A Human Rights-Based Approach to Criminal Law, Including the Decriminalization of Conduct Associated with Poverty and Status

A PRACTITIONERS' GUIDE

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icj International Commission of Jurists

IC=S INSTITUTE OF COMMONWEALTH STUDIES | SCHOOL OF ADVANCED STUDY UNIVERSITY OF LONDON

The Commonwealth

DECRIMINALISE POVERTY & STATUS

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The Commonwealth Secretariat is the intergovernmental organisation that supports the Commonwealth's 56 member countries to achieve the Commonwealth's aims of development, democracy, and peace. Its mission is to support member governments, partner with the broader Commonwealth family and others to improve the well-being of all Commonwealth citizens, and to advance their shared interests globally.

The Global Campaign to Decriminalise Poverty and Status is a coalition of organisations from across the world that advocate for the repeal of laws, reform of policies and change in practices that target people based on poverty, status or for their activism.

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Acknowledgments

The **Global Campaign to Decriminalise Poverty and Status** is a coalition of organisations from across the world that advocate for the repeal of laws, reform of policies and change in practices, that target people based on poverty, status or for their activism. This Practitioners' Guide, a collaborative effort between the International Commission of Jurists (ICJ) and the Institute of Commonwealth Studies (ICwS) – both proud members of the Campaign, as well as the Commonwealth Secretariat (ComSec) – provides a valuable tool for legal practitioners across the Commonwealth. It represents a key component of the Campaign's broader efforts to achieve justice and equality for all.

This Practitioners' Guide was written and researched by Daron Tan, with legal review by Livio Zilli. Professor Kingsley Abbott and ICJ Commissioner, Justice Aruna Devi Narain, made crucial substantive contributions to the review of the Guide. The Guide has been greatly informed by the contributions of the participants of several consultations jointly organized by the ICJ, the ICwS and the ComSec on applying a human rights-based approach to criminal law. The participants included judges, lawyers and civil society representatives from across Africa, Asia, the Caribbean and Latin America. The provision of input and advice by these persons does not imply their endorsement of the Guide's content, for which the authors remain solely responsible.

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Introduction

1. BACKGROUND

In criminal justice systems around the world, including within the Commonwealth,[1] marginalized individuals and groups are disproportionately represented among "criminal suspects" and "offenders". Individuals experiencing poverty and homelessness are criminalized through "petty", "minor" offences, such as the criminal proscription of loitering, begging, informal trading, sleeping rough, vagrancy, littering and inability to pay civil debts.

Enforcement of these "offences" clogs up criminal justice systems worldwide, causing unsustainable case backlogs, without addressing the root causes of poverty or homelessness. Uneven enforcement – resulting from profiling and discrimination by law enforcement agencies and the challenges navigating the criminal justice system – have further exacerbated the overrepresentation of already marginalized individuals and groups within society among those who are criminalized. These people, especially those who experience discrimination on multiple and intersecting grounds, are disproportionately impacted by the criminalization of certain conduct associated with poverty, homelessness and status, further entrenching existing structural inequalities and marginalization.

At the heart of this problem is the unjustified criminalization of individuals and sometimes entire communities, through laws that wrongfully treat poverty, homelessness and status as a crime. These laws target or disproportionately impact people based on their social, political or economic status, in a manner that detrimentally affects persons belonging

[1] For the full list of the 56 countries who are members of the Commonwealth, please see, The Commonwealth, "Member countries", available at: https://thecommonwealth.org/our-member-countries.

to already marginalized or disadvantaged groups. As such, the criminal proscription of certain conduct, including those associated with poverty, homelessness and status, is not in conformity with general principles of criminal law and international human rights law and standards.

Many of these criminal laws, penalizing conduct associated with poverty, homelessness and status, are rooted in, embody and codify unequal power relations that stem from the legacy of colonial occupation. For instance, across the Commonwealth, many countries have retained laws criminalizing vague concepts, such as being a "vagrant", a "rogue", a "vagabond" and so forth, which were introduced during colonial occupation and were based on the English Vagrancy Act of 1824.[2] Post-independence, many countries also enacted penal laws adopting similar language or intents, with the aim of segregating and controlling the use of public spaces.

Together with the Institute of Commonwealth Studies (ICwS) and the Commonwealth Secretariat (ComSec), the International Commission of Jurists (ICJ) held several rounds of in-person consultations on applying a human rights-based approach to criminal law with various stakeholders, including judges, lawyers and civil society representatives from across Africa, Asia, the Caribbean and Latin America. The content and scope of this Practitioners' Guide has been enriched by the deep insights and expertise from the generous sharing of the participants in these consultations.[3]

These consultations followed a presentation in March 2024 on the need to decriminalize conduct associated with poverty, homelessness and status at the biennial Commonwealth Law Ministers Meeting in Zanzibar, Tanzania.[4] This presentation, in turn, followed commitments made by

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2 UN Human Rights Council, *Breaking the cycle: ending the criminalization of homelessness and poverty: Report of the Special Rapporteur on extreme poverty and human rights*, UN Doc. A/HRC/56/61/Add.3, 26 June 2024 ("UN Doc. A/HRC/56/61/Add.3"), para. 21.

3 ICJ, "A human rights-based approach to criminal law: Africa regional consultation", 12 June 2024, available at: https://www.icj.org/a-human-rights-based-approach-to-criminal-law-africa-regional-consultation/. See, also, ICJ, "Asia and Caribbean regional consultation: A human rights-based approach to criminal law", 11 September 2024, available at https://www.icj.org/asia-and-caribbean-regional-consultation-a-human-rights-based-approach-to-criminal-law/.

4 ICwS, "Commonwealth Law Ministers Meeting: decriminalise poverty and status", 7 March 2024, available at: https://commonwealth.sas.ac.uk/news/commonwealth-law-ministers-meeting-decriminalise-poverty-and-status.

the Commonwealth Heads of Government Meeting (CHOGM) in Rwanda in June 2022 to "fully implement laws that promote and protect inclusion, to eliminate discriminatory laws, policies and practices, and to promote appropriate legislation, policies and action", in pursuit of Sustainable Development Goals (SDGs) 10 (reduced inequalities) and 16 (peace, justice and strong institutions).[5]

2. PURPOSE AND STRUCTURE OF THE PRACTITIONERS' GUIDE

This Practitioners' Guide addresses the global growing trend towards wrongful overcriminalization of conduct associated with poverty, homelessness and status by presenting a human rights-based approach to criminal law, based on general principles of criminal law and international human rights law and standards. This approach can be used to address the detrimental impact of the criminalization of this conduct on health, equality and other human rights.

The Practitioners' Guide aims to serve as a reference and practical guide to justice sector actors and others – such as legislatures, government officials, policy-makers, national human rights institutions, oversight bodies, victims' groups, human rights advocates, civil society organizations and academics – offering a clear, accessible and operational legal framework and practical legal guidance on a human rights-based approach to criminal law.

The Practitioners' Guide is split up into four chapters and draws extensively on international, regional and domestic laws, policies and practices in relation to the criminalization of conduct associated with poverty, homelessness and status:

- **Chapter I** sets out what a human rights-based approach to criminal law is by explaining what the general principles of criminal law and international human rights law and standards are, and by providing concrete examples to demonstrate how these principles may be applied in practice.

[5] The Commonwealth, "Communique of the Commonwealth Heads of Government Meeting "Delivering A Common Future: Connecting, Innovating, Transforming", 25 June 2022, para. 19, available at: https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2022-06/CHOGM%202022%20Communique.pdf?VersionId=sqWEwpE4gyzg8wIdTCoPO0yQgVNZ7Izy.

- **Chapter II** maps out the relevant international and regional human rights law and standards in relation to the criminalization of conduct associated with poverty, homelessness and status. These laws and standards can and should be cited, as authoritative sources of law, by practitioners in their legal advocacy and reform initiatives.

- **Chapter III** will assist practitioners in identifying and analyzing the laws that are used to criminalize conduct associated with poverty, homelessness and status. It draws on examples from various jurisdictions to demonstrate the application of a human rights-based approach to criminal law, including by showing how, for example, "vagrancy laws" in specific countries are generally incompatible with a human rights-based approach to criminal law. The chapter then compiles emblematic domestic legal developments and jurisprudence from around the world, which can serve as a comparative law casebook for practitioners pursuing legal reform and advocacy efforts in their respective jurisdictions.

- **Chapter IV** provides concrete suggestions on the pivotal roles that lawyers, judges, prosecutors, law enforcement officials, legislators, policymakers, national human rights institutions and civil society can play in dismantling legal frameworks and practices that unjustly criminalize conduct associated with poverty, homelessness and status.

While many of the examples featured in this Practitioners' Guide are drawn from countries in the Commonwealth, due to their shared colonial legacies, the examples are not limited solely to countries that are former British colonies, in order to reflect the global trend of the overcriminalization of conduct associated with poverty, homelessness and status.

This Practitioners' Guide is thus timely in providing a tool for practitioners to pursue legal advocacy and reform efforts for the review and repeal of discriminatory criminal laws that are antithetical to human rights and the rule of law.

CHAPTER I

CRIMINAL LAW PRINCIPLES AND INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

This chapter sets out general principles of criminal law and international human rights law and standards to provide a clear, accessible and workable legal framework on applying a human rights-based approach to criminal law proscribing various forms of conduct, including conduct associated with poverty and status.[6]

The general principles of criminal law and international human rights law and standards outlined in this chapter and referred throughout this Practitioners' Guide reiterate or reflect: (i) existing general principles of criminal law; (ii) international human rights law, including customary and treaty law; (iii) judicial decisions; (iv) national law and practice; and (v) legal scholarship in accordance with accepted practice and Article 38 of the Statute of the International Court of Justice. They do not establish new elements of international law. Rather, they are drawn from, and restate, existing criteria under general principles of criminal law and international human rights law and standards, with the aim of clarifying a human rights-based approach to criminal law.

Taking a human rights-based approach to criminal law aims to address the detrimental impact of the application of criminal law to certain forms of conduct on health, equality and other human rights. This includes conduct associated with, *inter alia*, homelessness and poverty; sexual and reproductive health and rights; abortion; consensual sexual conduct; sex work; sexual orientation, gender identity and gender expression; HIV non-disclosure, exposure or transmission; drug use and the possession of drugs for personal use.

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[6] The human rights-based approach outlined below elaborates on the ICJ's *The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, or the 8 March Principles for short. The 8 March Principles seek to offer a clear, accessible and workable legal framework – as well as practical legal guidance – on taking a human rights-based approach to criminal law. ICJ, *The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty,* March 2023, ("ICJ, The 8 March Principles"), available at: https://www.icj.org/wp-content/uploads/2023/03/Principles-Report_English.pdf; ICJ, "ICJ publishes a new set of legal principles to address the harmful human rights impact of unjustified criminalization of individuals and entire communities", 8 March 2023, available at: https://www.icj.org/resource/icj-publishes-a-new-set-of-legal-principles-to-address-the-harmful-human-rights-impact-of-unjustified-criminalization-of-individuals-and-entire-communities/.

More broadly, applying a human rights-based approach to criminal law may also assist in addressing the question of which conduct should or should not be criminalized, as well as whether the content and scope of a given criminal law provision or a penalty under other legal instruments are consistent with general principles of criminal law and international human rights law and standards.[7]

1. GENERAL PRINCIPLES OF CRIMINAL LAW

General Part I of *The 8 March Principles* reflects the criteria that must be met under general principles of criminal law to proscribe certain conduct in a non-discriminatory way, respecting the rule of law.

The principles in General Part I of *The 8 March Principles* are reproduced in full below:

[7] A human rights-based approach to criminal law may assist "in considering the compliance of [certain] criminal offences … with general principles of criminal law and international human rights law and standards, such as, for example, those proscribing: apostasy; blasphemy; truancy; defamation; libel; propaganda; public nuisance; loitering; vagrancy; immorality; public indecency; same-sex marriage; the promotion of homosexuality; obscenity and sexual speech; certain kinds of pornography; non-exploitative surrogacy; certain harmful practices; migration-related infractions; the provision of humanitarian assistance; acts of solidarity; and certain types of civil disobedience." Furthermore, a human rights-based approach to criminal law, as reflected in and expounded by the 8 March Principles, may "also be helpful in determining whether other penalties, under other legal instruments, are in compliance with international human rights law and general principles of criminal law. These include penalties enshrined in subsidiary legislation (*e.g.*, regulations, rules, guidelines), disciplinary laws, civil laws, by-laws, administrative laws and regulations (*e.g.*, zoning, curbing) and mental health commitment laws, among others. These laws and regulations, while not necessarily characterized as criminal under domestic law, have an analogous punitive character or stigmatizing intent or effect, given the severity of the penalty or other adverse impacts that the person concerned risks incurring. The nature, duration or manner of execution of certain sanctions – such as fines, asset forfeiture, civil commitment of people with disabilities, mandated drug or other medical treatment, deportation and administrative removals, removal of parental authority – may also be evidence of their punitive, quasi-criminal character." See, ICJ, The 8 March Principles, pp. 7 – 8.

General Part I: Basic Principles of Criminal Law

Principle 1 – Principle of Legality

No one may be held criminally liable for any act or omission that did not constitute a criminal offence, under national or international law, at the time when such conduct occurred. The principle of legality also requires that the law be publicly and sufficiently accessible and the criminal liability foreseeable and capable of being clearly understood in its application and consequences. Thus, crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence with a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is not criminally proscribed.

Criminal law must not proscribe any act or omission in terms that are vague, imprecise, arbitrary or overly broad.

Criminal law must not be construed broadly to an accused person's disadvantage. In the case of ambiguity, the definition of a particular offence should be interpreted in favour of the accused.

Principle 2 – Harm Principle

Criminal law may only proscribe conduct that inflicts or threatens substantial harm to the fundamental rights and freedoms of others or to certain fundamental public interests, namely, national security, public safety, public order, public health or public morals. Criminal law measures justified on these grounds must be narrowly construed, and the assertion of these grounds by the State must be continuously scrutinized.

Principle 3 – Individual Criminal Liability

No one may be held criminally liable for any act or omission except on the basis of their individual criminal liability for such conduct.

Principle 4 – Voluntary Act Requirement

No one may be held liable for a criminal offence unless that person has engaged in a voluntary act or omission as defined in that offence. Criminal liability may not be based on thoughts, intentions, beliefs or status alone.

Principle 5 – Mental State Requirement

No one may be held liable for a criminal offence unless that person has committed the material elements of that offence with the mental state required in the definition of the offence, such as intent, purpose, knowledge, recklessness, or criminal negligence. Every criminal offence that is punishable with deprivation of liberty must include a mental state requirement with respect to each material element.

Principle 6 – Grounds for Excluding Criminal Liability

No one may be held criminally liable for an offence if that person has a lawful defence for their conduct, including that the conduct is justified or excused, such as by reason of necessity, self-defence or duress.

To illustrate how a human rights-based approach can assist in analyzing the compliance or otherwise of the criminalization of certain conduct with general principles of criminal liability, consider, for example, the criminal proscription of "loitering" by being deemed an "idle and disorderly person" in Sierra Leone under section 7 of the Public Order Act of 1965.

Sierra Leone: Proscription of "Loitering"

Section 7 of the Public Order Act ("idle and disorderly persons") states: "Any person loitering in or about any stable house or building, or under any piazza, or in the open air, and not having any visible means of subsistence, and not giving a good account of himself, shall be deemed an idle and disorderly person, and shall, on conviction thereof, be liable to imprisonment for any period, not exceeding one month".[8]

Section 7 is inconsistent with several general principles of criminal law:

Principle 1 (Principle of Legality): The provision employs vague, imprecise, arbitrary and overly broad language, such as "loitering", "not having any visible means of subsistence", "not giving a good account of himself", and "idle and disorderly", terms that are left undefined.

[8] Section 7, The Public Order Act, 1965, available at: https://www.sierra-leone.org/Laws/1965-46s.pdf.

Principle 2 (Harm Principle): Neither the act of "loitering", in and of itself, nor being "deemed an idle and disorderly person" inflicts or threatens substantial harm to the fundamental rights and freedoms of others, or to fundamental public interests, namely, national security, public safety, public order, public health or public morals. It is not clear either how the other constitutive elements of the provision ("not having any visible means of subsistence", and "not giving a good account of himself") inflict or threaten substantial harm.

Principle 4 (Voluntary Act Requirement): The criminal prohibition on being "idle and disorderly" also criminalizes a person based on their status of "not having any visible means of subsistence" and "not giving a good account of himself", instead of a voluntary act or omission.

Principle 5 (Mental State Requirement): Section 7 is also silent on the mental state required with respect to the commission of the "offence", in spite of the "offence" being punishable with a term of imprisonment of up to one month. The provision does not specify the *mens rea* – be it intent, purpose, knowledge, recklessness, or criminal negligence – and criminal liability, therefore, appears to be based on status alone, as mentioned above.[9]

Principle 6 (Grounds for Excluding Criminal Liability): For a person experiencing homelessness, being in a public space (or "loitering" in a public space) may be considered a necessity, if there are no

[9] See, for instance, the Hungarian Constitutional Court's decision [38/2012 (XI. 14.)], in relation to the Petty Offences Act and its criminalization of using public spaces for anything "different than its original destination": "Moreover, the Court determined that for a petty offence violation the offender must demonstrate intention or negligence. Homelessness was deemed a social condition that lacks attributable subjective fault." *Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* Reference OL HUN 4/2018, 20 June 2018, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/OL_HUN_4_2018.pdf, citing the Decision of the Constitutional Court [38/2012 (XI. 14.)], available at: http://public.mkab.hu/dev/dontesek.nsf/0/1C19F4D0CFDE32FBC1257ADA00524FF1?OpenDocument.

reasonable alternatives or resources available.[10] The enforcement of the law in Sierra Leone appears to indicate that the defence of necessity has not been applied to exclude criminal liability for those charged and/or convicted for being an "idle and disorderly" person.

Among other things, Principle 21 of *The 8 March Principles*, which is an application and reflection of general principles of criminal law, as well as international human rights law and standards,[11] makes clear that no one may be held criminally liable "on the basis of their employment or means of subsistence or their economic or social status, including their lack of a fixed address, home or their experiencing homelessness in practice".

Section 7 of the Public Order Act of Sierra Leone is now the subject of an ongoing legal case seeking to challenge the law that has been filed at the Court of Justice of the Economic Community of West African States (ECOWAS) against the Sierra Leone.[12]

Considering the compatibility with general principles of criminal law and international human rights law and standards of the criminalization of consensual same-sex sexual conduct, with 61 countries still retaining such criminal laws,[13] is another example to demonstrate how a human

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[10] See, for instance, the California Court of Appeal's decision in *In re Eichorn*, 81 Cal. Rptr. 2d 535, 540 (Ct. App. 1998), where the Court found that a man experiencing homelessness should be allowed to assert the defence of necessity for violating the City of Santa Ana's anti-camping ordinance. See also, the Delhi High Court's decision of *Ram Lakhan vs State 137 (2007) DLT 173* on 5 December 2006, available at: https://indiankanoon.org/doc/434096/, in relation to the detention of a person allegedly found begging in a "Certified Institution" ("… he ought not to be ordered to be detained if, in considering his condition and circumstances of living as required under Section 5 (6) of the said Act, the court discerns a defense of necessity; a situation where the person had no legitimate alternative to begging to feed and clothe himself or his family. Similarly, where it is apparent that the person was found begging under the exploitative command of others, he ought not to be deprived of his liberty by being sent to a Certified Institution for detention.")

[11] Principle 21 of the 8 March Principles will be set out fully in Chapter II.

[12] Campaign to Decriminalise Poverty & Status, "Court case filed against Sierra Leone to overturn discriminatory loitering laws", 3 May 2022, available at: https://decrimpovertystatus.org/court-case-filed-against-sierra-leone-to-overturn-discriminatory-loitering-laws/.

[13] ILGA World, "ILGA World Database: Area 1, Legal Frameworks: Criminalisation of consensual same-sex sexual acts", available at: https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts.

rights-bases approach to criminal law works, in practice. With respect to this, relying on the legality and harm principles,[14] in particular, in 2018, the Supreme Court of India delivered its landmark decision, *Navtej Singh Johar v. Union of India*, which declared section 377 of the Indian Penal Code unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex".[15]

India: "Unnatural Offences" and Section 377 of the Indian Penal Code

Section 377 of the Indian Penal Code ("unnatural offences") stated:

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

In arriving at its decision to decriminalize consensual sexual conduct between adults of the same sex, the Supreme Court's reasoning relies on the legality and harm principles, two of the general principles of criminal law outlined above, in addition to its extensive discussion based on human rights law and standards. For instance, with respect to the harm principle, the Court noted that, "consensual sexual acts between adults in private space are neither harmful nor contagious to the society",[16] and the "organisation of intimate relations is a matter of complete personal choice especially between consenting adults".[17] Further, resorting, in turn, to the principle of legality for its analysis, the Court also observed that

[14] Worth noting is the famous debate between legal philosophers Lord Patrick Devlin (*The Enforcement of Morals*) and Professor H.L.A. Hart (*Law, Liberty and Morality*) between 1959 and 1965 on the relationship between morality and criminal law, in the context of the Wolfenden Report's proposal to decriminalize "homosexual behaviour between consenting adults in private" in the England and Wales. In his rebuttal to Lord Devlin, Professor Hart quotes John Stuart Mill's articulation of the harm principle in Mill's 1859 essay *On Liberty*: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

[15] *Navtej Singh Johar & Orts. v. Union of India thr. Secretary Ministry of Law and Justice*, 2018 INSC 790, para. 156(i), available at: https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf.

[16] *Ibid*., para. 239.

[17] *Ibid*., para. 240.

section 377 was overbroad because it "fails to make a distinction between consensual and non-consensual sexual acts between competent adults", and is thus "manifestly arbitrary".[18]

The application of these and the other abovementioned general principles of criminal law to specific criminal law provisions proscribing various types of conduct, particularly those criminalizing conduct associated with poverty, homelessness and status, will be demonstrated in greater detail in Chapter III.

2. CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

Principle 7 – Human Rights Restrictions on Criminal Law

Criminal law must be interpreted consistently with international human rights law. Criminal law may not restrict the exercise of any human right unless such a limitation is:

a) in accordance with the law – the principle of legality;
b) in pursuit of one of the limited and narrowly defined, legitimate fundamental public interests allowed under international human rights law, namely, for the protection of the fundamental rights and freedoms of others, national security, public safety, public order, public health or public morals;
c) strictly necessary to achieve these legitimate interests;
d) proportionate to the legitimate interest(s) it pursues, meaning that it must be the least intrusive or restrictive means to achieve the desired result;
e) appropriate to the legitimate interest(s) to be protected, including by being rationally and reasonably connected to it;
f) not arbitrary;
g) non-discriminatory; and
h) consistent with other rights recognized under international human rights law.

To the extent that criminal law measures restrict or impair the exercise of human rights, they must be narrowly construed. The State must go beyond merely asserting an interest in the protection of the fundamental rights and freedoms of others, national security,

[18] *Ibid*., para. 239.

public safety, public order, public health or public morals, including by showing concrete evidence of the necessity of a criminal law response to protect them, and its assertions must be continuously scrutinized.

The substantial harm that the proscribed conduct is said to inflict or threaten must be foreseeable and not unreasonably remote. To be proportionate, criminal law may be applied only as a last resort, where other less restrictive means of achieving the above-mentioned legitimate interests are insufficient.

Principle 8 – Legitimate Exercise of Human Rights

Except as in accordance with the permissible limitations set forth in principle 7, criminal law may not proscribe any conduct that is protected under human rights law, namely, because this conduct constitutes the legitimate exercise and enjoyment of human rights guaranteed under international or domestic human rights law.

Principle 9 – Criminal Law and Prohibited Discrimination

Criminal law may not, on its face or as applied, in substance or in form, directly or indirectly discriminate on any, including multiple and intersecting, grounds prohibited by international human rights law.

Prohibited grounds of discrimination include: age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; minority or other status.

Principle 10 – Criminal Liability May Not Be Based on Discriminatory Grounds

No one may be held criminally liable for conduct that does not constitute a criminal offence if committed by another person and where the criminalization of such conduct constitutes prohibited discrimination under international or domestic law.

Principle 11 – Limitations on Criminal Liability for Persons under 18 Years of Age

No one under the age of 18 may be held criminally liable for any conduct that does not constitute a criminal offence if committed by a person who is 18 or older.

Principle 12 – Criminal Law and Non-Derogable Human Rights

Criminal law may not, even in times of 'an emergency threatening the life of the nation', contravene the State's non-derogable human rights obligations under international human rights law.

Principle 13 – Criminal Law Sanctions

Criminal law sanctions must be consistent with human rights, including by being non-discriminatory and proportionate to the gravity of the offence. Custodial sentences may only be imposed as a measure of last resort.

These principles reflect or reiterate existing international human rights law and standards, and do not create new elements of international law. For example, Principles 7, 8, 9, 10 and 13 of *The 8 March Principles* reflect and reprise the nature and scope of the right to freedom of opinion, expression and information guaranteed under article 19 of the International Covenant on Civil and Political Rights (ICCPR).

Article 19 of the ICCPR provides: "1. Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice."[19] While under certain narrow circumstances, a State may restrict the right to freedom of expression and information, any such restrictions must be strictly limited in accordance with article 19(3) of the ICCPR, which provides:

> "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as

[19] Article 19(1) and (2), ICCPR.

> are provided by law and are necessary: a) For respect of the rights or reputations of others; b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

As such, to the extent that exercising the right to freedom of expression and information is a legitimate exercise and enjoyment of human rights (Principle 8 – Legitimate Exercise of Human Rights), article 19(3) of the ICCPR makes clear that any restriction or limitation on expression or information must meet certain narrow conditions (Principle 7 – Human Rights Restrictions on Criminal Law). This includes the conditions of legality (i.e. be "provided by law"), legitimate purpose (i.e., those listed in article 19(3)) and non-discrimination (Principles 9 and 10). Furthermore, any restriction must be necessary for one of the recognized legitimate purposes and must be proven as the least restrictive and proportionate means to achieve the purported aim (Principle 13 – Criminal Law Sanctions).[20]

To illustrate a human rights-based approach to criminal law, relying this time on human rights law and standards constraints on criminal law, as reflected in and expounded by the aforementioned principles in General Part II of *The 8 March Principles*, consider the proscription of "sedition" in section 124-A of Pakistan's Penal Code (Act XLV of 1860):

Pakistan: Criminalization of "Sedition"

Section 124-A of the Penal Code states: "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1: The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2: Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

[20] Article 19(3), ICCPR; UN Human Rights Committee, *General comment No. 34: Article 19: freedoms of opinion and expression,* UN Doc. CCPR/C/GC/34, 12 September 2011 ("UN Doc. CCPR/C/GC/34"), paras. 22 – 36.

Explanation 3: Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."[21]

Section 124-A of the Penal Code is inconsistent with several of the legal standards articulated in General Part II of *The 8 March Principles*:

Principles 7 and 8 (Human Rights Restrictions on Criminal Law, and Legitimate Exercise of Human Rights): To the extent that the proscribed conduct under section 124-A constitutes the exercise of the right to freedom of expression, any limitation on the expression, in the form of a prohibition through criminal law, must be in accordance with the narrowly construed standards articulated under Principle 7. However, section 124-A is inconsistent with the principles of legitimate purpose, legality, necessity, proportionality and non-discrimination.[22] For instance, the terms "hatred", "contempt", "excites or attempts to excite disaffection towards", "disloyalty" and "all feelings of enmity" are ambiguous and inconsistent with the principle of legality.

Principle 9 (Criminal Law and Prohibited Discrimination): Section 124-A may also be applied in a manner that discriminates based on political or other opinion, which is prohibited by international human rights law. This has been reflected in the manner in which the law has been used against actual and perceived political opponents of the government.[23] As such, it would seem to fall foul of the principle based on international

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21 Section 124-A, Pakistan Penal Code (Act XLV of 1860), available at: https://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html.

22 In relation to sedition laws, the UN Human Rights Committee has stated: "Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information." See, UN Doc. CCPR/C/GC/34, para. 30.

23 See, for instance, Al Jazeera, "Pakistani court strikes down sedition law in win for free speech", 30 March 2023, available at: https://www.aljazeera.com/news/2023/3/30/pakistani-court-strikes-down-sedition-law-in-win-for-free-speech; Rida Tahir, "Lahore High Court Strikes Down Pakistan's Colonial-era Sedition Law", *Oxford Human Rights Hub,* 11 May 2023, available at: https://ohrh.law.ox.ac.uk/lahore-high-court-strikes-down-pakistans-colonial-era-sedition-law/.

human rights law and standards that "criminal law may not, on its face or as applied, in substance or in form, directly or indirectly discriminate on any, including multiple and intersecting, grounds prohibited by international human rights law."

Principle 13 (Criminal Law Sanctions): Convictions under section 124-A may result in imprisonment for life, a sanction that is grossly disproportionate to the gravity of the offence, and which disregards the principle that custodial sentences may only be imposed as a measure of last resort.

In March 2023, the Lahore High Court struck down section 124-A as unconstitutional in *Haroon Farooq v Federation of Pakistan*, holding that it "offends the fundamental rights enshrined in Articles 19 and 19A of the Constitution", which guarantee the rights to freedom of speech and of the press, and access to information in all matters of public importance, respectively.[24]

The above demonstrates how the standards articulated in General Part II of *The 8 March Principles*, setting forth a human rights-based approach, may be used. The application of these principles to other specific criminal laws will be demonstrated in greater detail in Chapter II, particularly, those provisions criminalizing forms of conduct associated with poverty, homelessness and status.

3. GUIDING QUESTIONS ON APPLYING THE GENERAL PRINCIPLES OF CRIMINAL LIABILITY AND INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS

This Practitioners' Guide invites practitioners to utilize the following guiding questions to guide and structure their analysis and advocacy on applying a human rights-based approach to criminal laws. The list of questions outlined here is not an exhaustive one. These questions synthesize the relevant principles, laws and standards, captured in *The 8 March Principles*.

[24] *Haroon Farooq v. Federation of Pakistan & Others,* In the Lahore High Court, Lahore Judicial Department, W.P. No.59599 of 2022, para. 77, available at: https://sys.lhc.gov.pk/appjudgments/2023LHC1450.pdf.

This can assist when practitioners are considering which conduct should or should not be criminalized, and whether the content and scope of a given criminal provision or other penalties under other legal instruments are consistent with general principles of criminal law and international human rights law and standards. The guiding questions can be used to develop and strengthen the arguments and advocacy points that practitioners may be advancing to justify adopting a human rights-based approach to criminal law, including to promote the decriminalization of wrongfully proscribed conduct.

These guiding questions will be used as the basis of the analysis advanced in Chapter III of this Practitioners' Guide of domestic laws and jurisprudence on the criminalization of conduct associated with poverty, homelessness and status. Practitioners are advised to consider this checklist of questions and determine if the questions are relevant to their own analysis and strategies.

