THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

HOLDEN AT KAMPALA

CIVIL APPLICATION NO. ____ OF 2021

(ARISING FROM CONSTITUTIONAL PETITION NO. 36 OF 2018)

1. **PAN AFRICAN LAWYERS UNION (PALU)** **APPLICANTS**
2. **SOUTHERN AFRICA LITIGATION CENTRE (SALC)**

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INTERVENE AS *AMICI CURIAE* BY THE APPLICANTS HEREIN ARISING FROM CONSTITUTIONAL PETITION NO. 36 OF 2018

BETWEEN

FRANCIS TUMWESIGE ATEENYI **PETITIONER**

And

ATTORNEY GENERAL **RESPONDENT**

SUBMISSIONS OF THE *AMICI CURIAE*

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INTRODUCTION

1. If it may please the Court, these are the submissions of the *amicus curiae* in these proceedings.

2. The applicants for admission as *amici curiae* are the Pan African Lawyers Union (PALU) and the Southern Africa Litigation Centre (SALC). The *amicus* brief intends to assist the Court in determining the constitutionality of sections 169(1)(c) and (d) of the Penal Code.

3. The following issues are addressed in these submissions:

   3.1. The requirements for admission as *amicus curiae* in Uganda, including the particular interest and expertise of the applicants as *amici curiae*;

   3.2. The legal basis for the brief, including:

      3.2.1. The legal history of section 168(1) of the Penal Code;
      3.2.2. The applicability of the right to dignity and freedom from inhuman and degrading treatment in interpreting the constitutionality of section 168(1) of the Penal Code;
      3.2.3. The difficulty with justifying the limitation of rights as a crime prevention measure; and
      3.2.4. The findings of the African Court on Human and Peoples' Rights in its Advisory Opinion relating to offences like section 168(1) of the Penal Code of Uganda, and in particular its findings on women and children's rights.

REQUIREMENTS FOR ADMISSION AS *AMICUS CURIAE*

4. The requirements for admission as *amicus curiae* was recently summarised in the Supreme Court decision *In Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 Ors* (Civil Application 2016/2) [2016] UGSC 2 (14 March 2016). In that decision, it was emphasised that it is within this Court's jurisdiction to decide on the admission of *amicus curiae*, on the nature and extent of their intervention, and on the extent to which the Court will make use of the brief, if any.

5. The principles accepted by the Supreme Court in relation *to amicus curiae* are that:

> *"Participation of amici is purely at the discretion of the court.*
> *Amicus curiae can be important and relevant in matters where the Court is of the opinion that the matter before it requires some kind of expertise which is in the possession of a specific individual.*
> *The ultimate control over what the amicus can do lies exclusively with the Court.*
> *The amicus must be neutral and impartial.*
> *The submissions must be intended to give assistance to the court it would not otherwise enjoy.*
> *Limited to engagement with matters of the law.*
> *Submissions draw attention to relevant matters of law - useful, focused and principled legal submissions not favouring any of the parties.*
> *The amici must have valuable expertise in the relevant area of law and general expertise in law does not suffice.*
> *The points of law to be canvassed should be novel to aid development of jurisprudence.*
> *The participation must be in the wider interest of public justice.*
> *The interest of the amicus is its 'fidelity' to the law.*
> *An amicus should address court on points of law not raised by the parties but is of concern to the court.*
> *Remind the court of legal matters which have escaped the court that may cause a wrong interpretation of law.*
> *An amicus shall not introduce new/ fresh evidence.*
> *Where in adversarial proceedings, parties allege that a proposed amicus is biased or hostile towards one or more of the parties, or where the applicant through previous*

conduct, appears to be partisan on an issue before the court the court will consider such an objection by allowing the respective part to be heard on the issue.

The court will regulate the extent of amicus participation in the proceeding to forestall the degeneration of amicus role to partisan role.

Whereas consent of the parties to the proposed amicus role is a factor to be taken into consideration, it is not the determining factor. Furthermore, objections raised by the parties is a factor to be taken into consideration but is not the determining factor."

6. Based on these principles, the applicants submit that their amicus brief is aligned to the principles espoused by the Supreme Court:

Specific and valuable expertise of the applicants

7. In 2018, PALU filed a Request for 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.[1] It did so as part of its mandate to promote human rights and following the substantial concerns raised by its members during its 2016 and 2017 Annual General Meetings, which centred on the continued negative repercussions of the outdated colonial-era offences throughout Africa. In filing the Request for an Advisory Opinion, PALU sought to obtain advice from the African Court on how best to interpret offences like sections 168(1)(c) and (d) of the Uganda Penal Code, which offences exist in one form or another in many countries throughout Africa.

8. SALC has contributed to research and scholarship on the origin and enforcement of rogue and vagabond offences in Africa. SALC conducted research to determine the practice of police and courts in enforcing these offences, including in Malawi,[2] Zambia,[3] Botswana,[4]

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[1] Advisory Opinion of the African Court on Human and Peoples' Rights, No. 1/2018, 4 December 2020. Available online at https://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/001-2018_-_PALU-Advisory_Opinion.pdf.

[2] The research report is available online at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/No-Justice-for-the-Poor-A-Preliminary-Study-of-the-Law-and-Practice-Relating-to-Arrests-for-Nuisance-Related-Offences-in-Blantyre-Malawi.pdf. See also the 2014 article entitled "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi: available online at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/7Banda.pdf.

[3] The submission is available online at https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/02/Review-of-the-Zambia-PC-and-CPC-February-2021.pdf.

[4] The report is available online at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-Rights-Booklet.pdf.

Eswatini,[5] and Kenya.[6] SALC's broad mapping of vagrancy related offences throughout Africa is available online and was referred to in the Advisory Opinion of the African Court.[7]

Impartiality of the applicants and fidelity to the law

9. PALU brings together the continent's five regional lawyers' associations, over fifty-five national lawyers' associations and over 1,000 lawyers from Africa and the Diaspora. PALU's mission is to advance the law and the legal profession, the rule of law, good governance, human and peoples' rights and socio-economic development of the African continent.

10. SALC's vision is that the rule of law and human rights are respected, protected, promoted and fulfilled throughout Southern Africa.

11. Both applicants work to ensure that all alws are enforced within the ambits of the Constitution and the rule of law. Accordingly, both organisations have throughout their existence sought to provide objective legal advice on how criminal laws ought to be enforced in a manner that would ake them compliant with regional and international human rights standards.

Submissions limited to novel matters of law not raised by the parties

12. The current legal arguments before this Court focus predominantly on the relevant Articles in the Constitution which the Petitioner claims are impacted by the offences in section 168(1) of the Penal Code. PALU and SALC submit that their legal submissions are novel and independent of those made by the parties in this matter.

