlaw. africanlii.org/judgment/high-court-general-division/2017/23.html.

25 *Idem.*

26 Penal Reform International (PRI), ***Recommandations africaines pour une réforme pénale***, 2008, pp. 9 et seq.

27 The 21st Special Session of the African Commission on Human and Peoples' Rights, entrusted the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa with the mission of developing principles for the decriminalization of petty offences in Africa. The commission officially launched the principles during the 63rd Ordinary Session in October 2018. See Resolution on the Need to Define the Principles for the Re-characterization and Decriminalization of Petty Offences in Africa - ACHPR/RES.366 (EXT.OS/XX1), 2017.

the following:
"Criminal laws must be a necessary and proportionate measure to achieve this legitimate aim in a democratic society, including through the prevention and detection of crime in a manner that does not impose excessive or arbitrary interference with individual rights and freedoms. There must be a rational connection between the law, its application and the objective pursued".

41. The Kampala Declaration on Prison Conditions in Africa[28] calls on governments to overhaul their criminal policies and to reconsider the use of prisons. The Kampala Declaration on Prison Conditions concludes that mass incarceration serves the interests of justice and is clearly not a good use of public resources.

42. Maintaining inconsistent internal rules is tantamount to failure to comply with international commitments. Unjustified failure to fulfil these commitments entails the international responsibility of the State. The will of the Member States is very important, as it is established that:
"refusal to fulfil a treaty obligation involves international responsibility".[29]

43. This will be the case for States' implementation of the two African Union Charters mentioned above and the Protocol on the Rights of Women. These are States' treaty obligations in this area. Subject to implementation, legally, the States' obligations are fulfilled upon adoption of the instruments adapted internationally. The latter are of higher authority.

C. Aspects that temper obligations enforceable against States

44. Different aspects of international human rights law may be considered in this regard. If, as stated in the Request for an Opinion, there is a nexus between the instruments at issue in the request for opinion and former colonial instruments, the question of the linkage of these States, having succeeded the colonial regime, could arise, without the need, for the time being, to establish responsibilities. In its Opinion, the Court noted that:
"vagrancy laws commonly use the terms "rogue", "vagabond", "idle" and "disorderly" to label persons deemed to be vagrants. These terms, the Court holds, are a reflection of an outdated and largely colonial

28 *International Seminar on Prison Conditions in Africa*, Kampala, 21 September 1996.

29 ICJ, Advisory Opinion, 18 July 1950, *Interpretation of Peace Treaties* (2nd Phase), Reports 1950, p. 228; see also ICJ, *Gabcikovo Nagymaros*, Judgment, 25 September 1997, Reports 1997, p. 38, § 47.

perception of individuals without any rights and their use dehumanizes and degrades individuals with a perceived lower status".

45. Many of these laws emanated from the colonial era. The laws allowed segregation and separation of communities to oppress and repress them. The instruments were often vague and overly general...they were used for arbitrary arrests and for the excessive and abusive use of colonial power. In some countries, offences such as vagrancy are commonly used to arrest sex workers, the homeless and people with psychosocial disabilities.…

46. There is an acute issue of how succession between the colonial master and our current sovereign systems was conducted.[30] This is the problematic issue of State succession.[31] It can be underscored in this regard that the law of succession is not indifferent to the circumstances in which the succession occurs. In particular, the significance of decolonization between 1945 and the end of the 1960s led the codification conventions of 1978 and 1983 to individualize the category of the "newly independent states" of African defined as successor States.[32]

47. The internal legal order of the predecessor State has disappeared and has been replaced by that of the successor African state. This "transfer" of legislation, administrative regulations, jurisdiction of civil, criminal and administrative courts is a direct consequence of the principle of territorial sovereignty.[33] As a result, the criminal treatment that States currently administer to the so-called vagrants is a matter of their own authority.

