

Submission of the International Commission of Jurists on

“Decriminalization of homelessness and extreme poverty”

*In response to a call for input from
the UN Special Rapporteur on the right to adequate housing and the UN
Special Rapporteur on extreme poverty*

5 October 2023

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International Commission of Jurists

P.O. Box 1740, Rue des Buis 3,
1211 Geneva 1, Switzerland

Tel: +41(0) 22 979 3800 – Fax: +41(0) 22 979 3801 – Website: <http://www.icj.org> - E-mail:
info@icj.org

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A. Introduction

1. The International Commission of Jurists (ICJ) welcomes the opportunity to provide information to the UN Special Rapporteur on the right to adequate housing and the UN Special Rapporteur on extreme poverty in response to their “Call for Input: Decriminalization of homelessness and extreme poverty”.¹
2. The present submission is based in part on “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” (the 8 March Principles).²
3. The 8 March Principles, which were developed over a five-year consultative process with experts from across the world including jurists, academics, legal practitioners, human rights defenders, and various civil society organizations working in diverse legal traditions, bring together international law and standards addressing the harmful human rights impact of unjustified criminalization of individuals and entire communities. The individuals and communities most frequently disproportionately impacted by such laws are those in vulnerable situations due to existing discrimination and marginalization.
4. In recent years, the UN Secretary-General, the Office of the High Commissioner for Human Rights, and global and regional human rights mechanisms, bodies and experts, as well as national courts, legislatures and domestic human rights institutions, have expressed concern about the harmful human rights impact of criminal laws proscribing, among other things, conduct associated with:
 - sexual and reproductive health and rights;
 - consensual sexual activity;
 - gender identity;
 - gender expression;
 - HIV non-disclosure, exposure and transmission;
 - drug use and the possession of drugs for personal use; and
 - homelessness and poverty.
5. They have therefore called for the removal of criminal and other punitive laws, policies and practices pertaining to some or all the above-mentioned

¹ Office of the High Commissioner for Human Rights, *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#:~:text=The%20Guidelines%20for%20the%20Implementation%20of%20the%20Ri,ght,such%20as%20sleeping%20or%20eating%20in%20public%20spaces>

² International Commission of Jurists, *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* (8 March 2023), available at: https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf

conduct as a critical step to protect the right to health and other human rights.

The International Commission of Jurists' 8 March Principles

6. In March 2023, the ICJ published 8 March Principles. These Principles are based on general principles of criminal law and international human rights law and standards. They seek to offer a clear, accessible and workable legal framework – as well as practical legal guidance – on applying the criminal law to conduct associated with:
 - sexual and reproductive health and rights, including termination of pregnancy;
 - consensual sexual activities, including in contexts such as sex outside marriage, same-sex sexual relations, adolescent sexual activity and sex work; gender identity and gender expression;
 - HIV non-disclosure, exposure or transmission;
 - drug use and the possession of drugs for personal use; and
 - homelessness and poverty.
7. The Principles are additionally intended to address the detrimental impact of the criminalization of the abovementioned conduct on human rights, including to health, equality and non-discrimination. In General Part I and General Part II, the 8 March Principles reflect the criteria that must be met under general principles of criminal law and international human rights law, respectively, to proscribe certain conduct in a non-discriminatory way, respecting the rule of law. Special Part III of the 8 March Principles features principles derived from the application of General Parts I and II to the criminalization of conduct associated with sex, reproduction, drug use and the possession of drugs for personal use, HIV, homelessness and poverty.
8. The 8 March Principles are designed to reiterate or reflect:
 - existing general principles of criminal law;
 - international human rights law, including customary and treaty law;
 - judicial decisions;
 - national law and practice; and
 - legal scholarship in accordance with accepted practice and article 38 of the Statute of the International Court of Justice.
9. They therefore do not establish new elements of international law. Rather, they are drawn from, and restate, existing general principles of criminal law and international human rights law, with the aim of clarifying a human rights-based approach to criminal law proscribing conduct associated with sex, reproduction, drug use and the possession of drugs for personal use, HIV, homelessness, and poverty.
10. The 8 March Principles ought to be interpreted considering general principles of criminal law and in accordance with international human rights law and standards, applying the most favourable guarantees for the exercise and enjoyment of human rights, including under domestic law.

They are based on the notion that domestic law cannot be invoked as a justification for a breach of international law.³

11. In addition, the Principles set out minimum standards, and that nothing in them should be construed as justifying a lower level of protection for individuals than that which is provided in national laws or under general principles of criminal law, or in a manner that would limit, restrict or undermine human rights guaranteed under international human rights law and standards. They are to be interpreted as a “living document”: that is, dynamically, in the light of present-day conditions and responsive to the evolution of human rights law and standards.
12. The UN Office of the High Commissioner for Human Rights,⁴ UNAIDS,⁵ WHO and UNDP supported the development of the 8 March Principles.

Principle 21 – Decriminalizing of Life-Sustaining Activities in Public Spaces, Homelessness and Poverty

13. Principle 21 of the 8 March Principles, entitled “Life-Sustaining Activities in Public Spaces and Conduct Associated with Homelessness and Poverty”, is more relevant for the present submission. As with the other Principles set out in Special Part III of the 8 March Principles, Principle 21 results from, reflects and has been elaborated by applying the general principles and legal standards in General Part I and Part II to its subject matter, that is, the criminalization of conduct associated with homelessness and poverty. Principle 21 reads as follows:

“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

³ Vienna Convention on the Law of Treaties, article 27.

⁴ Office of the High Commissioner for Human Rights, *Statement during the thirty-second session of the Commission on Crime Prevention and Criminal Justice* (22 May 2023), available at: https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_32/Statements/Item_3_-_OHCHR.pdf

⁵ UNAIDS, *New legal principles launched on International Women’s Day to advance decriminalization efforts* (8 March 2023), available at: https://www.unaids.org/en/resources/presscentre/featurestories/2023/march/20230308_new-legal-principles-decriminalization

- 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.”
14. While many of the Principles set out in the 8 March Principles are relevant to the call for submissions made by the Special Rapporteurs, ICJ’s submission will focus predominantly on Principle 21 as set out in full above. In addition, the ICJ’s submission highlights the situation of particular individuals and groups who experience discrimination on multiple and intersecting grounds and are disproportionately impacted by the criminalization of certain conducts that are associated with poverty and homelessness. These include sex workers, LGBTI persons and street vendors. In that regard, the 8 March Principles state that “[C]riminal 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”⁶; and that “[N]o 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.”⁷
15. The submission also draws on the ICJ’s work in various jurisdictions in Asia and Africa providing examples of criminal laws and practices that continue to significantly impinge on the human rights of marginalized and disadvantaged persons especially. While the country examples provided include India, Pakistan, Sri Lanka, Nepal, Zimbabwe, Uganda, Malawi and South Africa, the ICJ has also recently joined the Global Campaign to Decriminalize Poverty and Status, and campaigns against the overuse and abuse of criminal law across the world in keeping with international law and standards.
16. The information and examples provided in this submission seek to respond to the first and third questions posed in the Special Rapporteurs’ call for input, namely:
1. Laws or regulations that prohibit begging, eating, sleeping, or performing personal hygienic activities in all or certain public places (please kindly include the wording of these laws and regulations and specify whether they are effectively enforced).
 3. Information about attempts made or planned to decriminalize street vending, informal business activities, sex work, begging, eating, sleeping or performing personal hygienic activities in public places.

⁶ International Commission of Jurists, *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* (8 March 2023), Principle 9, available at: https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf

⁷ *Ibid.*, Principle 10.

17. For ease of reading, the remainder of this submission is divided into subsections based on relevant laws and information pertaining to countries. A brief conclusion is then provided.

B. India

18. In 2019, after extensive field research, the ICJ published a report titled *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India*.⁸ The report documents the manner in which, despite the striking down of criminalization of same-sex relations in *Navtej Singh v. Union of India*,⁹ discrimination against, criminalization and harassment of LGBTI persons in India continue.

19. People interviewed by the ICJ shared instances of violence perpetrated by State actors, such as the police, which made apparent the targeting of transgender and gender non-binary persons using laws that criminalize, among others, sex work, begging and public nuisance.¹⁰

Anti-begging laws

20. As the ICJ report notes, a range of Indian laws criminalize beggary. Examples of such laws include:

- a. The Telangana Prevention of Begging Act, 1977;
- b. The Andhra Pradesh Prevention of Begging Act, 1977;
- c. The Maharashtra Prevention of Begging Act, 1959;
- d. The Goa, Daman and Diu Prevention of Begging Act, 1972;
- e. The Gujarat Prevention of Begging Act, 1959;
- f. The Tamil Nadu Prevention of Begging Act, 1945;
- g. Karnataka Prohibition of Beggary Act, 1975.

21. Begging is a significant source of livelihood for many transgender persons given that they are often discriminated against and are often unable to secure alternative means of subsistence or work. As a result, transgender persons who earn their income through begging are more vulnerable to abuse and harassment by the police through such anti-beggary laws.