13. PALU and SALC submit that sections 168(1)(c) and 168(1)(d) of the Penal Code of Uganda ought to be constructed in line with the purposive interpretation approach, which refers to situations in which courts utilise extraneous materials from the pre-enactment phase of legislation to determine the true intention behind these offences. Information on the legislative history of these offences in Uganda has not been canvassed by either of the

[5] The report is available online at https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/09/SALC-Eswatini-Human-Rights-Research-Report.pdf.
[6] The report is available online at https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/09/Kenya-Report.pdf.
[7] The document is available online at https://icj-kenya.org/?smd_process_download=1&download_id=5015.

parties before this Court. This history is important not only to the interpretation of sections 168(1)(c) and (d) of the Penal Code, but also to the interpretation of those rights entrenched in the Constitution.

14. PALU and SALC highlight the impact of sections 168(1)(c) and (d) of the Penal Code on Article 24 of the Constitution. The violation of this right is an important consideration which the parties have not raised. Article 24 of the Constitution enshrines "respect for human dignity and protection from inhuman treatment". It states that "no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment." The right to dignity is not only a right in and of itself but also a principle which ought to guide the interpretation of other constitutional rights.

15. PALU and SALC also bring to the Court's attention the international developments to ensure that crime prevention measures do not violate human rights.

16. PALU and SALC submit further that the offences have recently been established to violate 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, all treaties to which Uganda is bound. The findings of the African Court in its Advisory Opinion on vagrancy-related offences have not been canvassed by the parties.

THE LEGAL BASIS FOR THE BRIEF

THE HISTORY OF SECTION 168 OF THE PENAL CODE

17. PALU and SALC submit that sections 168(1)(c) and 168(1)(d) of the Penal Code of Uganda ought to be constructed in line with the purposive interpretation approach.

History as a tool for legal interpretation

18. English law is traditionally subject to three rules of statutory construction: the literal rule, the mischief rule and the golden rule. The literal rule requires that a law is to be read exactly as written and should not divert from its ordinary meaning. Courts have imposed an absurdity limit on this rule, which states that a statute cannot be interpreted literally if it

would lead to an absurd result. This recognition led to the development of the golden rule,[8] which reflects a position that the intent of the law is more important than its text and that courts may depart from a literal meaning where it would lead to an absurd result. According to the mischief rule, a statute must be construed so as to suppress the mischief and advance the remedy, thus giving the courts considerable latitude in achieving the objective of the legislature despite any inadequacy in the language included in it.[9] The mischief rule was set out in *Heydon's Case*.[10] In that case, the court asked four questions: What was the common law before the making of the Act? What was the mischief and defect for which the common law did not provide? What remedy had parliament resolved and appointed to cure the problem? What was the true reason for the remedy? The rule was accordingly seen to apply to legislation developed from common law.

19. These three rules of interpretation eventually evolved into the purposive interpretation approach. The purposive approach refers to situations in which courts utilise extraneous materials from the pre-enactment phase of legislation (including early drafts, Hansards,[11] committee reports, etc.). The English Law Commission proposed the adoption of the purposive approach in 1969, and it was eventually adopted in a House of Lords decision in *Pepper v Hart*.[12] The case established the principle that when primary legislation is ambiguous, courts may refer to statements made in the House of Commons or House of Lords in an attempt to interpret the meaning of the legislation.

20. When trying to interpret the meaning of statutory provisions, courts make use of both internal and external aids. Internal aids to statutory interpretation include the context, title, headings, interpretation clause and punctuation. External aids to statutory interpretation include the objects and reason of the Act, text books, dictionaries, international convention, legislative history, judicial interpretation of words, debates and proceedings of the legislature and the state of affairs at the time of the passing of the Bill.

[8] *Grey v Pearson* 185 6 HL Cas 61, 106.
[9] *Smith v Hughes* 1960 2 All ER 859.
[10] 1584 76 ER 637.
[11] Hansard is a substantially verbatim report (with repetitions and redundancies omitted and obvious mistakes corrected) of parliamentary proceedings.
[12] 1993 AC 593.

21. The Preamble to the Constitution specifically recognises the country's "struggles against the forces of tyranny, oppression and exploitation" and the need to promote "the principles of unity, peace, equality, democracy, freedom, social justice and progress". As such, the history of the sections 168(1)(c) and (d) of the Penal Code ought to be considered, which, as set out below, was deliberately aimed at oppression and exploitation.

British history of the rogue and vagabond offence

22. The vagrancy laws found in Africa can be traced as far back as the 14th century in Europe.[13] Coinciding with the time of the Black Plague, the exploitative feudal system was disintegrating, resulting in a lack of labourers to work the fields. In Britain, the Statute of Labourers was passed at that time to make it unlawful to refuse an offer of work, to stop the mobility of labourers and to force labourers to accept low wages.[14]

23. As migration from rural to urban areas increased, the focus of vagrancy laws by the 17th century was to protect the public from nuisances, criminality and the financial burden brought by massive unemployment.[15] For instance, the 1662 Settlement and Removal Act in Britain provided that any visitors, travelling labourers or beggars had to be returned to their home parishes where they would be required to find labour for vagrants or provide relief for the truly needy.

24. The history of English vagrancy laws reveals little concern for the actual plight of vagrants, though it may rather suggest various economic and cultural concerns regarding indigent persons and their place in a rapidly-industrialising English society. Sociologists have suggested three main purposes for English vagrancy laws:

    24.1. 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;

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[13] William Chambliss "A Sociological Analysis of the Law of Vagrancy" *Social Problems* Vol 12 No 1 (1965) at 69.
[14] Paul Flynn, "Vagrancy Laws and the Right to Privacy" *University of San Francisco Law Review* Vol 2 (1967-1968), at 337-338. Michael Lahan "Trends in the Law of Vagrancy" *Connecticut Law Review* Vol 1 (1968) at 350-351.
[15] Paul Flynn "Vagrancy Laws and the Right to Privacy" *University of San Francisco Law Review* Vol 2 (1967-1968) at 337-338.

24.2. To reduce the costs incurred by local municipalities and parishes to look after the poor; and

24.3. To prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials.[16]

25. The development of English vagrancy laws was by no means an objective or democratic exercise. Essentially, vagrancy laws amounted to the exercise of control over a marginalised group in society by a more privileged class, primarily for its own interests and based on its own notions of the bounds of appropriate social behaviour.[17] Indeed, the terminology employed in vagrancy laws and government reports of the period reveals contempt for and disdain towards vagrants. Vagrancy laws over centuries have typically featured a characterisation of targeted individuals as indolent, lazy, worthless, unwilling to work, or as habitual criminals, outcasts or morally depraved individuals.[18]

26. The development of vagrancy laws generally did not consider the rights of individuals to freedom of movement, human dignity, equality, fair labour practices or a presumption of innocence.

