

**African Commission on Human and Peoples' Rights**

**Draft Principles on the Declassification and Decriminalisation  
of Petty Offences in Africa**

**1 March 2017**

**PREAMBLE**

**The African Commission on Human and Peoples' Rights (the 'African Commission')** meeting at its    Ordinary Session, held from    to   , in   :

**Recalling** its mandate to promote and protect human and peoples' rights under the African Charter on Human and Peoples' Rights (the 'African Charter');

**Recognising** its mandate under Article 45(1)(b) of the African Charter to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation';

**Recalling** Articles 2, 3, 5 and 6 of the African Charter, which guarantee the rights and freedoms recognised in the African Charter to all persons without distinction of any kind; the right of all persons to equality before the law and to equal protection of the law; the right to inherent dignity and the prohibition against torture, cruel, inhuman or degrading treatment and punishment; and the right of every person to liberty and security, including the prohibition against arbitrary arrest and detention;

**Noting** Articles 4, 7, 12, 16, 18 and 22 of the African Charter which guarantee the right to life; the right to have a cause heard; freedom of movement; the right to the best attainable state of physical or mental health; the right to special measures of protection for older persons and persons with disabilities, keeping with their physical and other needs; and the right to economic, social and cultural development;

**Recognising** the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, which guarantees equal protection of rights to individuals with 'physical, mental, intellectual, developmental or sensory impairments'; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, in particular Articles 3 and 4 which guarantee the right to dignity, life, integrity and security of the person; and the African Charter on the Rights and Welfare of the Child which requires that 'the best interests of the child shall be the primary consideration' in all actions relating to the child;

**Recalling** the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa which call on State Parties to the African Charter to declassify and decriminalise minor offences, 'such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents'; and the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa ('the Luanda Guidelines') which articulate grounds for arrest based on principles of legality and equality, and encourage the diversion of minor offences away from the criminal justice system;

**Bearing in mind** its decision in Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan, 48/90-50/91-52/91-89/93 on the interpretation of Article 6 of the African Charter as permitting arrests only in the exercise of powers normally granted to the security forces in a democratic society;

**Noting** Articles 2, 4, 7, 9, 10, 11, 14, 15 and 17 of the International Covenant on Civil and Political Rights; Articles 2, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 1, 2, 3, 4, 12 and 16 of the Convention on the Rights of the Child; Articles 2, 3 and 6 of the Convention on the Elimination of All Forms of Discrimination against Women; and Articles 2, 4, 5, 9, 12, 13 and 14 of the Convention on the Rights of Persons with Disabilities;

**Mindful** of the spirit of the Sustainable Development Goals, adopted by the United Nations General Assembly in 2015, and in particular their motto of 'leaving no one behind';

**Noting** Goal 16 of the Sustainable Development Goals that calls on States to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective and inclusive institutions at all levels’, and target 16.3 specifically that seeks to ensure equal access to justice for all;

**Concerned** about the existence of vague and overly broad, colonial-era national laws, and sub-ordinate laws, in many African countries that create petty offences and impede the enjoyment of human rights by all persons, particularly on the basis of social origin, social status or fortune; the negative socio-economic impact of the enforcement of these offences; and the lack of access to legal assistance services for persons who are unable to afford a private lawyer;

**Mindful** of overcrowding in prison populations across Africa, and the need to develop strategies for preventing people from coming into the prison system, including through the use of alternatives to criminal prosecution, and the declassification and decriminalisation of some offences;

**Concerned** about the disproportionate impact of laws that create petty offences on the poor and persons who are otherwise marginalised or vulnerable to human rights violations within the criminal justice system;

**Hereby adopt the following Principles on the Declassification and Decriminalisation of Petty Offences in Africa:**

## A. Definitions

For the purpose of these Principles:

**Arrest** refers to the act of apprehending a person for the alleged commission of a criminal offence, or to the action of a competent authority to arrest and detain a person as otherwise authorised by law.

**Declassification** refers to re-classifying offences as administrative or non-arrestable offences, or offences for which pre-trial detention may not be used and a prison sentence not be imposed upon conviction.

**Decriminalisation** refers to the process of removing an act that was criminal, and its associated penalties, from the law;

**Ill treatment** includes acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, as defined in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

**Law enforcement officials** are all officials or other competent persons, whether appointed or elected, or authorities granted, at minimum, powers of arrest in law, by the State;

**Performance of life sustaining activities** means to move, sleep, eat and exchange food, trade, tout, hawk, and engage in hygiene-related activities in public places;

**Petty offences** are minor offences for which the punishment is prescribed by law as a warning, community service, a low value fine or short term of imprisonment, often for failure to pay the fine. Examples include, but are not limited to, offences such as being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places; and laws criminalising informal commercial activities, such as hawking and vending.