⁸ International Commission of Jurists, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India* (June 2019), available at:

<https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>

⁹ Supreme Court of India, *Navtej Singh Johar vs Union Of India Ministry Of Law And Justice*, N°. 76 OF 2016 (6 September 2018), available at:

<https://indiankanoon.org/doc/168671544/>

¹⁰ For more details, see International Commission of Jurists, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India* (June 2019), available at:

<https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>; and International Commission of Jurists, “*Unnatural Offences”: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* (February 2017), available at:

<https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf>

Transgender persons also told the ICJ that they are often presumed to be sex workers or beggars.

22. Another example is the Indian Railways Act, which punishes begging in a railway carriage or station with imprisonment for up to a year or with a fine of INR 2000 [approximately US\$ 30]. The ICJ has documented several instances of police implementation of the Act in a manner which ultimately amounts to harassment and extortion of transgender persons begging on trains.
23. Similarly, the Bombay Prevention of Begging Act, 1959 permitted a police officer to “*arrest without a warrant any person who is found begging*”. In 2018, in *Harsh Mander v. Union of India*, the High Court of Delhi held that provisions of the Bombay Prevention of Begging Act, 1959, which had been extended to apply in Delhi, were unconstitutional. The Court found that the law failed to distinguish between voluntary and involuntary begging, was arbitrary, and thus violated the right to equality under article 14 of the Constitution. The Court held that the criminalization of begging amounted to a violation of the right to live with dignity, guaranteed under article 21, and of the right to freedom of expression under article 19 of the Constitution.¹¹

Public nuisance laws

24. Section 268 of the Indian Penal Code (IPC) states:
“A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any 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, danger or annoyance to persons who may have occasion to use any public right”.
25. Section 268 is a typical example of “nuisance laws”, which often feature vague concepts and overly broad formulations, thus leaving them open to abuse. This provision, for example, appears to effectively allow arrest simply for causing “*annoyance to the public*”; as a result, it is often used against LGBTI persons. Section 290 of the Penal Code sets out the punishment for those found guilty of a public nuisance, namely a fine of up to INR 200 [approximately US\$ 7].

Sex Work

26. While Indian law does not criminalize sex work *per se*, under the Immoral Trafficking Prevention Act (“ITPA”), several aspects of conduct associated with sex work are criminalized, including “soliciting” and “living on the earnings of prostitution”.
27. The police often use legal provisions designed to regulate sex work against transgender persons, to arrest and detain them. A study by the People’s

¹¹ High Court of Delhi, *Harsh Mander v. Union of India*, W.P. (C) 10498/2009, CM Appl. 1837/2010 and W.P. (C) 1630/2015, para. 29.

Union for Civil Liberties (Karnataka) in 2004 noted the human rights violations faced by transgender sex workers and stated that the ITPA has “provided the legal basis for arrest and intimidation of the transgender sex worker population”.¹²

28. Many transgender persons often rely on sex work as a means of livelihood. There is also a perception that transgender persons are involved in sex work, even when they may not be. Furthermore, interviews conducted by the ICJ suggest that State police forces have taken large-scale action against sex workers to remove them from public spaces.¹³

C. Pakistan

29. This section draws significantly on ICJ’s 2020 briefing paper titled *Pakistan: Transgender Persons (Protection of Rights) Act, 2018*, which provides an analysis of the Act itself and the context in which it was drafted and within which it is being implemented.¹⁴ The operation of the laws detailed below is compounded by what ICJ has noted to be the “apathy and complicity of the police in human rights violations and abuses against transgender people”.¹⁵

Anti-beggary and “vagrancy” laws

30. The Punjab Vagrancy Ordinance, 1958,¹⁶ defines a “vagrant”¹⁷ as someone who “solicits or receives alms in a public place” or “allows himself to be used as an exhibit for the purpose of soliciting or receiving alms” and punishes the same “vagrants” upon conviction with a sentence of up to three years in prison. The Ordinance also criminalizes employing or causing “any person to solicit or receive alms” or using a person as “an exhibit for the purpose of soliciting or receiving alms”, with a penalty of up to one year in prison.¹⁸ Courts have upheld the Punjab Vagrancy

¹² Peoples’ Union for Civil Liberties, Karnataka (PUCL-K), *Human Rights violations against the transgender community - A study of kothi and hijra sex workers in Bangalore* (September 2003), available at: <https://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf>, p. 49.

¹³ International Commission of Jurists, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India* (June 2019), p. 99.

¹⁴ The Transgender Persons (Protection of Rights) Act (2018), available at: https://na.gov.pk/uploads/documents/1526547582_234.pdf

¹⁵ International Commission of Jurists, “*International Transgender Day of Visibility: End impunity for attacks against transgender people*” (31 March 2022), available at: <https://www.icj.org/international-transgender-day-of-visibility-end-impunity-for-attacks-against-transgender-people/>

¹⁶ The Punjab Vagrancy Ordinance (1958), available at: [http://punjablaws.gov.pk/laws/94.html#:~:text=%E2%80%94\(1\)%20Any%20police%20officer,to%20confiscation%20under%20this%20Ordinance8](http://punjablaws.gov.pk/laws/94.html#:~:text=%E2%80%94(1)%20Any%20police%20officer,to%20confiscation%20under%20this%20Ordinance8)

¹⁷ *Ibid.*, section 2(g).

¹⁸ International Commission of Jurists, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A briefing paper* (March 2020), available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>, p. 19.

Ordinance, reinforcing colonial stigmas of “pollution” and “nuisance” attached to collecting alms.¹⁹

Transgender Persons Act

31. The Transgender Persons (Protection of Rights) Act,²⁰ passed in 2018, with the stated aim of protecting transgender people, also created a new criminal offence related to beggary. Section 17 of the Act states:

“Whoever employs, compels or uses any transgender person for begging shall be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees or with both.”

32. The provision’s language appears to cast the net very wide: it is not restricted to “compelling” transgender people to beg, which would entail some kind of coercion, but also includes: “employs” or “uses”, which may, therefore, also apply to voluntary and willful conduct on the part of transgender people.
33. Including begging by transgender people as a separate, distinct offence under the Transgender Persons (Protection of Rights) Act is at the very least questionable since, for many transgender people in Pakistan, begging remains one of their limited livelihood opportunities. In the past, laws related to beggary, including the Punjab Vagrancy Ordinance, have been significantly misused against the transgender community, with law enforcement agencies using them to harass, blackmail, imprison and sexually assault transgender people.²¹ Furthermore, the police routinely interpret the vague penal clauses on “begging” and “vagrancy” to prohibit and penalize spiritual and celebratory rituals of the *khawajasira*²² community (for instance, at weddings and childbirth) that have crucial significance in the community’s folk tradition.
34. Therefore, section 17 of the Transgender Persons (Protection of Rights) Act ultimately reinforces certain stereotypes against transgender people, which can be traced back to the British colonial period. The Criminal Tribes Act, enacted in 1871,²³ considered “begging” a nuisance to public order

¹⁹ International Commission of Jurists, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A briefing paper* (March 2020), available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>, p. 20.

²⁰ The Transgender Persons (Protection of Rights) Act (2018), available at: https://na.gov.pk/uploads/documents/1526547582_234.pdf

²¹ International Commission of Jurists, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A briefing paper* (March 2020), available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>, p. 19.

²² Khawajasiras are socially, politically and historically constituted community of gender diverse people. Nowadays, they are often referred to as transgender women. But this classificatory category is unable to encapsulate the experience, complexity, diversity and historical position of khawajasiras.

²³ Criminal Tribes Act (1871), available at: <https://ccnmtl.columbia.edu/projects/mmt/ambekar/web/readings/Simhadri.pdf>

and designated it a criminal activity, taking away from *hijras*²⁴ one of the main sources of their traditional livelihood: the collection of alms at marriages, childbirth and other occasions.

35. The provision against begging in the Transgender Persons (Protection of Rights) Act not only reinforces the criminalization of beggary, but it could also be read to target the relationship between *guru*²⁵ and *chaila*²⁶, in which *gurus* train their *chailas* to collect alms. Such a provision also risks making the “structure of relatedness” and “kinship” of such communities vulnerable to the State’s disciplinary and punitive measures, allowing the State to, effectively, “police” forms of kinship common in certain transgender communities.
36. Courts in Pakistan have failed to recognize the human rights concerns stemming from the criminalization of beggary and vagrancy. The Federal Shariat Court and the Lahore High Court have respectively declared the Punjab Vagrancy Ordinance of 1958 compatible with Islam and the Constitution of Pakistan.²⁷ Other courts have also reinforced the colonial stigmas of “pollution” and “nuisance” attached to collecting alms.²⁸

D. Sri Lanka

37. This section draws significantly on the ICJ’s 2021 Briefing Paper, *Sri Lanka’s Vagrants Ordinance No. 4 Of 1841: A Colonial Relic Long Overdue for Repeal*.²⁹

Vagrancy Ordinance

38. The Vagrants Ordinance of 1841,³⁰ which was introduced in colonial times remains in force to date. The Ordinance acts as a “decency law” penalizing certain conduct, such as behaving in a “riotous and disorderly manner”, “wandering”, “idling”, “gather or collect of alms under false pretense”, “endeavoring by the exposure of wounds, deformities, leprosy or loathsome disease to collect alms” (sections 2- 4), “soliciting”, and “acts

²⁴ A term used to describe an identity category for people assigned male at birth whose gender identity and/or gender expression is female.