27. The laws had little effect in reducing the number of vagrants because they did not address the underlying causes of vagrancy. In 1821, a report from the Select Committee on the Existing Laws Relating to Vagrants noted the increasing number of vagrants and observed that the expense of administering the existing laws was significant.[19] The report further noted that the procedure of sending vagrants back to their municipalities of origin was onerous and ineffective.[20] The Committee recommended that, instead of sending vagrants back home, they should be imprisoned for longer periods to dissuade them from vagrancy.[21]

28. The vagrancy laws were eventually codified in the English Vagrancy Act of 1824, which later provided the framework for vagrancy laws in the British colonies. The Vagrancy Act of 1824 (the 1824 Act) was enacted "for the more effectual suppression of vagrancy and

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[16] W Chambliss "A Sociological Analysis of the Law of Vagrancy" (1960) 12 *Social Problems* 67-77.
[17] *Id* 77; L Sebba "The creation and evolution of criminal law in colonial and post-colonial societies" (1999) 3 *Crime, Histoire et Sociétés,* at para. 4.
[18] P Ranasinghe "Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 *Osgoode Hall LJ, 55-94,* 60-61.
[19] House of Commons *Report from the Select Committee on the Existing Laws Relating to Vagrants* (1821).
[20] *Id* 4.
[21] *Id* 5.

punishment of idle and disorderly persons" in England. The Vagrancy Act repealed all previous statutes on the subject, amended the definitions of idle and disorderly persons, rogues and vagabonds and set out powers to search persons and premises.

29. Included in section 4 of the English vagrancy Act of 1824 were offences similar to sections 168(1)(c) and (d) of the Uganda Penal Code. It included as rogue and vagabond:

    29.1. Every suspected person or reputed thief, frequenting any river, canal … or any street, highway or avenue leading thereto, or any place of public resort, with intent to commit a felony; and

    29.2. Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not giving a good account of himself or herself.

30. However, concerns quickly arose around the arbitrary and vague nature of these offences. For example, the status elements of these offences were removed in Britain after the 1937 case of *Ledwith v Roberts*[22] which introduced a requirement of reasonable cause to suspect prohibited acts had been committed.

31. In the 1936 English case of *Ledwith v Roberts*[23], the Court held that "suspected person" referred to a class of persons who were, apart from the particular occasion, within the description of suspected persons. The Court observed that the reference to a "suspected person or reputed thief" should be construed similarly narrow so as to refer to one whom law enforcement officers suspects of being guilty of criminal behaviour based upon previous conduct of which they are actually aware. According to *Ledwith*, "any other view would put the reasonable person loitering in a street for a reasonable cause at the mercy of any constable who knew nothing about him except that he was loitering, and therefor chose to suspect him of loitering for the purpose of committing a felony or misdemeanour."

[22] [1937] 1 KB 232 (C.A. 1936).
[23] [1936] 3 All ER 570.

32. In *King v Attorney General*[24] the Supreme Court of Ireland considered the provisions of section 4 of the Vagrancy Act, which is the origin of rogue and vagabond offences,[25] to be contrived and contrary to the right to security of person:

> *"In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance."*[26]

33. The Criminal Attempts Act of 1981 subsequently repealed section 4 of the 1824 Vagrancy Act on loitering by "suspected persons or reputed thieves" on the basis that police used the law to target persons based on race.[27]

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[24] [1981] 1 LR 245, 57.
[25] Centre for Human Rights Education, Advice and Assistance (CHREAA) and the Southern Africa Litigation Centre (SALC) (2013) *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre*, Malawi 15-21.
[26] At page 257.
[27] UK House of Commons Sub-Committee on Race Relations and Immigration hearings into the so-called sus law in 1980.

History of the rogue and vagabond offence in Uganda

34. These vagrancy offences were duplicated in the colonies. In all colonies, the vagrancy laws were also used to shape labour discipline and the social order to control labourers who demanded higher wages.

35. The trajectory in the use of vagrancy laws followed a similar pattern in Africa as it did in Britain, where the laws were first used to supply labour and later to curb the effects of urbanisation on cities and the urban elite.[28] By the 1930s, socio-economic and cultural change that accompanied colonialism resulted in increased migration to urban areas.[29] This led to a number of laws specifically targeted at strengthening vagrancy laws.

36. Vagrancy laws were some of the first laws passed by colonial administrations. In Uganda, a plethora of vagrancy laws were passed since 1902 which allowed arrests without a warrant of any person wandering about without any proof of employment or visible means of subsistence. These vagrancy laws provided a labour pool from which labour could be extracted to meet the demands of the colonial economy.[30] Setting up of the police forced at the same time was an important part of the colonial project, with more money spent on police and prison budgets throughout the colonial period. [31]

37. In 1901 the Trade Licencing Act introduced licence fees for African traders to safeguard the interests of Asian and European traders.[32] In 1907, the Uganda Removal of Undesirable Natives Ordinance was passed.[33]

38. The Vagrancy Ordinance No. 4 of 1911 provided:

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[28] Mine Ener "Prohibitions on Begging and Loitering in Nineteenth-Century Egypt" *Die Welt des Islams* Vol 39 Issue 3, State, Law and Society in Nineteenth Century Egypt (1999).
[29] Andrew Burton and Paul Ocobock "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).
[30] Andrew Burton and Paul Ocobock "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).
[31] J Oloka-Onyango, "Police Powers, Human Rights and the State in Kenya and Uganda: A Comparative Analysis" *Third World Legal Studies*, Volume 9, 1990.
[32] W Monteith, "Markets and Monarchs: Indigenous Urbanism in Postcolonial Kampala" in *Settler Colonial Studies* Volume 9, 2019 - Issue 2: Settler Colonialism, Indigeneity and the City.
[33] Colonial Reports presented to the Houses of Parliament, Uganda Protectorate Report for 1906-7, No. 558, June 1908, page 16.