As a quick practical note, some of the guiding questions below may be repeated under the different principles under General Parts I and II. For instance, the questions to inquire whether a legal provision is consistent with the principle of legality (Principle 1) would also be relevant to the inquiry on human rights restrictions on criminal law (Principle 7), to the extent that criminal law may not restrict the exercise of any human rights unless the limitation is in accordance with the law, i.e., the principle of legality. Similarly, the analysis of what substantial harm to the fundamental rights and freedoms of other or to certain fundamental public interests the criminal law provision purports to address (Principle 2) is the same inquiry of the legitimate interest(s) pursued by a criminal law restriction on a human right (Principle 7). Whether a criminal law provision is non-discriminatory (Principle 7) will depend on the analysis pursuant to Principles 9 and 10 of *The 8 March Principles*.

General Part I – Basic Principles of Criminal Law	
Principle 1 – Principle of legality	Is criminal liability being imposed for an act or omission that does not constitute a criminal offence, under national or international law, when the conduct occurred?
	Is the law publicly and sufficiently accessible?
	Is the law vague, imprecise, arbitrary or overly broad? Is criminal liability foreseeable and capable of being clearly understood in its application and consequences?

	Does the law narrowly define the punishable offence with a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is not criminal proscribed?
	In case of ambiguity, is the definition of a particular offence interpreted in favour of the accused?
Principle 2 – Harm principle	What substantial harm to the fundamental rights and freedoms of others is the law trying to protect against?
	What substantial harm to certain fundamental public interest(s), namely, national security, public safety, public order, public health or public morals, is the law trying to protect against?
	Is the threshold of "substantial harm" met? Is this clearly defined, such that the substantial harm the proscribed conduct is said to inflict or threaten is foreseeable and not unreasonably remote?
	Is the criminal law justified on protecting against these "substantial harms" narrowly construed?
	Is the criminal law strictly necessary to protecting against these "substantial harms" and proportionate to the interest(s) pursued, i.e., it must be the least intrusive or restrictive means to achieve the desired result?
	Is the criminal law appropriate to the protection against "substantial harms", including by being rationally and reasonably connected to the interest(s)?
	Has the State shown concrete evidence of these grounds and of the necessity of a criminal law response? Are the grounds advanced by the State continuously scrutinized? Are the State's assertions still relevant?
Principle 3 – Individual criminal liability	Is criminal liability for any act or omission based on individual criminal liability for such conduct?
Principle 4 – Voluntary act requirement	What is the voluntary act or omission defined in the offence to establish criminal liability?
	Is criminal liability based on a person having engaged in a voluntary act or omission as defined in that offence?
	Is criminal liability based on thoughts, intentions, beliefs or status alone?

Principle 5 – Mental state requirement	What is the *mens rea* of the offence, i.e., the mental state requirement (such as intent, purpose, knowledge, recklessness, or criminal negligence) defined in the offence to establish criminal liability?
	Is criminal liability based on a person having committed the material elements of that offence with the mental state required in the definition of the offence, such as intent, purpose, knowledge, recklessness, or criminal negligence?
	For an offence punishable with deprivation of liberty, does the criminal offence include a mental state requirement with respect to each material element?
Principle 6 – Grounds for excluding criminal liability	Does the criminal law establish lawful defences for the conduct to justify or exclude criminal liability, such as by reasons of necessity, self-defence or duress?
	How are the defences defined and applied, as a matter of statute or case law?
General Part II – Criminal Law and International Human Rights Law and Standards	
Principle 7 – Human rights restrictions on criminal law	What human rights are detrimentally impacted by the law?
	Is the limitation on human rights in accordance with the law, i.e., the principle of legality (i.e., Principle 1, *The 8 March Principles*)?
	Is the criminal law in pursuit of one of the limited and narrowly defined, legitimate fundamental public interests allowed under international human rights law, namely, for the protection of the fundamental rights and freedoms of others, national security, public safety, public order, public health or public morals?
	Is the criminal law strictly necessary to achieve the legitimate purpose(s)?
	Is the criminal law proportionate to the legitimate interest(s) pursued, i.e., it must be the least intrusive or restrictive means to achieve the desired result?
	Is the criminal law appropriate to the legitimate interest(s) to be protected, including by being rationally and reasonably connected to it?
	Is the criminal law not arbitrary?

	Is the criminal law non-discriminatory (i.e., Principles 9 and 10, *The 8 March Principles*)?
	Is the criminal law consistent with other rights recognized under international human rights law?
	Is the criminal law measure narrowly construed?
	Has the State shown concrete evidence of the legitimate interest(s) pursued by the criminal law response and the necessity of a criminal law response? Are these grounds asserted by the State continuously scrutinized? Are the State's assertions still relevant?
Principle 8 – Legitimate exercise of human rights	Does the law proscribe conduct that is protected under human rights?
	Does the law proscribe conduct that constitutes the legitimate exercise and enjoyment of human rights guaranteed under international or domestic law?
Principle 9 – Criminal law and prohibited discrimination	Does the law, on its face or as applied, in substance or in form, discriminate on any grounds prohibited by international human rights law?
	Does the law discriminate directly or indirectly on these grounds?
	Are there multiple and intersecting grounds that are discriminated against by the law?
	Are any of the prohibited grounds of discrimination (i.e., age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/ citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; minority or other status) engaged?

Principle 10 – Criminal liability may not be based on discriminatory grounds	Is criminal liability based on conduct that does not constitute a criminal offence if committed by another person?
	Does the criminalization of such conduct constitute discrimination on grounds prohibited by international or domestic law?
Principle 11 – Limitations on criminal liability for persons under 18 years of age	May criminal liability for the offence be imposed on persons under the age of 18?
	Is criminal liability for persons under the age of 18 based on conduct that does not constitute a criminal offence if committed by a person who is 18 or older?
Principle 12 – Criminal law and non-derogable human rights	Is there an "an emergency threatening the life of the nation"?
	What human rights are detrimentally impacted by the law? Is the criminal law measure under scrutiny derogating from the State's non-derogable human rights obligations under international human rights law?
Principle 13 – Criminal law sanctions	What sanctions are imposed for contraventions of the law? Do these sanctions include custodial sentences?
	Are the sanctions consistent with human rights?
	Are the sanctions non-discriminatory and proportionate to the gravity of the offence?
	Are custodial sentences being imposed as a measure of last resort?

CHAPTER II

INTERNATIONAL AND REGIONAL LAW AND STANDARDS ON THE CRIMINALIZATION OF CONDUCT ASSOCIATED WITH POVERTY AND STATUS

This chapter will specifically map out the relevant international and regional human rights law and standards on the criminalization and penalization of conduct associated with poverty and status. The decriminalization of poverty and status will serve as the case study on applying a human rights-based approach to criminal law for the purposes of this Practitioners' Guide.

These relevant international and regional human rights laws and standards can and should also be cited, as authoritative sources of law, by practitioners in their legal advocacy and reform initiatives aimed at furthering the decriminalization of conduct associated with homelessness and poverty. The relevant international human rights law and standards will assist practitioners in assessing whether existing and proposed domestic criminal laws are consistent with international human rights law and standards and general principles of criminal liability.

Furthermore, the human rights law and standards on the criminalization of poverty and status may also prove useful for advocacy targeted at other forms of proscribed conduct that fails to respect human rights and the rule of law, through the parallels and commonalities that can be drawn across different forms of wrongfully criminalized conduct.

1. INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS ON THE CRIMINALIZATION OF CONDUCT ASSOCIATED WITH POVERTY AND STATUS

The criminalization of life-sustaining activities in public places and conduct associated with homelessness and poverty is prohibited under international human rights law. This prohibition is captured in Principle 21 of *The 8 March Principles*, which, in turn, results from, reflects and has been elaborated by applying the general principles and legal standards in General Part I and Part I of *The 8 March Principles*.

Principle 21 – Life-sustaining activities in public places and conduct associated with homelessness and poverty

No one may be held criminally liable:

a) For engaging in life-sustaining economic activities in public places, such as begging, panhandling, trading, touting, vending, hawking or other informal commercial activities involving non-contraband items;

b) For engaging in life-sustaining activities in public places, such as sleeping, eating, preparing food, washing clothes, sitting or performing hygiene-related activities, including washing, urinating and defecating, or for other analogous activities in public places, where there are no adequate alternatives available; or
c) On the basis of their employment or means of subsistence or their economic or social status, including their lack of a fixed address, home or their experiencing homelessness in practice.

Various sources of international human rights law have made clear the State obligation to repeal or reform laws that criminalize conduct associated with poverty, homelessness and status, including the *Guiding Principles on Extreme Poverty and Human Rights*;[25] the *Guidelines for the Implementation of the Right to Adequate Housing*;[26] as well as UN Human Rights Council resolutions.[27] The recent joint study by the UN Special Rapporteurs on Extreme Poverty and Adequate Housing has reaffirmed this obligation to repeal laws that criminalize life-sustaining activities.[28]

[25] The Guiding Principles on Extreme Poverty and Human Rights emphasize the State obligation to "repeal or reform any laws that criminalize life-sustaining activities in public places, such as sleeping, begging, eating or performing personal hygiene activities"; Office of the High Commissioner for Human Rights, *Guiding Principles on Extreme Poverty and Human Rights,* 2012, para. 66, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf.

[26] The Guidelines for the Implementation of the Right to Adequate Housing state that "States should prohibit and address discrimination on the ground of homelessness or other housing status and repeal all laws and measures that criminalize or penalize homeless people or behaviour associated with being homeless, such as sleeping or eating in public spaces"; UN Human Rights Council, *Guidelines for the Implementation of the Right to Adequate Housing: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* UN Doc. A/HRC/43/43, 26 December 2019 ("Guidelines for the Implementation of the Right to Adequate Housing"), para. 33.

[27] See, for instance, UN Human Rights Council, *Resolution adopted by the Human Rights Council on 19 June 2020: 43/14. Adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context,* UN Doc. A/HRC/RES/43/14, 6 July 2020, para. 1(j) ("To take all measures necessary to eliminate legislation that criminalizes homelessness").

[28] UN Doc. A/HRC/56/61/Add.3, para. 1.

Homelessness and poverty are, themselves, *prima facie* violations of human rights. States have an immediate obligation under international human rights law to "respond urgently to the needs of persons who are currently homeless as well as to implement plans to prevent and eliminate systemic homelessness as swiftly as possible".[29] Furthermore, poverty is "both a cause and a consequence of human rights violations and an enabling condition for other violations",[30] as States have an immediate obligation to take steps towards the full realization of economic, social and cultural rights and to ensure that those living in poverty can enjoy at least minimum essential levels of all economic, social and cultural rights.[31] As such, homelessness and poverty represent the failure of States to guarantee and provide for the access to and enjoyment of such rights.

Thus, laws, policies and practices that criminalize and penalize conduct associated with poverty and homelessness are inappropriate State responses to such predicaments and amount, instead, to the "double victimization of persons experiencing homelessness and poverty". This has been emphasized in a joint study by two UN independent human rights experts, the Special Rapporteur on extreme poverty and human rights (UN Special Rapporteur on Extreme Poverty), and the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (UN Special Rapporteur on Adequate Housing).[32]

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[29] UN Human Rights Council, *Guidelines for the Implementation of the Right to Adequate Housing: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* UN Doc. A/HRC/43/43, 26 December 2019, Guideline No. 5 ("Guidelines for the Implementation of the Right to Adequate Housing"*)*, para. 32; see also, UN Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UN Doc. E/1992/23, 13 December 1991.

[30] UN Office of the High Commissioner for Human Rights, *Guiding Principles on Extreme Poverty and Human Rights,* p. 2, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf.

[31] *Ibid*., paras. 48 – 49.

[32] UN Human Rights Council, *Breaking the cycle: ending the criminalization of homelessness and poverty: Report of the Special Rapporteur on extreme poverty and human rights*, UN Doc. A/HRC/56/61/Add.3, 26 June 2024 ("UN Doc. A/HRC/56/61/Add.3"), para. 1.

The Delhi High Court captured succinctly this notion of "double victimization" in its decision to strike down, as unconstitutional, parts of the Bombay Prevention of Begging Act, 1959, as extended to the Union Territory of Delhi:

> "**The State simply cannot fail to do its duty to provide a decent life to its citizens and add insult to injury** by arresting, detaining and, if necessary, imprisoning such persons, who beg, in search for essentials of bare survival, which is even below sustenance."[33]

1.1. Criminalization of poverty and status violates human rights

Criminalizing and penalizing conduct associated with poverty, homelessness and status violates a broad range of human rights protected under international human rights law, including the rights to: life; freedom from discrimination; equality before the law and equal protection of the law without discrimination; freedom from cruel, inhuman or degrading treatment or punishment; liberty and security of person; adequate standard of living; adequate housing; highest attainable standard of physical and mental health; freedom of movement; and the right to privacy.[34]

Criminalizing conduct associated with poverty, homelessness and status is contrary to the principle that criminal law may not proscribe any conduct that is protected under human rights law (reflected in Principle 8 of *The 8 March Principles*), unless the criminal proscription is in accordance with the permissible limitations set forth in international human rights law (reflected, in turn, in Principle 7 of *The 8 March Principles*). However, as will be demonstrated in Chapter III, laws criminalizing conduct associated with poverty, homelessness and status rarely conform with international human rights law principles or with the general principles of criminal law (reflected in General Part I of *The 8 March Principles*).[35]

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[33] Emphasis added. *Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors,* W.P.(C) Nos. 10498/2009 & 1630/2015 ("*Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors"*), paras. 33, available at: https://www.hlrn.org.in/documents/HC_Delhi_Decriminalisation_of_Begging.pdf. The decision will be discussed in greater detail in Chapter III.

[34] UN Doc. A/HRC/56/61/Add.3, para 10; ICJ, *The 8 March Principles*, p. 6.

[35] As will be demonstrated below, this is because these laws are, *inter alia*, often vague, imprecise and overbroad, in contravention of the principle of legality; are discriminatory; and have no rational nexus to the legitimate interests of, for instance, public health or public order; and prescribe sanctions, including custodial sentences, that are not the least intrusive or restrictive means to achieve the desired result.

This has been affirmed by the UN Human Rights Committee, which has explicitly made clear that laws on "vagrancy" may violate the right to liberty and security of person, guaranteed under article 9 of the ICCPR.[36] The Committee has generally emphasized that any substantive grounds for arrest and detention "must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application",[37] consistent with the principle of legality (reflected in Principle 1 of *The 8 March Principles*). The Committee has specifically noted that a "vaguely-worded anti-vagrancy law" permitting warrantless arrests may not conform with this requirement.[38]

Furthermore, punishing individuals for engaging in life-sustaining activities, such as eating, sleeping and sitting in particular areas, may constitute cruel, inhuman or degrading treatment or punishment,[39] to the extent that such treatment or punishment is an expansive concept that applies not only to "acts that cause physical pain but also to acts that cause mental suffering to the victim".[40]

1.2 Discrimination prohibited by international human rights law and criminal liability based on discriminatory grounds

In contravention of the principle of non-discrimination (reflected in Principles 9 and 10 of *The 8 March Principles*), criminal laws proscribing conduct associated with poverty, homelessness and status discriminate against

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[36] UN Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person),* UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 22, 40.

[37] *Ibid*., para. 22.

[38] *Ibid*., para. 22; UN Human Rights Committee, *Concluding observations of the Human Rights Committee: The Philippines,* UN Doc. CCPR/CO/79/PHL, 1 December 2003, para. 14 ("The Committee is also concerned that a vaguely worded anti-vagrancy law is used to arrest persons without warrant, especially female prostitutes and street children.")

[39] UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America,* UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para. 19 ("… the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of discrimination and cruel, inhuman or degrading treatment").

[40] UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment: Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992,* para. 5.

persons on the basis of their social and economic situation[41] and other related prohibited grounds of discrimination, including race, nationality, disability, gender, sexual orientation, and gender identity or expression.

Such prohibited discrimination may constitute:

(i) Direct discrimination, resulting, for example, from laws that criminalize the status of being "vagrants", "vagabonds", "rogues", or "idle and disorderly"; or
(ii) Indirect discrimination, resulting, for example, from the enforcement of criminal laws that are facially neutral and prohibit forms of conduct, such as "begging" or "public obstructions", but which impact disproportionately on persons experiencing homelessness or living in poverty; and/or
(iii) Intersectional discrimination, namely, discrimination people may experience on multiple, intersecting grounds of discrimination prohibited by international human rights law.[42] For instance, the UN Working Group on discrimination against women and girls, in its report on the gendered inequalities of poverty, has noted how in many jurisdictions, "criminal laws are disproportionately applied to women and girls because of their economic and social status, and due to the costs of accessing the formal justice system".[43]

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41 The Committee on Economic, Social and Cultural Rights (CESCR Committee) has expressly recognized a person's "economic and social situation" as a prohibited ground of discrimination, noting that a person's "social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places." See, Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),* UN Doc. E/C.12/GC/20, 2 July 2009, para. 35.

42 UN Doc. A/HRC/56/61/Add.3, p. 10 – 12.

43 UN Human Rights Council, *Gendered inequalities of poverty: feminist and human rights-based approaches: Report of the Working Group on discrimination against women and girls,* UN Doc. A/HRC/53/39, 26 April 2023, para. 32 ("Those particularly affected are women and girls living in poverty seeking reproductive health care and services, including abortion, Indigenous, migrant and ethnic minority women and girls, women and girls who are experiencing homelessness, women and girl street vendors, sex workers, those who use drugs or are associated in trade in drugs, women in the informal economy, informal and cross-border traders, women and girls environmental and human rights defenders, and members of LGBTQ+ communities.")

1.3 Criminal liability of persons under 18 years of age

Specifically with regard to children in street situations, the UN Committee on the Rights of the Child has recommended that States: "abolish where appropriate offences that criminalise or disproportionately affect children in street situations, such as begging, breach of curfews, loitering, vagrancy and running away from home".[44] The offence of "running away from home" is an emblematic example of the types of criminal offences that Principle 11 (Limitations on Criminal Liability for Persons under 18 Years of Age) of *The 8 March Principles addresses*, as an offence that, in law, only a person under 18 years of age (i.e., a child under international human rights law)[45] may commit.[46] The Committee has also emphasized that States have an "obligation to respect the dignity of children in street situations and their right to life, survival and development" by, *inter alia,* "decriminalizing survival behaviours and status offences".[47]

1.4 Proportionality of sanctions and penalties

The *Guiding Principles on Extreme Poverty and Human Rights* call on States to "review sanctions procedures that require the payment of disproportionate fines by persons living in poverty, especially those related to begging, use of public space and welfare fraud, and consider abolishing prison sentences for non-payment of fines for those unable to pay."[48]

The 8 March Principles may also help in considering whether sanctions and penalties, whether or not they are characterized as criminal under domestic law, may have a punitive character or stigmatizing intent or effect, given the severity of the penalty or other adverse impacts that the person concerned risks incurring. In this regard, the imposition of fines; prison sentences for non-payment of fines; and evictions may be disproportionate and discriminatory (Principle 13 – Criminal law sanctions).

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[44] Committee on the Rights of the Child, *General comment No. 21 (2017) on children in street situations,* UN Doc. CRC/C/GC/21, 21 June 2017 ("UN Doc. CRC/C/GC/21"), paras. 14, 26.

[45] Article 1, Convention on the Rights of the Child ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

[46] Other examples of such "offences" include those related to truancy and disobedience to parents.

[47] UN Doc. CRC/C/GC/21, para. 32.

[48] Guiding Principles on Extreme Poverty and Human Rights, para. 66.

2. REGIONAL LAW AND STANDARDS ON THE CRIMINALIZATION OF CONDUCT ASSOCIATED WITH POVERTY AND STATUS

There have also been developments at the regional level reflecting the obligation of States to decriminalize conduct associated with poverty, homelessness and status. Some of these developments reflect and are consistent with the application of a human rights-based approach to criminal law outlined in this Practitioners' Guide.

2.1 Africa

Notable regional developments in Africa include the African Commission on Human and Peoples' Rights' adoption of the *Principles on the Decriminalisation of Petty Offences in Africa*, and the advisory opinion of the African Court on Human and Peoples' Rights on vagrancy laws.

In October 2018, the African Commission on Human and Peoples' Rights adopted the *Principles on the Decriminalisation of Petty Offences in Africa* (ACHPR Principles).[49] According to Part 2 of the Principles:

> "The purpose of the Principles on the Decriminalisation of Petty Offences is to guide States on the **decriminalisation of petty offences in Africa** in terms of Articles 2, 3, 5 and 6 of the African Charter. The Principles establish standards against which petty offences created by law or by-law should be assessed, and promote measures that can be taken by State Parties to **ensure that such laws do not target persons based on their social origin, social status or fortune by criminalising life-sustaining activities**."[50]

[49] Worth noting as well is the *Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa*, adopted by the African Commission on Human and Peoples' Rights in November 2003, which recommends the decriminalization of offences, including "being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents", see, *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa*, available at: https://achpr.au.int/index.php/en/node/883; and African Commission on Human and Peoples' Rights, *Resolution on the Adoption of the "Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa" - ACHPR/Res.64(XXXIV)03*, 20 November 2003, available at: https://achpr.au.int/en/adopted-resolutions/64-resolution-adoption-ouagadougou-declaration-and-plan-action.

[50] African Commission on Human and Peoples' Rights, *Principles on the Decriminalisation of Petty Offences in Africa,* 25 October 2018 ("ACHPR Principles"), available at: https://achpr.au.int/index.php/en/node/846.

African Commission on Human and Peoples' Rights: Principles on the Decriminalisation of Petty Offences in Africa

The Principles are organized into six parts. Parts 1 and 2 articulate the definitions in and purpose of the Principles.

Parts 3 to 5 highlight how petty offences are inconsistent with the various rights guaranteed in the African Charter, namely: the right to equality and non-discrimination under articles 2, 3 and 18 (Part 3); the right to dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment under article 5 (Part 4); and the right to liberty and security of person and freedom from arbitrary arrest and detention under article 6 (Part 5).

Part 6 emphasizes the obligations of State Parties to the African Charter to "decriminalise petty offences in accordance with these Principles and other regional and international human rights standards".

Accordingly, State Parties should decriminalize certain petty offences, and ensure that "laws criminalising conduct in broad, vague and ambiguous terms are decriminalised"; and ensure that "laws which criminalise the status of a person or their appearance are decriminalised, in particular, laws that criminalise life-sustaining activities in public places" (as per Principles 1, 2, 4, 5, 7, 8, 9, 10, 13 and 21 of *The 8 March Principles*).[51] Furthermore, States should provide "alternatives to arrest and detention for other minor offences that are not decriminalised under [the ACHPR Principles]" and address the "root causes of poverty and other marginalisation". States should also adopt measures to give effect to the ACHPR Principles and "ensure that the rights and obligations contained herein are always guaranteed in law and practice, including during conflict and states of emergency".

[51] These are, respectively: Principle 1 – Principle of Legality; Principle 2 – Harm Principle; Principle 4 – Voluntary Act Requirement; Principle 5 – Mental State Requirement; Principle 7 – Human Rights Restrictions on Criminal Law; Principle 8 – Legitimate Exercise of Human Rights; Principle 9 – Criminal Law and Prohibited Discrimination; Principle 10 – Criminal Liability May Not be Based on Discriminatory Grounds; Principle 13 – Criminal Law Sanctions; and Principle 21 – Life-sustaining activities in public places and conduct associated with homelessness and poverty.

In December 2020, the African Court on Human and Peoples' Rights delivered its landmark Advisory Opinion, requested by the Pan African Lawyers Union (PALU), on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa (PALU Advisory Opinion).[52] The Court declared that vagrancy laws[53] are incompatible with the human rights guaranteed[54] in the African Charter on Human and Peoples' Rights, Children's Rights Charter, and Women's Protocol, and that States have a positive obligation to repeal or amend their vagrancy laws and related laws to comply with these instruments.[55]

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[52] African Court on Human and Peoples' Rights, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa,* No. 001/2018, 4 December 2020, ("PALU Advisory Opinion"), available at: https://www.african-court.org/cpmt/advisory-finalised.

[53] Vagrancy laws include: "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." *Ibid*., para. 155(i).

[54] These include the rights to non-discrimination and equality; dignity; liberty; fair trial; freedom of movement; and protection of the family. Specifically, in relation to children, the Court also considered children's right to non-discrimination, the best interests of the child and children's right to fair trial.

[55] PALU Advisory Opinion, para. 155(iii) – (vi).

African Court on Human and Peoples' Rights, 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

While a detailed analysis of the PALU Advisory Opinion is beyond the scope of this Practitioners' Guide,[56] some sections of the opinion have been highlighted below.

The Court held that vagrancy laws, both in terms of "their formulation as well as in their application" criminalize "the status of an individual", enable "the discriminatory treatment of the underprivileged and marginalized", and also deprive "individuals of their equality before the law". It further found that warrantless arrests for vagrancy-related offences "are not only a disproportionate response to socio-economic challenges but also discriminatory since they target individuals because of their economic status".[57]

The "vague, unclear and imprecise" language of vagrancy laws was emphasized by the Court as antithetical to the principle of legality.[58] The Court indicated that 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", thus making such laws "prone to abuse, often to the detriment of the marginalized sections of society".[59]

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[56] For a detailed commentary of the PALU Advisory Opinion, see, Willene Holness, "Decriminalising vagrancy offences in Africa beyond the African Court's Advisory Opinion: quo vadis?*", African Human Rights Yearbook vol. 5 Pretoria 2021,* available at: https://scielo.org.za/scielo.php?script=sci_arttext&pid=S2663-323X2021000100018; and Jacquelene W. Mwangi, "Request for Advisory Opinion by the Pan African Lawyers Union (Palu) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, No. 001/2018", *American Journal of International Law Volume 117(1), January 2023, pp. 121 – 127,* available at: https://www.cambridge.org/core/journals/american-journal-of-international-law/article/request-for-advisory-opinion-by-the-pan-african-lawyers-union-palu-on-the-compatibility-of-vagrancy-laws-with-the-african-charter-on-human-and-peoples-rights-and-other-human-rights-instruments-applicable-in-africa-no-0012018/638EA326FEFADC636C511F1DAD6AE112.

[57] PALU Advisory Opinion, paras. 75, 83 – 87.

[58] This is reflected in Principle 1 – Principle of Legality of *The 8 March Principles*.

[59] PALU Advisory Opinion, paras. 71 and 86.

The Court also held 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", and is not compatible with Article 5 of the Charter on the right to dignity.[60] This reflects the Court's understanding of the stigmatizing effect of derogatory labels attached to vagrancy provisions. Of note as well is how the Court assessed the effect of forceful relocations, as a result of the enforcement of vagrancy laws, as being an affront to the right to dignity, as evidence of their punitive character.[61]

2.2 The Americas

In 2017, the Inter-American Commission on Human Rights published its *Report on Poverty and Human Rights in the Americas,* emphasizing, among other things, the need for a "human rights approach" to eradicating poverty based on "respect for the dignity and autonomy of persons living in poverty".[62]

The Inter-American Commission on Human Rights put forward specific findings and recommendations in relation to restricting, sanctioning or criminalizing conduct associated with poverty, from the angle of the principles of equality and non-discrimination. The relevant paragraphs from the report are reproduced in full below:

Inter-American Commission on Human Rights, Report on Poverty and Human Rights in the Americas

"177. Frequently, rules and practices restricting undesirable conduct and activities considered 'undesirable' or contrary to public order – such as begging, sleeping or loitering in the streets, among others – aggravate the situation of exclusion, disadvantage and discrimination faced by persons living in poverty.

60 PALU Advisory Opinion, para. 81.

61 See, for instance, Principle 13 – Criminal Law Sanctions of *The 8 March Principles*, which emphasizes that sanctions must be consistent with human rights, including by being non-discriminatory and proportionate to the gravity of the offence.

62 Inter-American Commission on Human Rights, *Report on Poverty and Human Rights in the Americas,* OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017, para. 17, available at: https://www.oas.org/en/iachr/reports/pdfs/poverty-humanrights2017.pdf.

178. The sanctioning or criminalization of such acts and behavior coupled with the obstacles faced by the poor when seeking access to justice on equal terms with others contribute to their heightened exclusion and stigmatization. **The IACHR considers it important to stress that the prohibition on begging and related activities could amount to a violation of the principles of equality and non-discrimination**."[63]

2.3 Europe

The European Court of Human Rights has considered the criminalization of begging in two decisions: *Lăcătuş v. Switzerland* in 2021 and *Dian v. Denmark* in 2024.

The Court has found that *blanket* bans on begging violate article 8 of the European Convention on Human Rights (ECHR), which guarantees the right to respect for private and family life. According to the Court, the assessment turns on the person's "economic and social situation":[64] blanket bans on begging imposed to punish a person who "lacked any other means of subsistence" and "had no choice but to beg in order to survive" would constitute an unjustified interference with article 8 of the ECHR.[65]

In relation to begging, the Court noted in *Lăcătuş v. Switzerland* that the concept of human dignity is inherent to article 8 of the ECHR, and that:

> "The Court takes the view that a person's dignity is severely compromised if he or she does not have sufficient means of subsistence. […] By the act of begging, the person concerned is adopting a particular way of life with the aim of rising above an inhumane and precarious situation."[66]

The facts and findings of the Court in *Lăcătuş v. Switzerland* and *Dian v. Denmark* will be briefly set out below, taking note of how the Court differentiated the circumstances in the two cases to arrive at two different

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63 Emphasis added. *Ibid*., paras. 177 – 178.

64 European Court of Human Rights, *Case of Lăcătuş v. Switzerland,* Application no. 14065/15, 19 January 2021 ("*Lăcătuş v. Switzerland*"), para. 57; European Court of Human Rights, *Dian v. Denmark,* Application No. 44002/22, 21 May 2024 ("*Dian v. Denmark*"), paras. 44, 49.

65 *Lăcătuş v. Switzerland*, para. 115.

66 *Lăcătuş v. Switzerland*, para. 56.

conclusions regarding whether bans on begging violate human rights guaranteed under the ECHR. The factual matrix of both cases are also presented below to assist practitioners in understanding the divergent approaches taken by the Court in the two cases.

The European Court of Human Rights' judgments indicate a more exacting threshold for a finding that the criminalization of conduct associated with poverty and status constitutes a human rights violation in comparison to the findings articulated by other regional human rights bodies, such as the African Commission, African Court and Inter-American Commission on the same question.