²⁵ Roughly translated as “teacher” or “mentor”.

²⁶ Roughly translated as “disciple”.

²⁷ International Commission of Jurists, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A briefing paper* (March 2020), available at:

<https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>, p. 20. See also judgement PLD 1985 FSC 344 which

is a federal Shariat court judgment that upheld the Vagrancy Ordinance, including provisions related to begging; and the CLC 2002 LHC 139 which is a Lahore high court judgment that says the Vagrancy Ordinance is not against Islam or fundamental rights and it is not discriminatory. It refers to those who collect alms for a living as “parasites” and imposters.

²⁸ *Ibid.*

²⁹ International Commission of Jurists, *Sri Lanka’s Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal - A briefing paper* (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>

³⁰ Ordinance No. 4 (1841), available at:

http://www1.umn.edu/humanrts/research/srilanka/statutes/Vagrants_Ordinance.pdf

of indecency” (section 7).³¹ As a result, the Ordinance criminalizes conduct commonly associated with begging and sex-work.

39. Those who engage in the abovementioned conducts are defined by the Act as “rogues”, “vagabonds” or “incorrigible rogues”.³² People convicted as “incorrigible rogues” are expected to provide monetary security for one year after their release to guarantee their future good behaviour.³³ In terms of Sri Lanka’s Criminal Procedure Code,³⁴ such “security” entails the execution of a bond with sureties and places a burden on the accused to show why they should not have to execute such a bond.³⁵
40. This provision is in contravention with the principle of *ne bis in idem* as it seeks to re-incriminate someone based on their past behaviour. Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) provides that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law.” Moreover, casting the burden on the accused to demonstrate why they should not be made to execute a bond, as the Act does, presumes guilt until the person concerned proves their innocence. This is in contravention of article 14 (2) of the ICCPR, which stipulates that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”
41. The Houses of Detention Ordinance of 1907 acts as a supplement to the Vagrants Ordinance.³⁶ It provides for a “house of detention” to be established to receive any person convicted as a vagrant.³⁷ While such houses were meant to operate as training centres or shelters for the homeless, in reality they simply deprive such persons of their liberty.³⁸
42. Section 4(2) of the Houses of Detention Ordinance states that “every person detained in a house of detention shall be detained until he avails himself of suitable employment found for him, or until he is removed or discharged”. This provision must be read with section 8 of the Vagrants Ordinance, which provides that, if the offender is female and found guilty, the court may, in its discretion, both in respect of any imprisonment or imprisonment in default of a payment of fine, commit such female to any house of detention.³⁹

³¹ For more on the Vagrants Ordinance, see International Commission of Jurists, *Sri Lanka’s Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal - A briefing paper* (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>

³² Section 4(e) of the Vagrants Ordinance.

³³ Sections 5 and 6 of the Vagrants Ordinance.

³⁴ Code of Criminal Procedure Act (1979), available at: <https://www.srilankalaw.lk/revised-statutes/volume-ii/217-code-of-criminal-procedure-act.html>, section 82.

³⁵ *Ibid.*

³⁶ Ordinance N°5 (1907), available at: http://hrlibrary.umn.edu/research/srilanka/statutes/Houses_of_Detention_Ordinance.pdf

³⁷ *Ibid.*, section 3(1).

³⁸ International Commission of Jurists, *Sri Lanka’s Vagrants Ordinance No. 4 of 1841: A Colonial Relic Long Overdue for Repeal - A briefing paper* (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>, p. 11.

³⁹ Section 8 of the Vagrants Ordinance.

43. Section 12 of the Houses of Detention Ordinance provides that any vagrant who escapes a house of detention – or leaves such facility without permission – shall be liable to imprisonment for up to three months.⁴⁰ Therefore, such houses of detention essentially function as prisons for those whom the State has deemed to be “vagrants”. Such arbitrary deprivation of liberty is in violation of the right to liberty under article 9 of the ICCPR. In 2017, the UN Working Group on Arbitrary Detention recommended that both the Vagrants Ordinance and the House of Detention Ordinance be repealed, noting that the acts criminalized as “vagrancy” were strongly associated with poverty, which was a social problem to be addressed through the provision of support services that allow the impoverished to live with dignity and self-sufficiency.⁴¹

Sex Work

44. The Vagrants Ordinance criminalizes “living on the earnings made by prostitution” and “soliciting in public”.⁴² Section 3(1)(b) penalizes “every common prostitute wandering in public... and behaving in a riotous and indecent manner,” while section 7(1)(a) criminalizes soliciting “illicit sexual intercourse” in public places. Section 9(1)(a) of the Ordinance criminalizes as an “incorrigible rogue” “any person who knowingly lives wholly or in part of the earnings of prostitution.”

45. In the early case of *Saibo v. Chellam*,⁴³ the Supreme Court, interpreting these provisions, held that:

“Prostitution is not an offence per se under our law...what the subsection penalizes is ‘the making of a living out of the corruption and degradation of others.’

...

This would apply when another person is charged with the living on the earnings of a prostitute but in the case of the prostitute herself it would be meaningless. Both according to the intention of the Ordinance and the words of the subsection itself the latter has no application to prostitutes who live on their own earnings as prostitution.”

46. The Court ruled that sex work (i.e. in its description of “leading the life of a prostitute”) was not an offence and, therefore, acquitted the two women who were arrested under section 9(1)(a) of the Vagrants Ordinance.

47. Following on from this decision, in February 2020, a magistrate, citing *Saibo v. Chellam*, ruled that a sex worker can be arrested under section 3 of the Ordinance only if the sex worker behaves in a “riotous or disorderly

⁴⁰ Section 12 of the Houses of Detention Ordinance.

⁴¹ United Nations working group on arbitrary detention, *Preliminary findings from its visit to Sri Lanka* (2017), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22541>.

⁴² Sections 3 (1) (b), 7(1)(a) and 9 (1) (a) of the Vagrants Ordinance.

⁴³ Supreme Court of Sri Lanka, *Saibo and Another v. Chellam and Others*, Case 25 NLR 251 (1923).

manner in any public street or highway”, and not merely for engaging in commercial sex.⁴⁴

48. In terms of section 5 of the Vagrants Ordinance, if an offender is prosecuted three times, the person’s name is added to the “incorrigible rogues” list. Sex workers often do not realize this and, in wanting to avoid lengthy litigation, frequently plead guilty on multiple occasions, unaware that this would lead to them being listed as “incorrigible rogues” with severe legal consequences.⁴⁵
49. Evidence suggests that police officers arresting sex workers are quite aware of the legal provisions relating to “incorrigible rogues”, and commonly inform judges of the same in the charge sheet. The judges thereafter proceed to levy heavier fines on these sex workers. In practice, police officers may also use these provisions to threaten sex workers to extort from them either money or sex. A recently released report by the Sri Lanka chapter of Sex Workers and Allies South Asia on the “Status of Sex Workers in Sri Lanka” found that nearly 50 per cent of sex workers who had been arrested under the Vagrants Ordinance were told to plead guilty by either the Police or by their lawyer.⁴⁶
50. The report also found that even judges who were aware of the consequences for sex workers of pleading guilty repeatedly remained silent in this regard. The report notes that due to these common practices, at least 85 per cent of sex workers arrested pleaded guilty. This has led to a significant number of sex workers having criminal records and to an exacerbation of their often already dire financial situation.
51. Finally, the report also notes that the prevailing social stigma surrounding sex work and their marginalization have led to sex workers not being able to access free legal assistance or to their being unaware of the potential availability for such services. Sex workers therefore resort to finding lawyers who charge full fees, thereby pushing them into further debt cycles.⁴⁷

LGBTI persons

52. Section 7 of the Vagrants Ordinance, which refers to soliciting and acts of indecency in public places, has routinely been used by the police to arrest and detain LGBTI persons at cruising spots and transgender sex workers

⁴⁴ Shehan Chammika Silva, *Not an offence to earn a living by prostitution: Magistrate*, in Daily Mirror (19 February 2020), available at:

https://www.dailymirror.lk/print/front_page/Not-an-offence-to-earn-a-living-by-prostitution:-Magistrate/238-183356. See also The Sunday Times, *Backlash against police use of archaic law to arrest female sex workers* (11 April 2021), available at: <https://www.sundaytimes.lk/210411/news/backlash-against-police-use-of-archaic-law-to-arrest-female-sex-workers-439574.html>; and Colombo Gazette, *Sex workers in Sri Lanka battle a raw deal* (8 March 2020), available at: <https://colombogazette.com/2020/03/08/sex-workers-in-sri-lanka-battle-a-raw-deal/>

⁴⁵ ICJ interview with RG, a Colombo based queer lawyer.

⁴⁶ Sex Workers and Allies South Asia - Sri Lanka Chapter, *Status of Sex Workers in Sri Lanka: A National Report 2022-2023* (2023), available at: <https://srilankabrief.org/wp-content/uploads/2023/05/Status-of-sex-workers-in-sri-lanka-2022-2023-EN.pdf>, p. 33.