"Vagrants may be arrested by police officers without a warrant, and if found by a magistrate to be so, may be committed to gaol for three months. When in goal they are credited with an allowance of 8 annas a day as wages, and when that fund amounts to the sum necessary for their passage home, they may be sent thither either by land or water."[34]

39. While vagrancy laws were used to punish those founds in urban areas "without a visible means of subsistence", other laws were also used to manipulate the extraction of forced labour to build the colonial empire. Under the Uganda Agreement of 1900, chiefs were required to maintain public roads in their districts through one month forced labour per year by their subjects. The 1919 Native Authority Ordinance legalised *luwalo*, a practice of forced labour for men between the ages of 18 and 45 to assist in public works projects.[35] Similarly, starting in 1909, African men who could not pay their tax had to engage in forced labour.[36] For example, the Poll-Tax Ordinance of 1905[37] provide that any person who was unable to pay the tax in cash "shall in lieu thereof work for the period of one month".[38] After the passing of the 1930 Forced Labour Convention, poll tax labour was abolished. *Luwalo* continued in use, and between 1932 and 1937, an average of 395 819 men were engaged in such labour. *Luwalo* was officially abolished in 1939, at which point a Native Administration Tax replaced the luwalo obligation, whilst poll taxes were also increased.[39]

40. Oloka-Onyango notes:

"Violence by the state was applied both within the sphere of production relations (i.e., economics) and to social and political relations as a whole. This is revealed inter alia in the laws and the practice of forced labour; the prohibitions against loitering and

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[34] "East Central Africa" *Journal of the Society of Comparative Legislation* Vol. 11 No. 2 (1911) pages 436-440.
[35] Opolot Okia "Virtual Abolition: The Economic Lattice of Luwalo Forced Labour in the Uganda Protectorate" *African Economic History*, 2017.
[36] Opolot Okia "Virtual Abolition: The Economic Lattice of Luwalo Forced Labour in the Uganda Protectorate" *African Economic History*, 2017.
[37] Published in the Uganda Official Gazette of April 1st, 1905.
[38] Uganda Poll-Tax Ordinance, UK Parliamentary Debate, Hansard Volume 146: debated on Tuesday 23 May 1905.
[39] Opolot Okia "Virtual Abolition: The Economic Lattice of Luwalo Forced Labour in the Uganda Protectorate" *African Economic History*, 2017.

vagrancy; the consumption of native liquor; compulsory taxation; collective punishment; internal exile, deportation and detention-without-trial."[40]

41. Communities which resisted taxes, land alienation and forced labour for settlers, were violently repressed and their leaders were incarcerated or executed.[41]

42. The Vagrancy Ordinance of 1922 increased the powers of arrest, allowed for the detention of adult vagrants until work can be found or they are repatriated home, and where they refuse work, allowed for their imprisonment.[42] Police referred to the "hordes of native vagrants and suspects who infect the towns". [43] An amended ordinance was passed in 1925 that placed the onus on a potential offender to prove 'gainful' employment, failing which he would be sent to public work schemes until he earned sufficient funds to cover the costs of repatriation. Whilst the Colonial Office initially found this Ordinance discriminatory since it only placed such onus on Africans and encouraged forced labour, it later approved it. [44] This was markedly harsher than the Tanganyika Ordinance which placed the onus of proof of lack of means of subsistence on the prosecutor and repatriation costs were paid by the State and not through compulsory labour. [45]

43. Vagrancy Ordinance No. 4 of 1925 defined a vagrant as:

"Any native of the Protectorate found without employment and fixed abode and unable to render a satisfactory account of himself at such distance from his ordinary place of abode as to make it impossible for him to proceed there without assistance."

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[40] J Oloka-Onyango, "Police Powers, Human Rights and the State in Kenya and Uganda: A Comparative Analysis" *Third World Legal Studies*, Volume 9, 1990.
[41] Sanderson Beck "East Africa 1700-1950" in Mideast & Africa 1700-1950: Ethics of Civilisation (2010). He notes for example that Harry Thuku from the Young Kikuyu Association of Kenya was imprisoned from 1922-1930 after suggesting that people should disobey these laws and the forced labour system.
[42] Andrew Burton and Paul Ocobock "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), page 273.
[43] Andrew Burton and Paul Ocobock "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), page 277, referring to internal correspondence by colonial police in 1922 and 1924.
[44] Andrew Burton and Paul Ocobock "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) page 280.
[45] Andrew Burton and Paul Ocobock "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), page 281.

44. The rationale was explained as follows:

> *"This definition is designed to enable authorities to charge with vagrancy that numerous class of native which swarms into townships for no good reason and can probably show on any given occasion sufficient means of temporary subsistence without being in permanent employment. The cost of transporting such persons back to their districts is thus discharged by the amounts earned during their confinement in prison."*[46]

45. From the 1920s onward it has been noted that "vagrancy would be marked by its use to clear East Africa's urban centres of undesirable African populations, to correct perceived African delinquency, and to maintain colonial social order."[47]

46. In 1940, a special Vagrancy Law was passed in the Kingdom of Buganda in response to increased urban migration.[48]

47. An interesting development at this time was the flourishing markets on the periphery of the cities, which escaped the ambit of vagrancy laws.[49] Women played a central role in the development and organisation of these markets. *Toninyira* were largely open markets run by female traders at night.[50] Colonial authorities however deemed the markets as subversive and passed the Markets Act which provided that only a municipal or town council can establish and maintain a market. They also expanded the borders of Kampala.[51]

48. The 1950s were characterised by an over-supply of labour and the development of structural unemployment. Given the little investment in education by the colonial

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[46] "East Africa" *Journal of Comparative Legislation and International Law*, Third Series, Vol.9, No. 3 (1927) page 174.
[47] Andrew Burton and Paul Ocobock "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) page 274-7.
[48] Andrew Burton and Paul Ocobock "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).
[49] W Monteith, "Markets and Monarchs: Indigenous Urbanism in Postcolonial Kampala" in *Settler Colonial Studies* Volume 9, 2019 - Issue 2: Settler Colonialism, Indigeneity and the City.
[50] W Monteith, "Markets and Monarchs: Indigenous Urbanism in Postcolonial Kampala" in *Settler Colonial Studies* Volume 9, 2019 - Issue 2: Settler Colonialism, Indigeneity and the City.
[51] W Monteith, "Markets and Monarchs: Indigenous Urbanism in Postcolonial Kampala" in *Settler Colonial Studies* Volume 9, 2019 - Issue 2: Settler Colonialism, Indigeneity and the City.

administration, many of the unemployed were youth.[52] Street trading formed an important source of income which expanded with accelerating urbanisation.

49. In 1950 the rogue and vagabond offence was specifically included in the Criminal Procedure Code and Penal Code of Uganda.

    49.1. Section 11(b) of the Criminal Procedure Code No. 13 of 1950 provides that any officer in charge of a police station may arrest or cause to be arrested "any person within the limits of that station who has no ostensible means of subsistence or who cannot give a satisfactory account of himself or herself."

    49.2. Section 168(1)(c) of the Penal Code No. 12 of 1950 (Cap 120) provides that "Every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself" shall be deemed a rogue and vagabond.

    49.3. Section 168(1)(d) of the Penal Code provides that "Every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose" shall be deemed a rogue and vagabond.