European Court of Human Rights, *Lăcătuş v. Switzerland* (2021)

Facts: The applicant, who belongs to the Roma community, was found guilty of begging on public streets under the Geneva Criminal Law Act and was ordered to pay a fine of 500 Swiss francs. She was then imprisoned for five days for being unable to pay the fine. Section 11A of the Geneva Criminal Law Act provides: "Any person who has engaged in begging shall be punished by a fine." The Court noted that the applicant was extremely poor, illiterate and unemployed; not in receipt of social benefits; and was not supported by any third party, such that "begging allowed the applicant to secure income and alleviate her poverty."[67]

Decision: The Court found that the penalty imposed on the applicant, pursuant to the blanket ban on begging under section 11A of the Geneva Criminal Law Act, constituted a violation of article 8 of the ECHR:

> "… the penalty imposed on the applicant was **proportionate neither to the aim of combating organised crime nor to that of protecting the rights of passers-by, residents and shopkeepers**. In the present case, it considers that the measure pursuant to which the applicant, an extremely vulnerable person, was punished for her actions in a situation in which, to all appearances, **she had lacked any other means of subsistence and had thus had no choice but to beg in order to survive, diminished her human dignity and**

[67] *Lăcătuş v. Switzerland*, para. 58.

impaired the very essence of the rights protected by Article 8 of the Convention. The respondent State therefore overstepped its margin of appreciation in the present case."[68]

In its reasoning, the Court emphasized that a blanket ban under criminal law, as compared to less intrusive measures, coupled with the "fundamental importance of the matter for the applicant's subsistence", meant that only a "narrow margin of appreciation" can be afforded to Switzerland in the case.[69]

In relation to the custodial sentence of five days that the applicant served for not being able to pay the fine, the Court observed that this was a "severe sanction". The Court stated: "In the circumstances of the present case, in view of the applicant's precarious and vulnerable situation, the imposition of a custodial sentence, which was liable to further increase an individual's distress and vulnerability, was almost automatic and inevitable in her case."[70]
Because the Court found a violation of article 8 of the ECHR, it did not examine separately the complaints under article 10 (freedom of expression), and under article 14 (protection from discrimination) in conjunction with article 8 of the ECHR.

Analysis: By noting that human dignity is encompassed under the protections of article 8 of the ECHR because it is "inherent in the spirit of the Convention", the Court directly linked a person's means of subsistence to their human dignity, to the extent that the term "private life" under article 8 is a "broad term not susceptible to exhaustive definition".[71]

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68 Emphasis added. *Lăcătuş v. Switzerland*, para. 115.

69 *Lăcătuş v. Switzerland*, para. 105 ("In the light of the great variety of solutions adopted by the member States, the Court finds that there is no consensus within the Council of Europe with regard to bans or restrictions on begging. It nevertheless observes a certain trend towards limiting its prohibition, and a willingness on the part of States to simply focus on effectively protecting public order through administrative measures. A blanket ban under criminal law, such as the one at issue in the present case, appears to be the exception. The Court considers that this fact constitutes a second indication – in addition to the fundamental importance of the matter for the applicant's subsistence – of the narrow margin of appreciation afforded to the respondent State in the present case.")

70 *Lăcătuş v. Switzerland*, para. 109, further noting in paragraph 110: "The Court considers that such a measure must be justified on solid public interest grounds, which did not obtain in the present case".

71 *Lăcătuş v. Switzerland*, paras. 54 – 56.

In assessing the margin of appreciation to be afforded to Switzerland with regard to bans or restrictions on begging, the Court undertook an analysis of the practices of other States of the Council of Europe. The Court observed "a certain trend towards limiting its prohibition, and a willingness on the part of States to simply focus on effectively protecting public order through administrative measures", as opposed to blanket criminal bans.[72] As part of the proportionality and margin of appreciation analysis,[73] this assessment reflects the idea that limitations imposed by criminal law must be strictly necessary and proportionate to the pursued legitimate interest, meaning they must be the least intrusive or restrictive means to achieve the desired result (as per Principle 7 of *The 8 March Principles*).

Furthermore, the Court noted the severity of the sanction of a five-day custodial sentence for the applicants' failure to pay the fine, which it held would "further increase an individual's distress and vulnerability". With respect to this, the Court considered the consistency of sanctions and penalties with human rights. As noted in Principle 13 of *The 8 March Principles*, sanctions must be non-discriminatory and proportionate to the gravity of the offence, and custodial sentences may only be imposed as a measure of last resort.

European Court of Human Rights, *Dian v. Denmark* (2024)

Facts: The applicant, a Romanian national, was convicted of begging on a street in Copenhagen, under section 197(2) of the Penal Code, and of insulting a police inspector in the exercise of her functions, under section 121 of the Penal Code. He was sentenced to twenty days' imprisonment, since he had a previous conviction for begging, and to the confiscation of 190.50 Danish kroner. Section 197 of the Penal Code states:

[72] *Lăcătuş v. Switzerland*, para. 104.

[73] See, for instance, Council of Europe, "The Margin of Appreciation", available at: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#:~:text=Proportionality,-The%20doctrine%20of&text=The%20principle%20of%20proportionality%20requires,of%20review%20in%20different%20contexts.

"1) Any person who, having previously been cautioned by the police, is found guilty of begging or of permitting a member of his household under 18 years of age to beg shall be sentenced to imprisonment for a term not exceeding six months. In mitigating circumstances, the penalty may be remitted. A caution under this provision will remain on record for five years.
2) The requirement of a prior caution shall not apply if the offence was committed in a pedestrian zone, at a station, in or at a supermarket or on public transport.
3) When determining the sentence, it shall be considered an aggravating circumstance if the offence was committed at one of the locations referred to in subsection 2."

It is a precondition for conviction that the begging took place in a personal manner causing nuisance to the public.[74]

Decision: In contrast to its decision in *Lăcătuş v. Switzerland,* the Court held that article 8 of the ECHR is not applicable in the case. It distinguished the facts of *Dian v. Denmark* by stating that it was not "convinced that the applicant lacked sufficient means of subsistence, or that begging was his only option to ensure his own survival, or that by the act of begging, he adopted a particular way of life with the aim of rising above an inhumane and precarious situation, and thus protecting his human dignity" (relying on the reasoning in *Lăcătuş v. Switzerland*).[75] The Court noted that the act of begging was "a means, or at least an additional means, of income for the applicant".[76]

Additionally, the Court established that the present case did not pertain to a blanket ban on begging, as in Denmark "begging was allowed under certain conditions", but not if "it took place in a personal manner causing nuisance to the public and the person had been warned beforehand".[77] The Court observed that the applicant "could, and continue to, beg in Copenhagen, and elsewhere in Denmark, outside the designated areas [under section 197(2) of the Penal Code], provided that it does not take place in a personal manner causing nuisance to the public".[78]

[74] *Dian v. Denmark*, para. 14.
[75] *Dian v. Denmark*, para. 53.
[76] *Dian v. Denmark*, para. 54.
[77] *Dian v. Denmark*, para. 55.
[78] *Dian v. Denmark*, para. 55.

The Court also held that "the onus must therefore be on the applicant to substantiate his assertion that he was in a precarious and vulnerable situation, including that he lacked sufficient funds for his own subsistence." The Court noted that in this case, as the applicant was a foreigner, this was information that "could not, or could not easily, be verified by the domestic authorities".[79]

Analysis: Based on both decisions by the European Court of Human Rights, only: (i) *blanket* bans on begging; (ii) imposed on a person who lacked any other means of subsistence and had thus had no choice but to beg in order to survive, would engage the protection of article 8 of the ECHR, in the absence of any countervailing public interest articulated by the State Party.

This appears to be a strict and restrictive interpretation of what constitutes an impermissible criminalization of "life-sustaining activities", which the Court has considered in a case-by-case assessment, based on the applicant's economic and social conditions. This may create challenges in assessing when one's economic and social conditions qualify for protection under article 8 of the ECHR.

The Court's position is dissonant with the international human rights law position on the criminalization of conduct associated with poverty and status, which does not require an assessment of whether the criminalization on begging arises from a blanket ban or not. In fact, in its Concluding observations on the sixth periodic report of Denmark, the UN Committee on Economic, Social and Cultural Rights recommended that Denmark repeal the legal provisions "criminalising conducts associated with situations of poverty and of deprivation of the right to adequate housing, such as begging and rough sleeping".[80] The Court cited this recommendation in its judgment, albeit it chose not to rely on it in reaching its conclusions in the case.[81]

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79 *Dian v. Denmark*, para. 49.

80 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on sixth periodic report of Denmark,* UN Doc. E/C.12/DNK/CO/6, 12 November 2019, para. 48(c).

81 *Dian v. Denmark,* para. 31. Also cited by the Court, but not in its final decision, was the letter, dated 21 February 2022, from the United Nations High Commissioner for Human Rights to the Minister of Foreign Affairs on the follow-up to Denmark's Universal Periodic Review, which noted, as an area of concern, the repeal of "legal provisions criminalising conducts associated with

The Court in *Dian v. Denmark* did not engage with some of the flaws in the design of the criminal prohibition on begging in section 197 of Denmark's Penal Code. This is presumably because it had already determined that article 8 of the ECHR was not applicable in the first place, and that the case was inadmissible and thus did not require it to engage in a proportionality inquiry.

For instance, the Court did not analyze whether the criminalization of begging "in a personal manner causing nuisance to the public" is compatible with the principle of legality, despite the vagueness of the terms "personal manner" and "nuisance to the public". The Court also did not assess whether custodial sentences, as the penalty for infractions under section 197 of Denmark's Penal Code, constituted a proportionate and non-discriminatory sanction for "begging", and whether deprivation of liberty was being imposed as a measure of last resort. The severity of the sanction – a custodial sentence – should have contributed towards the Court's assessment of whether there was a *prima facie* interference with article 8 of the ECHR.

In contrast, in *Lăcătuş v. Switzerland*, the Court specifically stated that the custodial sentence of five days, which the applicant served for not being able to pay the fine, was a "severe sanction".[82] Notable as well is the fact that imprisonment is the *only* sentencing option upon convictions under section 197 of the Danish Penal Code, as opposed to the case of *Lăcătuş v. Switzerland*, where a fine was initially imposed, and a custodial sentence was meted out only because the applicant was unable to pay the fine.[83]

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situations of poverty and of deprivation of the right to adequate housing, such as begging an rough sleeping as well as investing in measures that provide long-term solutions and support the social reintegration of homeless people and increasing the capacity of shelters for homeless people." See, *Dian v. Denmark*, para. 32.

82 *Lăcătuş v. Switzerland*, para. 109, further noting in paragraph 110: "The Court considers that such a measure must be justified on solid public interest grounds, which [it] did not obtain in the present case".

83 This has been noted by the Danish Ministry of Justice; see, European Network of National Human Rights Institutions, *ENNHRI written observations in application no. 44002/22: Strugel Ion Dian against Denmark,* para. 6, available at: https://ennhri.org/wp-content/uploads/2023/06/ENNHRI-third-party-intervention-Dian-v.-Denmark_final.pdf ("The ministry does acknowledge that it is not possible to issue a fine in Denmark where imprisonment is the only option, and thus penalties in Denmark are more severe compared to Switzerland".)

CHAPTER III

CRIMINALIZATION OF CONDUCT ASSOCIATED WITH POVERTY AND STATUS

The following chapter aims to assist practitioners in identifying and analyzing whether the laws that criminalize conduct associated with poverty, homelessness and status, do so in a manner that is inconsistent with general principles of criminal liability and the human rights principles, laws and standards elucidated above in Chapters I and II. The examples from various jurisdictions serve as further case studies on the application of a human rights-based approach to criminal law, and provide comparative examples for practitioners to assess whether a particular law, policy or practice is consistent with international human rights law and general principles of criminal law.

This chapter is concerned with the content and scope of the criminal law provisions proscribing conduct associated with poverty, homelessness and status, as well as the consistency of other forms of penalties with general principles of criminal law and international human rights law.

At times, the mere existence of these laws violates human rights, regardless of their threatened or actual enforcement, and contributes to a broad range of human rights violations.[84] Additionally, this chapter will also consider other forms of penalties –regardless of whether they are characterized as "criminal" under domestic law – which have an analogous punitive character or stigmatizing intent or effect, given the severity of the penalty or other adverse impacts that the person concerned risks incurring, such as forced institutionalization, fines, evictions, demolitions and confiscation of goods.

While beyond the ambit of this Practitioners' Guide, which focuses on substantive criminal law provisions and penalties, the enforcement of these laws, policies and practices also risks exposing persons experiencing poverty to further human rights violations. Both substantive criminal law – namely, the law that defines what conduct is criminal and determines the permissible punishment for the proscribed conduct – and its enforcement through criminal procedure laws, practices and policies, including those related to policing, investigations, arrests, deprivation of liberty, detention conditions and trial and sentencing procedures, may violate human rights. These violations often occur along with and/or as a result of harassment and extortion by police officers, lack of access to

[84] ICJ, *The 8 March Principles*, p. 6 ("Unless criminal laws proscribing the above-mentioned conduct are directed at coercion or force or otherwise at the absence of consent – their mere existence – let alone their threatened or actual enforcement – violates human rights. The use of criminal law in these domains contributes to a broad range of human rights violations".)

legal counsel, overly onerous bail conditions, excessive use of pre-trial detention, and inhumane detention and prison conditions. As such, these violations are often the result of some of the systemic inadequacies or complete absence of due process safeguards in criminal justice systems around the world.

In 2017, the UN Committee on the Elimination of Discrimination against Women observed that in Sri Lanka, for example, the police use provisions in the Vagrants Ordinance No. 4 of 1841 "to arbitrarily arrest women in prostitution, using their possession of condoms as evidence of engaging in prostitution, and subjecting them to harassment, sexual bribery, and extortion".[85] The enforcement of such "offences" contributes to prison overcrowding.[86] In Kenya, for example, the ICJ's Kenya Section has noted that arrests for petty offences tend to affect those from poor economic backgrounds, who "cannot afford sufficient legal representation which exposes them to harsh outcomes before the judicial system".[87] In this respect, the UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing have recommended, *inter alia*, improving judicial review, access to justice and legal aid; implementing alternatives to detention; reforming law enforcement approaches; and promoting equal access to public spaces.[88]

1. FORMS OF CONDUCT ASSOCIATED WITH POVERTY AND STATUS THAT ARE CRIMINALIZED

Generally, forms of status or conduct associated with poverty that are criminalized include: (a) engaging in life-sustaining economic activities in public places, such as begging, panhandling, trading, touting, vending, hawking or other informal commercial activities involving non-contraband items; (b) engaging in life-sustaining activities in public places, such as sleeping, eating, preparing food, washing clothes, sitting or performing

[85] CEDAW Committee, *Concluding observations on the eighth periodic report of Sri Lanka,* UN Doc. CEDAW/C/LKA/CO/8, para. 26.

[86] Open Society Foundation, "Why It's Time to Repeal Petty Offense Laws", May 2021, available at: https://www.opensocietyfoundations.org/explainers/why-it-s-time-to-repeal-petty-offense-laws.

[87] ICJ Kenya, "Julie Wayua Matheka: Spearheading Kenya's Decriminalisation of Petty Offences Campaign", 8 May 2024, available at: https://icj-kenya.org/news/julie-wayua-matheka-spearheading-kenyas-decriminalisation-of-petty-offences-campaign/.

[88] UN Doc. A/HRC/56/61/Add.3, pp. 13 – 18.

hygiene-related activities, including washing, urinating and defecating, or for other analogous activities in public places, where there are no adequate alternatives available; or (c) on the basis of people's employment or means of subsistence or their economic or social status, including their lack of a fixed address, home or their experiencing homelessness in practice (Principle 21, *The 8 March Principles*).

The UN Special Rapporteur on Extreme Poverty and the UN Special Rapporteur on Adequate Housing have identified seven categories of laws that criminalize poverty and/or homelessness:[89]

"(a) **Vagrancy laws** which criminalize a person for failure to provide 'a good account of themselves', having no settled or fixed abode, or having no means of subsistence. Vagrancy is criminalized through colonial-era laws that contain vague and arbitrary prohibitions such as being a 'rogue', a 'vagabond', 'idle or disorderly'.

(b) Modern laws which prohibit **behaviour-based conduct** and criminalize activities such as camping, sleeping or erecting shelter, eating, washing or bathing, storing personal effects in a public space, causing noise disturbances or obstructing a road, footpath or entrance to a public or private building.

(c) Regulations for **environmental, public health or waste management**, that prohibit littering and the unauthorised disposal or collection of waste or garbage, public washing or bathing, eating, drinking or cooking in a public space, urinating and defecating in public, or washing, drying or spreading clothes or bedding.

(d) Prohibitions against **begging**, which criminalize requests for money or other items of value. This can include blanket bans on all forms of begging, begging in particular zones, or the prohibition of 'active' begging.

(e) Prohibiting **informal labour activities in the public domain that sustain livelihoods**, such as hawking, vending, trading, waste collection and sorting, car guarding and washing, or providing informal transport.

[89] UN Doc. A/HRC/56/61/Add.3, para. 2.

(f) Laws against **squatting**, such as the unlawful occupation of uninhabited public and private buildings or land for survival needs due to a lack of access to any affordable alternative.

(g) **Bans or time restrictions on parking vehicles or caravans** in public spaces, prohibiting camping in a vehicle, tent, caravan or any other type of temporary or provisional accommodation."

These laws, penalizing status and conduct associated with poverty and/or homelessness, are rooted in, embody and codify unequal power relations that stem from the legacy of colonial occupation. Many of the laws that criminalize vague concepts, such as being a "vagrant", "rogue", "vagabond" and so forth, were introduced during colonial occupation, based on, for example, The English Vagrancy Act of 1824 and the French Penal Code of 1810, among others,[90] and exported by the Dutch, English, French, Portuguese and Spanish administrations to their colonies.[91]

Post-independence, many countries not only retained such colonial-era laws but also enacted penal laws adopting similar language or intents, with the aim of segregating and controlling the use of public spaces. This is despite how these "offences" frequently contain "outdated language" with "little relevance in the twenty-first century".[92] The African Court on Human and Peoples' Rights, in its PALU Advisory Opinion, has described three main reasons that motivated the adoption of vagrancy laws:

> "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**

[90] UN Doc. A/HRC/56/61/Add.3, para. 21.

[91] Christopher Roberts, *Vagrancy and Vagrancy-Type Laws in Colonial History and Today,* p. 4 – 5, available at: https://www.law.cuhk.edu.hk/app/wp-content/uploads/2022/10/Vagrancy-and-Vagrancy-Type-Laws-in-Colonial-History-and-Today.pdf.

[92] Janeille Zorina Matthews and Tracy Robinson, "Modern Vagrancy in the Anglophone Caribbean", *Caribbean Journal of Criminology Vol. 1 No. 4,* April 2019, p. 125, 129.

> **creating broad crimes providing wide discretion to law enforcement officials**."[93]

Generally, these colonial-era vagrancy and vagrancy-type laws often created "status crimes" where the offence is not based upon prohibited action or omission, but rests upon the identity of the offender who is, or is perceived to be, in a certain personal condition or is of a "specific character".[94] These provisions often contain vague language, such as being "idle" or "disorderly", having "no visible means of subsistence", or "not being able to "give a satisfactory account" of oneself. They may also criminalize conduct associated with the socio-economic status of persons experiencing homelessness and poverty, such as acts of "begging" or "gathering alms". These prohibitions on begging range from blanket bans on all forms of begging, begging in particular zones, or the prohibition of "active" begging.[95]

The above categories identified by the UN Special Rapporteurs are not an exhaustive list, and there is a gamut of laws that penalize the status of persons experiencing homelessness and/or poverty, or forms of conduct associated with homelessness and/or poverty. These laws may also be applied against others who are targeted as a result of societal discrimination, such as sex workers or LGBTQI+ persons. Furthermore, there are also penal laws that are disproportionately applied against and/or impact persons experiencing homelessness or poverty, including those ostensibly intended to protect "public peace", "public order" or "public security", in a similar vein to vagrancy-type laws. These may include, for instance, general criminal prohibitions on "breach of the peace" or "public nuisance", which, in turn, enhance the risk that persons experiencing homelessness and poverty be arbitrarily arrested and detained.

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93 Emphasis added. PALU Advisory Opinion, para. 59. See, as well, UN Doc. A/HRC/56/61/Add.3, para. 21; Christopher Roberts, "Discretion and the Rule of Law: The Significance and Endurance of Vagrancy and Vagrancy-Type Laws in England, The British Empire, and the British Colonial World"*, Duke Journal of Comparative & International Law Vol 33:181,* p. 196, 203; Anneke Meerkotter, "Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces", *University of Miami Law Review Caveat Volume 74:1* ("Meerkotter, Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces"*),* p. 5; and Tracy Robinson, "Sticky Colonial Criminal Laws", *75 University of Miami Review Caveat 58 (2020),* p. 59 – 61.

94 ICJ, *Sri Lanka's Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal,* December 2021, p. 3, available at: https://www.icj.org/wp-content/uploads/2022/01/Sri-Lanka-Briefing-Paper-A-Colonial-Relic-Long-Overdue-for-Repeal-2021-ENG.pdf.

95 UN Doc. A/HRC/56/61/Add.3, para. 2.

Criminalization of "Public Nuisance" in Former British Colonies in Asia

Across Asia, the minor offence of "public nuisance" is criminalized in a nearly identical fashion in the former British colonies of Bangladesh, Brunei, India, Pakistan, Malaysia, Myanmar and Singapore, reflecting the shared origins of the countries' criminal codes. All these criminal prohibitions are contained in section 268 of these countries' Criminal Codes, with India's prohibition now contained in section 270 of its new penal code, the Bharatiya Nyaya Sanhita 2023 (but formerly contained in section 268 of its colonial-times Penal Code).

In these former British colonies in Asia, "public nuisance" is defined as illegal acts or omissions causing "common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, dangers or annoyance to persons who may have occasion to use any public right".[96] There are real challenges associated with defining clearly and precisely what being a "public nuisance" entails,[97] in line with the principle of legality. It is also not apparent whether the harm that these laws seek to protect against rises to the threshold of "substantial harm" required by the harm principle. This vagueness has exposed persons experiencing homelessness and poverty to arrest and detention in both Bangladesh and India.[98]

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96 See, for instance, Bangladesh Penal Code, available at: http://bdlaws.minlaw.gov.bd/act-11/section-3086.html; Indian Penal Code, available at: https://lddashboard.legislative.gov.in/sites/default/files/A1860-45.pdf; Pakistan Penal Code, available at: https://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html; Singapore Penal Code 1871, available at: https://sso.agc.gov.sg/Act/PC1871?ProvIds=pr268-&ViewType=Advance&Any=road+traffic+act+bicycles&WiAl=1.

97 In the context of the United States, Thomas W. Merrill, "The New Public Nuisance: Illegitimate and Dysfunctional", *The Yale Law Journal Forum,* 20 February 2023, p. 987 – 991, available at: https://www.yalelawjournal.org/pdf/F7.MerrillFinalDraftWEB_6mp4njiu.pdf.

98 Global Forum of Communities Discriminated on Work and Descent (GFOD), *Submission to the Special Rapporteurs on the Right to Adequate Housing and Extreme Poverty and Human Rights*, 13 September 2023, available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.ohchr.org/sites/default/files/documents/issues/joint-activity/decriminalization-homelessness/subm-decriminalization-homelessness-

Similar nuisance-related criminal prohibitions can be found globally,[99] and they are often "applied disproportionately to the poor in society, who are more likely to be assumed to violate such offences, and are more likely to be found in circumstances that could lead to such arrests and who are less able to assert their rights and access legal support to dispute unlawful arrests."[100] As such, they violate the principle that criminal law may not be applied to discriminate indirectly based on grounds prohibited by international human rights law, such as economic and social status.

2. CASE STUDY: APPLYING A HUMAN RIGHTS-BASED APPROACH TO VAGRANCY LAWS

Vagrancy and vagrancy-type laws[101] are the basis and inspiration for

extreme-cso-gfod.docx&ved=2ahUKEwih5LiNh5-HAxWPSGwGHZz3BrIQFnoECBoQAQ&usg=AOvVaw3xTGCSgm4sGc-swiTb9l_e; ICJ, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India,* June 2019, p. 113, available at: https://icj2.wpenginepowered.com/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf.

99 See, for instance, prohibitions on "common nuisance", using identical language, in the Penal Codes of Malawi (section 168); Seychelles (section 166); Tanzania (section 170); Tuvalu (section 165); Uganda (section 160); and Zambia (section 172) which state: "Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights; commits the misdemeanor termed a common nuisance and shall be liable to imprisonment for one year."

100 See for instance, in Malawi: Southern Africa Litigation Centre, *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi,* p. 1, available 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.

101 There is no universally accepted definition of "vagrancy", with many countries adopting different formulations of so-called "vagrancy offences". As noted in the PALU Advisory Opinion by the African Court on Human and Peoples' Rights: "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 disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer"; see, PALU Advisory Opinion, para. 58. See,

many of the laws criminalizing poverty and status. Thus, they serve as a good starting point to demonstrate the application of general principles of criminal liability and international human rights law and standards, i.e., a human rights-based approach to criminal laws.

Consider the following legal provisions in Sri Lanka and Guyana, retained from British occupation and commonly found in many other former British colonies, criminalizing status and conduct associated with "vagrancy" and its related concepts:[102]

Sri Lanka: Vagrants Ordinance No. 4 of 1841[103]

Sri Lanka's Vagrants Ordinance No. 4 of 1841 continues to be applied in a discriminatory and arbitrary manner till this day, criminalizing conduct commonly associated with begging and sex work.

The Ordinance consists of twenty-five provisions. Sections 2 – 5, 7 and 9 of the legislation penalize certain kinds of social behaviour, including behaving in a "riotous and disorderly manner"; "wandering"; "idling"; "gather[ing] or collect[ing] of alms under false pretense"; "soliciting"; and "acts of indecency". The Ordinance labels persons engaged in such conduct as "rogues", "vagabonds" or "incorrigible rogues", and the punishment for some of these "offences" are aggravated depending on the number of times they are repeated.

Section 10(1)(b), pertaining to the "detention of youthful bad characters", allows the Magistrate to convict boys between the ages

also, Christopher Roberts, "Discretion and the Rule of Law: The Significance and Endurance of Vagrancy and Vagrancy-Type Laws in England, The British Empire, and the British Colonial World"*, Duke Journal of Comparative & International Law Vol 33:181,* p. 183 – 184 ("A "vagrant" was hence understood to be poor, immoral criminally suspicious, and itinerant at the same time… "Vagrancy-type" law refers to all those laws that do not utilize the language of "vagrancy" but nonetheless penalize the same sort of activities, or, more broadly, fulfill a functionally similar role.")

[102] See, also, for instance Sierra Leone's proscription of loitering under the Public Order Act, as discussed in Chapter I.

[103] For a detailed analysis of the Vagrants Ordinance No. 4 of 1841, see the ICJ's detailed legal briefing on the law: ICJ, *Sri Lanka's Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal,* December 2021, available at: https://www.icj.org/wp-content/uploads/2022/01/Sri-Lanka-Briefing-Paper-A-Colonial-Relic-Long-Overdue-for-Repeal-2021-ENG.pdf.

of twelve and twenty-one, who are "found habitually wandering about the streets and accosting persons therein, or in the company of disorderly or immoral persons or of reputed criminals, [and when] such person has no regular occupation, or not other occupation than that of professing to render casual services to persons requiring them."

Human Rights-Based Approach Analysis of Sri Lanka's Vagrants Ordinance No. 4 of 1841: Similar to many other vagrancy and vagrancy-related laws, Sri Lanka's Vagrancy Ordinance No. 4 of 1841 is inconsistent with general principles of criminal liability and international human rights law and standards, and wrongfully criminalize conduct associated with homelessness and poverty.

For instance, several of its provisions are vague and overbroad in a manner contrary to the principle of legality (Principles 1 and 7 of *The 8 March Principles*). Section 2's criminalization of "riotous and disorderly behaviour", section 7(1)(b)'s criminalization of acts of "gross indecency" and other ambiguously worded criminal law provisions are not defined and allow for arbitrary and discriminatory arrests by law enforcement agents, and subsequent enforcement through charges, trial, conviction and sentencing.

Several of the proscribed behaviours (e.g. "wandering", "acts of indecency", "idling") also cannot reasonably be said to inflict or threaten substantial harm to the fundamental rights and freedoms of others, or to fundamental public interests, namely, national security, public safety, public order, public health or public morals, in contravention of the harm principle (Principle 2 of *The 8 March Principles*). In any event, the substantial harm that the proscribed conduct is said to inflict or threaten must be foreseeable and not unreasonably remote, which is a threshold unlikely to be met by these "offences".[104]

The Ordinance also creates "status crimes", insofar as it determines culpability of individuals based on their economic status and means of subsistence, in a manner that is inconsistent with Principle 4 (Voluntary Act Requirement), as well as Principles 9 and 10 (Criminal Law and Prohibited Discrimination, and Criminal Liability May Not Be Based on Discriminatory Grounds), as it discriminates based on social and economic

[104] ICJ, *The 8 March Principles*, Principle 7.

status. A similar analysis may apply to the provisions in the Ordinance related to begging (sections 3(1)(a) and section 4(d)) and the detention of "youthful bad characters" (section 10(1)(b)).

Guyana: Summary Jurisdiction (Offences) Act 1893

Part V of Guyana's Summary Jurisdiction (Offences) Act 1893[105] criminalizes so-called "offences against religion, morality and public convenience", including "vagrancy" (section 143); roguery and vagabondage (section 144); obeah and witchcraft (sections 145 – 146);[106] and "incorrigible roguery" (section 147).

Section 143 ("vagrancy") states that an individual shall be declared "a vagrant or idle and disorderly person", and be liable for a fine or imprisonment of up to two months, if, *inter alia*, the person:

"(b) wanders abroad, or places himself in any public way or public place, or intrudes in any private premise after being lawfully ordered to depart, and uses any solicitation, means or device to induce the bestowal of alms upon him, or causes procures, or encourages any other person to do so"; or

(c) sleeps, lodges or loiters in or under any porch, verandah, gallery, outhouse, passage, gateway, dwelling-house, warehouse, store, shop, stable, or other building, or in or under any building wholly or in part unoccupied, or is found in or under any cart, carriage, vessel, or in any logie or plantation building, or on or under any wharf, stelling, quay, jetty, bridge or other place, or in any cane-field or provision ground, or on or in any dam or trench immediately adjoining thereto, without leave of the owner, occupier, or persons for the time being in charge thereof, and has no visible means of subsistence or does not give a satisfactory account of himself."

[105] Guyana, Summary Jurisdiction (Offences) Act, available at: https://www.oas.org/juridico/pdfs/mesicic4_guy_summ.pdf.

[106] Obeah refers to a "system of belief among Black people chiefly of the British West Indies and the Guianas that is characterized by the use of magic ritual to ward off misfortune or to cause harm"; see, Merriam-Webster, available at: https://www.merriam-webster.com/dictionary/obeah.