⁴⁷ *Ibid.*, p. 32.

even when they are not engaged in any sexual act.⁴⁸ Discrimination against transwomen arising from the implementation of such legal provisions has led some transwomen who face housing problems to live in slum areas because they feel safer there than in middle class environments.⁴⁹ Furthermore, during the COVID-19 pandemic, many transgender sex workers were asked to leave their lodgings because their landlords and neighbours mistakenly believed the disease spread through sexual activities.⁵⁰

E. Nepal

53. As detailed below, the Nepali authorities have made several attempts to prohibit people living in poverty in urban settings from selling in the street.⁵¹ To do so, they have drawn on a range of laws including: the Local Government Operation Act; the Municipal Police Regulation; and the Solid Waste Management Act. However, none of these legal regulations directly addresses street vendors or their own unique contexts and circumstances.
54. In the absence of clear legal measures governing street vending, life-sustaining activities of street vendors continue to be criminalized. Recent official data published by Nepal's Central Bureau of the Statistics shows that nearly half of business establishments nationwide are operating without registration (as informal work), of which 34,101 are street business.⁵² These street businesses are source of income for an estimated 45,330 people nationally.⁵³ The Nepal Street Vendors Trade Union (NEST), however, estimates that there are more than 30,000 street vendors in Kathmandu valley alone.⁵⁴

⁴⁸ ICJ interviews (2022-2023). See also BRIDGE, *Human Rights Violations faced by LGBTQ People in Sri Lanka (August 2021- March 2023): An analysis by BRIDGE* (2023), available at: <https://bridge2equality.org/wp-content/uploads/2023/06/BRIDGE-Analysis-NEW-English-Color.pdf>

⁴⁹ ICJ interview with TR, Executive Director of an LGBTI civil society organization (December 2022).

⁵⁰ ICJ interview with DP, an LGBTI activist (February 2023).

⁵¹ Sandesh Shrestha, *City cracks down on street vendors "to drive them back to their villages"*, in *The Record* (18 July 2018), available at:

<https://www.recordnepal.com/crackdown-on-street-vendors-to-drive-them-back-to-their-villages>; Post Report, *KMC removes street vendors*, in *The Kathmandu Post* (14 September 2017), available at:

<https://kathmandupost.com/valley/2017/09/14/kmc-removes-street-vendors>

⁵² Government of Nepal, National Planning Commission, Central Bureau of Statistics, *National Economic Census 2018, Analytical Report, Informal Sector* (March 2021), available at: <https://nsonepal.gov.np/wp-content/uploads/2021/06/Analytical-Report-Informal-Sector.pdf>. Out of 923,356 business establishments, 460,422 (almost 49.9%) are unregistered (informal).

⁵³ Government of Nepal, National Planning Commission, Central Bureau of Statistics, *National Economic Census 2018, Analytical Report, Informal Sector* (March 2021), available at: <https://nsonepal.gov.np/wp-content/uploads/2021/06/Analytical-Report-Informal-Sector.pdf>

⁵⁴ Republica, *Street Vendors to organise mass protest against KMC's harassment on January 9*, in *Republica* (07 January 2023), available at:

<https://myrepublica.nagariknetwork.com/news/next-to-organize-mass-protest-on-january-9-against-kmc-s-harassment-to-street-vendors/>. See also Emile Shrestha, *Street Vendors in Kathmandu*, Kathmandu University School of Law (January 2019), available at: https://www.academia.edu/38182076/STREET_VENDORS_IN_KATHMANDU_pdf

55. The Kathmandu Metropolitan City (KMC) has repeatedly used force to confiscate the goods of street vendors and evict them from their trading sites.⁵⁵ During the tenure of the former KMC mayor, Bidya Sundar Shakya, street vending was prohibited only “in the inner city”.⁵⁶ However, after a new mayor, Balen Shah, was elected in 2022, KMC escalated the application of harsher measures restricting street vending in all areas of the city. Threats against and manhandling of street vendors by the municipal police have continued.⁵⁷
56. Following a series of failed attempts to “clear the pavements”, the KMC administration, under the direction of Mayor Balen Shah, issued a notice in early January 2023 prohibiting carrying out business on the road strip (footpath) and in other public places.⁵⁸ The notice warns against doing business on the footpath and other public places stating:
- “[Activities like unauthorized business on the street, keeping materials for personal use, running business by keeping goods on carts or bicycles leading to unauthorized obstruction of the mobility of the public shall be prohibited...
- ...This notice has been published to inform that any person or organization involved in above unauthorized activities shall be prosecuted according to the law...
- ...Anyone found violating this notice, his/her, items shall be seized, and the person shall be punished as per sections 11 & 97 of Local Government Act, 2017 (2074), section 39 of Solid Waste Management Act 2011 (2068) and other relevant laws of Kathmandu Metropolitan City.”⁵⁹

⁵⁵ See *inter alia*: Anup Ojha, *Street vendors up in arms against KMC’s indifference*, in The Kathmandu Post (21 August 2023), available at: <https://kathmandupost.com/kathmandu/2023/08/21/street-vendors-up-in-arms-against-kmc-s-indifference>; Anup Ojha, *Mayor under fire for City police’s mistreatment of street vendor*, in The Kathmandu Post (12 July 2023), available at: <https://kathmandupost.com/kathmandu/2023/07/12/mayor-under-fire-for-city-police-s-mistreatment-of-street-vendor>; Republica, *Street vendors protest in front of KMC Office*, in Republica (23 August 2022), available at: <https://myrepublica.nagariknetwork.com/news/street-vendors-protest-in-front-of-kmc-office/>; Sandesh Shrestha, *City cracks down on street vendors to “drive them back to their villages”*, in The Record (18 July 2018), available at: <https://www.recordnepal.com/crackdown-on-street-vendors-to-drive-them-back-to-their-villages>; and Post Report, *KMC removes street vendors*, in The Kathmandu Post (14 September 2017), available at: <https://kathmandupost.com/valley/2017/09/14/kmc-removes-street-vendors>

⁵⁶ Shasta Kansakar, *Organised Street Vending*, in New Business Age (06 March 2023), available at: <https://www.newbusinessage.com/MagazineArticles/view/3805>

⁵⁷ Setopati, *No city for street vendors* (01 July 2022), available at: <https://en.setopati.com/social/159017>

⁵⁸ Anup Jha, *Street vending ban a kick in belly of urban poor*, in The Kathmandu Post (13 January 2023), available at: <https://kathmandupost.com/kathmandu/2023/01/13/street-vending-ban-a-kick-in-the-belly-of-urban-poor>

⁵⁹ Kathmandu Metropolitan City, *Information of Kathmandu Metropolitan City about the prohibition of doing business on the road (footpath) and other public places*, Public Notice (10 January 2023), Nepali version available at: <https://urlz.fr/nAKJ>

57. Despite its clear human rights obligations in respect of workers in the informal economy, the KMC continues to apply a range of domestic laws to penalize street vendors and take away their means of making a living. Some of these laws are described hereafter.

Local Government Operation Act 2017 (2074)

58. Section 11 of the Local Government Operation Act 2017(2074) gives municipalities the following powers:

- “establishment, operation and management of the municipal police including formulation and implementation of laws, policies and standards relating to municipal police”;⁶⁰
- “enforcement of decisions, laws and policies of the city”;⁶¹ “protection of the public land and property”;⁶² and
- “supervision and management of local market and parking lot”.⁶³

59. In addition, section 97 of the Act places a duty on municipalities in relation to the “protection of property in its area”. This duty includes responsibilities pertaining to “maintenance of government, community and public property”.⁶⁴

60. Properly understood both provisions empower the municipality to mobilize the municipal police for various purposes, including to protect property, and maintain and supervise local markets and parking lots. In practice, however, while purporting to enforce these provisions, the municipal police often harass street vendors and confiscate their property.

Municipal Police Act, 2023 (2080)

61. Section 7 of the Municipal Police Act, 2023 (2080)⁶⁵ lists the rights and duties of the municipal police, including the “management and supervision of the market and vehicle parking lot”;⁶⁶ and “monitoring, regulating and controlling the action in waste management”.⁶⁷ Furthermore, the Act details the role of municipal police “to facilitate in registration and renewal of professional business in case found to be carrying out without license”.⁶⁸

62. However, it is not clear if this provision applies to the street vendors as their businesses are informal/unregistered businesses.

Municipal Police Regulation, 2015 (2072)

⁶⁰ Local Government Operation Act, 2017 (2074), section 11 (2) A (1).

⁶¹ *Ibid.*, section 11 (2) A (2) a.

⁶² *Ibid.*, section 11 (2) A (2) b.

⁶³ *Ibid.*, section 11 (2) A (2) d.

⁶⁴ *Ibid.*, section 97 (1) A.

⁶⁵ Kathmandu Metropolitan City, *Municipal Police Act, 2080 (2023)*, Nepali version available at: <https://urlz.fr/nAKT>

⁶⁶ *Ibid.*, section 7 (1) C.