50. In 1957, through the Abolition of Forced Labour Convention, States were required "to suppress and not make use of any form of forced or compulsory labour." As labour law standards improved, vagrancy laws were retained and enforced for purposes other than extracting labour. Vagrancy offenses have since become a catch-all offense to address a range of "undesirable" behaviours while sidestepping criminal law and procedure requirements. These offenses also continue to be used to harass informal economy workers. The use of vagrancy laws has come to the ILO's attention, mostly to the extent that persons prosecuted as vagrants are forced into work or community service, but the impact of vagrancy laws on the ability of people to access livelihoods remains largely unrecognised.

[52] A Burton, "Raw youth, school-leavers and the emergence of structural unemployment in late-colonial urban Tanganyika" *Journal of African History*, 47 (2006).

51. The 1970s were characterised by an aggressive response to urban migration and the resultant strain this placed on cities.[53] Idi Amin launched the Keep Uganda Clean campaign, which was characterised to eliminate "parasites", "the lazy ones" and "undesirables".[54] The campaign was later extended in the Self-Help Projects Decree No. 9 of 1975, which allowed local authorities to launch clean-up campaigns and mandated the fine or imprisonment of those who did not comply with the mandatory labour required. This coincided with Uganda hosting the organisation of African Unity's annual conference in 1975 and resulted in the mass removal of vagrants from the city using idle and disorderly and rogue and vagabond offences. The Keep Uganda Clean targeted anyone deemed not to contribute, who were at risk of being "rounded up" and "taught a lesson".[55]

52. The Community Farm Settlement Decree No. 8 of 1975 further allowed the State to resettle any "unemployed able-bodied person" on a community farm. The decree mandated anyone with access to land to use it productively or risk conviction of an offences. Two years later, Amin extended the decree to include persons between the ages of 16 and 40. It also allowed officials to arrest anyone over the age of 12 who was wandering about without any visible means of subsistence. Women drew the wrath of the police and politicians who felt that unmarried and unemployed women did not be long in the cities and promoted anti-social behaviour.[56] In 1973, local chiefs issued an order to all single women living in Kampala to vacate the city.[57]

53. These punitive measures of social control were often counter-productive. One author noted at the time:

> *"It would seem imperative that African countries, with limited resources in hand to deal with crime, should pay careful attention to the possibility that they may be*

[53] A Decker "Idi Amin's Dirty War: Subversion, Sabotage and the Battle to Keep Uganda Clean, 1971-1979" *International Journal of African Historical Studies* Vol. 43 No. 3 (2010), page 492.
[54] A Decker "Idi Amin's Dirty War: Subversion, Sabotage and the Battle to Keep Uganda Clean, 1971-1979" *International Journal of African Historical Studies* Vol. 43 No. 3 (2010).
[55] A Decker "Idi Amin's Dirty War: Subversion, Sabotage and the Battle to Keep Uganda Clean, 1971-1979" *International Journal of African Historical Studies* Vol. 43 No. 3 (2010), 503.
[56] A Decker "Idi Amin's Dirty War: Subversion, Sabotage and the Battle to Keep Uganda Clean, 1971-1979" *International Journal of African Historical Studies* Vol. 43 No. 3 (2010), 505-9.
[57] A Decker "Idi Amin's Dirty War: Subversion, Sabotage and the Battle to Keep Uganda Clean, 1971-1979" *International Journal of African Historical Studies* Vol. 43 No. 3 (2010).

embarking on a self-defeating exercise when taking a decision with regard to the enforcement of norms through the use of the criminal process."[58]

54. In the 1990s, section 106 of the Children Act No. 6 of 1996 decriminalised section 168 of the Penal Code as applied to children.

55. In 2002, the Ministry of Justice and Constitutional Affairs in Uganda commissioned a study on access to justice. The final report, entitled *Participatory Poverty Assessment on Safety, Security and Access to Justice: Voices of the Poor in Uganda*, noted that offences such as being idle and disorderly and rogue and vagabond were anti-poor and made the poor more vulnerable.

56. With ownership and use of private property out of reach of poor citizens and migrant workers, criminalising livelihood activities in public spaces becomes untenable. As such, vagrancy laws embody colonial and elites' conception of public space as a sanitised and privileged space.[59]

57. Children who live and work on the streets continue to face arrests under vagrancy laws. These arrests are often in violation of children's rights[60] and without rational basis.[61]

58. Children who live or find themselves on the streets are often described by police as unruly criminals. Such an approach shows little appreciation for the circumstances which have led to children finding themselves on the streets,[62] including domestic abuse, child neglect,

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[58] GH Boehringer, "Aspects of Penal Policy in Africa, with Special Reference to Tanzania" *Journal of African Law*, Vol. 15 No. 2 (1971), page 184.
[59] K Dinesh et al "Re-examining Legal Narrative on Vagrancy, Public Spaces and Colonial Constructs: A Commentary on the ACHPR's Advisory Opinion on Vagrancy Laws in Africa" *Law & Informality Insights* No. 4, WIEGO (2021).
[60] Human Rights Awareness and Promotion Forum (2016) "The Implications of the Enforcement of 'Idle and Disorderly' Laws on the Human Rights of Marginalised Groups in Uganda"; Human Rights Watch (2014) "Where Do You Want Us to Go? Abuses against Street Children in Uganda".
[61] The Malawi High Court in the case of *Republic v Balala* [1997] 2 MLR 67 (HC) reviewed the conviction of a child under a vagrancy law in the absence of any evidence supporting the charge. The Court noted: "When he was questioned by police, he said that he come to the northern region to look for employment. I am concerned that the charge of being a rogue and vagabond can be used to oppress needy persons who are not criminals. The juvenile in the present case would be a clear example where mere poverty, homelessness and unemployment would land a person in prison."
[62] Martin Rwamba, "Eight schoolgirls arrested for loitering in Maralal town at 2am" 5 January 2019, https://www.the-star.co.ke/news/2019/01/05/eight-schoolgirls-arrested-for-loitering-in-maralal-town-at-2am_c1873358.

disease, poverty, drought, lack of educational opportunities and conflict.[63] These are issues for which society must take responsibility and which cannot be wished away by sending children to prison.

59. There are frequent reports of mass arrests of street children for vagrancy in Uganda.[64] In a 2014 report by Human Rights Watch, it noted that children who live on the streets are often referred to as *bayaaye* or *muyaaye*, meaning vagabonds, idlers or deviants. These children are routinely held in police custody for being idle and disorderly, despite detention being a measure of last resort and the Children Act specifically decriminalising sections 167 and 168 of the Penal Code in respect of children. These mass arrests violate the rights under the African Charter and the Child Rights Charter.

60. Refugees who have faced conflict and endured long journeys to reach Uganda, are often forced into activities such as street vending and waste picking because of discrimination and language barriers. They also often spend long periods sleeping on the streets. They accordingly face frequent threats of arrest and detention under section 168 of the Penal Code.[65]

The response of the judiciary to vagrancy laws in Africa

61. Courts in Africa have also expressed concern about colonial era laws that contravene human and peoples' rights and principles of criminal law.