Furthermore, section 153 of the Act criminalizes a broad range of "minor offences" that are "essentially offences of vagrancy".[107] This includes section 153(1)(xlvii) which criminalizes "cross-dressing for an improper purpose", which was declared unconstitutional by the Caribbean Court of Justice in November 2018 in *McEwan and Others v. Attorney General of Guyana*.[108] Some of the reasoning of the Court will be highlighted below in relation to the vagueness and uncertainty of vagrancy and vagrancy-related offences, in section III(b) of this chapter.

Human Rights-Based Approach Analysis of Guyana's Summary Jurisdiction (Offences) Act 1893: Once again, similar to Sri Lanka's Vagrancy Ordinance and other vagrancy or vagrancy-type laws, the above-mentioned provisions of Guyana's Summary Jurisdiction (Offences) Act 1893 are also inconsistent with general principles of criminal liability, and international human rights law and standards. Guyana's Summary Jurisdiction (Offences) Act contains language that is similar, if not identical, to other vagrancy and vagrancy-related laws in other former British colonies, such as Sierra Leone's proscription of "loitering" based on similar material elements.[109]

The headings used in the Summary Jurisdiction (Offences) Act – "Vagrants", "Rogues and Vagabonds" and "Incorrigible Rogues" – appear to shift from criminalizing actions, to criminalizing status,[110] in contravention of the voluntary act requirement (Principle 4, *The 8 March Principles*). With respect to section 143, in particular, the determination of culpability is identical to provisions in Sri Lanka's Vagrants Ordinance, based on economic status and means of subsistence, amounting to direct discrimination (Principles 9 and 10, *The 8 March Principles*).

Contributing to the perniciousness of Guyana's vagrancy offences is the fact that vagrancy is classified as a summary offence, with summary

[107] *McEwan and Others v. Attorney General of Guyana* [2018] CCJ 30 (AJ), ("*McEwan v. Attorney General of Guyana*") [115].

[108] *McEwan v. Attorney General of Guyana.*

[109] See Chapter I for a detailed analysis, based on general principles of criminal law, of Sierra Leone's proscription of "loitering".

[110] Janeille Zorina Matthews and Tracy Robinson, "Modern Vagrancy in the Anglophone Caribbean", *Caribbean Journal of Criminology Vol. 1 No. 4,* April 2019, p. 125, 129.

courts reportedly "the face of the administration of justice to most people in the Anglophone Caribbean":[111]

> "As justice is more informal in summary courts and the high standards for evidentiary proof and procedural fairness are generally less strictly applied where the penalties are low and access to legal representation is more limited, vagrancy was pernicious because of its summary nature and not despite it."[112]

3. DOMESTIC LEGAL DEVELOPMENTS AND JURISPRUDENCE: PROSCRIPTION OF CONDUCT ASSOCIATED WITH POVERTY AND STATUS

The foregoing analysis of some of the criminal law provisions mentioned in Chapters I and II, and of vagrancy and vagrancy-type laws, demonstrates that many of them share similar flaws in their content and scope. These laws frequently:

- Are vague, arbitrary and overbroad;
- Proscribe conduct that does not substantially harm others or fundamental public interests, or purportedly aim to protect against harm that is too remote;
- Determine criminal liability based on one's status in a manner that is directly or indirectly discriminatory, and proscribe status rather than a voluntary act or omission; and/or
- Impose disproportionate and/or discriminatory sanctions, including custodial sentences.

A body of domestic jurisprudence from around the world has been developed by judicial benches in apex and appellate courts, such as Constitutional and Supreme Courts, as advocates seek to challenge the lawfulness of problematic provisions criminalizing conduct associated with poverty and status. To challenge the detrimental impact of the substance and application of these criminal law provisions, lawyers and human rights defenders have used public interest litigation and other legal advocacy strategies to contribute to efforts to repeal or amend these laws.[113]

[111] *Ibid*., p. 132.
[112] *Ibid*., p. 125
[113] See, for instance, Meerkotter, Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces.

These domestic legal developments and jurisprudence have been cited in the case law and legal reform efforts of other countries confronting similar challenges. They have also fed into the development of international and regional human rights law and standards on the criminalization of homelessness and poverty,[114] and vice-versa, to the extent that these international and regional standards are similarly cited in domestic case law and legal reform efforts. As such, this section highlighting emblematic domestic legal developments and jurisprudence can also serve as a comparative law casebook for practitioners pursuing legal reform and advocacy efforts in various jurisdictions.

This section is organized based on a selection of the guiding questions[115] listed in Chapter I, which reflect the general principles of criminal liability and international human rights law and standards. The purpose is to enable practitioners to consider how courts and other justice actors have determined the issues that may arise when applying a human rights-based approach to criminal law. At times, there have been divergent approaches across different jurisdictions, and at times domestic approaches may be inconsistent with a human rights-based approach to criminal law. This section will underscore how the reasoning adopted by courts and bodies around the world reflect – both positively and negatively – the various facets of a human rights-based approach to criminal law in relation to the criminalization of conduct associated with homelessness and poverty.

For the purposes of this section, the following guiding questions from Chapter I will be considered:

a. What **human rights are detrimentally impacted** by the law? Does the law **discriminate, directly or indirectly, based on prohibited grounds**?
b. Is the law **vague, imprecise, arbitrary or overly broad**? Is criminal liability foreseeable and capable of being clearly understood in its application and consequences?
c. What **substantial harm to the fundamental rights and freedoms of others, or to certain fundamental public**

[114] See, Chapter II, for more on the international and regional human rights law and standards in relation to the criminalization of conduct associated with homelessness and poverty.

[115] To emphasize, this section highlights a selection of some of the guiding questions articulated in Chapter I. This section does not purport to be exhaustive of all the guiding questions that are and should be relevant to the criminalization of conduct associated with homelessness and poverty, as well as of all the jurisprudence that has emerged in relation to this topic.

interests, is the legal provision purportedly protecting against? If the interest(s) is/are legitimate, is the law **strictly necessary** to achieve the purpose(s), and is it **proportionate** to the legitimate interest(s) it pursues, meaning, is it the least intrusive or restrictive means to achieve the desired result?

d. Is criminal liability **based on status alone**, instead of a voluntary act or omission? With respect to criminal offences punishable with deprivation of liberty, is criminal liability based on, among other things, each material element of the "offence" having been **committed with a required mental state**, such as intent, purpose, knowledge, recklessness or criminal negligence?
e. Does the law establish **lawful defences for criminal liability**, such as by reasons of necessity, self-defence or duress?
f. Are the **sanctions non-discriminatory and proportionate** to the gravity of the offence? Are **custodial sentences being imposed as a measure of last resort**?

3.1 What human rights are detrimentally impacted by the law? Does the law discriminate, directly or indirectly, based on prohibited grounds?

As previously noted in Chapter II, criminalizing and penalizing conduct associated with poverty and status may violate a broad range of human rights protected under international human rights law, including the rights to: life; freedom from discrimination; equality before the law and equal protection of the law without discrimination; freedom from cruel, inhuman or degrading treatment or punishment; liberty and security of person; adequate standard of living; adequate housing; highest attainable standard of physical and mental health; and freedom of movement.[116]

Different courts and bodies have approached laws criminalizing conduct associated with poverty and status differently in terms of their consideration of which human and constitutional rights are impacted by such proscriptions. Practitioners are advised to consider these divergent regional and domestic approaches when determining the best strategy and arguments to put forward in their legal advocacy and reform efforts, based on the legal circumstances within which they operate.

As highlighted in Chapter II, there have been different approaches to the question of which human rights are affected by the criminal proscription of conduct associated with poverty and status at the regional level. The African Commission on Human and Peoples' Rights, in their *Principles*

[116] UN Doc. A/HRC/56/61/Add.3, para 10; ICJ, *The 8 March Principles*, p. 6.

on the Decriminalisation of Petty Offences in Africa, has approached this based on the rights to: equality and non-discrimination; dignity; freedom from torture and other ill-treatment; and right to liberty and security of person and freedom of arbitrary arrest and detention. Similar to the African Commission, the African Court on Human and Peoples' Rights based their analysis in the PALU Advisory Opinion on the rights to non-discrimination and equality; dignity; and liberty; but also considered the rights to fair trial; freedom of movement; protection of the family; and women's and children's rights. The Inter-American Commission on Human Rights, in its report on poverty and human rights, briefly analyzed these laws as possibly violating the principles of equality and non-discrimination. Notably, the European Court of Human Rights focused its analysis on the right to respect for private and family life, with the right to dignity as being inherent to this inquiry, in *Lăcătuş v. Switzerland*.[117]

3.1.1. Proving *prima facie* violations of human rights

The different approaches by various courts and bodies to the criminalization of various forms of conduct associated with homelessness and poverty appear to reflect judicial skepticism of whether such criminalization does interfere with certain human rights in the first place, regardless of State justifications advanced to qualify such restrictions. For instance, as previously noted, at the regional level, the European Court of Human Rights, in *Dian v. Denmark*, has considered that only *blanket* bans would engage article 8 of the ECHR, guaranteeing the right to respect private and family life.

This may also be a more practical matter in terms of how certain issues are argued before the courts. For instance, in the decision of *Tunweisge Francis v Attorney General*, discussed in greater detail below, Uganda's Constitutional Court struck down as unconstitutional sections 168(1)(c) and (d) (offences related to being "rogues and vagabonds"), but rejected arguments that these provisions are discriminatory and contravene article 21(1) and (2) of the Ugandan Constitution. The Court noted the inconsistency between the case presented and the evidence adduced in the supporting affidavit, and held that the "general statements [set out in the affidavits] can hardly amount to proof of the matters alleged in complaining about police conduct."[118] In contrast, in *A.B. v The Attorney General* (2023), the High Court of Barbados was persuaded that section

[117] This is because the Court already made out a *prima facie* finding of an interference with the right to respect for private and family life: for more details, see Chapter II.

[118] *Tumwesige Francis v Attorney General* (Constitutional Petition No. 36 of 2018) [2022] UGCC 5 (2 December 2022) ("*Tunwesige Francis v Attorney General"*), at [54], available at: https://ulii.org/akn/ug/judgment/ugcc/2022/5/eng@2022-12-02."

14(1)(b), criminalizing children found "wandering", indirectly discriminates based on sex based on evidence from the claimants of the "serious gender disparity" in terms of the application of the provision.[119] This decision will be discussed in greater detail in section 3.1.3.

3.1.2. Double victimization: violating the human rights of those whose human rights have already been violated

As underscored in Chapter II, the criminalization of poverty and status amounts to a form of "double victimization", to the extent that the experiences of poverty and/or homelessness are *prima facie* violations of human rights.[120]

This notion of "double victimization" formed part of the reasoning of the Delhi High Court in its decision to strike down parts of the Bombay Prevention of Begging Act, 1959, as extended to the Union Territory of Delhi, as unconstitutional:

High Court of Delhi, *Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors* (2018)

The Bombay Prevention of Begging Act, 1959, allows the police to arrest persons found begging without a warrant (section 4(1)), and enables a summary enquiry by the court following which the person may be detained in a "Certified Institution". Repeat offenders risk aggravated punishments, depending on the number of past convictions, such as detention for a period of ten years if convicted for two times or more.[121]

The Bombay Prevention of Begging Act, 1959, has served as the blueprint of anti-beggary laws across India at the national level, with at least 20 states and two Union Territories having adopted similar anti-beggary laws.[122]

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[119] *A.B. v The Attorney General*, BB 2023 HC 1 ("*A.B. v The Attorney General*"), para. 97.

[120] See Chapter II for a detailed discussion on this point.

[121] *Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors,* paras. 3 – 5.

[122] This is according to information provided by the Government of India's Ministry of Social Justice & Empowerment in November 2010: see, Press Information Bureau Government of India Ministry of Social Justice & Empowerment, "No Authentic Data on Beggars", 29 November 2010, available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=67734.

In 2018, the High Court of Delhi struck down as unconstitutional several parts of the Bombay Prevention of Begging Act, 1959 that treated begging as an offence.[123] In its judgment, the Court underscored how begging as a "last resort to subsistence" represents a failure of the State in terms of its obligations to its citizens, and how criminalization fails to address the root cause of begging:

> "29. […] Begging is a symptom of a disease, of the fact that the person has fallen through the socially created net. The government has the **mandate to provide social security for everyone, to ensure that all citizens have basic facilities, and the presence of beggars is evidence that the state has not managed to provide these to all its citizens**.
>
> 30. If we want to eradicate begging, artificial means to make beggars invisible will not suffice. **A move to criminalize them will make them invisible without addressing the root cause of the problem. The root cause is poverty, which has many structural reasons**: no access to education, social protection, discrimination based on caste and ethnicity, landlessness, physical and mental challenges, and isolation."[124]

The Court emphasized that laws criminalizing begging would "add insult to injury" to those who are victims of the State's failure "to do its duty to provide a decent life to its citizens".[125] Thus, any law criminalizing begging, such as the provisions in the Bombay

[123] These included: sections 4 – 10 and 12 – 29 of the Act, which according to the Court: "either treat begging as an offence committed by the beggar, or deal with ancillary issues such as powers of officers to deal with the said offence, the nature of enquiry to be conducted therein, punishments and penalties to be awarded for the offence, the institutions to which such "offenders" could be committed and procedures following the awarding of sentence for committing the said offence"; *Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors,* paras. 41 – 42.

[124] Emphasis added; *Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors,* paras. 29 – 30.

[125] *Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors,* para. 33: "The State simply cannot fail to do its duty to provide a decent life to its citizens and add insult to injury by arresting, detaining and, if necessary, imprisoning such persons, who beg, in search for essentials of bare survival, which is even below sustenance."

Prevention of Begging Act, 1959, would be violative of article 21 of the Constitution of India, protecting the right to life and the right to live with dignity.[126]

3.1.3. Direct and indirect discrimination

As noted in Chapter II, discrimination may take the form of direct discrimination (i.e., differential treatment based on a protected characteristic) or indirect discrimination (i.e., where an action or policy, even if facially neutral has an unjustifiable disparate impact based on a protected characteristic) or intersectional discrimination (i.e., discrimination people may experience on multiple, intersecting grounds of discrimination prohibited by international human rights law).

The Barbados High Court's decision in *A.B. v The Attorney General* (2023) serves as a good example of how a particular legal provision may be both directly and indirectly discriminatory, in this case on the basis of age and sex:

High Court of Barbados, *A.B. v The Attorney General* (2023)

The Court was examining the constitutionality of the detention of two female teenage claimants who were committed to the Government Industrial School (GIS), a juvenile detention facility for "youthful offenders and vagrant children", pursuant to charges of "wandering" under section 14(1)(b) of the Reformatory and Industrial Schools Act.

The Juvenile Court had ordered the two girls to be committed to the GIS under section 14(1)(b), which criminalizes children under the age of 16 who are "found wandering and not having any home or settled place of abode or proper guardianship or visible means of subsistence". Children may be sent to the GIS and detained for a period between three and five years for committing an "offence" under section 14.

[126] The Supreme Court of India has expounded on the scope of article 21 of the Constitution of India guaranteeing the right to life, which includes the "right to shelter, education, healthcare and clean environment"; *Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors,* paras. 21 – 26.

The Claimants alleged, among other things, that section 14(1)(b) "violates the right to equality of treatment by disproportionately impacting upon girls and it only applies to minors".[127] The claimants relied on the right to the protection of the law, contained in section 11 of the Barbados Constitution,[128] which the Court confirmed confers "a right of equal protection of or equal treatment under the law and prohibits discrimination".[129] While "sex" is included expressly in section 11, "age" is not, but the Court held that "age" should be recognized as a category for protection:

> "I hold that the right to protection of the law or equal protection of the law under section 11 is not to be interpreted as being limited to the categories of discrimination contained in the chapeau of the section but **should extend to all grounds upon which a person may unjustifiably be treated differently**. This interpretation is **keeping with the mandate of the Court to give generous interpretation to the Constitution and avoiding tabulated legalism**."[130]

The Court found that section 14(1)(b), as a status offence,[131] is directly discriminatory on the basis of age, because it criminalizes "children for being children" and "singles out" children between 14 and 16 for criminal liability that does not apply to adults.[132] The Court referred to, *inter alia,* General Comment 10 of the Convention on the Rights of the Child (CRC),[133] as well as a resolution from the

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[127] *A.B. v The Attorney General*, para. 59.

[128] Notably, the Claimants did not rely on section 23 of the Constitution which provides protection against discrimination, as "age" and "sex" are not listed as prohibited grounds for differential treatment in the section. *A.B. v The Attorney General*, para. 60 – 61.

[129] *A.B. v The Attorney General*, para. 78.

[130] Emphasis added. *A.B. v The Attorney General*, para. 80.

[131] This concept of a "status offence" or "status crime" will be discussed in greater detail below, under section 3.4 of this chapter.

[132] See, ICJ, *The 8 March Principles*, Principle 11, which states: "No one under the age of 18 may be held criminally liable for any conduct that does not constitute a criminal offence if committed by a person who is 18 or older."

[133] *A.B. v The Attorney General*, para. 89, citing General Comment 10 ("It is quite common that criminal codes contain provisions criminalising behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. … The Committee recommends that the State parties abolish the provisions on status offences in order to establish equal treatment under the law for children and adults.")

UN Human Rights Council,[134] to establish that at the "international level, it is clear that status offences such as the section in dispute must be abolished".[135]

The Court also held that section 14(1)(b) indirectly discriminates on the basis of sex because the evidence shows that "more girls are detained pursuant to and so affected by the application of section 14(1)(b) than males", and that the "majority of girls detained at the GIS are for section 14(1)(b)".[136] The Court referred to article 2 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which requires States to eliminate discrimination against women.[137] This is even if section 14(1)(b) is "expressed in neutral terms as to the gender of its targets", because "such law will still be discriminatory where the acts prohibited are more closely associated with one class of persons."[138]

Noting that the Deputy Solicitor General has "given no indication or any evidence that [section 14(1)(b)] is reasonably required in order to accord respect for the rights and freedoms of others and for the public interest to incarcerate children in need of care", the Court held:

> "It follows then that section 14(1)(b) is **directly discriminatory based on age and indirectly discriminatory on the basis of sex**. The provision also falls afoul of the protection of the law provisions and should for this reason also be declared unconstitutional."[139]

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[134] *A.B. v The Attorney General*, para. 90, citing the UN Human Rights Council ("[The Council] [c]alls upon States to enact or review legislation to ensure that any conduct not considered a criminal offence or not penalised if committed by an adult is also not considered a criminal offence and not penalised if committed by a child, in order to prevent the child's stigmatisation, victimisation and criminalisation".)

[135] *A.B. v The Attorney General*, para. 92.

[136] *A.B. v The Attorney General*, para. 98.

[137] *A.B. v The Attorney General*, para. 95.

[138] *A.B. v The Attorney General*, para. 94.

[139] Emphasis added. *A.B. v The Attorney General*, para. 104. The Court's reference to the "protection of the law provisions" is in relation to its additional finding that the section was "hopelessly vague and not law", which will be discussed in the next section: see, *A.B. v The Attorney General*, paras. 30 – 58.

Three instructive points from the Barbados High Court's judgment are worth underscoring here, as they may be particularly helpful for practitioners crafting legal arguments:

1. First, the Court's judgment held that section 14(1)(b) could be both directly discriminatory (on the basis of age) and indirectly discriminatory (on the basis of sex). For the latter, the Court was persuaded by the affidavit provided by the claimant highlighting the "serious gender disparity" in the application of section 14(1)(b),[140] which is demonstrative of the utility of quantitative evidence in supporting claims based on indirect discrimination.
2. Second, the Court took a progressive interpretation of what can constitute a prohibited characteristic in relation to discrimination claims, in line with international human rights law and standards. It recognized that age is a category that should be recognized as a protected characteristic. With respect to this, Principle 11 of *The 8 March Principles* addresses criminal law provisions imposing criminal liability exclusively on persons under 18 years of age for conduct, which, when engaged in by adults, does not carry any criminal consequences. Moreover, the criminalization and institutionalization of children is unlikely to be in their best interests, as emphasized by the Court.[141]
3. Third, the Court relied on international human rights law and standards in its finding of discrimination on the basis of age and sex, with references to the CRC, CEDAW and a resolution of the UN Human Rights Council. Reference was also made to the African Court on Human and Peoples' Rights PALU Advisory Opinion.

3.1.4. Existence of wrongful criminal law violates human rights regardless of threatened or actual enforcement

The mere existence of laws criminalizing poverty, homelessness and status violates human rights, regardless of their threatened or actual enforcement, and contributes to a broad range of human rights violations.[142] As such, it is not valid for States to justify not repealing a problematic law based on assertions that the law is not enforced in practice.

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[140] *A.B. v The Attorney General*, para. 97.

[141] The Court highlighted that "the vagueness and arbitrary application is particularly more egregious where the alleged perpetrator is a child… It cannot be in the best interest of a child to criminalize them simply as a means for a parent or guardian to control their non-criminal behaviour."

[142] ICJ, *The 8 March Principles*, p. 6 ("Unless criminal laws proscribing the above-mentioned conduct are directed at coercion or force or otherwise at the absence of consent – their mere existence – let alone their threatened or actual enforcement – violates human rights. The use of criminal law in these domains contributes to a broad range of human rights violations".)

This has been affirmed by the UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing:

> "States should move beyond *de facto* decriminalization, where laws prohibiting life-sustaining activities in public spaces remain in place but are not enforced. **Mere non-enforcement of laws that are not compliant with human rights remains insufficient, as such laws remain a constant threat to persons experiencing homelessness or poverty as long as they remain in force.** They reinforce the message in law enforcement and society that persons who experience challenging living conditions are inherently law breakers."[143]

As a comparative example, in the context of the criminalization of consensual same-sex sexual conduct, the European Court of Human Rights has found that pernicious legal, administrative, policy and/or judicial measures that were in themselves discriminatory – whether or not enforced at the time – or that were implemented in a discriminatory manner, violated the European Convention and caused their victims to experience fear and distress.[144] This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors' abuses, against whom the State does not offer protection. In the case of *Dudgeon v The United Kingdom*, the European Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,[145] instead of, or at times in addition to, prosecution.

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[143] UN Doc. A/HRC/56/61/Add.3, para. 35.

[144] See, *Dudgeon v. The United Kingdom*, no. 7525/76, judgment, 22 October 1981, paras 40 to 46; *Norris v. Ireland*, no. 10581/83, judgment, 26 October 1988, paras 38 and 46 to 47; *Modinos v. Cyprus*, no. 15070/89, judgment, 22 April 1993, paras 23, 24 and 26; and *A.D.T. v. the UK*, no. 35765/97, judgment, 31 July 2000, paras 26 and 39. See also, *Marangos v. Cyprus*, no. 31106/96, Commission's report of 3 December 1997, unpublished.

[145] See the European Commission's report in *Dudgeon*, cited in the Court's judgment in the same case, where, in arriving at its conclusion that it saw no reasons to doubt the truthfulness of the applicant's allegations, the Commission had noted that, "the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals [...] the existence of the law prohibiting consensual and private homosexual acts [...] provides opportunities for blackmail [...] and may put a strain upon young men [...] who fear prosecution for their homosexual activities". They reached this conclusion despite their finding that the number of

3.2 Is the criminal law vague, imprecise, arbitrary or overly broad? Is criminal liability foreseeable and capable of being clearly understood in its application and consequences?

The principle of legality has featured prominently in the jurisprudence of several domestic courts assessing whether vagrancy or vagrancy-type laws pass constitutional muster, either as a principle explicitly enshrined in the country's Constitution (such as, for instance, article 28(12) of Uganda's Constitution); or as read into certain constitutional provisions (such as, for instance, the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution); or as an operative constitutional principle of common law and statutory interpretation.

3.2.1. Imprecise and overly broad substantive content of "vagrancy" laws

Several courts have relied on the principle of legality, as an inherent concept of the rule of law, to strike down as unconstitutional laws criminalizing so-called "vagrancy", particularly those from the British tradition:

Supreme Court of the United States, *Papachristou v. City of Jacksonville* (1972)

In 1972, the Supreme Court declared as unconstitutionally vague the vagrancy ordinance of Jacksonville, Florida, which criminalized conduct associated with "vagrancy".[146] The defendants in the case

prosecutions in such cases [...] was so small "that the law has in effect ceased to operate". It appears inevitable to the Commission that the existence of the laws in question will have similar effects. The applicant alleges in his affidavits that they have such effects on him", Commission's report, para. 94.

[146] Jacksonville Ordinance Code § 257 stated: "Rogues and vagabonds, or dissolute persons who go about begging; common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses." See, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) ("*Papachristou v. City of Jacksonville*"), footnote 1, available at: https://supreme.justia.com/cases/federal/us/405/156/.

had been charged with various forms of conduct associated with "vagrancy", including "prowling by auto", "vagabonds", "loitering", "common thief" and "disorderly loitering on street", concepts that are familiar within many former British colonies with similar vagrancy and vagrancy-type laws.

The Court declared that the ordinance was void for vagueness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute", and because "it encourages arbitrary and erratic arrests and convictions". The Court specified: "Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids".[147]

The Court also noted that the effect of the ordinance's vagueness was the "unfettered discretion it places in the hands of the Jacksonville police", as it allows arrests based on "suspicion" instead of the standard of "probable cause". The Court held:

> "A direction by a legislature to the police to arrest all "suspicious" persons would not pass constitutional muster. **A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest**."[148]

Ugandan Constitutional Court, *Tunwesige Francis v Attorney General* (2022)

In 2022, the Constitutional Court of Uganda examined the constitutionality of sections 168(1)(c) and (d) of Uganda's Penal Code Act and declared them void for inconsistency with the Constitution.[149]

Section 168 of the Penal Code Act dealt with offences related to being "rogues and vagabonds", punishable with imprisonment of up to six months, or up to one year for subsequent offences. Section 168(1)(c) proscribed being a "suspected person or reputed thief who

[147] *Papachristou v. City of Jacksonville*, s. 162.
[148] Emphasis added. *Papachristou v. City of Jacksonville*, s. 169 – 170.
[149] *Tumwesige Francis v Attorney*, at [61].

has no visible means of subsistence and cannot give a good account of himself or herself". Section 168(1)(d) proscribed being a "person found wandering" in public spaces, "and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose".[150]

Notably, the principle of legality is explicitly enshrined in article 28(12) of the Ugandan Constitution, which provides: "Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."

In reliance on article 28(12), the Constitutional Court held, in relation to sections 168(1)(c) and (d) of the Penal Code Act:

> "that the elements for the impugned provisions are **ambiguous, vague and too broad to amount to a precise definition of an offence** which is what is required under article 28(12) of the Constitution or what is otherwise referred to as the **principle of legality**".[151]

The Court's full analysis of sections 168(1)(c) and (d), set out below, will be useful for practitioners seeking to challenge the legality of provisions in many jurisdictions that criminalize conduct associated with homelessness and poverty using similar, if not identical language:

In relation to section 168(1)(c):

> "It is not clear what he or she would be suspected of. Neither is it clear, in case of a reputed thief, as to who would determine that he is a reputed thief, at the time of arrest and being charged. More bewildering is the second element and that he or she has no visible means of subsistence. Visible

[150] Section 168, Penal Code Act, available at: https://ulii.org/akn/ug/act/ord/1950/12/eng%402014-05-09.

[151] Emphasis added. *Tunwesige Francis v Attorney General,* at [40]. Also worth noting is the Court's holding that section 168(1)(c) reverses the onus of proof on an accused to give "a good account" of himself, in violation of the presumption of innocence as a constituent element of the right to a fair trial, which is non-derogable under the Constitution: see, [45] – [51]. In this regard, see also Principle 12 of *The 8 March Principles* (Criminal Law and Non-Derogable Human Rights).

> to who? What are visible means of subsistence that ought to reflect in the person at the time of his arrest and charging? The last element is that he or she cannot give a good account of himself or herself? Account about what? And to who? Is to the police officer or citizen arresting him? And what is a good account anyway? Is this not subjective, depending on whoever hears the same?"[152]

In relation to section 168(1)(d):

> "The first element would appear to refer to anyone who is outside his or her home. The conclusion in the second element would appear to only be a matter of conjecture for the person making the conclusion. The time and circumstances that would lead to such a conclusion are not specified. What is a disorderly purpose? No guidance is available in the provision. And why should having such a purpose be criminalised without an element harm or prejudice to any person?"[153]

The Court held, following the analysis of the impugned offences not being constitutionally permissible for being "vague, ambiguous and too broad", that "any attempt to deprive an individual of his or her personal liberty on account of these impugned offences would contravene the affected person's right to personal liberty", protected under article 23(1)(c) and (4)(b) of the Constitution.[154] Additionally, it would also follow that these unconstitutional laws "cannot lawfully be the cause of restriction of one's fundamental right to move freely throughout Uganda", protected article 29(2)(a) of the Constitution.[155]

Three points from the Ugandan Constitutional Court's decision in *Tunwesige Francis v Attorney General* are worth highlighting in relation to the application of the principle of legality:

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[152] *Tunwesige Francis v Attorney General,* at [36].

[153] *Tunwesige Francis v Attorney General,* at [37]. Notably, the last line ("And why should having such a purpose be criminalised without an element harm or prejudice to any person?") is a reflection of the harm principle, i.e. Principle 2 of *The 8 March Principles*.

[154] *Tunwesige Francis v Attorney General,* at [56].

[155] *Tunwesige Francis v Attorney General,* at [57].

1. First, the fact that the principle of legality is clearly embedded in Uganda's Constitution was clearly determinative in the Court's decision.
2. Second, the effective manner in which the Court questioned the legality of each constituent element of the two impugned provisions, through a series of targeted questions, highlights how the language in vagrancy and vagrancy-type laws is patently vague, ambiguous and overly broad.
3. Third, the logical sequence of the Court's analysis should be emphasized:[156] the Court first established that the two legal provisions being examined are constitutionally void for being vague, ambiguous and too broad. As such, any restriction on the rights to personal liberty or freedom of movement, based on these unconstitutional legal provisions, would therefore be unlawful, to the extent that any restriction on human rights must be in accordance with the law.[157] This framing may be helpful for practitioners seeking to structure their legal arguments in a logical and coherent manner.

The vagueness or uncertainty of a criminal statutory provision cannot be "cured" or "removed" through guidance provided by judges, prosecutors or law enforcement agents, because individuals will still not know how to regulate their conduct to avoid criminal liability, *prior* to being arrested. As emphasized by the Barbados High Court, in *A.B. v The Attorney General* (2023):

> "It is also **not permissible to disregard vague or uncertain language in a statute, especially a criminal one, on the expectation that judges will provide guidance**. The need for some flexibility has to be balanced against the requirements of certainty and legality, which mean that the statute itself must provide sufficient guidance. **Leaving it entirely to judges to explicate the meaning of an offence is impermissible because individuals must have *prospective* notice of what is prohibited by law so as to regulate their conduct.** Where language is too open-ended, it allows for wide variation in interpretation, leading to the application of inconsistent standards that may vary according to the personal predilections of individuals. This kind of discretion can lead to the retrospective

[156] This is likely in response to the order of arguments presented by the petitioners, which serves as a reminder to practitioners on the importance of presenting legal arguments in a logical and coherent manner.