⁶⁷ *Ibid.*, section 7 (1) K.

⁶⁸ Kathmandu Metropolitan City, *Municipal Police Act, 2080 (2023)*, section 7 (1) R.

63. Rule 6(1) of the Municipal Police Regulation, 2015 (2072) empowers municipal police to “remove obstacles created by any construction or business in the mobility of the public”. The application of this Rule by the police is haphazard. Street vendors frequently do not disturb – or create obstacles for – traffic and pedestrians. The Rule also does not specify the extent of the force or coercive power to be employed by the police in removing such obstacles.
64. Municipal police have been reported to use excessive force and arrest street vendors – including persons with disabilities – inhumanely and recklessly. Police are reported to have physically assaulted vendors, as well as to have confiscated and kept their goods.⁶⁹

Solid Waste Management Act

65. Section 39 of Solid Waste Management Act, 2011 (2068) lists the punishment for committing offences under section 38 of the same Act, which criminalizes a range of activities relating to the management of solid waste.⁷⁰ The Act does not criminalize street vending directly, nor does it specifically regulate the management of solid waste by vendors.

⁶⁹ Rastriya Samachar Samiti, *Street vendors bearing brunt of KMC crackdown*, in Nepalnews.com (16 August 2023), available at: <https://www.nepalnews.com/s/capital/street-vendors-bearing-brunt-of-kmc-crackdown-on-sidewalk-business>

⁷⁰ Solid Waste Management Act, 2068 (2011), available at: <https://faolex.fao.org/docs/pdf/nep137767.pdf>, section 38. “Offense: Anybody committing any of the following acts shall be considered to have committed an offense under this Act: a) Discharge of solid waste in places and time other than prescribed by the local body; b) Unauthorized use of solid waste placed in the container or solid waste collection centre; c) Damaging, destroying the container placed in solid waste collection centers displacing the container from its position, or inflicting any loss to the collection centre; d) To carry out solid waste management works without obtaining permission under this Act; e) Violating the terms and conditions mentioned in the license issued for the management of solid waste issued under this Act; f) Throwing, placing or depositing any kind of harmful substance at the solid waste collection centre, container or solid waste depositing place; g) Placing, throwing or depositing solid waste from the house, compound and premises on the road or on any other public places; h) Polluting other's house or land by the leaches or sewer leakage; i) Stoppage of any vehicle or denial to move away any stopped vehicle from the road or from any other public place at the time and place prescribed by the Local Body, during solid waste collection or cleaning work is being carried out; j) Throwing, placing, depositing or discharging any kind of harmful waste, except in places prescribed by the Local Body like a road or on any other public places, causing detrimental effect to the public health; k) Littering everywhere, placing, discharging or causing to discharge harmful waste, chemical waste, industrial waste, health institutions related waste; l) Littering everywhere, placing, discharging or causing to discharge harmful waste by industrial enterprise or health institutions, emanating from industry or health institution; m) Creating obstruction in the collection, transportation and management of solid waste; n) Creating obstruction, 'Bandha' (strike), or 'gherao' (circumvention) on solid waste collection, transportation works or at the final discharge site or call strikes at the solid waste management work; o) Manufacture, sale or distribute any material banned for generating excessive waste by the Government of Nepal through the publication of notice in the Nepal Gazette; p) Importing chemical poison contrary to the provisions of section 44 or not fulfilling the responsibility of destroying date expired medicine; q) Discharging solid waste by mixing without segregating at its source contrary to the provisions of section 6; r) Placing, throwing or stockpiling of dead or slaughtered animal or bird, and their excrement (from the stomach and entrails,) feathers, bones and scales of fish etc .at public places, roads, lanes, chowks”.

Domestic and International Human Rights Standards

66. The Constitution of Nepal, 2015 (2072) provides for several rights that are directly relevant to street vendors. These include: the right to freedom to operate business in any part of the country;⁷¹ the right to equality, which explicitly forbids discrimination on the grounds of “economic condition”;⁷² and the right to “choose employment”.⁷³ These constitutionally guaranteed rights are infringed by the treatment of street vendors described above.
67. In addition to its domestic human rights obligations, Nepal is party to a range of international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), which obligates the Nepali authorities to respect, protect and fulfil, among others, the rights to an adequate standard of living (article 11) and work (articles 6-8).

F. Malawi

Local Government (Lilongwe City Council) (Market and Vending) By-laws, 2018

68. Lilongwe’s Market and Vending By-laws empower Lilongwe City Council to “designate public markets within the city of Lilongwe”.⁷⁴ Section 5 of the Market and Vending By-laws thereafter prohibits any person from “establish[ing] a private market or engag[ing] in street vending within the City of Lilongwe, unless he has obtained prior written permission from the Council”.⁷⁵ Failure to comply with this provision in particular results in the impounding of his or her merchandise by the Council.⁷⁶
69. Further penalties are set for failure to comply with the remainder of the provisions of the By-laws. Such provisions vary but include, as examples, setting of fees and rental to be paid by those operating in public markets,⁷⁷ permissible conduct in markets,⁷⁸ and the times at which such markets are permitted to operate.⁷⁹

⁷¹ Constitution of Nepal, 2072 (2015), article 17 - Right to Freedom: “(1) No person shall be deprived of his or her personal liberty except in accordance with law... (2)(f) Freedom to practise any profession, carry on any occupation and establish and operate any industry, trade, and business in any part of Nepal.”

⁷² *Ibid.*, article 18 - Right to Equality: “(3) The State shall not discriminate among citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideological conviction or on similar other grounds”.

⁷³ *Ibid.*, article 33 - Right to Employment: “(1) Every citizen shall have the right to employment... (2) Every citizen shall have the right to choose employment.”

⁷⁴ Local Government (Lilongwe City Council) (Market and Vending) By-laws (2018), available at: <https://malawilii.org/akn/mw/act/qn/2018/99/eng@2018-12-28/source.pdf> (pp. 65-74), section 4.

⁷⁵ *Ibid.*, section 5.

⁷⁶ *Ibid.*, section 27(2).

⁷⁷ Local Government (Lilongwe City Council) (Market and Vending) By-laws (2018), available at: <https://malawilii.org/akn/mw/act/qn/2018/99/eng@2018-12-28/source.pdf> (pp. 65-74), section 6.

⁷⁸ *Ibid.*, section 27(1)(a)-(i).

⁷⁹ *Ibid.*, section 8.

70. On 28 April 2023, purportedly acting to ensure compliance with section 5 of the Market and Vending By-laws, the Lilongwe City Council issued a public notice stating that from 2 May 2023, it would “remove all vendors who are doing their businesses in undesignated places such as streets”.⁸⁰ It warned that those caught trading in undesignated places would be evicted from the streets and have their goods confiscated.
71. Lilongwe is not the only Malawian town in which such evictions are occurring. On 8 December 2022, the High Court granted a temporary order restricting the Blantyre City Council from forcibly removing informal traders without due notice and reason.⁸¹
72. In respect of the Lilongwe City Council’s notice, on 5 June 2023, the High Court granted leave for judicial review to challenge the Lilongwe by-laws empowering the authorities to evict informal traders, prevent them from plying their trade on the streets and confiscate their goods. On 13 July 2023, the High Court heard the application for an interim order restricting the City Council from evicting informal traders from the streets of Lilongwe. The High Court did not grant the interim relief sought, therefore leaving informal traders at risk of eviction from the streets of Lilongwe. However, at the time of writing, High Court’s decision on the by-laws’ lawfulness was pending.
73. In its statement on the case, the Southern African Litigation Centre noted that:
- “The High Court granting permission for judicial review allows the informal traders in Lilongwe to challenge the City Council by-laws, which permit the Council to evict the informal traders from the streets, confiscate, and impound their goods. The informal traders are also challenging their eviction from the streets without providing them with more market spaces or ensuring fair distribution of market space to cater to the growing demand before chasing them from the streets.”⁸²
74. Informal traders complain about abuses of power that are commonplace in the implementation of the by-laws and about attempts from officials to solicit bribes and sexual favours from traders for the return of confiscated goods.⁸³

⁸⁰ Malawi 24, *LCC to remove street vendors next week* (29 April 2023), available at: <https://malawi24.com/2023/04/29/lcc-to-remove-street-vendors-next-week/>

⁸¹ Southern Africa Litigation Centre, *Blantyre informal traders challenge eviction* (8 December 2022), available at: <https://www.southernafricalitigationcentre.org/2022/12/08/blantyre-informal-traders-challenge-eviction/>

⁸² Southern Africa Litigation Centre, *Malawi: Lilongwe informal traders challenge eviction and confiscation of goods* (14 June 2023), available at: <https://www.southernafricalitigationcentre.org/2023/06/14/press-release-lilongwe-informal-traders-challenge-eviction-and-confiscation-of-goods/>

⁸³ *Ibid.*

G. South Africa

75. This section focuses on the criminalization of homelessness and poverty in the City of Cape Town in particular. In early 2022, despite significant public opposition, the City of Cape Town amended two of its by-laws with the effect of deepening and increasing the criminalization of homelessness and poverty in Cape Town.