**Reasonable accommodation** is a modification or adjustment to the procedure, process or physical conditions of detention to take into account the needs of persons with physical,

mental, intellectual or sensory disabilities, and to ensure that such persons can access, on an equal basis with other persons, the physical environment, information and communications, and other facilities provided by the detaining authority. Equal access should be provided regardless of the type of impairment, legal status, social condition, gender and age of the detainee;

**Torture** has the same meaning as Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was endorsed by the African Commission in Part I, paragraph C(4) of the Robben Island Guidelines for the Prohibition and Prevention of Torture;

**Vulnerable persons** are persons who are marginalised in society and the criminal justice system because of their status, or an intersection of one or more statuses. This includes, but is not limited to, the economically or socially marginalised, including persons living in poverty, homeless persons, street children, beggars, older persons, people who use drugs, persons with disabilities, sex workers, street traders and vendors, on the basis of sexual orientation and gender identity, or on the basis of any other actual or imputed status.

#### **B. Petty offences are inconsistent with Articles 2, 3 and 18 of the African Charter on the right to equality and non-discrimination**

1. Article 2 and 3 of the African Charter guarantee to all persons the enjoyment of rights and freedoms recognised in the Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status; to equality before the law and the equal protection of the law.
2. Article 18 of the African Charter requires State Parties to ensure the elimination of discrimination against women and children, and to implement special measures for the protection of the older persons and persons with disabilities, in keeping with their physical and other needs.
3. State Parties to the African Charter have an obligation to ensure that the adoption and implementation of all laws, including laws that create petty offences, respect, protect

and promote the rights of all persons to equality before the law and non-discrimination as set out in Articles 2, 3 and 18 of the African Charter.

4. Laws that create petty offences are inconsistent with the principles of equality before the law and non-discrimination on the basis that they either target, or have a disproportionate impact on, the poor and other vulnerable persons.
5. The enforcement of petty offences have the effect of punishing, segregating, controlling and undermining the dignity of persons on the basis of their status. They also infringe upon the autonomy of persons by restricting their performance of life sustaining activities in public spaces, particularly for those living in poverty. The enforcement of these laws perpetuates the stigmatisation of poverty by mandating a criminal justice response to what are socio-economic and sustainable development issues. In this regard, petty offences reinforce discriminatory attitudes against marginalised persons.

**C. Petty offences are inconsistent with Article 5 of the African Charter on the right to dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment**

6. Article 5 of the African Charter guarantees respect for the inherent dignity of all persons, and prohibits torture, cruel, inhuman or degrading punishment or treatment ('torture and other ill treatment'). Conditions of detention in police custody, pre-trial detention, prisons, and other detention facilities should conform to all regional and international human rights standards, including that detainees are treated with respect for their inherent dignity, and are protected from torture and other ill treatment. Severley overcrowded conditions of detention will, at minimum, amount to ill treatment.
7. Petty offences are inconsistent with the right to dignity and freedom from ill treatment on the basis that their enforcement contributes to overcrowding in places of detention or imprisonment.
8. Overcrowding in places of detention is incompatible with the provision of physical conditions of detention that respect the dignity of detainees, and procedural and other safeguards to protect detainees from ill treatment, as previously laid down by the African Commission in the African Charter and the Luanda Guidelines.

**D. Petty offences are inconsistent with Article 6 of the African Charter on the right to liberty and security of the person and freedom from arbitrary arrest and detention**

9. Article 6 of the African Charter guarantees all persons the right to liberty and security of the person, prohibits arbitrary arrest and detention, and provides that a person may only be deprived of their liberty for reasons and conditions previously laid down by law, and in such a way as to permit arrest only in the exercise of powers normally granted to law enforcement officials in a democratic society.

10. The enactment, interpretation and enforcement of petty offences by State Parties should:

10.1. Comply with the rule of law.

10.1.1. The laws defining criminal conduct must be clear, precise and accessible, and clearly establish the elements of the crime, as well as the grounds upon which a person can be arrested and detained.

10.1.2. Petty offences are often vague and overly broad, and do not always specify the conduct being criminalised or the requisite criminal intent. As a consequence, law enforcement officials are given wide discretion to determine which activities constitute criminal behaviour in a particular context, which often results in the law being applied in an arbitrary and/or discriminatory manner.