[157] ICJ, *The 8 March Principles*, Principle 7.

> criminalization of individuals. In addition, it entrusts too much power to law enforcement, leaving individual rights and liberty subject to the whims of both the judiciary and the police."[158]

Similarly, the vagueness of a criminal provision cannot be "removed" by law enforcement or prosecutorial authorities giving details of the basis of the arrest or filing of charges, as held by the Caribbean Court of Justice in *McEwan v. Attorney General of Guyana* (2018), in relation to section 153(1)(xlvii) of Guyana's Summary Jurisdiction (Offences) Act criminalizing "cross-dressing for an improper purpose":

> "It was suggested to us by the Solicitor General that any potential vagueness could be removed if, when a person is charged, details are given of the improper purpose that prompted the laying of the charge. This is not an effective solution to the problem. **It seeks to cure the vagueness *after* the individual has been arrested for the offence. On the contrary, individuals require advance notice of any proscribed conduct so as to regulate their behaviour so as to avoid getting into trouble.**"[159]

3.2.2. Vagueness and arbitrariness of enforcement powers

Practitioners should also consider whether discretionary enforcement powers that are attached to laws penalizing conduct associated with homelessness and poverty are arbitrary and overly broad. For example, powers are often granted to State authorities, such as the police, to carry out arrests, searches and seizures without a judicial warrant in their enforcement of vagrancy and vagrancy-type criminal laws.[160] As a result,

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[158] *A.B. v The Attorney General*, para. 51.

[159] *McEwan v. Attorney General of Guyana,* [82].

[160] See, for instance, section 4 of India's Maharashtra Prevention of Begging Act, which empowers law enforcement agents to "arrest without a warrant any person who is found begging". Section 7(1) of Pakistan's Punjab Vagrancy Ordinance allows a police officer to "without an order from a magistrate and without a warrant, arrest and search any person who appears to be a vagrant." Section 3(2) of Sri Lanka's Vagrants Ordinance allows a police officer to "arrest without a warrant every person deemed to be an idle and disorderly". There are numerous other examples across various jurisdictions of warrantless arrest powers being attached to vagrancy-type "offences", including in, but not limited to, Antigua and Barbuda, Bangladesh, Bahamas, Brunei, Kenya, Jamaica, Namibia, Nigeria, Tanzania, Trinidad and Tobago, Uganda, Zambia and Zimbabwe: see, Christopher Roberts, *Vagrancy and Vagrancy-Type Laws in Colonial History and Today,* available at: https://www.law.cuhk.edu.hk/app/wp-content/uploads/2022/10/Vagrancy-and-Vagrancy-Type-Laws-in-Colonial-History-and-Today.pdf.

there is a real risk that such provisions may enable arbitrary arrests and detention based on discriminatory grounds, often without any valid grounds as a matter of domestic criminal procedural laws.

The African Court on Human and Peoples' Rights' PALU Advisory Opinion noted that arrests without a warrant for vagrancy offences are arbitrary because "often times, no rational connection exists between such arrests and the objectives of law enforcement".[161] As a result, the Court noted that this may result in "pretextual arrests, arrests without warrants and illegal pre-trial detention", which "exposes vagrancy laws to constant potential abuse".[162] This point was similarly noted by the Supreme Court of the United States in *Papachristou v. City of Jacksonville*, when it noted: "A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."[163]

This point was also central to the Malawi High Court's decision in *Ex Parte Henry Banda et al* in 2022, concerning the legality of indiscriminate sweeping exercises and arrests carried out by the Kasungu Police:

Malawi High Court, *Ex Parte Henry Banda et al* (2022)

In this case, the Malawi High Court was examining a judicial review claim regarding the legality of the decisions of the Kasungu Police carrying out an indiscriminate sweeping exercise and arrest. The police allegedly did not inform the applicants, at the time of the arrest, of the reasons of their arrests, and they were taken into police custody and spent a night in the police cells without being informed of the reasons for their detention. They were later charged with the offence of being a "rogue and vagabond" under section 184(1)(b) of the Penal Code, the police having coerced them to plead guilty to the offence. The Court eventually convicted them, sentencing them to the payment of a fine of K3,000 in default to imprisonment for three months with hard labour.[164]

[161] PALU Advisory Opinion, para. 82.

[162] PALU Advisory Opinion, para. 85.

[163] *Papachristou v. City of Jacksonville*, s. 169 – 170.

[164] Malawi High Court, *The State v The Officer In-Charge | Ex Parte: Banda & Others* (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022) ("*Ex Parte Henry Banda et al*"), para. 1.1, available at: https://malawilii.org/akn/mw/judgment/mwhc/2022/139/eng@2022-07-22.

In finding that indiscriminate sweeping exercises conducted by the police usually do not meet the criteria for arrests to be lawful under the Criminal Procedure and Evidence Code and the Constitution, the Malawi High Court underscored:

> "… the Malawian courts abhor the police practice of **randomly arresting people without proper grounds, prosecuting and convicting them on vagrancy or nuisance related offences which upon review, confirmation or appeal do not stand the test of legality as well as constitutionality**".[165]

These powers exacerbate the arbitrariness associated with the content and scope of the "offences" established by the legal provisions and raise serious concerns about due process and fair trial rights. As emphasized by the High Court, citing the PALU Advisory Opinion:

> "… because **vagrancy laws often punished an individual's perceived status**, such as being "idle", "disorderly" or "a reputed thief", **which status did not have an objective definition**, law enforcement officers could **arbitrarily arrest individuals without the sufficient level of *prima facie* proof that they committed a crime**."[166]

The Malawi High Court's decision highlights how it is crucial for practitioners to closely consider whether acts of enforcement by State agents, such as sweeping exercises and indiscriminate arrests, comply with domestic law and regulations or are *ultra vires*. This inquiry also applies to administrative actions of State officials, such as eviction exercises carried out against informal traders in positions of economic vulnerability.[167]

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[165] Emphasis added. *Ex Parte Henry Banda et al*, para. 2.11.

[166] Emphasis added. *Ex Parte Henry Banda et al,* para. 2.28.

[167] The authors of this Guide consider that forced evictions, such as the ones that were the subject of the South African Constitutional Court's review in *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* (2014), can have a punitive, quasi-criminal character, even if not characterized as "criminal", due to the severity of the penalty or other adverse impacts against informal traders whose livelihoods depend on trading in a particular location. The decision will be discussed in greater detail below.

3.3 What substantial harm to the fundamental rights and freedoms of others, or to certain fundamental public interests, is the legal provision purportedly protecting against? If the interest(s) is/are legitimate, is the law strictly necessary to achieve the purpose(s), and is it proportionate to the legitimate interest(s) it pursues, meaning, is it the least intrusive or restrictive means to achieve the desired result?

Integral to the human rights analysis of laws criminalizing homelessness and poverty is scrutiny of the purported purpose of such laws, and whether they can be justifiably said to protect against substantial harm to the fundamental rights and freedoms of others, or against harm to certain fundamental public interests.[168] It is not enough for States to put forward a justification for certain legal provisions, as it must still be proven that these provisions are narrowly construed, and that other less restrictive means of achieving the legitimate interest(s) are insufficient.[169]

3.3.1. Lack of clarity about the purpose or public interest

It is often unclear what "substantial harm" is inflicted or threatened to the fundamental rights and freedoms of others, or certain fundamental public interests, as a result of the conduct associated with poverty and status proscribed by certain flawed legal provisions.

For instance, the Ugandan Constitutional Court, in *Tumwesige Francis v Attorney General* (2022), questioned the absence of the element of harm in the constituent parts of section 168(1)(d) of the Penal Code Act, criminalizing a "person found wandering" in public spaces, "and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose":

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[168] As emphasized in Principle 7 of *The 8 March Principles*, a criminal law measure may only proscribe "in pursuit of one of the limited and narrowly defined, legitimate fundamental public interests allowed under international human rights law, namely, for the protection of the fundamental rights and freedoms of others, national security, public safety, public order, public health or public morals."

[169] As noted in the preamble of *The 8 March Principles*, there are "frequent attempts by States and others to justify human rights violations resulting from the existence and/or application of criminal law by relying upon claims of cultural, traditional or community values or religious beliefs, or stated threats to the rights and reputation of others, national security, public order, public morals or public health".

> "What is a disorderly purpose? No guidance is available in the provision**. And why should having such a purpose be criminalized without an element harm or prejudice to any person**?"[170]

"Public order" or "public health" interests are often put forward to justify the proscription of begging or restrictions of access to public spaces. As noted by the UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing: "Many of these laws [criminalizing homelessness and poverty] ostensibly aim at maintaining public order and public health, protecting the environment, or reducing visible homelessness".[171]

While "public order" and "public health" may be legitimate interests to restrict human rights, these interests must be closely scrutinized to determine if they hold water, particularly if the proscription of certain conduct does not require proof of substantial harm to the interest(s) as an element to be established to determine criminal liability. For instance, in 2015, the Belgian *Conseil d'État*, in *Pietquin and Others*, examined the prohibition of begging in the city of Namur, and specified that: "**begging could not in itself be considered a breach of public order**" (emphasis added).[172] Similarly, in 2012, the Constitutional Court of Hungary determined that article 186 of Act 2 of 2012 on Petty Offences, criminalizing the use of public spaces for habitual residence, storage or anything "different than its original destination", was unconstitutional. The Court emphasized that "**residing in a public space does not inherently infringe the rights of others, cause damage or endanger the habitual use of space or public order and therefore should not be considered a petty offence**." (emphasis added)[173] These conclusions reflect the courts' efforts to closely examine the justifications put forward by States to criminalize and penalize forms of conduct associated with homelessness and/or poverty.

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[170] Emphasis added. *Tumwesige Francis v Attorney General*, at para. 37.

[171] UN Doc. A/HRC/56/61/Add.3, para. 3.

[172] *Lăcătuş v. Switzerland,* at para. 28, citing *Pietquin and Others*, no. 299.729 ("… it specified that begging could not in itself be considered a breach of public order but could be prohibited at certain times, in certain places and in accordance with certain procedures.")

[173] *Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* Reference OL HUN/4/2018, 20 June 2018, citing the decision of the Constitutional Court [38/2012 (XI. 14.)], available at: http://public.mkab.hu/dev/dontesek.nsf/0/1C19F4D0CFDE32FBC1257ADA00524FF1?OpenDocument.

3.3.2. Distinctions between forms of begging based on the "harm" associated

Legislatures and courts around the world, recognizing the harmful effects of blanket bans on begging, have attempted to draw distinctions, in jurisprudence and statutory law, between different forms of begging. In Europe, as a matter of criminal and administrative law, several countries have distinguished between "silent" or "passive" begging, on the one hand, and "aggressive" or "intrusive" begging, on the other hand.[174]

Constitutional Court of Italy, *Decision No. 519* (1995)

The Italian Constitutional Court has examined the prohibition of begging on several occasions. In 1995, the Court examined the constitutionality of article 670 of the Italian Criminal Code, which, in its first part, criminalized begging in public in all forms, with aggravated punishments for begging carried out in a "disgusting or harassing way", or by "faking deformity or disease", or by using "other fraudulent means to arouse the pity of others".[175]

In its decision, the Court held that, under a test of "reasonableness", "public peace and public order do not appear to be seriously put into danger by begging in the form of a simple request for help."[176] In so doing the Court was examining whether there is a rational nexus between the proscribed conduct ("a simple request for help", or so-called "passive" or "silent" begging) and the public interests purportedly served by the criminal law ("public peace and public order").

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[174] The European Court of Human Rights considered these differences in State practices in *Lăcătuş v. Switzerland*, paras. 19 – 31. See also, Anna Kompatscher, "Begging as a human rights? – challenging the penalization of begging in the EU in light of the recent Lăcătuş v. Switzerland case", *Housing Rights Watch,* 1 July 2021, available at: https://www.housingrightswatch.org/content/begging-human-right-–-challenging-penalisation-begging-eu-light-recent-lăcătuş-v-switzerland.

[175] Giacomo Pailli and Alessandro Simoni, "Begging for Due Process: Defending the Rights of Urban Outcasts in an Italian Town", *Seattle University Law Review Vol. 39:1303,* p. 1306. Article 670 stated: "Whoever begs in a public place or in a place open to the public shall be punished with imprisonment of up to three months. The penalty is imprisonment between one and six months if the fact is committed in a disgusting or harassing way [*ripugnante o vessatorio*], or by faking deformity or disease, or using other fraudulent means to arouse the pity of others."

[176] *Ibid*., citing Constitutional Court of Italy, *Decision No. 519*, 28 December 1995, available at: https://giurcost.org/decisioni/1995/0519s-95.htm.

> As a result, the first part of article 670 of the Italian Criminal Code was found to be unconstitutional. The Court chose to retain the second section of the article, which made begging that is carried out "in a disgusting or harassing way" as a separate crime, finding that the provision "was aimed at protecting well-deserving values, such as the 'spontaneous fulfillment of the duty of solidarity'".[177]

The Austrian Constitutional Court has drawn a similar distinction between "silent" begging and the criminalization of "aggressive and commercial/professional begging", in its *Decision G 155/10-9* in June 2012.[178] In a similar vein, the Denmark High Court, in 2021, held that section 197 of Denmark's Penal Code "pursues legitimate aims – namely the concern to maintain public safety and order", because it criminalizes begging which causes nuisance to the public and is thus "targeted in particular at begging that generates an insecure environment",[179] in contrast to a blanket ban on begging. This section was later the subject of the European Court of Human Rights' decision in *Dian v. Denmark* mentioned above.

The authors of this Practitioners' Guide are concerned that this distinction between "silent" and "aggressive" begging may be used to justify proscriptions of "aggressive begging", which are frequently still not construed in a sufficiently narrow manner, and perpetuate the stigmatization of begging. It must be emphasized that the "substantial harm" that these provisions are typically purporting to protect against is the "aggressive" conduct, which is not inherent or fundamentally linked to the act of "begging". Begging, in and of itself, does not inflict or threaten substantial harm to the fundamental rights and freedoms of others or

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[177] *Ibid*., p. 1310, which also noted: "In 1999, while approving an "omnibus law" aimed at the abolition of a number of petty crimes, Section 2 of Article 670 was finally abolished with bipartisan support, and without introducing any administrative sanction. Thus, adult begging was definitively brought into the realm of irrelevance from the point of view of criminal law."

[178] Anna Kompatscher, "Begging as a human rights? – challenging the penalization of begging in the EU in light of the recent Lăcătuş v. Switzerland case", *Housing Rights Watch,* 1 July 2021, available at: https://www.housingrightswatch.org/content/begging-human-right-–-challenging-penalisation-begging-eu-light-recent-lăcătuş-v-switzerland, citing Austrian Constitutional Court, *Decision G 155/10-9,* 30 June 2012, available at: https://www.vfgh.gv.at/downloads/VfGH_G_155-10_Bettelverbot_Sbg.pdf.

[179] *Dian v. Denmark,* para. 9, citing the high Court of Denmark's decision, 11 November 2021.

to certain fundamental public interests, as the Italian Constitutional Court and the Austrian Constitutional Court have both acknowledged. Proscriptions of "aggressive begging" are not sufficiently circumscribed because they include "begging" as a constituent element for establishing liability.

In any event, the harm that the criminal proscription of "aggressive begging" purports to target, in most States, would already be the object of existing criminal laws that may adequately respond to forms of "aggressive" conduct that may threaten or inflict substantial harm, such as criminal laws related to assault (e.g., the criminal proscription of common assault, actual bodily harm and wounding/grievous bodily harm), battery or harassment. As an example: in the United Kingdom, the Anti-social Behaviour, Crime and Policing Act 2014 deals with "anti-social behaviour", such as "conduct that has caused or is likely to cause, harassment, alarm or distress to any person".[180] The Court of Appeal (England and Wales), in *Swindon Borough Council v Abrook*, has made clear that, if applied to someone who was begging, this does *not* require courts to distinguish between "aggressive" and "passive" begging, but to assess, instead, "whether the behaviour of a respondent has caused, or is likely to cause, harassment, alarm or distress".[181] The corollary of the Court's reasoning is that whether someone was begging, in and of itself, is irrelevant to the question of whether one is causing or is likely to cause "harassment, alarm or distress". This represents a preferable approach that responds specifically to the substantial harm caused by certain conduct, without conflating this with conduct, such as begging, that should not be criminalized.

[180] See, Section 2, Anti-social Behaviour, Crime and Policing Act 2014, available at: https://www.legislation.gov.uk/ukpga/2014/12/section/2. It is beyond the scope of this Practitioners' Guide to undertake a detailed analysis of whether the United Kingdom's policing of so-called "anti-social behaviour" is consistent with general principles of criminal liability and international human rights law and standards, but it should be noted that, in the absence of clearer definitions of the proscribed conduct in line with the principle of legality, the provisions may be subject to arbitrary enforcement in a manner that indirectly discriminates against persons experiencing homelessness and poverty, for example, due to stereotypes and profiling.

[181] Mark Smulian, "Court of Appeal rejects distinction between 'aggressive' and 'passive' begging when it comes to obtaining anti-social behaviour injunctions", *Local Government Lawyers*, 14 March 2024, available at: https://www.localgovernmentlawyer.co.uk/community-safety/393-community-safety-news/56742-court-of-appeal-rejects-distinction-between-aggressive-and-passive-begging-when-it-comes-to-obtaining-anti-social-behaviour-injunctions, citing *Swindon Borough Council v Abrook* [2024] EWCA Civ 221.

In a similar manner, States have sometimes justified prohibitions on begging based on the need to protect individuals, especially children, against being coerced or exploited into begging. This was highlighted by the Federal Supreme Court of Switzerland, in their examination of section 11A of the Geneva Criminal Law Act in 2008, later the subject of the European Court of Human Rights' judgment in *Lăcătuş v. Switzerland*:

> "From the public interest perspective, it should also be noted that, in reality, **it is unfortunately not uncommon for those who beg to be exploited as parts of networks which use them solely for their own gain and, in particular, that there is a real risk of minors, especially children**, being exploited in this way, which the authority has a duty to prevent and forestall."[182]

While there may be a legitimate State interest in protecting the human rights of individuals in positions of vulnerability, such as children, who may be coerced or exploited into begging by organized crime syndicates, criminal proscriptions should aim to respond specifically to the coercion and exploitation, instead of focusing on begging in and of itself. The criminal law ought to respond to the substantial harms – such as the worse forms of child labour, child exploitation, coercion, force, abuse of authority or fraud – not to conduct associated with begging.

3.3.3. Demonstrating strict necessity and proportionality

As emphasized, it is insufficient for the State to articulate the fundamental public interest(s) served by the criminal law, as State must also show concrete evidence that the particular provision is strictly necessary and is proportionate, meaning that it is the least intrusive or restrictive means to achieve the desired result.

This was emphasized by the Malawi High Court in the *Ex Parte Henry Banda et al* decision, in relation to the State interest of "prevention of crime" as a justification for the enforcement of vagrancy-related offences. The Court held:

> "This Court is in agreement with the African Court's Advisory Opinion position that 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,**

[182] Emphasis added. *Lăcătuş v. Switzerland*, para. 18, citing *Judgment of the Federal Supreme Court of 9 May 2008 [6C_1/2008 (ATF 134 | 214)*, para. 5.6.

clearly, was therefore largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets. Criminal justice courts nor this Court is not saying that vagrancy laws do not contribute to the prevention of crimes in some cases but that it is crucial as noted by the African Court that **other less-restrictive measures such as offering vocational training for the unemployed and providing shelter for the homeless adults and children were 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 were unnecessary and should be avoided."[183]

3.4 Is criminal liability based on status alone, instead of a voluntary act or omission? With respect to criminal offences punishable with deprivation of liberty, is criminal liability based on, among other things, each material element of the "offence" having been committed with a required mental state, such as intent, purpose, knowledge, recklessness or criminal negligence?

3.4.1. Vagrancy laws, status crimes and the voluntary act and mental state requirements

Many laws that criminalize conduct associated with homelessness and/or poverty create "status crimes", particularly those of the "vagrancy" tradition, to the extent that they punish an individual based on their perceived status, instead of for a voluntary act or omission. As a result, they are typically discriminatory, such as on the basis of one's socioeconomic status. Furthermore, for criminal offences punishable with deprivation of liberty, the material elements of the "offence" are not always accompanied by a required mental state, such as intent, purpose, knowledge, recklessness or criminal negligence.

[183] Emphasis added. *Ex Parte Henry Banda et al*, para. 2.29. In this regard, see also the Malawi High Court's decision striking down section 184(1)(c) of the Penal Code as unconstitutional because it is not an acceptable limitation to the applicant's constitutional rights, noting: "The effect and extent of the infringement of these rights are not acceptable limitations to these rights. Section 184(1)(c) is not justifiable when there are other policing tools like section 28 of the Penal Code"; High Court of Malawi, *Gwanda v S (Constitutional Cause 5 of 2015)* [2017] MWHC 23 (10 January 2017), p. 12 ("*Gwanda v S")*, available at: https://malawilii.org/akn/mw/judgment/mwhc/2017/23/eng@2017-01-10.

This has been repeatedly noted by the Malawi High Court in its various judgments in relation to the arbitrary arrests of people based on vagrancy laws. In *Gwanda v S*, the Court noted:

> "In the matter at hand, as earlier observed, the **Applicant was arrested simply because of his status**. … Hence I am bound to agree that the application of section 184(1)(c) on the Applicant infringed his rights under section 20(1) of the Constitution [prohibiting discrimination]."[184]

Similarly, in *Ex Parte Henry Banda et al*, the High Court, citing the PALU Advisory Opinion, held that:

> "… because **vagrancy laws often punished an individual's perceived status**, such as being "idle", "disorderly" or "a reputed thief", which **status did not have an objective definition**, law enforcement officers could arbitrarily arrest individuals without the sufficient level of *prima facie* proof that they committed a crime."[185]

Vagrancy and vagrancy-related offences are also typically silent on the mental state requirement with respect to the commission of the "offence", even if the "offence" is punishable with custodial sentences. This is in part because there is no mental state requirement – be it intent, purpose, knowledge, recklessness, or criminal negligence – that can be attached to criminal liability that is based on status alone as opposed to a voluntary act or omission. This point has been made by Hungary's Constitutional Court in its Decision 38/2012 (XI. 14.), in relation to the criminalization of residing in a public space, where it determined that "for a petty offence violation the offender must demonstrate intention or negligence", but homelessness is a "social condition that lacks attributable subjective fault".[186]

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[184] Emphasis added. *Gwanda v S*, p. 11 – 12. This also demonstrates how status crimes are inherently discriminatory on the basis of grounds prohibited under international human rights law, such as socioeconomic status. Under section 20(1) of the Constitution, discrimination is prohibited on the grounds of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition."

[185] Emphasis added. *Ex Parte Henry Banda et al,* para. 2.28.

[186] *Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* Reference OL HUN 4/2018, 20 June 2018, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/OL_HUN_4_2018.pdf; citing Decision of the Constitutional Court [38/2012 (XI. 14.)], available at: http://public.mkab.hu/dev/dontesek.nsf/0/1C19F4D0CFDE32FBC1257ADA00524FF1?OpenDocument.

In 1999, the Supreme Court of the United States delivered its decision *Chicago v Morales,* concerning the constitutionality of the City of Chicago's Gang Congregation Ordinance, a vagrancy-type law that penalized "loitering" with "criminal street gang members". The decision from three of the justices noted how the law lacked a *mens rea* requirement and failed to distinguish between innocent conduct and conduct threatening harm:

Supreme Court of the United States, *Chicago v. Morales* (1999)

The City of Chicago enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place. If a police officer observes a person whom he reasonably believes to be a gang member loitering in a public place with one or more persons, he may order them to disperse, and a failure to promptly obey will give rise to a violation of the law.

Affirming the Supreme Court of Illinois' judgment, the Court held that the Ordinance was unconstitutionally vague and did not give people adequate notice of what constitutes prohibited conduct, and what did not, and violated the requirement that a legislature should establish minimal guidelines to govern law enforcement.

The decision was split six-three between the nine justices of the Supreme Court. In the decision of Justice Stevens, joined by Justice Souter and Justice Ginsburg, the Justices concluded that that the law "is a criminal law that contains no *mens rea* requirement" and "infringes on constitutionally protected rights". With references as well to the principle of legality and harm principle, the Justices underscored how state courts have only upheld ordinances criminalizing "loitering" if accompanied by the constituent element of some other overt act, or evidence of criminal intent:

"Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' **but rather about what loitering is covered by the ordinance and what is not**. The Illinois Supreme Court emphasized the **law's failure to distinguish between innocent conduct and conduct threatening harm**. Its decision followed the precedent set by a number of state courts that have upheld **ordinances that criminalize loitering combined with**

some other overt act or evidence of criminal intent. However, state courts have uniformly invalidated laws that do not join the term 'loitering' with a second specific element of the crime."[187]

The absence of a mental state requirement can also be relevant in examining the breadth of a criminal law provision, in line with the principles of legality, strict necessity and proportionality. For instance, the Supreme Court of Canada, in *R v Heywood* (1994), held that section 179(1)(b) of the Criminal Code, in relation to vagrancy, was overbroad and violated the Canadian Charter of Rights and Freedoms. In its decision, the Court engaged in a discussion on whether the word "loiter" contained in section 179(1)(b) requires "malevolent intent", and if the provision would thus be overbroad in the absence of a mental state requirement:

Supreme Court of Canada, *R v Heywood* (1994)

The respondent had been previously convicted of sexual assault involving children, which resulted in him being prohibited from committing vagrancy by loitering near playgrounds, school yards or public parks, pursuant to section 179(1)(b) of the Criminal Code. He was later arrested and convicted, while on probation, under section 179(1)(b), and during trial challenged the constitutionality of the provision.[188]

In a five-four decision, the Supreme Court held that section 179(1)(b) violated section 7 of the Charter of Rights and Freedoms (guaranteeing life, liberty and security, and the right not to be deprived thereof except in accordance with the principles of fundamental justice), and was not justified under section 1 (justifying reasonable limits on the rights and freedoms in the Charter, prescribed by law as can be demonstrably justified in a free and democratic society).

[187] Emphasis added. *Chicago v. Morales*, 527 U.S. 41 (1999), available at: https://supreme.justia.com/cases/federal/us/527/41/.

[188] *R v Heywood* [1994] 3 SCR 761 ("*R v Heywood*"), p. 762, available at: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/1198/1/document.do.

The majority held that the word "loiter" should be given its "ordinary meaning" and declined to read in a requirement of "malevolent intent":[189]

> "The word 'loiter' in s. 179(1)(b) should be given its ordinary meaning – to stand idly around, hang around, linger, tarry, saunter, delay, dawdle – and **should not be interpreted as requiring a malevolent intent. None of the dictionary definitions requires a malevolent intent or makes any reference to such a requirement** and the jurisprudence considering its meaning in other sections of the Code supports the use of the ordinary meaning in s. 179(1)(b)."[190]

Thus, the Court held that section 179(1)(b) was overbroad as it restricts liberty far more than is necessary to accomplish its goal:

> "Although a prohibition for the purpose of protecting the public does not *per se* infringe the principles of fundamental justice, the prohibition in s. 179(1)(b) does so because it restricts liberty far more than is necessary to accomplish its goal**. It applies, without prior notice to the accused, to too many places, to too many people, for an indefinite period with no possibility of review**."[191]

3.4.2. Distinction between criminalizing status versus criminalizing conduct

The case law that has emerged from the United States in relation to the constitutionality of such laws across the country appears to draw a

[189] The Court further noted that, in any case, the concept of "malevolent intent", as opposed to "unlawful intent", has a "very broad scope that is extremely difficult to define". According to the Court: "Malevolent intent could mean almost anything, and its definition would be dependent upon the subjective views of the particular judge trying the case"; *R v Heywood*, p. 763.

[190] Emphasis added; *R v Heywood*, p. 763.

[191] Emphasis added; *R v Heywood*, p. 763 – 764. See also, Hamish Stewart, "476 – Mistake of Law Under the Charter", *1998 40 Criminal Law Quarterly 476*, p. 7, available at: https://tspace.library.utoronto.ca/bitstream/1807/128973/1/476%20%20Mistake%20of%20Law%20Under%20the%20Charter.pdf ("But if the word "loitering" is taken to indicate that the person must have some malevolent or evil intent when standing around the park, the provision is arguably narrow enough to pass constitutional scrutiny.")

distinction between laws that criminalize status (and therefore constitute cruel and unusual punishment),[192] on the one hand, and laws that are facially neutral and apply equally to all regardless of their status, on the other.

The Supreme Court of the United States recently considered this issue in relation to the City of Grants Pass's ban on public camping:

Supreme Court of the United States, *City of Grants Pass v Johnson* (2024)

In *City of Grants Pass v Johnson*, the Supreme Court of the United States examined whether the Eighth Amendment's protection against cruel and unusual punishments applies to the enforcement of laws banning public camping against involuntarily homeless people.

In the 1962 seminal case of *Robinson v California*, the Supreme Court struck down a California law that criminalized narcotic addiction, holding that punishing someone for their status of being an addict contravened the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Declining to extend *Robinson* to the present case, the six majority Justices appeared to draw a distinction between the criminalization of status, and the criminalization of conduct that is facially neutral and applies equally to all regardless of their status:

> "Grants Pass's public-camping ordinances do not criminalize status. **The public-camping laws prohibit actions undertaken by any person, regardless of status**. It makes no difference whether the charged defendant is currently a person experiencing homelessness, a backpacker on vacation, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building. […] Because the public-camping laws in this case do not criminalize status, *Robinson* is not implicated."[193]

[192] The Eighth Amendment of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted**." (emphasis added)

[193] Emphasis added. Supreme Court of the United States, *City of Grants Pass, Oregon v. Johnson et al*, 72 F. 4th 868, Syllabus, p. 3 ("*City of Grants Pass v. Johnson*"), available at: https://www.supremecourt.gov/opinions/23pdf/23-175_19m2.pdf.

