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IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

REQUEST FOR ADVISORY OPINION NO. 001 OF 2018

**IN THE MATTER OF A REQUEST BY THE PAN AFRICAN LAWYERS UNION
(PALU) FOR AN ADVISORY OPINION ON THE COMPATIBILITY OF VAGRANCY
LAWS WITH THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS
AND OTHER HUMAN RIGHTS INSTRUMENTS APPLICABLE IN AFRICA**



(Made under Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights and Rule 68 of the Rules of the African Court on Human and Peoples' Rights)

EXECUTIVE SUMMARY

JURISDICTION AND ADMISSIBILITY

This is a Request for an Advisory Opinion by the Pan African Lawyers Union (PALU) which is an African organisation that is recognised by the African Union through a Memorandum of Understanding (**Annexure 1**).

Pursuant to Article 4 (1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Court Protocol) and Rule 68 of the Rules of the African Court on Human and Peoples' Rights (Rules of Court), PALU specifically seeks an Advisory Opinion on the extent to which certain vagrancy laws comply with the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (the Child Rights Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Women's Rights Protocol).

The subject matter of this Request for an Advisory Opinion is not related to a matter being examined by the African Commission on Human and Peoples' Rights (African Commission).

CIRCUMSTANCES GIVING RISE TO THE REQUEST

A number of African Union Member States have retained criminal offences which do not criminalise specific acts, but rather the status of individuals as being poor, homeless or unemployed (**Annexure 2**).

For the purpose of this Request, these offences will loosely be referred to as vagrancy laws and can be categorised as follows:

- In at least 22 countries in Africa, it is an offence to be a vagrant. The penal codes of these countries define a vagrant as any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession. Once declared a vagrant, a person can be banned from the area, sent back to the person's place of origin, or deported, if the person is not a citizen.

- In at least 8 countries in Africa, it is an offence to be a “suspected person or reputed thief who has no visible means of subsistence and cannot give a good account” of him or herself.
- In at least 3 countries in Africa, the offence of being an idle and disorderly person includes someone who loiters or is idle and who does not have a visible means of subsistence and cannot give good account of him or herself.
- In at least 5 countries, the police are also allowed to arrest someone without a warrant where the person has no ostensible means of subsistence and cannot give a satisfactory account of him or herself.

Many countries abuse these provisions to arrest and detain persons where there has been no proof of a criminal act. It is our contention that vagrancy laws are therefore overly broad and allow police or other governmental officials a wide discretion to decide whom to arrest, effecting a disproportionate impact on vulnerable individuals in society. This equally exacerbates police cells and prison overcrowding and places a strain on the ability of the police or other governmental authorities to engage in effective crime prevention. The manner of enforcement of these offences are further contrary to the basic principles underlying criminal law and threatens the rule of law.

APPLICABLE LAW

PALU seeks an Advisory Opinion from the Court on whether the above vagrancy laws and by-laws violate articles 2, 3, 5, 6, 7, 12 and 18 of the African Charter; articles 3, 4(1) and 17 of the Child Rights Charter; and article 24 of the Women’s Rights Protocol.

ISSUES FOR DETERMINATION

PALU respectfully requests advice from this Honourable Court on the following issues for determination:

- 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 to not be discriminated against, as protected by Article 2 of the African Charter;*
 - ii. *the right of equal protection before the law and of the law, as protected by Article 3 of the African Charter;*
 - iii. *the right to dignity and to be free from inhuman, cruel or degrading punishment or treatment, as protected by Article 5 of the African Charter;*
 - iv. *the right to liberty and security, as protected by Article 6 of the African Charter;*
 - v. *the right to a fair trial, as protected by Article 7 of the African Charter;*
 - vi. *the right of freedom of movement and residence, as protected by Article 12 of the African Charter;*
 - vii. *the protections of the rights of women, children and persons with disabilities, as protected by Article 18 of the African Charter.*
- 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:**
- i. *the right to dignity and to be free from inhuman, cruel or degrading punishment or treatment, as protected by Article 5 of the African Charter;*
 - ii. *the right of freedom of movement and residence, as protected by Article 12 of the African Charter;*

- iii. *the protections of the rights of women, children and persons with disabilities, as protected by Article 18 of the African Charter;*
 - iv. *the right of the child to not be discriminated against, as protected by Article 2 of the Child Rights Charter;*
 - v. *the protections of the best interests of the child, as protected by Article 4(1) of the Child Rights Charter;*
 - vi. *the special protections of the right to a fair trial of the child, as protected by Article 17 of the Child Rights Charter.*
- c. **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:**
- i. *the right to not be discriminated against, as protected by Article 2 of the African Charter;*
 - ii. *the right of equal protection before the law and of the law, as protected by Article 3 of the African Charter;*
 - iii. *the right to dignity and to be free from inhuman, cruel or degrading punishment or treatment, as protected by Article 5 of the African Charter;*
 - iv. *the right to liberty and security, as protected by Article 6 of the African Charter;*
 - v. *the right to a fair trial, as protected by Article 7 of the African Charter;*
 - vi. *the right of the child to not be discriminated against, as protected by Article 2 of the Child Rights Charter;*
 - vii. *the protections of the best interests of the child, as protected by Article 4(1) of the Child Rights Charter;*

- viii. *the special protections of the right to a fair trial of the child, as protected by Article 17 of the Child Rights Charter;*
 - ix. *the special protections of women in distress, as protected by Article 24 of the Women's Rights Protocol.*
- d. **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 Child Rights Charter and the Women's Rights Protocol, and in the affirmative, determine what these obligations are.**