10.2. Be legitimate, necessary and proportionate.

10.2.1. Criminal laws must be in pursuit of a legitimate objective.

10.2.2. Criminal laws must be a necessary and proportionate measure to achieve that legitimate objective within a democratic society, including through the prevention and detection of crime in a manner that does not impose excessive or arbitrary infringements upon individual rights and freedoms. There must be

a rational connection between the law, its enforcement and the intended objective.

10.2.3. Petty offences can threaten the fundamental rights and freedoms of poor and other marginalised persons. Enforcement of such offences not only diverts resources away from the prevention and detection of serious crimes, but further entrenches the stigma and impact of poverty on persons most vulnerable to rights violations across the criminal justice chain.

10.2.4. Laws which allow for arrest and imprisonment for petty offences can be a disproportionate measure which is contrary to the principle of arrest as a measure of last resort.

10.3. Satisfy regional and international human rights standards, including the principles of equality before the law and non-discrimination, as previously laid down in Part B of these Principles.

**E. State Parties to the African Charter should declassify and decriminalise petty offences in accordance with these Principles and other regional and international human rights standards**

11. State Parties to the African Charter should take legislative, administrative and policy measures to ensure that laws and their enforcement comply with these Principles and other regional and international human rights standards.

12. State Parties are encouraged to:

**12.1. Decriminalise certain petty offences**

12.1.1. Ensure that laws criminalising conduct in vague and ambiguous terms, and which fail to distinguish between actual criminal behaviour and imputed criminal behaviour are decriminalised.

12.1.2. 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.

**12.2. Declassify certain petty offences**

12.2.1. Review other laws which do not meet the test for decriminalisation, as set out in these Principles in section 12.1 to assess whether they remain legitimate, necessary, and proportionate, and whether they target or have an otherwise discriminatory impact on the basis of a person's status in accordance with these Principles and other relevant regional and international human rights standards. For such laws, the State Party should take immediate steps to re-classify such offences as administrative or non-arrestable offences, or offences for which a prison sentence may not be imposed upon conviction.

**12.3. Implement alternatives to arrest and detention**

12.3.1. Establish and apply a variety of alternatives to arrest and detention for conduct that would otherwise constitute a petty offence, including diversion of cases away from the criminal justice system and the utilisation of recognised and effective alternatives that respect regional and international human rights standards. Alternatives to arrest and detention should be promoted under a framework that recognises the need for reasonable accommodation for persons with disabilities, and a framework that promotes the best interest of the child in conflict with the law.

**12.4. Address the root causes of poverty and other marginalisation**

12.4.1. Adopt legislative, administrative, policy and other measures that aim to address the conditions that cause, exacerbate or perpetuate poverty, rather than criminalise poverty, in accordance with the State obligation to respect, protect and promote human rights, which includes the right to development in Article 22 of the African Charter.

12.4.2. Adopt measures to eliminate the root causes of other marginalisation, including measures which criminalise same sex conduct, drug use and sex work.

12.4.3. Ensure the provision of services to all persons to regulate and constructively support people to perform life sustaining activities in public places.

## **12.5. Implement these Principles**

12.5.1. Adopt legislative, administrative, judicial, policy, and other measures to give effect to these Principles and ensure that the rights and obligations contained herein are always guaranteed in law and practice, including during conflict and states of emergency.

12.5.2. Take legislative, administrative, policy and other 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.

12.5.3. Ensure the wide dissemination of these Principles, including to parliament, justice and security sector institutions, national human rights institutions, national preventative mechanisms, police statutory oversight authorities, institutions with a mandate to monitor and provide oversight to criminal justice sector institutions, and the community.

12.5.4. Ensure that all law enforcement officials and judicial officers receive continuous and comprehensive training on their obligations to protect and respect the human rights of all persons, including in particular, Articles 2, 3, 5 and 6 of the African Charter, these Principles, the Luanda Guidelines, and other relevant regional and international human rights standards.

12.5.5. Provide information on the extent to which national legislation, policy and administration pertaining to existence and enforcement of laws that create

petty offences are consistent with these Principles in their periodic reports to the African Commission in accordance with Article 62 of the African Charter.

12.5.6. Systematise data collection and reporting that monitors the percentage of pre-trial detainees in the overall prison population; the number of awaiting trial detainees who spend more than one year in detention; the number of awaiting trial detainees who have access to legal assistance services, including separate statistics for those who receive legal assistance services at no cost, at every stage of the criminal justice process.

12.5.7. Encourage collaboration with national and regional non-governmental actors to share best practices in relation to the types of data collection, monitoring and reporting, and of ensuring inclusion of data collection in the cyclical country reports to the African Commission, and in the framework of the Sustainable Development Goals implementation agenda and Goal 16 specifically.