The majority Justices also rejected the argument put forward by the plaintiffs that *Robinson* should be extended beyond "laws addressing "mere status" to laws addressing actions that, even if undertaken with the requisite *mens rea*, might "in some sense" qualify as 'involuntary', as nothing in the Eighth Amendment permitted that course."[194]

In contrast, the dissenting opinion of Justice Sotomayor, joined by Justice Kagan and Justice Jackson, argued that Grants Pass's Ordinances criminalize being homeless because they "single out for punishment the activities that define the status of being homeless":[195]

> "Grants Pass's Ordinances criminalize being homeless. **The status of being homeless (lacking available shelter) is defined by the very behavior singled out for punishment (sleeping outside).** […] The Ordinances' purpose, text, and enforcement confirm that they target status, not conduct. For someone with no available shelter, the only way to comply with the Ordinances is to leave Grants Pass altogether."[196]
>
> […] Under the majority's logic, **cities cannot criminalize the status of being homeless, but they can criminalize the conduct that defines the status. The Constitution cannot be evaded by such formalistic distinctions**."[197]

The authors of this guide reiterate that under international human rights law, no one may be held criminally liable for engaging in life-sustaining activities in public places, such as sleeping.[198] Even if ostensibly neutral on its face, to the extent that they apply equally to all and not just against persons experiencing homelessness, these laws still constitute *indirect* discrimination as they have a "disproportionate impact on the equal enjoyment of human rights on the basis of prohibited grounds of discrimination, which include age, race, socio-economic, housing or residential status."[199] As such, they violate international human rights law

[194] *City of Grants Pass v. Johnson,* Syllabus, p. 3 – 4
[195] *City of Grants Pass v. Johnson,* Dissenting Opinion, p. 15.
[196] Emphasis added. *City of Grants Pass v. Johnson,* Dissenting Opinion, p. 13.
[197] Emphasis added. *City of Grants Pass v. Johnson,* Dissenting Opinion, p. 15
[198] Principle 21, *The 8 March Principles*.
[199] UN Doc. A/HRC/56/61/Add.3, para. 25.

and standards, including the prohibition of discrimination,[200] and because they criminalize the legitimate exercise of human rights.[201]

3.5 Does the law establish lawful defences for criminal liability (i.e., grounds for excluding criminal liability), such as by reasons of necessity, self-defence or duress?

3.5.1. Lawful defences for wrongful criminalization of conduct associated with poverty and status

Conduct associated with poverty, homelessness and status should not be criminalized. However, if there are, nonetheless, legal provisions penalizing such conduct, there should be lawful defences available, such as by reason of necessity or duress, that justifies or excuses the conduct and thus negates criminal liability.

The application of the defence of necessity and duress in relation to the penalization of conduct associated with poverty and homelessness has been acknowledged by some domestic courts. For instance, the defence of necessity should be available for the proscribing of conduct associated with homelessness, such as sleeping in public spaces. In *In re Eichorn* (1998), the California Court of Appeal held that a man experiencing homelessness should be allowed to assert the defence of necessity[202] for violating the City of Santa Ana's anti-camping ordinance:

> "There was substantial if not uncontradicted evidence that defendant slept in the civic center **because his alternatives were inadequate and economic forces were primarily to blame for his predicament**."[203]

The Delhi High Court has emphasized the obligation for courts to consider the applicability of defences as a necessary step of inquiry when examining cases relating to begging, in *Ram Lakhan v State:*

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[200] Principle 9, *The 8 March Principles*.

[201] Principle 8, *The 8 March Principles*.

[202] According to the Court, an "instruction on the defense of necessity is required where there is evidence "sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency." See, *In re Eichorn*, 81 Cal. Rptr. 2d 535, 540 (Ct. App. 1998).

[203] Emphasis added. *Ibid*.

Delhi High Court, *Ram Lakhan v State* (2007)

In this case, the Delhi High Court was considering, on appeal, the decision by the lower courts finding the petitioner to be a "beggar", who would thus be detained in a Certified Institution for a period of six months under section 5(5) of the Bombay Prevention of Begging Act, 1959.

The Court considered the applicability of the defences, such as the defences of sheer necessity or duress, in assessing whether a person found begging should be detained in a Certified Institution:

> "… he ought not to be ordered to be detained if, in considering his condition and circumstances of living as required under Section 5 (6) of the said Act, the court discerns a **defense of necessity; a situation where the person had no legitimate alternative to begging to feed and clothe himself or his family**. Similarly, where it is apparent that the person was found begging under the **exploitative command of others**, he ought not to be deprived of his liberty by being sent to a Certified Institution for detention."[204]

As such, the Court emphasized that whenever a person alleged to have been found begging is produced before a court, the Court must examine whether the person "has a defence of duress or necessity". The Court underscored that it is "an obligation on the Court to satisfy itself that the person did not have such a defense" regardless of whether the defence is raised by the person allegedly found begging.[205]

Practitioners should consider raising legal arguments based on lawful defences, which can be an important stopgap measure to ameliorate the detrimental impacts of the wrongful criminalization of conduct associated with poverty, homelessness and status. This is especially so in legal proceedings where a court may not be examining the constitutionality of a particular criminal provision, or when legal reform efforts to repeal or substantially amend the provision are already underway. For instance,

[204] *Ram Lakhan vs State* 137 (2007) DLT 173, para. 11, available at: https://indiankanoon.org/doc/434096/.
[205] *Ibid.,* para. 12.

in *Ram Lakhan v State*, the Delhi High Court emphasized that it was not "deciding a writ petition where the validity of the [Bombay Prevention of Begging Act, 1959] is in question",[206] but was nonetheless able to set aside the impugned judgment from the lower courts, based in part on the application of lawful defences in the case.

3.5.2. Lawful defences and mitigating circumstances for conduct that may be criminalized

The above deals with conduct that should not be criminalized in the first place (such as those in relation life-sustaining activities). At the same time, practitioners should also consider the application of defences for conduct that may necessitate a criminal law response, but nonetheless may be disproportionately targeted at or impact persons experiencing poverty and/or homelessness.

For instance, while theft may be criminalized to protect the property rights of individuals, can extreme poverty be considered a defence against the imposition of criminal liability, if one stole a loaf of bread to feed a family with starving children?[207] The Supreme Court of the Philippines has considered whether an individual's experience of extreme poverty can be a mitigating circumstance for sentencing purposes, if the individual committed theft out of necessity, in *People v. Macbul* (1943):[208]

Supreme Court of the Philippines, *The People of the Philippines vs. Moro Macbul* (1943)

The applicant, due to his extreme poverty and economic difficulties, was forced to steal two sacks of paper which he sold in order to be able to buy something to eat for various minor children of his. He pleaded guilty to the crime of theft, and it was also alleged that he was a habitual delinquent.

[206] *Ibid.,* para. 10.

[207] This is, of course, the plot of *Les Misérables* and the plight of the protagonist Jean Valjean, who served a 19-year prison sentence for stealing bread to feed his sister's starving children and attempting to escape from prison. For the academic debates on the poverty defence in the context of the United States, see, Michele E. Gilman, "The Poverty Defense", 47 U. Rich. L. Review 495 (2013), available at: https://scholarworks.law.ubalt.edu/all_fac/249/.

[208] It is unclear if the precedent set by this case in 1943 is consistently applied by courts in the Philippines, particularly in the lower courts, where convictions for petty and minor offences, such as those in relation to petty theft, are usually meted out.

The Supreme Court examined whether extreme poverty and necessity could operate as a mitigating circumstance falling within No. 10 of article 13 of the Revised Penal Code, which authorizes the court to consider in favour of an accused "any other circumstance of a similar nature and analogous to those above mentioned."

In finding that extreme poverty and necessity could operate as a mitigating circumstance, the Court affirmed the finding of the trial court and the lack of objection from the Solicitor General on the application of this mitigating circumstance:

> "We give it our stamp of approval, recognizing the immanent principle that **the right to life is more sacred than a mere property right**. That is not to encourage or even countenance theft but merely to dull somewhat the keen and pain-producing edges of the stark realities of life."[209]

3.6 Are the sanctions non-discriminatory and proportionate to the gravity of the offence? Are custodial sentences being imposed as a measure of last resort?

Any form of criminal sanction – whether in the form of imprisonment, fines and/or other forms of penalties – that results from a conviction based on a law that criminalizes conduct associated with poverty, homelessness or status, would typically be disproportionate, discriminatory and thus arbitrary. This is to the extent that using the criminal law, in and of itself, is not strictly necessary or proportionate to achieve a legitimate purpose, such as to protect against substantial harm to the fundamental rights and freedoms of others, or to certain public interests.

However, even if it has been determined that a certain form of conduct may be criminalized, it is still crucial to consider whether the penalty imposed is non-discriminatory and proportionate, and whether custodial sentences are being imposed only as a measure of last resort.

More broadly, practitioners should consider whether a given penalty – regardless of whether they are labelled as criminal in nature – are proportionate and non-discriminatory. Even if certain laws and regulations

[209] Emphasis added. *The People of the Philippines vs. Moro Macbul,* G.R. No. L-48976, 11 October 1943, available at: https://lawphil.net/judjuris/juri1943/oct1943/gr_l-48976_1943.html.

are not necessarily characterized as criminal under domestic law, they may have an analogous punitive character or stigmatizing intent or effect, given the severity of the penalty or other adverse impacts that the person concerned risks incurring. The nature, duration or manner of execution of certain sanctions, such as institutionalization, fines, evictions, demolitions and impoundment of goods, may also be evidence of their punitive, quasi-criminal character.[210]

3.6.1. Deprivations of liberty: imprisonment and other forms of detention

The disproportionate nature of a provision criminalizing poverty and status is further exacerbated if conviction may result in custodial sentences,[211] which should only be imposed as a measure of last resort. For instance, as previously noted in section II of this chapter, conviction based on section 143 of Guyana's Summary Jurisdiction (Offences) Act 1893, criminalizing "vagrancy" may result in imprisonment of up to two months.[212] Similarly, a conviction under section 184 of Malawi's Penal Code criminalizing being a "rogue and vagabond" may result in imprisonment for six months for the first offence, and imprisonment for 18 months for subsequent offences.[213]

The disproportionate nature of imprisonment upon a conviction for being a "vagrant" has been noted by the District Court of Cairns in *Parry v Denman* (1997), especially in the absence of facts indicating harmful or abusive behaviour:

District Court of Cairns, *Parry v Denman* (1997)

The appellant had approached people and asked for money and cigarettes while being drunk. He pled guilty before the Magistrates Court at Cairns to being a "vagrant", per the Vagrants Gaming and Other Offences Act 1931, for loitering in a public place to beg for alms. He was sentenced to six weeks' imprisonment for the offence.

[210] ICJ, *The 8 March Principles*, p. 8.

[211] While this section focuses on custodial sentences post-conviction, it must be noted that this problem is exacerbated by arbitrary detention occurring in the context of arrest and the excessive use of pre-trial detention for minor infractions, which are frequently accompanied by reports of onerous bail conditions, inadequate access to legal counsel, and the discriminatory and arbitrary enforcement of vague and overbroad laws.

[212] See, detailed analysis of section 143 in section 2 of this chapter.

[213] As previously noted, section 184(1)(c) was specifically struck down by the High Court in *Gwanda v S* (2017) for being unconstitutional.

On appeal, the District Court accepted that the appellant may have been an "irritation" and "annoyance" to the public and the Magistrates Court, but nothing in the facts indicated that he behaved in an abusive or harmful manner.[214]

The Court emphasized, in setting aside the sentence of imprisonment:

> "If to be an irritation or an annoyance to a fellow citizen were a crime to be worthy of four weeks' imprisonment, there would be nobody left to enforce the law. We would all be in prison. […] **The conduct of the appellant in no way, in my view, justified a sentence of imprisonment.** He was technically guilty of loitering for the purposes of begging alms but **there was nothing about his behaviour to suggest that there and then he was likely to engage in any conduct against which society needed to protect itself**."[215]

Custodial sentences are not limited to incarceration in prisons but can include orders to be detained in a detention facility or shelter, even if ostensibly for the purposes of "rehabilitation", as these can still represent deprivations of liberty.[216] Such detention orders can be gendered in nature, and may constitute arbitrary detention. This is exemplified by the findings of the UN Working Group on Arbitrary Detention following its visit to Sri Lanka in December 2017:

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[214] District Court of Cairns, *Parry v Denman* [1997] QDC 179, available at: https://www.queenslandjudgments.com.au/caselaw/qdc/1997/179/pdf-view. The Court noted: "In this particular case there is no doubt that the appellant would have been an irritation to those whom he approached asking for cigarettes. He was drunk. His appearance may well have been offensive. His smell may have been offensive. By the same token, there was nothing in the material put before the Magistrates Court to suggest that any of the people involved showed any fear or ran from the appellant's presence so as to protect themselves from him. There is no suggestion that anything he said to anybody was other than in the form of a polite albeit drunken request to be supplied with cigarettes. There is nothing to suggest that upon refusal, he came abusive or insistent towards the persons involved. In my view he may be appropriately described, in relation to the people to whom he made an approach, as an irritation, an annoyance."

[215] *Ibid*.

[216] Under article 4(2) of the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, deprivation of liberty means "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

Sri Lanka, Report of the UN Working Group on Arbitrary Detention

Female "offenders" of the Vagrants Ordinance No. 4 of 1841 may be detained in a house of detention established under the House of Detention Ordinance 1907 (section 8, Vagrants Ordinance),[217] including when a woman cannot pay the fine of 100 rupees after pleading guilty to acts of vagrancy under the Vagrants Ordinance.[218]

She will remain detained until she "avails [herself] of suitable employment found for [her], or until [she] is removed or discharged" (section 4(2), House of Detention Ordinance).[219] Escapes from the house of detention without permission may result in imprisonment of up to three months (section 12), such that, in effect, "such houses of detention essentially function as prisons for those who the State deems a 'vagrant'".[220]

Following its visit to Sri Lanka in December 2017, the UN Working Group on Arbitrary Detention found that 175 women were deprived of their liberty at the Methsevana State House of Detention in Gangodawila,[221] most of whom had been found to have committed acts of vagrancy under the Vagrants Ordinance No. 4 of 1841 and were detained pursuant to the House of Detention Ordinance.[222]

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[217] ICJ, *Sri Lanka's Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal*, December 2021, p. 11, available at: https://www.icj.org/wp-content/uploads/2022/01/Sri-Lanka-Briefing-Paper-A-Colonial-Relic-Long-Overdue-for-Repeal-2021-ENG.pdf.

[218] Human Rights Council, *Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka,* UN Doc. A/HRC/39/45/Add.2, 23 July 2018, paras. 61.

[219] ICJ, *Sri Lanka's Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal*, December 2021, p. 11, available at: https://www.icj.org/wp-content/uploads/2022/01/Sri-Lanka-Briefing-Paper-A-Colonial-Relic-Long-Overdue-for-Repeal-2021-ENG.pdf.

[220] *Ibid*.

[221] Human Rights Council, *Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka,* UN Doc. A/HRC/39/45/Add.2, 23 July 2018 ("UN Doc. A/HRC/39/45/Add.2"), paras. 60 ("An estimated 90 per cent of the women detained there have a psychosocial disability and the facility is unable to provide the support they require. The women are very poor and come to Methsevana with a low level of education. They are sent to the facility for rehabilitation and to undertake various vocational training activities.")

[222] UN Doc. A/HRC/39/45/Add.2, para. 61. At para. 64, the Working Group also noted that the two laws are "outdated and are overly broad in their application to individuals deemed to be "idle and disorderly", including "prostitutes".

Urging the Sri Lanka government to take immediate action to address these issues, the Working Group highlighted its serious concern that women and children are deprived of their liberty "without due process and satisfactory judicial review",[223] and most women "are 'no date' detainees, who have not been given a release date and are effectively detained indefinitely", as they are not taken back before the court for periodic review.[224]

Furthermore, the Working Group highlighted how the women were deprived of their liberty, highlighting the degree and intensity[225] of the restrictions placed on the detainees:

> "Women residing at Methsevana are not permitted to leave and **the facility is more like a prison than a suitable environment for vocational training**. Women are often brought to Methsevana in a prison van, uniformed police officers guard the facility, residential areas are secured by locks and bars, and a seclusion cell is used to temporarily house women who have been involved in violent behaviour."[226]

Some countries have repealed their colonial-era vagrancy laws but have replaced them with contemporary laws that give powers to State authorities to commit persons experiencing homelessness and/or poverty to shelters. Such regimes must be closely analyzed to determine if they result in deprivations of liberty that are disproportionate and/or discriminatory. As such, they may result in *de facto* criminalization regimes regardless of how such legal provisions are labelled as a matter of domestic law:

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[223] UN Doc. A/HRC/39/45/Add.2, para. 61.

[224] UN Doc. A/HRC/39/45/Add.2, para. 62.

[225] This language borrows from the language of the European Court of Human Rights, who has drawn a distinction between "deprivation of liberty" and "restrictions on the liberty of movement". According to the Court, the distinction is "merely one of a degree or intensity and not one of nature or substance": see, European Court of Human Rights, *Guzzardi v. Italy*, Application no. 7367/76, 6 November 1980, para. 93.

[226] Emphasis added. UN Doc. A/HRC/39/45/Add.2, para. 63.

Malaysia, Destitute Persons Act 1977

The Destitute Persons Act 1977[227] repealed The Vagrants Act 1965 and was presumably aimed at providing "protection and rehabilitation" for "destitute persons".[228]

Section 2 of the Act defines a "destitute person" as either: "any person found begging in a public place in such a way as to cause or to be likely to cause annoyance to persons frequenting the place or otherwise to create a nuisance;" or "any idle person found in a public place, whether or not he is begging, who has no visible means of subsistence or place of residence or is unable to give a satisfactory account of himself". This is language that is reminiscent of British-inspired vagrancy laws, such as the references to "no visible means of subsistence or place of residence", or "unable to give a satisfactory account of himself", which are concepts inconsistent with general principles of criminal law and international human rights law and standards.

Section 3 of the Act empowers an authorized officer to bring a "destitute person" before a Magistrate within 24 hours. If the Magistrate has reasonable cause to believe the person is a "destitute person", the person may be admitted temporarily to a welfare home pending a report by a social welfare officer, which will be completed within one month. If the Magistrate is then satisfied, based on the report, that the person is a "destitute person", the Magistrate may order the person to reside in a welfare home for up to three years, which may be extended for a further period of up to three more years.

Although the Act does not explicitly criminalize being a "destitute person", section 11 makes it a criminal offence to refuse or resist

[227] Destitute Persons Act 1977, available at: http://www.commonlii.org/my/legis/consol_act/dpa1977234/#:~:text=An%20Act%20to%20provide%20for,for%20the%20control%20of%20vagrancy.&text=title%20and%20commencement-,1.,to%20the%20whole%20of%20Malaysia..

[228] Bernama, "Decision on Destitute Persons Act to be known next year", *New Straits Times,* 19 February 2022, available at: https://www.nst.com.my/news/nation/2022/02/772777/decision-destitute-persons-act-be-known-next-year.

to be taken into the charge of the authorized officer or to escape from the authorized officer. Notably, section 11 also indicates the level of restrictions on movement for the individual who is forced to reside in the welfare home: it is a criminal offence to leave a welfare home without permission of the Superintendent; or to fail to return without reasonable cause to the welfare home, with potential imprisonment of up to three months.[229] These may indicate restrictions on the freedom of movement that may rise to the level of deprivation of liberty.

Furthermore, the Act is silent on the possibility for individuals deemed as "destitute persons" to appeal or seek a review of any detention in a welfare home ordered under the Act.[230]

Similarly, in Bangladesh, although the Vagrant and Shelterless Persons (Rehabilitation) Act of 2011 was enacted presumably to rehabilitate the vagrants, shelterless and people engaged in begging, critics have argued that it has become "a tool to put the shelterless behind bars".[231] The law allows law enforcement agencies to capture "vagrants" and "shelterless persons" and detain them for up to two years in rehabilitation centers

[229] See, also reports of the conditions of detention in certain welfare homes in Malaysia, for instance, Hanna Alkaf, "Here's what the gomen can do if you APPEAR like you're homeless", *cilisos.my,* 4 May 2016, available at: https://cilisos.my/heres-what-the-gomen-can-do-if-you-appear-like-youre-homeless/ ("At Pusat Sehenti Desa Bina Diri in Sungai Buloh, for example, male detainees are locked into a large cage-like room with bars instead of walls, and chains on the door, and not permitted to leave that room at all for the first week of remand. There are no barriers for privacy and all persons must eat, sleep, pass time, and use the bathroom together in the same room.")

[230] Malay Mail, "Repeal harmful Destitute Persons Act 1977 – Food Not Bombs-KL", 10 June 2014, available at: https://www.malaymail.com/news/what-you-think/2014/06/10/repeal-harmful-destitute-persons-act-1977-food-not-bombs-kl/684737. ("Through Operasi Gelandangan, government officers regularly subject persons on the streets to raids, drug tests, acts of intimidation and various forms of systematic harassment. "Beneficiaries" of this system cannot decline or appeal intervention by the state. Worse still, the law defines "resistance", including escape from detention, as an offence punishable by imprisonment. In other words, treatment more closely resembles policing than social welfare.")

[231] The Daily Star, "Vagrant act a 'tool' to put shelterless behind bars", 18 September 2011, available at: https://www.thedailystar.net/news-detail-202904.

(section 10), and if a person flees from such centres, they may be sentenced to up to three months' imprisonment (section 22).[232] Similar concerns have been documented in India, in relation to the detention of those found "begging" in "Certified Institutions".[233]

3.6.2. Fines and fees

Fines that are imposed for conduct that should not be criminalized, such as conduct associated with poverty, homelessness and status, are arbitrary and unlawful.

Additionally, practitioners must also consider whether fines that are imposed for petty or minor criminal offences, or those that are imposed as administrative measures,[234] are proportionate and non-discriminatory. The imposition of financial sanctions may create a "two-tier system of justice based on a person's ability to pay".[235] This has been termed "poverty penalties", and may take the following forms:

- Incarceration for failure to pay fines, if the person is unable to pay the fine;
- Piling on more fines, costs and fees for failure to pay fines, including through the use of installment payment plans;
- Imposing other legal sanctions for defaulting on fine payments, such as drivers' license suspensions, denial of access to social welfare, or loss of voting privileges; or
- Fining socially marginalized communities, such as those who

[232] Consortium for Street Children, "Bangladesh", September 2019, available at: https://www.streetchildren.org/legal-atlas/map/bangladesh/status-offences/are-children-criminalised-for-vagrancy-loitering-truancy-or-similar-activities/.

[233] Law Hub, "The Vagrancy Laws of India: An Overview and Human Rights Perspective", available at: https://law-hub.in/introduction-to-law/vagrancy-laws-india-human-rights-overview/ ("While the intent behind creating certified institutions was to rehabilitate beggars, the reality often falls short. Overcrowding, poor living conditions, and a lack of effective rehabilitation programs are some of the issues plaguing these centers. Critics argue that this system does not facilitate reintegration into society but instead creates an environment where the cycle of poverty is perpetuated.")

[234] UN Doc. A/HRC/56/61/Add.3, para. 14 ("Laws regulating public spaces are typically enforced by imposing administrative measures, including fines.").

[235] Campaign to Decirminalise Poverty & Status, *The Cape Declaration on Decriminalising Poverty and Status, 2023,* para. 8, available at: https://decrimpovertystatus.org/?resources=cape-declaration-on-decriminalising-poverty-and-status.

are marginalized because of race, gender, disability or other protected statuses.[236]

As recommended by the *Guiding Principles on Extreme Poverty and Human Rights*, States should "review sanctions procedures that require the payment of disproportionate fines by persons living in poverty, especially those related to begging, use of public space and welfare fraud, and consider abolishing prison sentences for non-payment of fines for those unable to pay."[237]

The punitive nature of financial sanctions and its impact on persons experiencing homelessness was underscored by the Supreme Court of the State of Washington in *City of Seattle v. Long* (2021), a case concerning whether the impoundment of an individual's truck and the cost of reimbursement for the impoundment constituted an excessive fine:

Supreme Court of the State of Washington, *City of Seattle v Steven Gregory Long* (2021)

The petitioner, a Native American general tradesman who stored work tools and personal items and lived in his vehicle, had his truck impounded in violation of Seattle Municipal Code SMC 11.72.440(B). At the impoundment hearing, the magistrate found that the petitioner had parked illegally, but waived the $44 ticket, reduced the impoundment charges to $547.12, and added a $10 administrative fee. The petitioner appealed all the way to the Supreme Court, bringing several claims including whether the impoundment and associated costs violated the excessive fines clauses in the State and Federal Constitution.[238]

[236] Jean Galbraith and Rheem Brooks, "The over-penalisation of poverty through fines and fees", *Penal Reform International,* 16 October 2023, available at: https://www.penalreform.org/blog/the-over-penalisation-of-poverty-through-fines-and/; Jean Galbraith, Latifa AlMarri, Lisha Bhati, Rheem Brooks, Zachary Green, Margo Hu and Noor Irshaidat, "Poverty Penalties as Human Rights Problems", *American Journal of International Law 117(3):397-440,* 2023.

[237] Guiding Principles on Extreme Poverty and Human Rights, para. 66.

[238] Article I, section 14 of Washington's Constitution states: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted". Similarly, the Eighth Amendment of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Court stated that to determine if the excessive fines clause is triggered, the first step is assessing whether the state action is "punishment", and the second step is to determine whether the fine is constitutionally excessive.[239]

The Court determined that the impoundment of the petitioner's truck and the associate costs were partially punitive and constituted a fine, noting that the "plain language shows that one purpose of the ordinance is to penalize violators".[240] Additionally, although the associated costs for impoundment were remedial and intended to reimburse the city, the associated costs were imposed only as a result of the impoundment, which the ordinance characterized as a "penalty".[241]

Next, the Court assessed that the impoundment and associated costs were unconstitutionally excessive, because they were "grossly disproportional to the gravity of a defendant's offense".[242] The Court held that this assessment includes considerations of an offender's circumstances such as their ability to pay:

> "The weight of history and reasoning of the Supreme Court demonstrate that excessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances. **The central tenant of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood**."[243]

[239] *City of Seattle v. Steven Gregory Long,* No. 98824-2, 12 August 2021 ("*City of Seattle v. Long*"), p. 25, available at: https://columbialegal.org/wp-content/uploads/2021/08/City-of-Seattle-v.-Steven-Long-Court-Opinion.pdf. P. 25

[240] *City of Seattle v. Long,* p. 26.f The Court noted that SMC 11.72.440(E) states: "Vehicles in violation of this section are subject to impound as provided for in Chapter 11.30 SMC, in addition to **any other penalty** provided for by law." (emphasis added).

[241] *City of Seattle v. Long,* p. 27.

[242] *City of Seattle v. Long,* p. 30, 37 – 38. According to the Court, this test requires consideration of: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused. Additionally, a person's ability to pay should be a factor too in determining whether the fine was grossly disproportionate.

[243] Emphasis added. *City of Seattle v. Long* P. 35, 37.

The Court assessed that the petitioner's circumstances were such that he had little ability to pay the associated costs due to his level of income, situation of homelessness, poor health, and loss of livelihood resulting from the impoundment.[244] As a result, the Court held that the impoundment and associated costs deprived Long of his means of living and violated the excessive fines clause.

City of Seattle v. Long is helpful in demonstrating how assessments of fines and fees should examine the *intent* and *effect* of financial sanctions, in order to determine if they are disproportionately punitive:

1. First, the Court determined that the impoundment and its associated costs – even if not criminal in nature, or characterized as a "fine" *per se* – can be punitive in nature to trigger the excessive fines clause. The Court took note of the *intent* of the ordinance to penalize (based on the words "any other penalty"), as evidence of the punitive intent of the impoundment and its associated costs.
2. Second, in determining the excessiveness of the penalty, the Court emphasized that the test should include consideration of a person's ability to pay when assessing the *impact* of a financial sanction, even if the imposition of a financial penalty may be facially neutral. This inquiry mirrors that of the test for indirect discrimination under international human rights law.

As noted by the *Guiding Principles of Extreme Poverty and Human Rights,* incarceration for being unable to pay fines should be reviewed and abolished,[245] such as those in relation to petty or minor offences. Many countries have provisions empowering courts to impose imprisonment in default of payment of a fine, with varying level of discretion.[246] This has often contributed to severe overcrowding in prisons, and will "aggravate unemployment, homelessness and poverty, thereby feeding a vicious cycle of deprivation and exclusion."[247]

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[244] *City of Seattle v. Long,* p. 39 – 40.

[245] Guiding Principles on Extreme Poverty and Human Rights, para. 66.

[246] See, for Bangladesh, Section 64, Penal Code 1860; for India, Section 8, The Bharatyiya Nyaya Sanhita, 2023; for Pakistan, Section 64, Penal Code 1860; and for Sri Lanka, Section 291, Code of Criminal Procedure.

[247] United Nations, *United Nations System Common Position on Incarceration*, April 2021, p. 4, available at: https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules/UN_System_Common_Position_on_Incarceration_09-06-2021.pdf.

Imposing imprisonment on individuals who are unable to pay a fine constitutes a sanction that impermissibly discriminates on the basis of one's socioeconomic status, as highlighted in a series of decisions of the United States Supreme Court. In *Williams v. Illinois* (1970) and *Tate v. Short* (1971), the United States Supreme Court considered it a denial of equal protection to convert fines to imprisonment for those who are unable to pay the fines and fees:

Supreme Court of the United States, *Williams v. Illinois (1970)* and *Tate v. Short (1971)*

In both cases, the Supreme Court prohibited converting fines and fees to incarceration for those who are unable to pay if: (i) the period of imprisonment exceeds the maximum term in the statute; and (ii) imprisonment is being imposed for offences for which a fine is the sole punishment authorized.

In *Williams v. Illinois*, the Court held that it would be discriminatory to subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum, solely by reason of their indigency. The petitioner had been convicted for petty theft. While the maximum term of imprisonment for petty theft was one year, the effect of the sentence imposed required the appellant to be confined for 101 days beyond this maximum period, because he could not pay the fine and costs of $505. As the non-payment here is involuntary, the application of the law works as "invidious discrimination solely because he is unable to pay the fine". The Court held:

> By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons, since the result is to **make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment**."[248]

A year later, in *Tate v. Short*, the Court examined the conviction of the petitioner on traffic offences, for which the person was fined – due to being unable to pay, the petitioner served an 85-day term in default. The traffic offences were punishable by fines only. The Court held that this constitutes precisely the same unconstitutional discrimination like in *Williams v. Illinois*, as the petitioner was "subjected to imprisonment solely because of his indigency".[249]

[248] Emphasis added. *Williams v. Illinois,* 399 U.S. 235 (1970).
[249] *Tate v. Short*, 401 U.S. 395 (1971).

3.6.3. Evictions, demolitions and impoundment of property

Evictions, demolitions and impoundment of property, even if administrative in nature, can have a punitive, quasi-criminal nature, as evidenced by the adverse impacts on individuals involved, as well as the nature and manner of effecting such administrative actions.

As underscored by the UN Committee on Economic, Social and Cultural Rights, "[f]orced eviction and house demolition as a punitive measure are … inconsistent with the norms of the [ICESCR]."[250] The requirement, including under international human right law, to scrutinize closely administrative actions is demonstrated by the South African Constitutional Court's 2014 decision regarding the City of Johannesburg's mass eviction of informal traders from their trading stalls as part of a "clean-up" operation:

South African Constitutional Court, *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* (2014)

The Constitutional Court granted a requested interim interdict to provide temporary relief for the City of Johannesburg's interference with the trading operations of informal traders. In October 2013, the City's Metro Police forcibly evicted the informal traders from their trading stalls and confiscated their goods, as part of the City's "Operation Clean Sweep", the stated objective of which was to "rid the City of unsightly and disorderly trading areas". According to the Court, in carrying out these indiscriminate evictions, the City "did not bother to distinguish between the traders who have always been doing business legally, and other informal traders who have not".[251]

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[250] UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The right to adequate housing (art. 11.1 of the Covenant): forced evictions,* 1997, para. 12.