62. In Kenya, the 1944 Limitation of Labour Regulations Act criminalised unregistered inhabitants in the cities, and between 1945 and 1946, 8388 people were arrested and either conscripted, forced into work or removed. This law was declared *ultra vires* by the Kenya Supreme Court in 1945 but replaced with other legislation shortly thereafter.[66]

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[63] Ombudsman Namibia, 2013 Baseline Study Report on Human Rights in Namibia, p 65, https://www.ombudsman.org.na/wp-content/uploads/2016/09/Baseline_Strudy_Human_Rights_2013.pdf.
[64] Human Rights Awareness and Promotion Forum (2016) "The Implications of the Enforcement of 'Idle and Disorderly' Laws on the Human Rights of Marginalised Groups in Uganda"; Human Rights Watch (2014) "Where Do You Want Us to Go? Abuses against Street Children in Uganda".
[65] "Upholding the rights of urban refugees in Uganda" *IIED Briefing*, September 2017.
[66] Andrew Burton and Paul Ocobock "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).

63. In Tanganyika, a magistrate declared a vagrancy law *ultra vires* in 1941 and ruled that the by-law was "unjust and oppressive".[67] A subsequent 1944 Township (Removal of Undesirable Persons) Ordinance however has survived to the present day and numerous children and adults have been arrested as vagrants under its provisions.[68]

64. The High Court of Kenya in *Anthony Njenga Mbuti and 5 Others v Attorney General and 3 Others*, concluded that the State blatantly disregarded the "inherent dignity" of all people by subjecting them to the Peace Bond provisions that have their roots in 11th century British criminal procedure.[69] The Court also reasoned that subjecting people to such dated procedures prohibit due process and equal protection under the Constitution.[70] The Court considered the Peace Bond provisions to be a class of crimes that subject citizens to inhuman and degrading treatment primarily due to the fact that there is no evidence of an actual crime being committed. As such, constitutional safeguards have been negated.[71]

65. The High Court of Malawi in the case of *Mayeso Gwanda v State* considered the constitutionality of the offence of being a rogue and vagabond and noted that "most of the colonies and protectorates have new constitutional orders and thus it is argued that theses vagrancy laws are now dated."[72] The Court held that the offence was unconstitutional and violated a range of human rights.[73]

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[67] Justice McRoberts explained that the law rendered "any African… subject to expulsion without process of law, without appeal, and without lawful reason and thereby represented a gratuitous interference with the rights of the subject who is entitled to travel where he will throughout the country, and to use the public roads for passage wherever they are established." Andrew Burton and Paul Ocobock "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).

[68] Section 3 of the Ordinance describes "undesirable persons" as those who loiter, those who are rogues and vagabonds, those who have no settled home within the area, no employment or reputable means of livelihood. Mkombozi Centre for Street Children "Police Round-Ups of Street Children in Arusha are Unjust, Unconstitutional and Undermine the United Republic of Tanzania Constitution and the Rule of Law" (2005).

[69] [2015] Constitutional Petition No 45 of 2014, at para 21.

[70] At para 66.

[71] *Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others* [2015] Constitutional Petition No 45 of 2014, at para 149.

[72] *Mayeso Gwanda v State* [2017] MWHC 23, Per Mtambo J, at 6. ("Obviously, it could never be a crime for one to be merely dishonest or unscrupulous or a wandering person without a fixed place of abode and no more. This is so because for a criminal offence to be present, one must commit an unlawful act (*actus reus*) and have a guilty mind (*mens rea*).")

[73] *Mayeso Gwanda v State* [2017] MWHC 23, Per Kalembera J. ("What evidence was there that the applicant intended to commit an offence?... there was no investigation, there was no evidence that the applicant intended to commit an offence or an illegality… His dignity was violated. He was presumed guilty until proven otherwise. All because he possibly appeared to be of no means. He was not treated as a human being. And where a person's dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual's human rights end up being violated.")

66. Also in Malawi, the High Court has held in a different case that "it is not an offence for any person to enjoy the freedom, peace and calm of the country and walk about in public places, be it aimlessly and without a penny in their pocket. One does not commit an offence by simply wandering about."[74]

67. The Malawi High Court in *Brown v Republic*,[75] considered a case where an unemployed person staying at a trading centre was sentenced for being a rogue and vagabond:

> *"It is not an offence merely to be found, during the night, on or near a road, highway, premises or public place. An unemployed or homeless person may be found sleeping on the veranda of public premises or beside a road or highway. He could be found loitering or sleeping at a marketplace or in a school building, just because he is poor, unemployed and homeless. It would be wrong and unjust to accuse such person of committing an offence under section 184(1)(c)."*

ARTICLE 24 OF THE CONSTITUTION

68. Article 24 of the Constitution is entitled "respect for human dignity and protection from inhuman treatment". It states that "no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment."

The right to dignity

69. Read with Article 45 of the Constitution which provides that the rights specifically mentioned in the Constitution "shall not be regarded as excluding others not specifically mentioned", it is clear that Article 24 explicitly entrenches the right to dignity.

70. The African Charter on Human and Peoples' Rights, adopted on 27 June 1981, in Article 4 provides: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

71. The African Charter in Article 5 provides: "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.

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[74] *Republic v Luwanja and Others* [1995] 1 MLR 217 (HC).
[75] MWHC Criminal Appeal No. 24 of 1996.

All forms of exploitation and degradation of man, particularly … cruel, inhuman or degrading punishment and treatment shall be prohibited."

72. In the case of *Purohit and Another v The Gambia*, the African Commission on Human and Peoples' Rights (hereinafter referred to as the 'African Commission') held that:

> *"[H]uman dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right."*[76]

73. In addition to being a substantive right, dignity is also an underlying constitutional principle. In this regard, the South African Constitutional Court in *Dawood v Minister of Home Affairs*[77] held that human dignity informs constitutional adjudication in many ways: It is a value that informs the interpretation of other rights; it is a constitutional value central in analysis of limitation of rights; and it is a justiciable and enforceable right that must be protected and respected.