48. It is in criminal matters that this succession is most complex. All post-colonial national criminal systems must make a sovereign

30 Succession of States means "replacement of one State by another in the responsibility for the international relations of a territory" (Art. 2, § 1(b), common to the Vienna Conventions of 1978 and 1983). This very general definition covers a wide range of realities, from simple border adjustments through the transfer of rules to the dissolution of a State. In a contentious case *Northern Cameroons (Cameroon v United Kingdom)* decided by the International Court of Justice (2 December 1963). The request submitted to the international judge was to find that the United Kingdom "had not conducted the peoples of Northern Cameroons to self-government". This is one aspect of transfer of legal assets. The Court dismissed the question.

31 It is common knowledge that Cameroon sought explanations from the International Court of Justice.

32 The principle was well established in customary law (...) the transfer of such property to the successor State "takes place ipso jure by virtue of the [transfer] treaty and without the need for a special acquisition agreement on the part of the successor State", CPJI, Case of P*eter Pazmany University v Czechoslovakia* (Judgment, 1933, Series B, No. 61, pp. 237-238).

33 Reports of Mr. Mohammed Bedjaoui to the ILC at the UN General Assembly since 1968.

assessment of the appropriateness of prosecutions ... the enforcement of decisions taken and rendered by courts, etc. .....

49. In any event, the establishment of criminal policies on these issues of vagrancy, which largely concern so-called petty offences, is a matter of national sovereignty in criminal matters. It is primarily up to the State to set the framework and intervene. States' positive obligations, including their responsibility, can only be established after the failure of this national criminal order whose State sovereignty is not open to challenge. The provisions of the Charter of Human and Peoples' Rights (1981), in particular Article 1 thereof, do not exclude this fact; on the contrary, they take into account the commitment made by States in the sense that:

50. "The Member States of the Organization of African Unity, parties to the present Charter, shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".

51. The standard known as the "national margin of appreciation" (NMA) could be considered to temper States' obligations. In the present case, where the matter is attractive from the point of view of criminal sovereignty, because it concerns matters of basic public policy, the national margin of appreciation must be considered. Under international human rights law, the State has a national margin of appreciation in this criminal field and in relation to this type of offence.[34]

52. This concept has been recognized in international human rights law since 1976. States may, in some cases, restrict rights and freedoms for reasons of public order, public health, national security, etc. This is a moderating concept, which is well reconciled with respect for the rights of individuals.

53. The African Commission on Human and Peoples' Rights also recalled that:

"Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies (…) as it indeed has direct and continuous knowledge of its society, its needs, resources, (…) and the fine balance

34 The ECHR recalled that: "The Court…is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or ... measure taken by a legal authority or any other authority") as well as to its own case-law (Engel & ors judgment of 8 June 1976. ECHR, *Handside v the United Kingdom*, 7 December 2016, §§ 49 and 50.

that need to be struck between the competing and sometimes conflicting forces that shape its society."[35]

54. There is no doubt that the positive obligations of States express the continental commitment of States to exercise their criminal sovereignty over vagrant nationals. Even considering the established human rights law provisions, one cannot deprive a State of its sovereignty of internal legal ordering that international human rights law otherwise recognizes. This is preserved by the NMA principle, under the control of the human rights judge.[36]

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55. It would be risky to conclude this individual opinion in this context. PALU has brought before the African Court a real subject, rich in questions. It is clear that some collective imagination identifies vagrants in terms of contraventions, misdemeanours and crimes, but these issues need to be addressed. Again, I agree with the Court's approach and conclusions, as do my Honourable Colleagues, but there were so many other hidden issues at stake.

35 African Commission on Human and Peoples' Rights, *Prince v South Africa* (2004), AHRLR 105 (ACHPR 2004), § 51.

36 Pellet (P.), *Droits-de-l'hommisme et droit international* », Droits fondamentaux, N. 01, 2001, p. 4820;La mise en œuvre des normes relatives aux droits de l'homme, CEDIN (H. Thierry et E. Decaux, dirs.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme,* Montchrestien, Paris, 1990, p. 126.