[251] South African Constitutional Court, *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* (CCT 173/13; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014), at [7] ("*South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others*"), available at: https://www.saflii.org/za/cases/ZACC/2014/8.html.

The applicants in the case argued that they were all trading lawfully and had the requisite written permission of the City under its By Laws and Trading Policy, and that the City's scheme to relocate the traders was unlawful because it had not followed the steps required by section 6A of the Businesses Act.[252]

In assessing whether to grant temporary relief to the applicants, the Court considered that the applicants and their families had faced "imminent irreparable harm" because their livelihood depends on their trading in the inner city, and they had been "rendered destitute and unable to provide for their families for over a month".[253]

In assessing the impact of the evictions, the Court noted:

"It must be added that the eviction of the traders involved constitutional issues of considerable significance. The ability of people to earn money and support themselves and their families is an important component of the right to human dignity. **Without it they faced "humiliation and degradation".** Most traders, we were told, have dependants. Many of these dependants are children, who also have suffered hardship as the City denied their breadwinners' lawful entitlement to conduct their businesses. The City has not disputed this. **The City's conduct has a direct and on going bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health care services. The harm the traders were facing was immediate and irreversible**."[254]

The City's conduct, having "spawned immediate and acute hardship that left the applicant traders destitute",[255] was a matter of manifest urgency that led the Court to grant the application for interim

[252] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others,* at [11].

[253] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others,* at [29].

[254] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others,* at [31].

[255] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others,* at [36].

relief.[256] The Court's finding of the traders' "clear, undisputed rights under section 4 of the By-Laws to do business in the locations where they traded before they were removed" was also determinative.[257] Additionally, the City did not follow the "prescripts of the statutory provision" of section 6A(3) of the Businesses Act, which "prescribes the steps the City must follow to designate a trading area for informal trading".[258]

The Court's assessment of the detrimental impacts on the traders, which, in turn, would result in "imminent irreparable harm", and the manner in which the evictions were carried out – namely, *ultra vires*, without following statutory guidance – indicates that forcible evictions are not proportionate and may have a quasi-criminal character. With respect to this, the Court noted, in particular, the "humiliation and degradation" the traders faced, indicating the stigmatizing, punitive effect of the unlawful evictions. Also relevant is how the actions of the City of Johannesburg were not in accordance with statutory law, which runs afoul of the principle of legality.

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[256] The Court's decision relied heavily on the fact that the City's conduct was unlawful, and the undisputed rights of the "legal" traders who were the applicants in the case. However, it is unclear how this would apply if, for instance, the applicants involved were "illegal" traders and the City had acted based on the processes prescribed by domestic law. Principle 21 of *The 8 March Principles* emphasize that no one may be held criminally liable for engaging in life-sustaining economic activities in public spaces. See, M Pieterse, "Rights, Regulation and Bureaucratic Impact: The Impact of Human Rights Litigation on the Regulation of Informal Trade in Johannesburg", 6 January 2017, available at: https://scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812017000100004 ("While sensible and understandable, this sidestepping of a more profound contemplation of traders' constitutional rights means that the judgment provided little clarity on the extent to which the implicated rights would assist traders in similar future disputes, especially in instances where the City does act within the parameters of the law, or acts only against "illegal" traders, as was its initial intention during "Operation Clean Sweep". […] The emphasis on lawfulness further meant that the Court failed to consider the impact of the City's policy framework's initial designation of certain kinds of trade as "illegal" on the rights of those whose livelihood-generating activities are effectively criminalised thereby.")

[257] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others,* at [25].

[258] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others,* at [26].

An assessment of the severity of forced evictions and demolitions will require a close examination of whether the State has complied with its procedural duties and due process guarantees, which are a prerequisite for a lawful eviction required under international human rights law. Evidence of procedural duties and due process guarantees not being followed may be further indicative of the punitive nature of such evictions and demolitions.[259] In such instances, judicial relief may be sought from the courts:[260]

- The Supreme Court of Bangladesh held in *ASK v. Bangladesh* (1999) that before carrying out a massive eviction from an informal settlement and demolition of homes, the government should develop a plan for resettlement, allow evictions to occur gradually, take into consideration the ability of those being evicted to find alternative accommodation and give fair notice before eviction.[261]
- Similarly, the High Court of Kenya in *Mitu-Bell Welfare Society v Attorney General* (2013) held that the forced eviction and demolition of the homes of families from an informal settlement in Nairobi violated the constitutional rights of the petitioners, as they were carried out in a manner that was "illegal, irregular, unprocedural and contrary to … the Constitution" and "without a relocation option".[262]

Practitioners can also undertake a similar analysis of the proportionality and potential punitiveness of the impoundment or confiscation of the property of individuals. As previously noted, this analysis should consider the *intent*

[259] See, UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The right to adequate housing (art. 11.1 of the Covenant): forced evictions,* 1997, paras. 15 – 16.

[260] See also, the Malawi High Court's temporary order restraining the Blantyre City Council from forcibly evicting informal traders, without due notice and reason: Southern Africa Litigation Centre, "Malawi: Challenging eviction of Blantyre informal traders" 2 December 2022, available at: https://www.southernafricalitigationcentre.org/malawi-challenging-eviction-of-informal-traders/.

[261] Supreme Court of Bangladesh, *Ain o Salish Kendra (ASK) v. Government and Bangladesh & Ors* 19 BLD (1999) 488, 29 July 2001; ICJ, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights,* 2008 ("ICJ, Courts and the Legal Enforcement of Economic, Social and Cultural Rights"), p. 27, available at: https://www.icj.org/wp-content/uploads/2009/07/Courts-legal-enforcement-ESCR-Human-Rights-Rule-of-Law-series-2009-eng.pdf.

[262] High Court of Kenya, *Mitu-Bell Welfare Society v Attorney General & 2 Others* [2013] eKLR, para. 75, available at: https://katibainstitute.org/wp-content/uploads/2021/01/High-Court-decision-Mitubell.pdf.

and *effect* of the impoundment, particularly in relation to individuals experiencing poverty and homelessness, as did the Washington Supreme Court in its decision in *City of Seattle v Long* (2021). The South African High Court's decision in *Makwickana v eThekwini Municipality* (2015) is also useful in demonstrating this analysis in relation to informal traders:

High Court of South Africa, *Makwickana v eThekwini Municipality and Others* (2015)

The applicant in this case contended that the removal and impoundment of the trading goods of a trader who fails to produce a license to trade are *ultra vires* and invalid, and inconsistent with several provisions of the Constitution, including section 9 (equality), section 22 (freedom of trade occupation and profession), section 25 (property) and section 34 (access to courts).

Section 35 of the eThekwini Municipality: Informal Trading By-law, 2014 empowers officers to remove and impound goods of an informal trader that the officer reasonably suspects are used in informal trading that is in contravention of the By-law, including informal trading on municipal property without a permit (section 11 of the By-law, enabled by section 6A(1)(c) of the Businesses Act).[263]

In its judgment, the Court noted that section 35(1) is overbroad because: "it permits impoundment for all contraventions without differentiating between serious absolute contraventions and less serious, formal non-compliances such as trading without producing proof of a permit that do not pose a threat to the public".[264]

The Court held that section 35 limits the right of access to property guaranteed by section 25 of the Constitution. In determining whether section 35 was in line with the requirements of fair procedure, rationality and proportionality, the Court held that the purpose (i.e., to compel the applicant to produce a licence or permit) of the deprivation (i.e., the impoundment) is "not sufficiently compelling to render the deprivation rational in the constitutional sense of the means being proportional to the ends":[265]

[263] *Makwickana v eThekwini Municipality and Others,* Case No: 11662/13, 17 February 2015 ("*Makwickana v eThekwini Municipality*"), [52].

[264] *Makwickana v eThekwini Municipality,* [80].

[265] *Makwickana v eThekwini Municipality,* [96].

"Deprivation of their property is **so invasive of their property rights that it impacts on the welfare of the street traders and their large families**. For most the impounded goods are their only assets and means to a meal. Impoundment is therefore serious irrespective of the commercial value of the goods. **Deprivation also impacts on their identity and dignity as people with property**, however little that is. On the facts of this case **the deprivation was permanent, without notice and without compensation ..."**[266]

In its assessment that section 35 constitutes direct and indirect discrimination under section 9(3) of the Constitution on basis of race and socio-economic status, the Court recognized the historical context of poverty, race and the position of street traders, noting how "apartheid layered poverty over race":[267]

"The power of the first respondent to remove, impound and dispose of informal traders' goods in s 35 of the By-law discriminate[s] against street traders as members of a depressed socio-economic class and not any other group. Street traders are such because their socio-economic status or race or both are barriers to better opportunities. **Effectively, the impoundment provisions compound their historical disadvantages**. Notwithstanding the altruistic aims of s 35 of the By-laws and although it is facially neutral **its effect is to discriminate directly and indirectly against poor and mainly African people**."[268]

The corollary of the High Court's holding is that the indiscriminate disposal of the street traders' property is discriminatory, disproportionate and, therefore, quasi-criminal in nature and impact. The Court's decision emphasized how the executive power to remove and impound goods, regardless of the severity of the infraction, is plainly disproportionate, and impoundment has an invasive impact on the human rights of street traders, including the right of access to property and equality, among others.

[266] *Makwickana v eThekwini Municipality,* [97].
[267] *Makwickana v eThekwini Municipality,* [115].
[268] *Makwickana v eThekwini Municipality,* [124].

CHAPTER IV

ROLE OF LAWYERS, JUDGES, PROSECUTORS, LAW ENFORCEMENT OFFICIALS, LEGISLATORS, POLICYMAKERS, NATIONAL HUMAN RIGHTS INSTITUTIONS AND CIVIL SOCIETY IN DECRIMINALIZING CONDUCT ASSOCIATED WITH POVERTY AND STATUS

The criminalization of poverty and status remains a pressing issue in many legal systems worldwide. Individuals are often penalized for conduct associated with poverty, homelessness and status, in a manner that contravenes general principles of criminal law and international human rights law and standards.

This chapter provides concrete suggestions on the pivotal roles that lawyers, judges, prosecutors, law enforcement officials, legislators, policymakers, national human rights institutions and civil society can play in dismantling legal frameworks and practices that unjustly criminalize conduct associated with poverty, homelessness and status.

It goes without saying that all these actors should work towards legal reform that applies a human rights-based approach to criminal laws. While comprehensive legal reform is essential, it is often a lengthy and arduous process. In the interim, stakeholders can implement immediate stopgap measures to mitigate harm. Drawing on the practical insights from several rounds of consultations that were held with stakeholders from Africa, Asia, the Caribbean and Latin America,[269] this chapter compiles useful practices from various contexts and outlines actionable strategies that each of the abovementioned actors can consider implementing, depending on the individual contexts in which they operate,[270] to address the detrimental human rights impacts of the criminalization of conduct associated with poverty, homelessness and status, both through policy shifts and direct legal interventions.

By leveraging their respective roles, these players can significantly reduce the discriminatory and disproportionate impacts of the wrongful criminal proscription of conduct associated with poverty, homelessness and status on individuals, particularly those hailing from marginalized communities, and lay the groundwork for lasting legal reform.

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[269] See, for instance, ICJ, "A human rights-based approach to criminal law: Africa regional consultation", 12 June 2024, available at: https://www.icj.org/a-human-rights-based-approach-to-criminal-law-africa-regional-consultation/; see also, ICJ, "Asia and Caribbean regional consultation: A human rights-based approach to criminal law", 11 September 2024, available at https://www.icj.org/asia-and-caribbean-regional-consultation-a-human-rights-based-approach-to-criminal-law/.

[270] The compilation of practices and guidelines from around the world below does not imply endorsement on the part of the authors of this Practitioners' Guide, as practitioners in different jurisdictions will have to closely consider what will work best based in the specific contexts in which they are operating.

1. LAWYERS AND LEGAL PRACTITIONERS

The multitude of case law referred to above is testament to the critical role of lawyers and legal practitioners (e.g., defence lawyers, legal aid advocates and paralegals) in furthering the decriminalizing of conduct associated with poverty, homelessness and status.[271] Lawyers, in collaboration with civil society groups and survivors of human rights violations and abuses, can use public interest litigation to challenge the constitutionality and legality of unjust criminal laws and analogous punitive laws, as well as their enforcement, as a means of addressing the detrimental human rights impacts arising from these laws.[272] They may be in a position to pursue legal remedies for individuals whose human rights were violated as a result of criminal laws wrongfully proscribing conduct associated with poverty, homelessness and status.

Lawyers and legal practitioners should consider taking on more cases, *pro bono*, involving the criminalization of conduct associated with poverty, homelessness and status, particularly those involving individuals who are experiencing poverty and/or homelessness, and who are unable to afford a lawyer. In so doing, practitioners should apply a human rights-based approach to criminal laws in formulating their legal arguments and strategies. Reference should be made to the rich body of jurisprudence and analysis at the international, regional and domestic levels, which have been extensively covered in Chapters II and III of this Practitioners' Guide. This may require lawyers and civil society groups to provide capacity-building and sensitization workshops to other lawyers and legal practitioners on the application of a human rights-based approach

[271] As recommended by the UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing: "Lawyers and judicial authorities must play an active role in the review of legislation criminalizing homelessness and poverty and in ensuring that the rights of persons in situation of precarity are protected." See, UN Doc. A/HRC/56/61/Add.3, para. 37.

[272] Meerkotter, Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces, pp. 22 – 28.

to criminal law.[273] When it comes to justice actors,[274] it has been noted that, capacity-building is more likely to be effective if delivered by retired judges, judges from other jurisdictions or members of UN or regional human rights treaty bodies.

1.1 Engaging in strategic litigation

While a detailed analysis of undertaking strategic litigation is beyond the scope of this Practitioners' Guide, legal practitioners are encouraged to carry out a cost-benefit analysis of litigation as a "tool of profound empowerment and social change", while bearing in mind that it is a costly and time-consuming endeavour.[275] Strategic litigation involves more than simply winning legal arguments in courts, as it creates public awareness, encourages public debate, sets important precedents, achieves change for people in similar situations and may spark policy changes.[276]

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[273] See, for instance, the recommendation of the CEDAW Committee on addressing gender stereotypes in the justice system: "Provide capacity building to judges, prosecutors, lawyers and law enforcement officials on the application of international legal instruments related to human rights, including the CEDAW Convention and the jurisprudence of the CEDAW Committee, and on the application of legislation prohibiting discrimination against women." CEDAW Committee, *General recommendation No. 33 on women's access to justice,* UN Doc. CEDAW/C/GC/33, 3 August 2015, para. 29. This general recommendation is echoed in a number of Concluding Observations made by the Committee with regard to individual States Parties (see e.g. the robust recommendation made to Mexico to *"ensure systematic and mandatory capacity-building of judges"*, prosecutors (…) on women's rights and gender equality to eliminate discriminatory treatment of women and girls, at CEDAW/C/MEX/CO/9 at paragraph 14(a)).

[274] During one of the consultations hosted to contribute to the drafting of this Practitioners' Guide, one participant, who is a justice actor, reflected candidly that they had never considered the relationship between the law and poverty prior to the consultation, and found the discussions on the impact of the wrongful criminalization of conduct associated with poverty and status enlightening and enriching.

[275] Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience*, 2018, p. 7, available at: https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf.

[276] ICJ, *Strategic Litigation Handbook for Myanmar,* September 2019, p. 6, available at: https://www.icj.org/wp-content/uploads/2019/09/Myanmar-Strat-Litig-HB-Publications-Report-Thematic-reports-2019-ENG.pdf.

Strategic litigation is often a process, not a single legal intervention, as the litigation itself may be only one among a range of advocacy efforts, that are mutually reinforced by other advocacy strategies by social movements.[277] Furthermore, even if litigation may result in an unsuccessful judicial outcome – for example, when courts decline to strike down legislation as unconstitutional – it may push the executive and legislature to enact legislative changes, such as by repealing discriminatory criminal laws, in order to preempt a potential successful judicial challenge in the near future.[278]

1.2 Submitting *amicus curiae* briefs

Legal practitioners, even if not directly involved in filing legal cases involving the wrongful criminalization of conduct associated with poverty, homelessness and status, may also consider filing *amici curiae* briefs, or "friend of the court" submissions, if appropriate for the context.[279] These briefs should be grounded in a human rights-based approach to criminal law, underscoring general principles of criminal law and international human rights law and standards when challenging the wrongful penalization of conduct, such as those associated with poverty, homelessness and status. For instance, the ICJ, alongside other organizations, has submitted an *amicus* brief to the Ugandan Constitutional Court on the human rights violations of street vendors, including violations of the right to property; the right to be free from discrimination; the right to dignity; the right to

[277] *Ibid*., pp. 6 – 7.

[278] For instance, consensual same-sex relations between men were decriminalized in Singapore through the repeal of section 377A of the Penal Code, after several rounds of constitutional challenges against the provision. Even though the Singaporean courts fell short of finding the section unconstitutional, the government announced in August 2022 that it would repeal the provision, following the Court of Appeal's judgment in *Tan Seng Kee v Attorney General* (2022), highlighting: "in a future court challenge, there is a significant risk of s377A being struck down, on the grounds that it breaches the Equal Protection provision in the Constitution". See, ICJ, "Singapore: Long overdue decriminalization of consensual same-sex relations between men overshadowed by discriminatory constitutional amendment purporting to "protect" definition of marriage", 28 November 2022, available at: https://www.icj.org/singapore-long-overdue-decriminalization-of-consensual-same-sex-relations-between-men-overshadowed-by-discriminatory-constitutional-amendment-purporting-to-protect-definition-of-mar/.

[279] Meerkotter, Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces, pp. 31 – 32 ("Any *amici curiae* interventions should consider the local jurisprudence and political context and evaluate any potential risks resulting from the intervention.")

personal security and freedom from arbitrary deprivations of liberty, as well as various economic and social rights, such as the rights to work and to an adequate standard of living.[280]

Civil society groups can also work closely with UN and regional human rights experts, who may submit *amicus* briefs too. For example, the UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing recently submitted an *amicus* brief to the United States Supreme Court in *City of Grants Pass v. Johnson*,[281] arguing that the punishing of persons experiencing homelessness for camping and sleeping in public spaces, when the authorities fail to offer any shelter or adequate housing, violates the right to adequate housing and amounts to cruel, inhumane and degrading treatment and punishment.[282]

2. JUDGES

Judges play a key role in reviewing legislation that wrongfully penalizes conduct associated with poverty, homelessness and status, as evidenced by the jurisprudence analyzed in the previous chapters.

[280] See, *In The Matter of An Application for Leave to Intervene as Amicus Curiae by the Applicants Herein Arising from Constitutional Petition No. 25 of 2022,* available at: https://www.ilawnetwork.com/wp-content/uploads/2023/09/Petition-No-25-Draft-Brief-FINAL-Version.pdf. In another case arising from the enforcement of criminal defamation and disinformation provisions against two human rights defenders, the ICJ submitted an *amicus* brief to the East Jakarta District Court requesting the Court to interpret these laws in ways that ensure conformity with international human rights law. The two human rights defenders were eventually acquitted by the East Jakarta District Court. See, ICJ, "Indonesia: ICJ asks court to ensure that defamation and "false information" laws not be used to silence and criminalize human rights defenders", 30 November 2023, available at: https://www.icj.org/indonesia-icj-asks-court-to-ensure-that-defamation-and-false-information-laws-not-be-used-to-silence-and-criminalize-human-rights-defenders/. See also, ICJ, "Indonesia: Criminalization of disinformation threatens freedom of expression", 1 December 2023, available at: https://www.icj.org/resource/indonesia-criminalization-of-disinformation-threatens-freedom-of-expression/; and Nabiel Gibran El Rizani, "Haris and Fatia Acquitted in Defamation Trial Brought by Minister Luhut", 8 January 2024, available at: https://jakartaglobe.id/news/haris-and-fatia-acquitted-in-defamation-trial-brought-by-minister-luhut.

[281] This case was discussed and analyzed in section 3.4.2 of Chapter III.

[282] *City of Grants Pass v. Johnson,* Brief of *Amici Curiae Current* U.N. Special Rapporteurs in Support of Respondents, 3 April 2024, available at: https://www.supremecourt.gov/DocketPDF/23/23-175/306690/20240403164253559_23-175%20bsac%20UN%20Rapporteurs%20Final.pdf.

When confronted with laws that wrongfully criminalize conduct associated with poverty, homelessness and status, judges should be encouraged to apply a human rights-based approach to criminal law through the range of judicial remedies available to them, including by:

- Striking down a legal provision or executive action as unconstitutional and unlawful;
- Exercising judicial discretion in relation to a person who has been charged under criminal provision/s proscribing conduct associated with poverty, homelessness and status;
- Issuing injunctions or restraining orders on harmful executive actions that penalize poverty, homelessness and status;
- Quashing arbitrary convictions arising from the enforcement of non-human rights compliant laws, and ordering the immediate release of all persons held in pre-trial detention or imprisoned following a conviction in such cases; and
- Ordering effective remedies for the violations of human rights associated with the unjust application of the criminal law, including compensation, restitution and guarantees of non-repetition.

The obligation to guarantee and protect human rights is not limited to the legislative and executive branches of the State, but must also be effectively discharged by the judiciary. In its authoritative General Comment No. 31, on the nature of the general legal obligations of State Parties under the ICCPR, the UN Human Rights Committee affirmed that:

> "The obligations of the Covenant in general … are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party."[283]

Judicial remedies ordered by the courts should be in line with international human rights law and standards, and should be effective by being prompt, accessible, available before a competent, independent and impartial authority, and lead to reparation and, where applicable, to cessation of the wrongdoing.[284]

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[283] UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on State Parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, para. 4.

[284] ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide, Revised Edition, 2018,* October 2018, pp. 65 – 76, available at: https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf.

2.1 Ensuring enforcement of court decisions

While judges are crucial in upholding the rule of law and human rights through their judgments and decisions, there can still be inherent limitations of positive court decisions if they are not enforced by other branches of the State. This is especially the case if court decisions are not effectively enforced and implemented. The legitimacy of the judiciary may also be undermined, if decisions taken are weak or impossible to enforce, even if they are well-intentioned, which may create false expectations for rights-holders. This may be due to:

- The lack of adequate guarantees regarding the enforcement of judicial orders directed at the political branches;
- The lack of judicial power to enforce the design and implementation of measures that require budgetary allocations; and
- The absence of cooperation from the political branches of the State when it comes to turning judicial orders into concrete guarantees, benefits or entitlements.[285]

As such, it may be necessary for courts to emphasize that the failure to comply with a judgment may constitute contempt of court, or to rely on procedural remedies to monitor the enforcement of judicial decisions.[286] The

[285] ICJ, Courts and the Legal Enforcement of Economic, Social and Cultural Rights, p. 91 – 92. See also, for instance, Singapore Academy of Law, "Annual Lecture 2008: Growth of Public Interest Litigation in India: The Honourable K G Balakrishnan Chief Justice of the Supreme Court of India", citing Justice S.P. Barucha, available at: https://www.sal.org.sg/Newsroom/Speeches/Speech-Details/id/450 ("This court must refrain from passing orders that cannot be enforced, whatever the fundamental right may be and however good the cause. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper. It is counter productive to have people say 'The Supreme Court has not been able to do anything' or worse. It is of cardinal importance to the confidence that people have in the Court that its orders are implicitly and promptly obeyed and is, therefore, of cardinal importance that orders that are incapable of obedience and enforcement are not made.")

[286] See, for instance, the procedural innovation of "continuing mandamus" developed by the Indian Supreme Court, which allows courts to issue relief in the form of orders and directives without dispositive judgments to retain continuous jurisdiction over the matter. A participant from the consultations organized to inform the content of this Practitioners' Guide has suggested that this may be a useful legal tool that may be adopted in the Indian contexts, as well as other relevant contexts where courts may be open to such procedural remedies. For more, see, Manoj Mate, "The Rise of Judicial Governance in the Supreme Court of India", *Boston University International Law Journal Vol. 33:169,* pp. 181 – 182, available at: https://www.bu.edu/ilj/files/2015/01/Mate-Rise-of-Judicial-Governance.pdf.

High Court of Malawi stressed the possibility of contempt of court for non-compliance in *Ex Parte Henry Banda et al* (2022),[287] in relation to its order to the executive and legislature to review and amend the whole of section 184 of the Penal Code (criminalizing being "rogues and vagabonds") within 24 months, particularly because of its prior 2017 decision in *Gwanda v S* that had declared section 184(1)(c) unconstitutional:[288]

> "… the Executive and Legislature are reminded that until they vacate an order or judgment of the Court, such remains a valid order or judgment of the Court **as such non-compliance of the same is contempt** as such the Attorney General being legal adviser to the two arms is reminded of the decision of *[Gwanda v S]* which called upon both the Executive and Legislature to undertake both legislative and policy reforms on vagrancy laws in Malawi generally and where appropriate initiate legislative changes in order to ensure such laws' consistency with the Constitution".[289]

This reminder contributed to the Parliament of Malawi adopting the Legal Affairs Committee's report calling for the review section 184 and related provisions of the law on vagrancy, in line with the decisions of the Malawi High Court.[290] This adoption was announced in September 2024 amid concerns that the executive and legislature may delay reviewing these laws at the risk of contempt of court sanctions.[291]

It is still unclear at the time of preparing this Practitioners' Guide when a draft Bill on decriminalizing vagrancy offences in Malawi will be introduced, as well as the scope and content of the Bill. In light of reports that law enforcement agents in Malawi have begun relying on other problematic criminal laws to target those experiencing poverty and/or homelessness

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[287] This case was discussed and analyzed in section 3.2.2 of Chapter III.

[288] This case was similarly discussed and analyzed in Chapter III.

[289] *Ex Parte Henry Banda et al,* para. 3.8.2.

[290] Southern Africa Litigation centre, "Parliament adopts report to review vagrancy offences in Penal Code", 5 September 2024, available at: https://www.southernafricalitigationcentre.org/parliament-adopts-report-to-review-vagrancy-offences-in-penal-code/; Kelvin Tembo, "Human Rights Groups expect urgency on vagrancy offences review Bill", 7 September 2024, available at: https://www.capitalradiomalawi.com/2024/09/07/human-rights-groups-expect-urgency-on-vagrancy-offences-review-bill/.

[291] Nation Online, "Parliament, Executive risk contempt of court", 30 May 2024, available at: https://mwnation.com/parliament-executive-risk-contempt-of-court/.

following the Malawi High Court's decisions,[292] the authors of this Guide recommend that this Bill should seek to comprehensively reform all laws criminalizing conduct associated with poverty, homelessness and status.

2.2 Developing and adhering to judicial guidelines on criminal case management and sentencing

Setting guidelines for judges and other justice actors on the factors that should be considered when managing and sentencing cases involving the wrongful criminalization of conduct associated with poverty, homelessness and status can also be helpful.

Such guidelines can be aimed at promoting the use of non-custodial measures,[293] in line with the UN Standard Minimum Rules for Non-Custodial Measures, better known as the Tokyo Rules,[294] and/or alternatives to custodial sentencing,[295] in accordance with the principles of minimum intervention, depenalization and decriminalization.[296] These guidelines are only as helpful as they are used, and as such should be cascaded through judicial academies and capacity-building workshops for justice actors at all levels, including magistrates. Such guidelines should also be targeted at judicial clerks and court administrators, who play a key role in assisting the work of judges and other judicial authorities.

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[292] As noted by a participant in the consultation organized to prepare this Practitioners' Guide, following the decisions of the Malawi High Court, it appears that law enforcement officers have begun using other laws instead to target those experiencing poverty and/or homelessness, such as begging laws, criminalized under section 180 of the Penal Code.

[293] See, also, ICJ, *The 8 March Principles*, Principle 13 on criminal law sanctions, which states "Criminal law sanctions must be consistent with human rights, including by being non-discriminatory and proportionate to the gravity of the offence. *Custodial sentences may only be imposed as a measure of last resort.*" (emphasis added).

[294] *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, 14 December 1990, ("Tokyo Rules") available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-non-custodial-measures. See, for instance, Rule 8.1 ("The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.")

[295] See, for instance, recommendations from: Africa Criminal Justice Reform, *The role of the Court in dealing with petty offences: Alternatives to arrest and detention,* September 2019, available at: https://decrimpovertystatus.org/?resources=the-role-of-the-court-in-dealing-with-petty-offences-2.

[296] Rule 2.6 – 2.7, Tokyo Rules.

For instance, effective from 1 April 2024, the United Kingdom's Sentencing Council issued general guidelines that one of the factors that may reduce the offence's seriousness or reflect personal mitigation should be "difficult and/or deprived background or personal circumstances". The guidelines stated that courts should "consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending", including "poverty", "insecure housing", "low educational attainment", "experience of discrimination" and so forth.[297]

Kenya's National Council on the Administration of Justice (NCAJ)[298] has issued its *Guidelines on Law and Practice for the Management of Petty Offenders*, aimed at guiding policy and practice reform towards safeguarding the rights of petty offenders and encouraging and promoting the use of non-custodial measures in relation to petty offences.[299] Its Guidelines are intended for use by law enforcement agency officers, prosecutors and the courts,[300] and encourage compliance with the principles of legality, proportionality and equality,[301] which are central to a human rights-based approach to criminal law. In addition to urging compliance with the right to a fair trial and due process guarantees, the NCAJ's Guidelines state that courts are guided by and obligated to observe the principles of proportionality, equality, uniformity, parity, consistency, impartiality, accountability, transparency and inclusiveness, in addition to the Constitution of Kenya and to respect human rights and fundamental freedoms.[302]

Some relevant guidance from the NCAJ's Guidelines for courts, at the trial and sentencing stages is reproduced below:

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[297] Sentencing Council, "General guideline: overarching principles", available at: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/.

[298] The National Council on the Administration of Justice (NCAJ) is a statutory body established under the Judicial Service Act (No. 1 of 2011) aimed at ensuring a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.

[299] National Council on the Administration of Justice, *Guidelines on Law and Practice for the Management of Petty Offenders*, ("NCAJ, Guidelines on Petty Offenders"), section 1.3, available at: https://ncaj.go.ke/wp-content/uploads/download-manager-files/GUIDELINES-ON-LAW-AND-PRACTICE.pdf.

[300] NCAJ, Guidelines on Petty Offenders, section 1.3.

[301] NCAJ, Guidelines on Petty Offenders, section 1.4.

[302] NCAJ, Guidelines on Petty Offenders, section 5.1.

