

## AMNESTY INTERNATIONAL PUBLIC STATEMENT

23 March 2023

AI Index: AFR 51/6586/2023

# CRIMINALIZING LOITERING IS DISCRIMINATORY AND CONTRARY TO THE RIGHT TO DIGNITY: THIRD-PARTY INTERVENTION FILED AT THE COMMUNITY COURT OF JUSTICE OF ECOWAS

On 22 March 2023, Amnesty International submitted a third-party intervention to the Community Court of Justice of the Economic Community of West African States (ECOWAS) in the case of *Advocaid Limited (Applicants) v The Republic of Sierra Leone (Respondent)* involving alleged widespread human rights violations stemming from the criminal proscription of ‘loitering’ in Sierra Leone.

Loitering in Sierra Leone is a petty offence that is defined in the Public Order Act of 1965 and the Summary Conviction Offences Ordinance of 1906. Section 7 of the Public Order Act provides that “*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*”.

In the case the applicants are claiming that loitering laws and their application unfairly target people living in poverty and subject them to punishment for potential, rather than actual, harmful acts. These laws often result in arbitrary arrests and detention, in violation of the rights to liberty and security of person. The applicants are also arguing that these laws discriminate against women, who are often subject to gender-based violence when law enforcement officials arrest and detain them on the basis of loitering laws.

The criminal proscription of loitering and other petty offences<sup>1</sup>, such as, for example, ‘being a vagrant’, ‘being a rogue and vagabond’ or ‘being an idle and disorderly person’, remains in force in 33 countries across the African continent, including Sierra Leone.<sup>2</sup> These laws were introduced in Africa, the Commonwealth and other regions by the English and French colonial powers with the pretext of protecting public order but their continued application results in widespread and systemic human rights violations. In several countries, these offences were introduced through a model criminal code based on the English Vagrancy Act of 1824.

Amnesty International’s third-party intervention highlighted that the criminalization of loitering is not consistent with international and regional human rights law and standards regarding the decriminalization of petty offences and does not comply with the principles of proportionality, legal clarity, and non-discrimination.

## REGIONAL AND INTERNATIONAL LAW AND STANDARDS ON DECRIMINALIZING PETTY OFFENCES

In recent years, international and regional human rights mechanisms have recommended states to decriminalize petty offences, including loitering. Regionally, the African Court on Human and Peoples’ Rights (African Court) issued in 2020 *the Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples’ Rights*.<sup>3</sup> The African Court concluded that vagrancy laws, including laws criminalizing loitering, are incompatible with a number of human rights enshrined in the African Charter on Human and Peoples’ Rights (African Charter).<sup>4</sup> The African Court declared that States Parties have a positive obligation to repeal or amend their vagrancy laws to comply with the African Charter.

<sup>1</sup> Petty offences are ‘minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment’. African Commission on Human and Peoples’ Rights, Principles on the Decriminalisation of Petty Offences in Africa, <https://www.achpr.org/legalinstruments/detail?id=2>, p. 9.

<sup>2</sup> Campaign to Decriminalise Poverty and Status, Submission on Decriminalisation of Homelessness and Extreme Poverty, 30 November 2021. <https://pettyoffences.org/downloads/submission-on-the-decriminalisation-of-homelessness-and-extreme-poverty/>, p.3.

<sup>3</sup> African Court on Human and Peoples’ Rights (ACtHPR), 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, no. 001/2018, 4 December 2020, [https://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/001-2018\\_-\\_PALU-Advisory\\_Opinion.pdf](https://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/001-2018_-_PALU-Advisory_Opinion.pdf)

<sup>4</sup> The African Court found that petty offences, including loitering, violate articles 2 (non-discrimination), 3 (equality before the law), 5 (prohibition of torture), 6 (personal liberty), 7 (fair trial), and 12 (freedom of movement).

At the international level, United Nations (UN) Treaty Bodies and Special Procedures have similarly made calls recommending states to decriminalize petty offences. In 2012, the UN Human Rights Council adopted the *Guiding Principles on Extreme Poverty and Human Rights*, which urged states to “repeal or reform laws that criminalize life-sustaining activities in public spaces, such as eating, begging, sleeping and perform personal hygiene activities”.<sup>5</sup>

## THE DISPROPORTIONATE USE OF CRIMINAL LAW TO ADDRESS LOITERING

The criminal proscription of petty offences, including loitering, does not in reality even address conduct that may constitute actual social harm as its proponents often mistakenly claim. The framework of what constitutes a petty offence is so broad, that it captures innocuous behaviors and activities that are not associated with any criminal activity and thus do not constitute a threat to public order.<sup>6</sup> Criminal proscription of petty offences is thus not necessary to protect public order or the rights and freedoms of others, which are among the legitimate aims that states may pursue by imposing necessary and proportionate restrictions on some human rights.<sup>7</sup>