Cape Town: Streets, Public Places and the Prevention of Noise Nuisances By-law⁸⁴

76. The “Streets By-law”, as amended in 2022, introduces a range of enforcement measures,⁸⁵ which bolster the power of “authorised officials” to implement the provisions of the By-laws and further the criminalisation of people experiencing homelessness.⁸⁶ The Streets By-law prohibits a very broad range of conduct in public places, including:⁸⁷

- intentionally blocking or interfering with the safe or free passage of a pedestrian or motor vehicle;
- intentionally touching or causing physical contact with another person, or his or her property, without that person's consent;
- approaching or following a person individually or as part of a group of two or more persons, in a manner likely to cause fear of imminent bodily harm or damage to or loss of property;
- continuing to beg from a person or closely follow a person after the person has given a negative response to such begging;
- blocking, occupying or reserving a public parking space or a public place in a manner that denies other members of the public from exercising their freedom of movement or use of a public facility;
- using abusive or threatening language;
- fighting or acting in a riotous or physically threatening manner;
- urinating or defecating, except in a toilet;
- bathing or washing except in a bath or shower;
- spitting;
- performing any sexual act;
- appearing in the nude or exposing genitalia;

⁸⁴ City of Cape Town, *Streets, public places and the prevention of noise nuisances amendment by-law* (2021), available at:

https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets_PublicPlaces_Amendment_By-law_2021.pdf; and City of Cape Town, *By-law relating to streets, public places and the prevention of noise nuisances* (30 May 2007), available at: <https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets%20Public%20Places%20and%20the%20Prevention%20of%20Noise%20Nuisances%20By-law.pdf>

⁸⁵ City of Cape Town, *Streets, public places and the prevention of noise nuisances amendment by-law*, available at:

https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets_PublicPlaces_Amendment_By-law_2021.pdf, para. 22A.

⁸⁶ Ndifuna Ukwazi, *Cape town’s unlawful occupation & streets by-laws are an assault on poor & unhoused families* (18 February 2022), Press Statement, available at: <https://nu.org.za/wp-content/uploads/2022/02/PRESS-STATEMENT-City-Gazettes-Unconsitutional-By-laws-3.pdf>

⁸⁷ City of Cape Town, *Streets, public places and the prevention of noise nuisances amendment by-law*, available at:

https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets_PublicPlaces_Amendment_By-law_2021.pdf, sections 2(3), 3, 4, 7.

- consuming any liquor or drugs;
- being drunk or be under the influence of drugs;
- soliciting any person for the purpose of prostitution or immorality;
- engaging in gambling;
- starting or keeping a fire;
- sleeping overnight or camping overnight or erecting any shelter, unless in an area designated for this purpose;
- causing a disturbance by shouting, screaming or making any other loud or persistent noise or sound, including amplified noise or sound;
- permitting noise from a private residence or business to be audible in a public place;
- collecting or attempting to collect money in a public place;
- depositing, packing, unpacking or leaving any goods or articles in a public place other than for a reasonable period during the course of the loading, off-loading or removal;
- obstructing pedestrian traffic on a sidewalk with any object.

77. The By-law provides, at the very least, that contravention of a range of these proscriptions give rise to a criminal offense with discretionary criminal sentences of up to 6 months imprisonment and/or a fine.⁸⁸ The amendments allow “authorised officials” to criminally charge and arrest a person who has been found sleeping in a public place if such a person refuses an offer to move to alternative shelter.⁸⁹ Additionally, the City can, under the amended By-law⁹⁰ and the Criminal Procedure Act,⁹¹ impound “any materials used in making of transient shelter” and “personal items of persons arrested”.⁹²

78. These harsh criminal sanctions fail to take into consideration the fact that there are only 2500 shelter beds in Cape Town, for as many as 14 000 persons experiencing homelessness.⁹³ The shortage of shelters is particularly acute for couples and families with children.⁹⁴ Furthermore, an

⁸⁸ City of Cape Town, *Streets, public places and the prevention of noise nuisances amendment by-law*, available at:

https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets_PublicPlaces_Amendment_By-law_2021.pdf, section 23(1). The wording of section 23(1) is unclear. It is possible to read it as limiting criminal offences created to only specific prohibitions in section 2(3) or read it as applying to all prohibitions in section 2(3) and the remainder of the Act.

⁸⁹ *Ibid.*, section 22 A(2).

⁹⁰ *Ibid.*, section 22 A(1)(e).

⁹¹ Criminal Procedure Act 56 (1955), available at:

https://www.gov.za/sites/default/files/gcis_document/201505/act-56-1955s.pdf

⁹² City of Cape Town, *Streets, public places and the prevention of noise nuisances amendment by-law*, available at:

https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets_PublicPlaces_Amendment_By-law_2021.pdf, section 22A (1)(e).

⁹³ J. Hopkins, J. Reaper, S. Vos & G. Brough, *Cape Town: The Cost of homeless* (2020), available at:

<https://homeless.org.za/wp-content/uploads/2021/02/THE-COST-OF-HOMELESSNESS-CAPE-TOWN-Full-Report-Web.pdf>

⁹⁴ Department of Social Development – Province of the Western Cape, *Annual Report 2021-2022* (2022), available at:

https://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/dsd_annual_report_2021-22.pdf

offer of alternative shelter represents only a short-term solution at best and does not address the root causes of homelessness:

“The shelter system seeks to solve the immediate need for a roof over the heads of those who are fortunate enough to access an available space. With only a 3-6 month shelter term, what often persists is a temporary lifestyle with temporary possessions. What differentiates housing from shelter to a large degree, is the sense of permanence and belonging. While a safe place to sleep at night often seems to be the most immediate need, there is a sense of consistency, comfort, safety, and ownership that accompanies a secure place of residence, which any temporary shelter would be strained to provide.”⁹⁵

79. Moreover, the addition of new enforcement measures to the By-law raises concern that the authorities will use these powers to continue to disproportionately or “selectively” target people experiencing homelessness.⁹⁶ For example, a recent report commissioned by the City itself found that law enforcement officials often do not interpret the By-laws “correctly or humanely” and that an approach that “polices homelessness. . . instead of addressing it more holistically” as a social problem runs counter to the “ethos of care and inclusivity that the City wishes to project as one of its strategic objectives.”⁹⁷ Lisa, an individual who has experienced homelessness, shared her experience with the Inkathalo Conversations, who produced the City’s report. She says this of the manner in which the By-laws are enforced:

“When do we draw the line man?... I know that you have a job to do and I know somebody is calling you and hassling you, but the way that [they] currently are doing it... they come, they take everything, you must leave the place... When they [are] done, there’s more mess than what there was. It never used to be like that. Nowadays, it’s like inhuman man, they take everything... They take all your stuff... how can you go take all my clothing... and I’ve got to march with one blanket at 3 o’clock at night?”⁹⁸

⁹⁵ The Inkathalo Conversations, *Phase one comprehensive report: Submission into the review of the street people policy, 2013 (policy number 12398b) and the development of a citywide strategy*, available at:

<https://www.groundup.org.za/media/uploads/documents/Inkathalo-2021-compressed.pdf>, p. 263.

⁹⁶ IOL, *SAHRC asked to probe continued ‘onslaught’ against the homeless people in Mitchells Plain* (25 March 2022), available at: <https://www.iol.co.za/capeargus/news/sahrc-asked-to-probe-continued-onslaught-against-the-homeless-people-in-mitchells-plain-cf7903e1-fb5d-46b7-98b4-a8fa0d14fb6d>

⁹⁷ The Inkathalo Conversations, *Phase one comprehensive report: Submission into the review of the street people policy, 2013 (policy number 12398b) and the development of a citywide strategy*, available at:

<https://www.groundup.org.za/media/uploads/documents/Inkathalo-2021-compressed.pdf>, p. 169.

⁹⁸ The Inkathalo Conversations, *Phase one comprehensive report: Submission into the review of the street people policy, 2013 (policy number 12398b) and the development of a citywide strategy*, available at:

<https://www.groundup.org.za/media/uploads/documents/Inkathalo-2021-compressed.pdf>, at p. 175.

Cape Town: Unlawful Occupation By-Law⁹⁹

80. The objective of the Unlawful Occupation By-law, as amended in 2022, appears to be, almost exclusively, preventing or stopping “unlawful occupation” of land by persons who were often homeless before occupying such land.
81. Non-compliance with the amended By-law is a criminal offence.¹⁰⁰ It is also a criminal offense, in terms of the By-law, to “disobeys any instruction or compliance order by an authorised official enforcing this By-law”.¹⁰¹
82. The specific conduct prohibited by the By-law is as follows:¹⁰²
- instigating or organising the unlawful occupation of land;
 - occupying land unlawfully;
 - clearing land, with the intention of occupying it, by removing vegetation or by any other means;
 - removing or damaging a sign put up in a managed settlement;
 - removing or damaging a sign put up on land that is not owned by the City;
 - removing or damaging survey pegs installed by the City;
 - demarcating any land with the purpose of allocating it to unlawful occupiers;
 - soliciting payment for arranging or organising for a person to occupy land without the consent of the owner of the land;
 - selling or purporting to sell land or structures on land that is or is intended to be occupied;
 - leasing or purporting to lease land or structures on land that is or is intended to be occupied;
 - transporting persons, building materials and personal possessions for the purpose of an unlawful occupation;
 - erecting or occupying a structure on land without the consent of the owner; and
 - interfering or obstructing an authorised official in preventing the erection or dismantling of a structure or the removal of the building materials and personal possessions of an unlawful occupier of land.
83. Depending on which provision of the By-law is contravened, a person found guilty of such contravention could be sentenced to up to two years’ imprisonment and/or a fine.¹⁰³

⁹⁹ City of Cape Town, *Unlawful Occupation By-Law* (2021), available at: https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Unlawful_Occupation_By-law.pdf

¹⁰⁰ City of Cape Town, *Streets, public places and the prevention of noise nuisances amendment by-law*, available at: https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets_PublicPlaces_Amendment_By-law_2021.pdf, section 11(1).