74. The South African Constitutional Court, in *S v Makwanyane and Another*[78] held that: "Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights…" [507A]

75. Many jurisdictions have elaborated on the importance of the presumption of innocence in upholding the right to dignity and protecting citizens from arbitrary arrests.[79]

76. The High Court of Kenya in *Anthony Njenga Mbuti and 5 Others v Attorney General and 3 Others*, concluded that the State blatantly disregarded the "inherent dignity" of all people by subjecting them to the Peace Bond provisions that have their roots in 11th century British

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[76] (2003) AHRLR 96 (ACHPR).
[77] 2000 (3) SA 936 (CC).
[78] 1995 (3) SA 391 (CC) *(abolished death penalty*, O'Regan J).
[79] *R v Oakes* [1986] 19 CRR 306, at page 322.

criminal procedure.[80] The Court also reasoned that subjecting people to such archaic procedures prohibit due process and equal protection under the Constitution.[81]

77. The Malawi High Court, considering the constitutionality of a rogue and vagabond offence, has held that arrests for behaviour that was not in fact criminal, amounted to inhumane and degrading treatment and violated the right to dignity:

> *"What evidence was there that the applicant intended to commit an offence?... there was no investigation, there was no evidence that the applicant intended to commit an offence or an illegality… His dignity was violated. He was presumed guilty until proven otherwise. All because he possibly appeared to be of no means. He was not treated as a human being. And where a person's dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual's human rights end up being violated."*[82]

78. The African Commission on Human and Peoples' Rights' Principles on the Decriminalisation of Petty Offences notes that "laws that criminalise petty offences have the effect of punishing, segregating, controlling and undermining the dignity of persons".[83]

79. In instances where specific groups of people are more at risk of being stopped, questioned and arrested by the police whilst going about their daily activities, each police stop becomes a demeaning and humiliating experience which makes people feel unwanted and distrustful of the police. It creates a situation where people live in fear of being stopped when they go about their daily activities and alienates the police from the community.[84]

80. In considering a similar offence, the African Court has held that an offences such as sections 168(1)(c) and (d) of the Uganda Penal Code violate the right to dignity in a number of ways, including in its degrading connotations, the manner in which it is enforced, and the disregard it has for persons attempting to sustain themselves:

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[80] [2015] Constitutional Petition No 45 of 2014, at para 21.
[81] At para 66.
[82] *Mayeso Gwanda v State* [2017] MWHC 23, per Kalembera J.
[83] Preamble of Principles.
[84] *Floyd and Others v the City of New York* 08 Civ. 1034 (SAS), 2013.

"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 largely colonial perception of individuals without any rights and their use dehumanises and degrades individuals with a perceived lower status.[85]

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." Consequently, the Court finds that vagrancy laws are incompatible with the notion of human dignity as protected under Article 5 of the Charter. [86]

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. [87]

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." [88]

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[85] Advisory Opinion of the African Court on Human and Peoples' Rights, No. 1/2018, 4 December 2020, para 79.
[86] Advisory Opinion of the African Court on Human and Peoples' Rights, No. 1/2018, 4 December 2020, para 80.
[87] Advisory Opinion of the African Court on Human and Peoples' Rights, No. 1/2018, 4 December 2020, para 81.
[88] Advisory Opinion of the African Court on Human and Peoples' Rights, No. 1/2018, 4 December 2020, para 82.

Inhuman and degrading treatment

81. Uganda's prisons are known for being overcrowded, and offences such as those in section 168 of the Penal Code have contributed to such overcrowding.[89] Despite calls for persons not to be arrested under vagrancy laws, sweeping exercises continue.[90] Overcrowding has also significantly contributed to the spread of communicable diseases in prison.[91]

82. Prison overcrowding has several implications for the discussion at hand:

    82.1. Detention for victim-less, minor offences have a direct impact on increasing prison overcrowding, even if the person is only detained for a few days or months. It impacts both the person arrested, and the conditions faced by existing prisoners.

    82.2. Repealing vagrancy-related offences will consequently have a positive impact on the prison population and the conditions in prisons.

    82.3. As a result of existing high rates of overcrowding, imprisonment for vagrancy-related offences constitutes a disproportionate measure which cannot be said to be a reasonable limitation of the rights to freedom and security of the person, to dignity, to freedom from inhumane and degrading treatment or punishment, and the right to health.

    82.4. The rates of pre-trial detention remain a concern in many countries in Africa and is partly affected by the criminal justice system's failure to conduct criminal investigations and trials speedily. Removing minor petty offences from the ambit of the criminal justice system could increase the resources available to police for investigative work, reduce the backlogs faced by the courts, result in the speedier processing of pre-trial detainees and have a positive impact on prison overcrowding.

83. The *Kampala Declaration's Plan of Action* has called on governments to review penal policies and reconsider the use of prisons to prevent crime.[92] Given the inhumane

[89] https://www.prisonstudies.org/country/uganda
[90] Consortium for Street Children and Save Street Children Uganda, "Housing discrimination, spatial segregation and children in street situations", May 2021.
[91] United States Department of State 2019 Report on Uganda.
[92] Adopted at the Kampala Seminar on Prison Conditions in Africa, September 1996, at para 3. "In many developing countries, there is concern about an increased rate of crime. An understandable response is to send more people to prison, resulting in increased prison populations. This response has little effect on rates of crime.

conditions in prisons for both prisoners and staff, the Declaration concluded that the over-use of imprisonment does not serve the interests of justice, does not protect the public, and is not a good use of scarce public resources.[93]

84. As part of the increased recognition of the need to reduce the use of imprisonment, the *United Nations Standard Minimum Rules for Non-Custodial Measures*[94] called on States to "rationalise criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender".[95] The Rules emphasise that "pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim."[96]

85. The *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa* accordingly recommended the "decriminalisation of some offences such as being rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents."[97]

86. Following in the Ouagadougou Declaration, the African Commission on Human and People's Rights' *Principles on the Decriminalisation of Petty Offences* notes that "petty offences are inconsistent with the right to dignity and freedom from ill-treatment on the basis that their enforcement contributes to overcrowding in places of detention or imprisonment."[98] It went further to note the Commission's concern with the adverse socio-economic impact of the enforcement of petty offences, including: "the imposition of fines on persons without means to pay, prolonged or arbitrary pre-trial detention, harassment by law enforcement officials, the economic and social cost to the families of people in detention, adverse health consequences from conditions of detention, and potential criminal records, which further entrench the marginalisation and burden of people living in poverty."

The majority of detainees are in pre-trial detention for petty crimes or serving short terms of imprisonment…" (para 3).

[93] The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), United Nations General Assembly Resolution A/RES/70/175 of December 2015.

[94] United Nations General Assembly Resolution 45/110 of December 1990.

[95] Rule 1.5.

[96] Rule 6.1.

[97] Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa, African Commission 34th Ordinary Session, November 2003.

[98] Section 7.

THE SHORTFALLS OF THE CRIME PREVENTION ARGUMENT

87. Article 43(2)(c) of Uganda's Constitution provides that the limitation of fundamental rights based on public interest, shall not permit: "any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."