## CRIMINALIZING LOITERING IS AT ODDS WITH THE PRINCIPLE OF LEGALITY

The respect of the principle of legality is of paramount importance in all instances where the state makes use of criminal law.<sup>8</sup> The *UN Working Group on Arbitrary Detention* (WGAD) stated that the principle of legality is one of the main safeguards of criminal procedure and requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate their conduct accordingly.<sup>9</sup>

Vagrancy laws, including criminal laws proscribing loitering, are at odds with the principle of legality. In the *Advisory Opinion on Vagrancy Laws*, the African Court has noted that: “[w]hile an eternal attribute of all good laws is that they must always be clear and precise, vagrancy laws often employ vague, unclear and imprecise language. Common terminology used in framing vagrancy offences include expressions such as ‘loitering’, ‘having no visible means of support’ and ‘failing to give a good account of oneself’. Such language does not provide sufficient indication to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws. This, automatically, makes vagrancy laws prone to abuse, often to the detriment of the marginalized sections of society.”<sup>10</sup>

## CRIMINALIZING LOITERING IS AT ODDS WITH THE PRINCIPLE OF NON-DISCRIMINATION AND THE RIGHT TO DIGNITY

Both regional bodies and domestic courts have emphasized that petty offences and their enforcement are inconsistent with the right to dignity which is guaranteed under Article 5 of the African Charter.<sup>11</sup>

Moreover, the criminal proscription of loitering discriminates against persons on multiple and intersecting grounds, including sex and gender. This discrimination intersects and is compounded by other factors including health status, social origin and a person’s economic and social situation. Women, lesbian, gay, bisexual, transgender and intersex persons (LGBTI) as well as people who are homeless and/or live in poverty including those with health issues, particularly mental health, are disproportionately affected by criminal laws proscribing loitering and petty offences.

The UN Working Group on Discrimination against Women and Girls (WGDAG) has repeatedly emphasized that vagrancy, loitering and public nuisance laws often result in the criminalization of women who engage in sex work and

<sup>5</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Extreme Poverty and Human Rights*, 27 September 2012, [https://www.ohchr.org/sites/default/files/Documents/Publications/OHCHR\\_ExtremePovertyandHumanRights\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf), principle 66 c. Special Rapporteur on Poverty and Human Rights, , *Extreme Poverty and Human Rights*, 4 August 2011, UN Doc. A/66/265, para. 82(f).

<sup>6</sup> See for example *State v Officer in Charge, Kasungu Police Station and Inspector General of Police, Ex Parte Henry Banda and 2 Others, Judicial Review Case No. 28 of 2018, 22 July 2022*, <https://media.malawilii.org/files/judgments/mwhc/2022/139/2022-mwhc-139.pdf>, para. 1.30; High Court of Malawi, *Gwanda v S*, Constitutional Cause 5 of 2015, 10 January 2017, <https://malawilii.org/mw/judgment/high-court-general-division/2017/23>; European Court of Human Rights, *Lacatus v Switzerland*, Application 14065/15, Chamber Judgment, 19 January 2021, [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-207377%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-207377%22]), paras 112-114.

<sup>7</sup> UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4.

<sup>8</sup> ICCPR, Article 15, African Charter of Human and People’s Rights, Article 7, ECHR, Article 7, IACHR, Article 9.

<sup>9</sup> UN Working Group on Arbitrary Detention, *Opinion No. 41/2017*, UN Doc. A/HRC/WGAD/2018/62, para 57. UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4, Principle 17. UN Economic and Social Council, *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2000/13, Principle 50.

<sup>10</sup> ACTHPR, *Advisory Opinion 001/2018* (previously cited), para 73

<sup>11</sup> See African Commission on Human and People’s Rights, *Principles on the Decriminalization of Petty Offences in Africa*, Principles 9, 10 and 11. *Ex Parte Henry Banda and 2 Others* (previously cited), para. 1.24.

the imposition of custodial sentences on them. The WGDWG stated that these laws harm rather than protect sex workers and, as they are at odds with international human rights law, should be repealed.<sup>12</sup> The enforcement of punitive sanctions and the discriminatory use of criminal law generate stigma and discrimination and violate women's dignity and bodily integrity by restricting their autonomy to make decisions about their lives.

---

<sup>12</sup>E.g., WGDWG, Report on the issue of discrimination against women in law and in practice, A/HRC/32/44, 8 April 2016, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/072/19/PDF/G1607219.pdf?OpenElement>, paras. 84 and 85; WGDWG, Women deprived of liberty, A/HRC/41/33, 15 May 2019, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/139/27/PDF/G1913927.pdf?OpenElement>, para. 36., UN Working Group on Discrimination against Women and Girls, UN Working Group on Arbitrary Detention, Joint amicus curiae in the Federal High Court of Nigeria (previously cited), chapter 2.2