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, section 11(2).

¹⁰³ City of Cape Town, *Streets, public places and the prevention of noise nuisances amendment by-law*, available at:

84. In terms of the unlawful occupation By-law, structures lived in by homeless persons will be subject to search and impoundment if it is “not yet capable of constituting a home”.¹⁰⁴
85. The By-law appears to be intended to give the City of Cape Town’s “authorised officials” the power and discretion to decide what constitutes a home by asking “Is your home, home enough?” Activists such as Karen Hendricks from Reclaim the City¹⁰⁵ and Sibusiso Xabangela from the Housing Assembly¹⁰⁶ have voiced concerns that City officials have discretion to determine what structures constitute a home, and thus which structures must go through formal eviction procedures under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act).¹⁰⁷
86. The lack of clear definition of what can be defined as a “home” under the By-law creates vague and ambiguous language, which “raises concerns about arbitrary enforcement of laws and exercise of policing discretion.”¹⁰⁸ It is likely that under this scrutiny, many shacks that have been otherwise seen to constitute homes by South Africa’s courts (including Constitutional Court), will not be deemed “home enough” under the City of Cape Town officials narrow construction of what a home is. The City of Cape Town therefore risks communicating to its officials implementing the By-law that they can choose whether to abide to the Act, section 26(3) of the Constitution and a significant body of jurisprudence on housing rights, evictions, and homelessness in South Africa.

H. Uganda

Vagrancy Laws

87. The provisions of Uganda's Penal Code relating to "Rogues and Vagabonds" were struck down by the Ugandan Constitutional Court in *Francis Tumwesige Ateenyi v Attorney General* in December 2022.¹⁰⁹ The Court held that the provisions in question “are ambiguous, vague and too

https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Streets_PublicPlaces_Amendment_By-law_2021.pdf, section 11(3)(a)(b).

¹⁰⁴ City of Cape Town, *Unlawful Occupation By-Law* (2021), available at:

https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Unlawful_Occupation_By-law.pdf, Chapter 3.

¹⁰⁵ Ground Up, *Cape Town passes Unlawful Occupations by-law, despite protest* (21 September 2021), available at: <https://www.groundup.org.za/article/cape-town-passes-unlawful-occupations-law-despite-protest/>

¹⁰⁶ *Ibid.*

¹⁰⁷ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 (1998), available at: https://www.gov.za/sites/default/files/gcis_document/201409/a19-98.pdf

¹⁰⁸ APCOF Study, *Poverty is not a crime. Decriminalising petty by-laws in South Africa* (2021), available at: <https://apcof.org/wp-content/uploads/030-study-on-decriminalising-poverty-in-south-africa-clare-ballard-patrick-burton-louise-edwards-abdirahman-maalim-gossar-and-chumile-sali.pdf>

¹⁰⁹ Uganda Constitutional Court, *Francis Tumwesige Ateenyi v. Attorney General*, Constitutional Petition No. 36 (2018), available at:

<https://ulii.org/akn/ug/judgment/ugcc/2022/5/eng@2022-12-02/source.pdf>

broad to amount to a precise definition of an offence”, and in violation of several constitutional rights.¹¹⁰ Subsequently, the laws in question were amended through the Uganda Law Revision (Miscellaneous Amendments) Act, 2023, by which Uganda repealed some of the rogue and vagabond, sedition, and false news offences in its Penal Code.¹¹¹

88. As the Southern African Litigation Centre noted in its statement on this legislative amendment, prior to the revision, “law enforcement officers routinely used these offences to arrest and persecute poor and marginalised people, including sex workers, sexual minorities, and informal traders”.¹¹²

Informal Traders

89. In the first seven months of 2022, at least 2636 persons appeared before Ugandan courts on charges of “hawking” or “plying street trade” without a licence.¹¹³ Some traders reported that they felt they were “treated like animals” by the authorities and were considered “strangers in our own country”.¹¹⁴ This is a long-term problem, brought about by efforts of the authorities to “clean up” streets, and has been brought to the attention of the Ugandan Parliament by vendors.¹¹⁵ Complaints include not only arrests and confiscations but instances of vendors being “beaten up and their property destroyed”.¹¹⁶ Decisions relating to evictions and removals of vendors have been highly politicised and allegedly marred by corruption.¹¹⁷
90. The treatment of vendors in Kampala, in particular,¹¹⁸ has led to four civil society organizations, including representative organizations of street

¹¹⁰ *Ibid.*, para 40.

¹¹¹ Southern African Litigation Centre, *Uganda: Repeals vagrancy, sedition, and false news offences* (11 July 2023), available at:

<https://www.southernafrialitigationcentre.org/2023/07/11/uganda-repeals-vagrancy-sedition-and-false-news-offences/#:~:text=The%20Southern%20Africa%20Litigation%20Centre,offences%20in%20its%20Penal%20Code>

¹¹² *Ibid.*

¹¹³ Reuters, *Uganda's street traders treated 'like animals' in major crackdown* (18 August 2022), available at:

<https://www.reuters.com/article/uganda-economy-traders-idAFL8N2ZR2V6>

¹¹⁴ *Ibid.*

¹¹⁵ Parliament of Republic of Uganda, *Vendors petition Parliament over harassment by KCCA* (18 June 2018), available at:

<https://www.parliament.go.ug/news/1989/vendors-petition-parliament-over-harassment-kcca>

¹¹⁶ Parliament of Republic of Uganda, *Vendors petition Parliament over harassment by KCCA* (18 June 2018), available at:

<https://www.parliament.go.ug/news/1989/vendors-petition-parliament-over-harassment-kcca>

¹¹⁷ P. Gumisiriza, *Street Vending in Kampala: From Corruption to Crisis*, in *African Studies Quarterly*, Volume 20, Issue 1 (January 2021), available at:

<https://asq.africa.ufl.edu/wp-content/uploads/sites/168/V20i1a5.pdf>

¹¹⁸ The Independent, *Street vendors petition court over eviction from Kampala* (26 March 2022), available at:

<https://www.independent.co.ug/street-vendors-petition-court-over-eviction-from-kampala/>; The Independent, *KCCA steps up operations to evict street vendors* (8 January 2022), available at:

traders, approaching Uganda’s Constitutional Court with a petition to declare unlawful the conduct of the government authorities and various laws used to criminalize traders.¹¹⁹ Thousands of vendors have been evicted from where they ply their trade with the authorities providing no viable alternative livelihood opportunities upon such eviction.

91. Alongside other organizations, the ICJ has submitted an amicus curiae brief to the Ugandan Constitutional Court, arguing that the authorities’ treatment of vendors is in violation of international and domestic human rights standards. The amicus submits that the authorities’ conduct violates several human rights of the vendors, including: the right to property; the right to be free from discrimination; the right to dignity; the right to personal security and freedom from arbitrary deprivation of liberty, as well as various economic and social rights, such as the rights to work and an adequate standard of living.
92. The laws that currently regulate vending in Kampala include: the Trade Licensing Act; the Local Governments (Kampala City) (Maintenance of Law and Order) Ordinance; and the Local Governments (Kampala City) Street Traders Byelaws Statutory Instrument 243-23.

Trade and Licensing Act

93. Section 16(1) of the Trade and Licensing Act provides that “[n]o person shall act as a hawker unless he or she is in possession of a valid hawkers licence granted to him or her for that purpose by the licensing authority”.¹²⁰ Hawker, in terms of the Act, refers to a “person who, whether on his or her own account or as the servant of another person, sells goods by retail other than in trading premises or in a market established under the Markets Act”.¹²¹ The licensing authority when it comes to hawkers licenses is stipulated in terms of section 9 of the Act to be either “the town clerk” or another designated official.¹²²
94. In respect of hawkers in particular, section 16(2) of the Act indicates the licensing authority “may, on application made to it in the prescribed manner and on payment of the appropriate fee ... grant to the applicant a hawkers licence”.¹²³ Section 16(3) of the Act specifies that though a hawkers license itself may be “in such form as may be prescribed”, that it must contain information related to: the kind of goods which may be hawked; the area within which the holder of the license can operate; and

<https://www.independent.co.ug/kcca-steps-up-operations-to-evict-street-vendors/#comments>

¹¹⁹ New Vision, *CSOs’ petition court over vendors eviction* (6 September 2022), available at: <https://www.newvision.co.ug/category/news/csos-petition-court-over-vendors-eviction-142355>

¹²⁰ The Trade (Licensing) Act (1969), available at: https://www.kcca.go.ug/uploads/acts/Trade%20licensing%20Act%20Chapter_101.pdf, section 16(1).