88. It is useful to take note of the words of Ntaba J in *Gwanda*, where she held:

> *"Let me state that the rule of law is the tenet of the Malawian constitutional law and indeed Malawian constitutional democracy should always be upheld and should not be compromised merely in the name of public safety or preventive policing."*

89. Whilst crime prevention is a legitimate government objective, any measures proposed to deal with this objective should be well researched and not be arbitrary, unfair or based on irrational considerations.[99]

90. Crime prevention is a complex issue with no easy solutions. The United Nations Office on Drugs and Crime (UNODC) notes in its *Introductory handbook on policing urban space* (2011):

> *"High levels of urban growth and inadequate services coupled with recent political transitions sometimes lead to rising crime rates and calls from various groups for more repressive policing. All too often, beleaguered police fall back on repressive policing strategies to allay demands from political leaders or the population. Inevitably, however, repressive policing tends to have the effect of achieving, at best, short-term reductions in crime and of alienating much of the population from the police. Repressive efforts further corrode law enforcement, making it harder for police to enforce the law in the future."*

[99] See BE Harcourt "Punitive Preventive Justice: A critique" *Chicago Institute for Law and Economics Working Paper* No. 599 (2012), 10 (in A Ashforth & L Zedner (eds), 2014, *Preventive Justice*, Oxford University Press).

91. The Guidelines for the Prevention of Crime (ECOSOC Resolution 2002/13) emphasise the use of a knowledge base as one of the basic principles underlying effective crime prevention strategies:

> *"Crime prevention strategies, policies, programmes and actions should be based on a broad, multidisciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices" (para 11).*

92. The types of knowledge required include knowledge about the incidence and prevalence of crime-related problems; knowledge about the causes of crime and victimisation; knowledge about existing policies and good practices; and knowledge about the process of implementing programmes and measuring their outcomes and impacts.[100]

93. In 2010, the *United Nations' Salvador Declaration* again emphasised that crime prevention strategies should be based on the **best available evidence** and good practices.

94. In 2015, the *United Nations' Doha Declaration on Integrating Crime Prevention and Criminal Justice* recognised the importance of **effective, fair, humane and accountable crime prevention strategies** as a central component to rule of law, which should be implemented "along with broader programmes or measures for social and economic development, poverty eradication, respect for cultural diversity, social peace and social inclusion" (section 3). To achieve this, the Doha Declaration emphasised the need to: "Adopt comprehensive and inclusive national crime prevention and criminal justice policies and programmes that fully take into account **evidence** and other relevant factors, including the **root causes of crime**, as well as the conditions conducive to its occurrence, and in accordance with our obligations under international law and taking into consideration relevant United Nations standards and norms in crime prevention and criminal justice, to ensure appropriate training of officials entrusted with upholding the rule of law and the protection of human rights and fundamental freedoms" (section 5).

95. Crime prevention has been shown to work in several instances, including where police corruption is reduced; direct patrol in crime hot spots; problem-oriented policing;

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[100] See UNODC *Handbook on the crime prevention guidelines – making them work*, 2010, at pages 50-54.

community policing with a clear focus; and improving police legitimacy with the community. The UNODC emphasises that the bedrock of crime reduction and prevention includes respect for human rights; political will; an assumption that all accused persons are innocent until proven guilty; an evidence base for decisions; and police forces that realise they must work with the community to prevent crime.[101]

96. Arrest practices applied broadly against offenders committing minor offences has not proved to lead to reductions in serious crime; and the rights violations occasioned by arrests requires strategies where arrest is only used as a last resort.

97. The arrests which relate to suspicious as opposed to actual conduct, are a strain on the resources of police, courts and prisons. Thus, it cannot be shown that the alleged deterrent effect of the sweeping exercises outweighs the negative impact it has on the functioning of the justice system and its ability to address serious crimes.

98. The UNODC in its *Handbook on strategies to reduce overcrowding in prisons* (2013) explains the result of punitive criminal justice policies:

> *"When poverty and lack of social support to the disadvantaged are combined with a 'tough on crime' rhetoric and policies which call for stricter law enforcement and sentencing, the result is invariably a significant increase in the prison population. Sometimes described as warehousing, the increased population typically comprises an overrepresentation of the poor and marginalised, charged with petty and non-violent offences. Although unrelated to crime rates, this situation is fuelled by media stories which promote tough action to combat crime despite the absence of evidence to demonstrate the link between rates of imprisonment and crime rates" (page 25).*

99. Often the objective of sweeping exercises is to assure the public that sufficient attention is paid to crime prevention. However, people find themselves imprisoned or detained in potentially life-threatening conditions, especially in cases where they cannot afford bail or a fine, even when there is no proof of an actual offence having been committed.

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[101] See UNODC, *Handbook on planning and action for crime prevention in Southern Africa and the Caribbean regions* (2008).

100. The UN Special Rapporteur on Extreme Poverty and Human Rights in 2011 noted that overly broad police powers "increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials."

101. The African Commission on Human and People's Rights in its Principles on the Decriminalisation of Petty Offences in Africa notes that "laws which allow for arrest and imprisonment for petty offences can be a disproportionate measure which is contrary to the principle of arrest as a measure of laws resort and may work against public health principles" (section 11.2.4). The Principles further note that "the enforcement of petty offences may also be inconsistent with the right to dignity and freedom from ill-treatment if the enforcement involves mass arrest operations" (section 9).

102. The African Court, in its Advisory Opinion found that there is no evidence that vagrancy is equivalent to criminality; loitering or idling on the streets does not suggest a likelihood to commit a crime; and there is no evidence that vagrancy laws prevent crimes in public places.[102]

THE ADVISORY OPINION OF THE AFRICAN COURT

103. PALU and SALC note that offences similar to sections 168(1)(c) and (d) of the Penal Code have recently been established to violate 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, all treaties to which Uganda is bound.

104. The African Court's Advisory Opinion concluded that vagrancy laws violate a range of fundamental rights protected under the African Charter: The right to non-discrimination and equality; the right to dignity; the right to liberty; the right to a fair trial; the right to freedom of movement; the right to protection of the family.

[102] K Dinesh et al "Re-examining Legal Narrative on Vagrancy, Public Spaces and Colonial Constructs: A Commentary on the ACHPR's Advisory Opinion on Vagrancy Laws in Africa" *Law & Informality Insights* No. 4, WIEGO (2021).

105. The Advisory Opinion also held that vagrancy laws violated children's right to non-discrimination; a fair trial; and to have the best interests of the child protected, as required by the African Charter on the Rights and Welfare of the Child.

106. Finally, the Advisory Opinion concluded that vagrancy laws violates Article 24 of the Maputo Protocol, which requires the protection of poor and marginalised women.

107. Since Uganda has ratified all these regional human rights treaties, a finding by the African Court that sections 168(1)(c) and (d) of the Penal Code violate these treaties, should assist this Honourable Court in its deliberating on whether the same provisions in Uganda's Constitution are violated by these offences.