- A petty offender should not be in custody for an excessive amount of time. Imprisonment of petty offenders should be avoided altogether as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Short sentences are disruptive and contribute to reoffending;[303]
- Due to the nature of petty offences, offenders should be given non-custodial sentences unless there are aggravating circumstances that make the sentence unsuitable;[304]
- The courts may use other means, including digital avenues, to dispose of petty offences. Courts may embrace the use of non-custodial sentencing, including fines, Community Service Orders (CSO), probation, and warnings, among others;[305]
- Courts will encourage the use of Alternative Justice Systems (AJS), which may include diversion, alternative dispute resolution, and plea bargaining, among others.[306]

2.3 Ensuring fines and fees are not discriminatory and/or disproportionate

As discussed in section III(f)(ii) of Chapter III, the imposition of fines and fees, and its disproportionate impact on those experiencing poverty, have at times resulted in incarceration for those who are unable to pay these financial sanctions. Judges may play a role here in ensuring that defaulters are not imprisoned for their inability to pay fines and fees: for instance, courts may order the State to provide individuals with remunerated work, which may contribute towards them paying off their fines.[307] The UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing have noted that, "default imprisonment

[303] NCAJ, Guidelines on Petty Offenders, section 5.2.

[304] NCAJ, Guidelines on Petty Offenders, section 5.2. These include, under section 23.7 of the Sentencing Guidelines: use of a weapon to frighten or injure a victim; multiple victims; grave impact on national security; serious physical or psychological effect on the victim; continued assault or repeated assaults on the same victim; commission of the offence in a gang or group; targeting of vulnerable groups such as children, elderly persons and persons with disability. These aggravating circumstances all pertain to the commission or threat of substantial harms, as a reflection of the harm principle.

[305] NCAJ, Guidelines on Petty Offenders, section 7.2.4.

[306] NCAJ, Guidelines on Petty Offenders, section 7.2.4.

[307] United Nations Office on Drugs and Crime, *Handbook on strategies to reduce overcrowding in prisons*, 2010, p. 46, available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf.

is only enforced if the sentenced person shows an unwillingness to pay, not if a person is unable to pay."[308]

In April 2023, the United States Department of Justice issued a letter to state and local courts and juvenile justice agencies regarding the imposition and enforcement of fines and fees for adults and youths, cautioning against practices that may be "unlawful, unfairly penalize individuals who are unable to pay or otherwise have a discriminatory effect".[309] Recommendations and best practices in the letter, based on constitutional principles, included:

- Considering an individual's economic circumstances when assessing whether fines and fees are grossly disproportionately to the severity of the offence;
- Assessing an individual's ability to pay fines and fees and establishing that the failure to pay is willful;
- Considering alternative approaches before incarceration, such as penalty-free payment plans, amnesty periods, or connecting indigent individuals with workforce development and financial counseling programmes;
- Ensuring due process protections such as access to counsel and notice; and
- Considering whether fines and fees may intentionally discriminate or have a disproportionate effect against a protected class, which is prohibited.[310]

3. PROSECUTORS AND LAW ENFORCEMENT OFFICIALS

By applying a human rights-based approach to criminal law, prosecutors and law enforcement officials may play a critical role in respecting and protecting the rule of law and human rights. Several international instruments have emphasized this role. For instance, the *UN Guidelines on the Role of Prosecutors* emphasize that:

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[308] UN Doc. A/HRC/56/61/Add.3, para. 39.

[309] United States Department of Justice, "Justice Department Issues Dear Colleague Letter to Courts Regarding Fines and Fees for Youth and Adults", 20 April 2023, available at: https://www.justice.gov/opa/pr/justice-department-issues-dear-colleague-letter-courts-regarding-fines-and-fees-youth-and.

[310] *Ibid*.; principles 1, 2, 3, 6 and 7.

> "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."[311]

Similarly, the *UN Code of Conduct for Law Enforcement Officials* emphasize that law enforcement officials "shall respect and protect human dignity and maintain and uphold the human rights of all persons."[312]

3.1 Implementing alternatives to arrest, detention and prosecutions

In seeking to respect and protect human rights in the context of the enforcement of laws wrongfully criminalizing conduct associated with poverty, homelessness and status, prosecutors and law enforcement officials should consider implementing alternatives to arrest, detention and prosecutions, as a stopgap measure, while legal reform may be underway. At the international level, in relation to the police, the prosecution service or other agencies dealing with criminal cases, the Tokyo Rules provide:

> "… the police, the prosecution service or other agencies dealing with criminal cases should be **empowered to discharge the offender if they consider that it is not necessary to proceed with the protection of society, crime prevention or the promotion of respect for the law and the rights of victims**… For minor cases the prosecutor may impose **suitable non-custodial** measures, as appropriate."[313]

At the regional level, the ACHPR Principles recommend that alternatives to arrest and detention be made available for petty or minor offences that are not decriminalized,[314] including but not limited to:

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[311] UN Guidelines on the Role of Prosecutors, 7 September 1990, para. 12, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors.

[312] UN Code of Conduct for Law Enforcement Officials, 17 December 1979, article 2, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/code-conduct-law-enforcement-officials.

[313] Emphasis added. Rule 5 on pre-trial dispositions (emphasis added), Tokyo Rules.

[314] The ACHPR Principles first recommend that certain petty offences be decriminalized, including those criminalizing conduct in broad, vague and ambiguous terms, and those criminalizing the status of a person or their appearance, and laws that criminalize life-sustaining activities in public places; see, ACHPR Principles, para. 14.1.

> "... **diversion of cases** involving petty offences away from the criminal justice system and **making use of community service, community-based treatment programmes, alternative dispute resolution mechanisms such as mediation**, as well as the utilisation of recognised and effective alternatives that respect regional and international human rights standards, and the **declaration of certain offences as non-arrestable offences**."[315]

While these recommendations are not targeted at any specific actor of State Parties to the African Charter, they are recommendations that should and could be implemented by public prosecutors and law enforcement officials, in cooperation with the judiciary.[316]

3.2 Setting and adhering to guidelines for public prosecutors and law enforcement officials

The recommendations on alternatives to arrest, detention and prosecutions can be codified into guidelines for public prosecutors and law enforcement officials, in order to ensure consistency and clarity in criminal law enforcement.

In addition to the guidance provided above, inspiration can also be drawn from guidance addressed to prosecutors on the handling of criminal cases in analogous situations. For instance, the *Guidance for Prosecutors on HIV-Related Criminal Cases*, developed by the UN Development Programme in response to concerns of an overly broad use of criminal law and similarly coercive and punitive measures in relation to HIV and other infectious diseases, may be instructive, including in relation to deciding whether

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[315] Emphasis added. ACHPR Principles, para. 14.2.2.

[316] These principles are echoed in the recommendations issued by the Africa Criminal Justice Reform to prosecutors, which encouraged diversion options based on restorative justice, such as victim-offender mediation, life skills programmes, family group conferences, community service, good behaviour orders and referral to social or rehabilitation programmes, when dealing with petty offences; see, Africa Criminal Justice Reform, *Prosecutors role in dealing with petty offences: Alternatives to arrest and detention,* September 2019, available at: https://decrimpovertystatus.org/wp-content/uploads/2022/03/Prosecutors-role-in-dealing-with-petty-offences.pdf. In terms of law enforcement officers, alternatives to arrest and detention can include warnings, and fines or administrative penalties; see, Africa Criminal Justice Reform, *The role of the police in dealing with petty offences: Alternatives to arrest and detention,* September 2019, available at: https://decrimpovertystatus.org/?resources=the-role-of-the-police-in-dealing-with-petty-offences-2.

and how to prosecute; pre-trial and trial considerations; and sentencing considerations.[317]

At the domestic level, the Directorate of Public Prosecutions in Malawi has issued its *Guidelines for Prosecutors on Nuisance-Related Offences in the Penal Code*:

Directorate of Public Prosecutions of Malawi, Guidelines for Prosecutors on Nuisance-Related Offences in the Penal Code

In addition to guiding prosecutors to consider alternatives to prosecution and ensure adherence to all requirements for fair proceedings,[318] the guidelines also emphasize that prosecutors shall take into account the principle of legality when interpreting whether any acts fall within the ambit of a specific offence, including the requirement that "penal statutes must be strictly construed, and that where they are vague or ambiguous, penal statutes should be interpreted in favour of accused's liberty".[319]

The guidelines stress that prosecutions should only be initiated or continued if: (1) the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction (evidential test); and prosecution is required in the public interest (public interest test).[320]

In relation to the public interest test, the guidelines state that even if the evidence is sufficient to provide a "reasonable prospect of conviction", prosecution may not be necessary if it is not required for the public interest and the offence is not serious:

[317] UNDP, "UNDP Guidance for Prosecutors on HIV Related Criminal Cases", 7 June 2021, available at: https://www.undp.org/publications/undp-guidance-prosecutors-hiv-related-criminal-cases.

[318] Directorate of Public Prosecutions, *Guidelines for Prosecutors on Nuisance-Related Offences in the Penal Code,* October 2017 ("Malawi Guidelines for Prosecutors on Nuisance Offences"), p. 5, available at: https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/02/PROSECUTION-GUIDELINES-DPP-Malawi.pdf.

[319] Malawi Guidelines for Prosecutors on Nuisance Offences, p. 8.

[320] Malawi Guidelines for Prosecutors on Nuisance Offences, p. 8.

> "Public interest considerations against prosecution include where the court is likely to impose a very small penalty; **where the loss or harm can be described as minor and as a result of a single incident**; where the defendant has no previous convictions, is ill, elderly or a youth; **where the offence is trivial, or obscure**; or **where alternatives to prosecution [are] available**, such as a caution, warning or other acceptable form of diversion.
>
> **Where conduct does little harm to an individual person or the community as a whole it might be of too inconsequential a nature to pursue prosecution and definitely should not result in detention**."[321]

The guidelines then provide specific guidance in relation to specific nuisance-related offences in the Penal Code: section 168 (common nuisance); sections 181 and 182 (conduct likely to cause a breach of peace); section 180 (idle and disorderly persons); and section 184 (rogues and vagabonds). Some noteworthy guidelines, which reflect the application of a human rights-based approach to criminal law, are:

- On section 180(f), criminalizing "wandering about and endeavouring by the exposure of wounds or deformation to obtain or gather alms": "Only persistent offences under this section which [cause] significant harm should be prosecuted or where the offence takes place in a harassing manner. Prosecutions under this offence should take care not to discriminate against persons with disabilities and should respect their dignity."[322]

- On section 184(b), criminalizing every "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself": "The offence should not be used against those who are without any visible means of support and who have committed no other offence. 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 money. No offence is committed merely because a person is destitute and homeless."[323]

[321] Emphasis added. Malawi Guidelines for Prosecutors on Nuisance Offences, p. 9.
[322] Malawi Guidelines for Prosecutors on Nuisance Offences, pp. 14 – 15.
[323] Malawi Guidelines for Prosecutors on Nuisance Offences, pp. 15 – 16.

The role of law enforcement agents, such as the police, is also crucial here, and it is worth noting the order of the Malawi High Court in *Ex Parte Henry Banda et al* (2022) compelling the police to "develop proper guidelines for sweeping exercises which shall ensure full protection of human rights".[324] In that case, the Court ordered compensation as a remedy for the violation of the rights of the applicants,[325] which is rare in judicial review cases, because:

> "Police in Malawi continue to not reform despite the numerous resources that have been sunk into trainings, behaviour change, awareness, policy and legislative reforms. This Court wishes to remind itself and everyone that the issue of these arrests has continued despite numerous court pronouncements for police to stop indiscriminate arrests and prosecutions which are usually thrown out on confirmation, review and appeal. It is therefore imperative at this point that courts show that the same is not acceptable and that law enforcement needs to stop getting away with such behaviour that undermines the rule of law especially noting that it is the same laws which [have] empowered them."[326]

Collaborative partnerships between law enforcement, persons experiencing poverty and/or homelessness, and other relevant actors may also contribute towards promoting equal access to public spaces,[327] and reducing the overreliance by State actors on punitive measures.

For instance, in the City of Ballarat in Australia, a Homelessness Protocol was adopted in 2022 aimed at clarifying the role of the city's Council in responding to people experiencing homelessness. It emphasizes, under Principle 5, collaborative partnerships between the police and Council, housing providers and community agencies; and under Principle 1, makes clear when the Victoria Police will be contacted, such as when there is a threat to safety, potential damage to property or the environment, or the person experiencing homelessness appears to be under the age of 16.[328]

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[324] *Ex Parte Henry Banda et al,* para. 3.6.3.

[325] *Ex Parte Henry Banda et al,* para. 3.6.6.

[326] *Ex Parte Henry Banda et al,* para. 3.7.

[327] See, for instance, A/HRC/56/61/Add.3, para. 45.

[328] City of Ballarat, *Homelessness Protocol 2022,* available at: https://www.ballarat.vic.gov.au/sites/default/files/2022-09/Homelessness%20Protocol%202022%20Final.pdf.

4. LEGISLATORS AND POLICYMAKERS

4.1 Engaging in legal reform: repeal or substantially amend laws penalizing conduct associated with poverty and status

It is patently clear that legislators and policymakers need to undertake a comprehensive review of all laws that may criminalize or penalize conduct associated with poverty, homelessness and status, whether directly or indirectly. This review process should be aimed at repealing or substantially amending the laws that criminalize:

- Engaging in life-sustaining economic activities in public places, such as begging, panhandling, trading, touting, vending, hawking or other informal commercial activities involving non-contraband items;
- Engaging in life-sustaining activities in public places, such as sleeping, eating, preparing food, washing clothes, sitting or performing hygiene-related activities, including washing, urinating and defecating, or for other analogous activities in public places, where there are no adequate alternatives available; or
- On the basis of the person's employment or means of subsistence or their economic or social status, including their lack of a fixed address, home or their experiencing homelessness in practice.[329]

This review should be participatory and inclusive in approach, and take into account general principles of criminal law and international human rights law and standards. New laws should not be introduced, even if purportedly in the name of "rehabilitation", that run counter to a human rights-based approach to criminal law, by replicating similar punitive or stigmatizing intents or effects. It is the obligation of legislators and policymakers, both at the federal and local levels, to undertake this comprehensive review, to the extent that several of the problematic regulations and ordinances wrongfully criminalizing conduct associated with poverty, homelessness and status are contained at the local or sub-national level.

This review would be in line with the commitment made by the Commonwealth Heads of Government in Rwanda in June 2022 to respect the rule of law, equal access to justice and independent justice systems, and additionally:

[329] ICJ, *The 8 March Principles*, Principle 21.

> "In pursuit of SDGs 10 (reduced inequalities) and 16 (peace, justice and strong institutions), Heads committed to fully implement laws that promote and protect inclusion, to eliminate discriminatory laws, policies and practices, and to promote appropriate legislation, policies and action."[330]

Additionally, the Plan of Action on the Commonwealth Law Ministers Declaration on Equal Access to Justice encouraged Commonwealth Governments to:

- "Collaborate across governmental departments and involve key stakeholders to (a) identify and address the multiple drivers that fuel increased vulnerability for particular communities; and (b) identify strategies that will result in increased protection for vulnerable persons in both civil and criminal justice systems.
- Review their legislation with the aim of removing discriminatory provisions, which can negatively affect parts of their populations' ability to effectively utilise and to protect their rights within justice systems, or which increase their exposure and vulnerability to abuses within criminal justice systems."[331]

Many countries have already taken steps to remove laws criminalizing conduct associated with poverty, homelessness and status from their books, such as vagrancy-type laws. Some of these efforts have been undertaken during reviews of a country's criminal or penal codes. As noted by the Campaign to Decriminalise Poverty and Status:

> "Rwanda and Angola recently removed vagrancy-related offences from their new Penal Code in 2018 and 2019 respectively. The redrafting of Penal Codes has also been the basis for removing

[330] The Commonwealth, "Communique of the Commonwealth Heads of Government Meeting "Delivering A Common Future: Connecting, Innovating, Transforming", 25 June 2022, paras. 18 – 19, available at: https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2022-06/CHOGM%202022%20Communique.pdf?VersionId=sqWEwpE4gyzg8wIdTCoPO0yQgVNZ7Izy.

[331] *Plan of Action on the Commonwealth Law Ministers Declaration on Equal Access to Justice,* 25 June 2022, available at: https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/2023-02/Commonwealth%20Law%20Ministers%20Declaration%20on%20Equal%20Access%20to%20Justice.pdf?VersionId=GKNdPIVvHb.LSaXMEsQNy8e105BQBNbn.

vagrancy offences in Cape Verde (2003), and Lesotho (2012) and Mozambique (2015)."[332]

Any law introduced to decriminalize conduct associated with poverty, homelessness and status should also address the detrimental harms already caused by the wrongful enforcement of such laws. For instance, in the Philippines, Republic Act No. 10158 was introduced in 2012 to amend article 202 of the Revised Penal Code, which criminalized "vagrancy".[333] As part of the Act, all pending cases were dismissed (section 2); and all persons serving sentences for violations were to be immediately released upon the Act (section 3) coming into effect.[334] In expunging convictions under such laws, it may also acknowledge the harm that having a criminal record for a past conviction can have on the individual concerned.[335] In a

[332] Campaign to Decriminalise Poverty and Status, "Submission on the Decriminalisation of Homelessness and Extreme Poverty", 30 November 2021, p. 16, available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.ohchr.org/sites/default/files/2022-03/CampaigntoDecriminalizePoverty.docx&ved=2ahUKEwjwh-iFqNiIAxWUwTgGHd4ZHB0QFnoECBQQAQ&usg=AOvVaw3l-9LGm6sCUw04_yUSe26H; see also, Meerkotter, Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces, pp. 9 – 10.

[333] Through Republic Act No. 10158, article 202 of the Revised Penal Code was amended to remove the offending sections on vagrancy, which was defined as: 1) Any person having no apparent means of subsistence, who has the physical ability to work and who neglects to apply himself or herself to some lawful calling; 2) Any person found loitering about public or semi-public buildings or places or trampling or wandering about the country or the streets without visible means of support; 3) Any idle or dissolute person who ledges in houses of ill fame; ruffians or pimps and those who habitually associate with prostitutes; or 4) Any person who, not being included in the provisions of other articles of this Code, shall be found loitering in any inhabited or uninhabited place belonging to another without any lawful or justifiable purpose. Unfortunately, the Act retained the criminalization of sex work (i.e. defined as women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct), although this was later decriminalized in Republic Act No. 11862 or The Expanded Anti-Trafficking Act of 2022.

[334] Republic Act No. 10158, 27 March 2012, An Act Decriminalizing Vagrancy, Amending for this Purpose Article 202 of Act No. 3815, as Amended, Otherwise Known as the Revised Penal Code.

[335] See, for instance, Marie Woolf, "Federal government looking at striking historic criminal convictions for vagrancy", *The Globe and Mail,* 15 May 2023, available at: https://www.theglobeandmail.com/politics/article-federal-government-looking-at-striking-historic-criminal-convictions/#:~:text="We%20are%20currently%20considering%20extending,acts%20such%20as%20aggressive%20panhandling.

different context, the United Kingdom's amendment to the Policing and Crime Act 2017, nicknamed the Alan Turing's Law, granted automatic pardons to those who were convicted for sexual acts no longer deemed criminal,[336] such as homosexual acts between men, although concerns have been raised about the implementation of the pardons system.[337]

Legal reform can and should go beyond repealing or substantially amending the laws that wrongfully criminalize conduct associated with poverty, homelessness and status, but should look to recognizing and protecting the human rights of persons experiencing poverty and/or homelessness. For instance, the Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing have noted that in Europe, the Homeless Bill of Rights, adopted by several cities, affirms various human rights of persons experiencing homelessness, including their right to use public spaces, to move freely within them, and to carry out survival activities without penalty, including begging or foraging for discarded food.[338]

4.2 Enacting and implementing policies strengthening access to justice

While this Practitioners' Guide focuses on substantive criminal law, it has repeatedly referenced how the wrongful application of unjust criminal laws has exposed persons experiencing poverty and/or homelessness to further human rights violations, that stem from broader structural failings of the criminal justice system. As discussed in the section 3 of this chapter, for instance, it may be necessary for legislators and policymakers to enact comprehensive laws and policies to ensure that the right to a fair trial and due process guarantees are scrupulously adhered to, taking into account the individual circumstances of those who come into contact with the criminal justice system.

One of the concerns that legislators and policymakers must address is the lack of adequate legal aid and representation for those who have come into contact with the criminal justice system because of these problematic

[336] Sections 164 – 172, Policing and Crime Act 2017, available at: https://www.legislation.gov.uk/ukpga/2017/3/contents.

[337] See, for instance, Joseph Lee, "Alan Turing law: Gay, unjustly convicted – and now denied a pardon", *BBC News,* 1 October 2019, available at: https://www.bbc.com/news/uk-49730231. It must also be noted that a pardon falls short of an expungement, as it does not erase one's criminal history in contrast to an expungement.

[338] UN Doc. A/HRC/56/61/Add.3, para. 45.

laws.[339] As underscored by the UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing, lawyers and other legal practitioners who defend the human rights of those experiencing poverty "deserve better protection and public support", and legal aid should be "made available to persons who cannot afford to engage counsel to defend themselves against charges or sanctions for minor offences."[340]

This point has been similarly made by the African Commission on Human and Peoples' Rights in its ACHPR Principles, where it urged States to:

> "Implement measures to **guarantee the right of all persons to legal advice and assistance**. In particular, States should **establish a legal aid service framework** through which legal services for persons who are unable to afford a private lawyer in criminal matters are assured."[341]

Legislators and policymakers may also consider reviewing existing regulations and policies on community-based advocates and paralegals. This may serve as a helpful stopgap measure to address gaps in terms of existing resources for legal representation and legal aid.[342] The UN Special Rapporteur on the Independence of Judges and Lawyers has recommended "expanding the legal ecosystem" and recognized the crucial role of community-based advocates and paralegals:

> "Review law, regulations and policy: work to remove obstacles and advance enabling environments for community justice workers. To this end, Member States should **decriminalize unauthorized practice of law for community justice workers, recognize community justice workers as human rights defenders and make protection schemes and security resources available to community justice workers where needed**."[343]

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[339] For more detailed guidance on the provision of legal aid, see, UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul,* UN Doc. A/HRC/23/43, 15 March 2013.

[340] UN Doc. A/HRC/56/61/Add.3, para. 37.

[341] ACHPR Principles, para. 14.4.1(b).

[342] This has been suggested by several participants of the consultations organized while preparing this Practitioners' Guide to be a helpful measure to expand access to justice for all. Some efforts have already been undertaken by advocates in several countries to codify the role of paralegals, such as through paralegal networks, in Malawi and Zambia, amongst others.

[343] Emphasis added. UN General Assembly, *Independence of judges and lawyers,* UN Doc. A/HRC/171, 13 July 2023, para. 63(b).

5. NATIONAL HUMAN RIGHTS INSTITUTIONS

In line with their mandate to promote and protect human rights, national human rights institutions (NHRIs) can promote and monitor the effective implementation of international human rights law and standards at the national level. NHRIs should adhere to the standards set out in the Paris Principles, in order to carry out their functions independently and effectively.[344]

NHRIs can, among other things, take effective measures to further the decriminalization of conduct associated with poverty, homelessness and status, including by:

- Issuing recommendations to other State agencies on reviewing and reforming laws penalizing conduct associated with poverty, homelessness and status;
- Investigating and seeking accountability for human rights violations related to the wrongful application of criminal laws; and
- Advocating for the human rights of persons experiencing discrimination on the basis of poverty, homelessness and/or other marginalized status.

For instance, India's National Human Rights Commission, in an advisory on the protection and rehabilitation of persons engaged in beggary, has recommended that states should "work towards decriminalising begging".[345] The Human Rights Commission of Sierra Leone has worked to develop a National Action Plan and facilitate a national dialogue on the decriminalization of petty offences in Sierra Leone.[346] NHRIs can also serve as the bridge between the human rights situation and

[344] Principles relating to the Status of National Institutions (The Paris Principles), 20 December 1993, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris.

[345] National Human Rights Commission, *Advisory for the Protection and Rehabilitation of Impoverished, Uneducated Children, Women, and Differently-abled Individuals Engaged in Begging,* June 2024, Recommendation 5.3, available at: https://nhrc.nic.in/sites/default/files/advisory_begging.pdf.

[346] Human Rights Commission of Sierra Leone, *HRCSL, NANHRI & Stakeholders Converge to Discuss Decriminalization of Petty Offences,* available at: https://www.hrc-sl.org/PDF/News/DECRIMINALIZATION%20OF%20PETTY%20OFFENCES.pdf.

international mechanisms: for instance, 11 NHRIs and ombudspersons made submissions to the call for input for the report of the UN Special Rapporteur on Extreme Poverty and the Special Rapporteur on Adequate Housing on the decriminalization of homelessness and extreme poverty.[347]

6. CIVIL SOCIETY

Finally, civil society actors play an indispensable role in furthering the decriminalization of conduct associated with poverty, homelessness and status, through their crucial work defending the human rights of individuals from marginalized communities.

Many of the successful outcomes discussed above, including those in relation to strategic litigation, and legal and policy reform can be attributed to the tireless work of civil society organizations carrying out sustained campaigns and mobilizing various actors towards repealing or reforming discriminatory criminal laws.

It is also in this context that is worth highlighting how civil society organizations and human rights defenders often lack the support and resources needed to effectively carry out their work, and are sometimes also vilified by State actors and wrongfully criminalized for work that constitutes the exercise of the right to freedom of expression, in a manner that also runs counter to the application of a human rights-based approach to criminal law.

The power of coalition building and joint advocacy efforts cannot be overstated, as demonstrated by the coordinated efforts of the Global Campaign to Decriminalise Poverty and Status:

[347] These included the NHRIs and ombudspersons from Argentina, Belgium, Canada, Denmark, Mexico, Oman, Philippines, Slovakia, South Africa, Sweden and Turkey, although the authors note that the information and analysis in the different submissions reflected varying levels of applying international human rights law and general principles of criminal law; see, OHCHR, "Call for Input: Decriminalization of homelessness and extreme poverty", available at: https://www.ohchr.org/en/calls-for-input/2023/call-input-decriminalization-homelessness-and-extreme-poverty.

Global Campaign to Decriminalise Poverty and Status

The Global Campaign to Decriminalise Poverty and Status is a coalition of organizations from across the world, including the ICJ and the Institute of Commonwealth Studies, that advocate for the repeal of laws, reform of policies and change in practices, that target people based on poverty, status or for their activism.

The Global Campaign's strategic priorities are coalition-building by mobilizing civil society actors and other allies as campaign members; pushing for the reform of laws and policies that criminalize people based on poverty, status and activism; and influencing State actors to implement reforms in law and practice that decriminalize poverty and status.

This work is carried out through advocacy, capacity building, coalition building, law reform, policy reform, research and strategic litigation.[348]

[348] For more, see, Campaign to Decriminalise Poverty & Status, available at: https://decrimpovertystatus.org.

ANNEX

List of cases from regional and domestic courts

A.B. v The Attorney General, BB 2023 HC 1 (Barbados High Court)

A.D.T. v. the UK, no. 35765/97, judgment, 31 July 2000 (European Court of Human Rights)

Ain o Salish Kendra (ASK) v. Government and Bangladesh & Ors 19 BLD (1999) 488, 29 July 2001 (Bangladesh Supreme Court)

Chicago v. Morales, 527 U.S. 41 (1999) (United States Supreme Court)

City of Grants Pass, Oregon v. Johnson et al, 72 F. 4th 868 (United States Supreme Court)

City of Seattle v. Steven Gregory Long, No. 98824-2, 12 August 2021 (Washington State Supreme Court, United States)

Decision G 155/10-9, 30 June 2012 (Austria Constitutional Court)

Decision No. 519, 28 December 1995 (Italy Constitutional Court)

Decision of the Constitutional Court 38/2012 (XI. 14.) (Hungary Constitutional Court)

Dian v. Denmark, Application No. 44002/22, 21 May 2024 (European Court of Human Rights)

Dudgeon v. The United Kingdom, no. 7525/76, judgment, 22 October 1981 (European Court of Human Rights)

Guzzardi v. Italy, Application no. 7367/76, 6 November 1980 (European Court of Human Rights)

Gwanda v S (Constitutional Cause 5 of 2015) [2017] MWHC 23 (Malawi High Court)

Haroon Farooq v. Federation of Pakistan & Others, W.P. No.59599 of 2022 (Lahore High Court, Pakistan)

Harsh Mander & Anr. V. UoI & Ors and Karnika Sawhney v. Union of India & Ors, W.P.(C) Nos. 10498/2009 & 1630/2015 (Delhi High Court, India)

In re Eichorn, 81 Cal. Rptr. 2d 535 (California Court of Appeal, United States)

Judgment of the Federal Supreme Court of 9 May 2008 [6C_1/2008 (ATF 134 | 214) (Switzerland Federal Supreme Court)

Lăcătuş v. Switzerland, Application no. 14065/15, 19 January 2021 (European Court of Human Rights)

Makwickana v eThekwini Municipality and Others (2015) (High Court of South Africa)

McEwan and Others v. Attorney General of Guyana [2018] CCJ 30 (AJ) (Caribbean Court of Justice)

Mitu-Bell Welfare Society v Attorney General & 2 Others [2013] eKLR (Kenya High Court)

Modinos v. Cyprus, no. 15070/89, judgment, 22 April 1993 (European Court of Human Rights)

Navtej Singh Johar & Orts. v. Union of India thr. Secretary Ministry of Law and Justice, 2018 INSC 790 (India Supreme Court)

Norris v. Ireland, no. 10581/83, judgment, 26 October 1988 (European Court of Human Rights)

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (United States Supreme Court)

Parry v Denman [1997] QDC 179 (Cairns District Court, Australia)

Pietquin and Others, no. 299.729 (2015) (Belgium *Conseil d'État*)

R v Heywood [1994] 3 SCR 761 (Canada Supreme Court)

Ram Lakhan vs State 137 (2007) DLT 173 (Delhi High Court, India)

Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa, No. 001/2018, 4 December 2020 (African Court on Human and Peoples' Rights)

South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014) (South Africa Constitutional Court)

Swindon Borough Council v Abrook [2024] EWCA Civ 221 (England and Wales Court of Appeal, United Kingdom)

Tate v. Short, 401 U.S. 395 (1971) (United States Supreme Court)

The People of the Philippines vs. Moro Macbul, G.R. No. L-48976, 11 October 1943 (Philippines Supreme Court)

The State v The Officer In-Charge | Ex Parte: Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (22 July 2022) (Malawi High Court)

Tumwesige Francis v Attorney General (Constitutional Petition No. 36 of 2018) [2022] UGCC 5 (2 December 2022) (Uganda Constitutional Court)

Williams v. Illinois, 399 U.S. 235 (1970) (United States Supreme Court)

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