¹²¹ The Trade (Licensing) Act (1969), available at: https://www.kcca.go.ug/uploads/acts/Trade%20licensing%20Act%20Chapter_101.pdf, section 1(b).

¹²² *Ibid.*, section 8(a).

¹²³ *Ibid.*, section 16(2).

the hours within which the holder of the license can operate and other conditions for such operation.

95. Section 16(7) of the Act empowers a licensing authority to “refuse to grant a hawkers licence under this section without assigning any reason for the refusal”. The same provision permits a licensing authority to “revoke any hawkers licence granted under this section if it is satisfied that any of the terms and conditions upon which the hawkers licence was granted has been contravened”. Refusal to grant such a license is subject to appeal “to the Minister whose decision shall be final”.¹²⁴
96. Irrespective of when they are granted, the Act provides that such licenses expire on the last day of the year, and presumably must therefore be obtained afresh.¹²⁵
97. Once granted, such license must be produced on demand by a range of officials including the police.¹²⁶ The Act appears to create a criminal offence of contravention of any provision of the Act, and upon conviction may be sentenced to a “fine not exceeding one thousand shillings”, and, at a Court’s discretion the “revo[cation of] any licence granted to him or her under this Act”.¹²⁷

Local Governments (Kampala City) (Maintenance of Law and Order) Ordinance

98. Part IV of the Maintenance of Law and Order Ordinance is headed “Street Traders, Food Sellers and Hawkers”. The Ordinance is very specific that, in the respect of street traders:

“A person shall not ply, his or her trade on any pavement, arcade, footway, street, un-alienated public land, unoccupied land or land in the possession of the Council **unless he or she is in possession of a permit issued by the Council under the Local Governments (Kampala City) (Street Traders) Byelaws**”. (Emphasis Added).¹²⁸
99. The Act empowers the Council to issue licenses subject to “such conditions as the Council deems fit”.¹²⁹
100. Section 14 of the Ordinance appears to require a separate and additional permit to be granted before a trader can “erect or place any stall, booth, burrow, table or stand”.¹³⁰
101. In respect of “hawkers”, section 15 of the Ordinance provides a similarly specific directive that:

¹²⁴ *Ibid.*, section 16(8).

¹²⁵ *Ibid.*, section 17.

¹²⁶ *Ibid.*, section 19.

¹²⁷ *Ibid.*, section 28(1).

¹²⁸ Local Governments (Kampala City) (Maintenance of Law and Order) Ordinance, available at:

<http://www.kcca.go.ug/uploads/acts/Kcc%20Maintenance%20of%20Law%20and%20Order%20Ordinance,2006.pdf>, section 13(1).

¹²⁹ *Ibid.*, section 13(2).

¹³⁰ *Ibid.*, section 14(1).

“A person, other than a person licensed under the Public Health (Licensing of Tradespersons) Rules, shall not hawk unless he or she is **in possession of a permit issued by the Council under the Local Governments (Kampala City) (Hawking) Bye-laws.**” (Emphasis Added).¹³¹

102. Although distinguishing between “hawkers” and “street traders” the Act only provides a definition of “hawker”¹³² and does not provide any clarity on how a hawker differs from a “street trader.

103. The Ordinance is clear that the “issue and renewal of permits” in terms of the Ordinance are at “the Council’s discretion”.¹³³ This is subject to an appeal to the Minister whose decision “shall be final after due consideration of the person’s age, character and the circumstances”.¹³⁴

104. Contravention of any provision of the Ordinance or any “instruction lawfully made or issued under this Ordinance” is subject to “a fine not exceeding two currency points or to imprisonment not exceeding two months or both”.¹³⁵ If so convicted, if a person continues to commit the offence for which she was convicted, that person will be “liable to a further fine of one currency point for each day that he or she continues to commit the offence from the date of his or her conviction”.¹³⁶ In terms of the Ordinance “one currency point is equivalent to twenty thousand shillings”.¹³⁷

Local Governments (Kampala City) Street Traders Byelaws - Statutory Instrument 243-23

105. Instrument 243-23 defines a “street trader” as “a propeller of a wheelbarrow, shoe repairer, shoe polisher, watch repairer, newspaper or book seller or charcoal seller carrying on business on a street or any other public place”.¹³⁸

¹³¹ *Ibid.*, section 15(1).

¹³² Hawker is defined by section 3 of the Ordinance as:

“a person who, whether on his or her own account or as the servant of another person, sells goods by retail other than in trading premises or in market established under the Markets Act.”

¹³³ Local Governments (Kampala City) (Maintenance of Law and Order) Ordinance, available at:

<http://www.kcca.go.ug/uploads/acts/Kcc%20Maintenance%20of%20Law%20and%20Order%20Ordinance,2006.pdf>, section 16(1).

¹³⁴ *Ibid.*, section 16(2)(b).

¹³⁵ *Ibid.*, section 27(1).

¹³⁶ *Ibid.*, section 27(2).

¹³⁷ Local Governments (Kampala City) (Maintenance of Law and Order) Ordinance, available at:

<http://www.kcca.go.ug/uploads/acts/Kcc%20Maintenance%20of%20Law%20and%20Order%20Ordinance,2006.pdf>, schedule.

¹³⁸ Local Governments (Kampala City) Street Traders Byelaws - Statutory Instrument 243-23, available at:

<https://www.kcca.go.ug/uploads/acts/Kampala%20Street%20Traders%20By-laws.pdf>, section 2(b).

106. Instrument 243-23 thereafter prohibits a street trader from carrying on business without a “permit from a town clerk” and specifies that the “form of permit to be issued to street traders shall be as set out in the First Schedule to these Byelaws”.¹³⁹
107. Section 5 of Instrument 243-23 empowers the town clerk to “refuse to issue any permit for such period and subject to such conditions and restrictions as he or she thinks fit”.¹⁴⁰ Instrument 243-23 also provides for the cancellation of such a permit¹⁴¹ and expiration dates.¹⁴² It renders a person who contravenes “conditions attached to the permit” liable on conviction “to a fine not exceeding one thousand shillings or to a term of imprisonment not exceeding two months or to both”.¹⁴³
108. This combined legal framework creates significant confusion in respect of which processes must be followed by vendors to obtain licenses and prescribed form by which to do so. These applicable laws do not even consistently define the categories of individuals to which they apply, providing various definitions for “hawkers” and “street traders” that depart from each other.
109. Each legal regulation provides different absolute direction to the relevant licensing authorities. None produces a requirement for such authorities to give reasons for their decisions. Each gives absolute discretion to reject or revoke vending licenses and hawking permits. Each separate law provides for different – and sometimes dramatically varying – and duplicative criminal offenses for failure to comply with specific legislative requirements.

I. Zimbabwe

110. The Vagrancy Act of 1960¹⁴⁴ defines a vagrant as a person who:
- “(a) has no—
(i) settled or fixed place of abode; or
(ii) means of support; and who wanders from place to place; or
(b) maintains himself by begging or in some other dishonest or disreputable manner.”
111. The Act also allows a police officer to “arrest without a warrant any person he reasonably suspects to be a vagrant”,¹⁴⁵ and furthermore criminalizes any person who “assists or encourages any vagrant to pursue his way of life as a vagrant”.¹⁴⁶

¹³⁹ *Ibid.*, section 3(1)-(2).

¹⁴⁰ *Ibid.*, section 5.

¹⁴¹ *Ibid.*, section 7.

¹⁴² *Ibid.*, section 8.

¹⁴³ *Ibid.*, section 9.

¹⁴⁴ Zimbabwe Vagrancy Act of 2016, available at: <https://zimlil.org/akn/zw/act/1960/40/eng@2016-12-31>

¹⁴⁵ *Ibid.*, section 3(1).

¹⁴⁶ *Ibid.*, section 4(1)(a).

112. Although the law is framed as “rehabilitative”, the Southern African Litigation Centre notes that it “punishes people for living in poverty, being homeless, or living on the street”.¹⁴⁷

113. The Criminal Code of Zimbabwe¹⁴⁸ contains a provision on “criminal nuisance”, which provides that “any person who does any of the acts specified in the Third Schedule shall be guilty of criminal nuisance and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both”.¹⁴⁹ The third schedule contains an extremely broad range of such “offences”, defined as criminal nuisance, including, for example, any person who:

- “wantonly or mischievously ... “(i)rings any bell; or (ii) makes any noise or disturbance or plays any musical instrument or wireless in a public place; or (iii) knocks at doors...”¹⁵⁰
- “encumbers or obstructs the free passage along any street, road, thoroughfare, sidewalk or pavement”;¹⁵¹
- “allows any refuse, excrement or other offensive material to be spilt or thrown into or on a public place”;¹⁵²
- “shouts or screams in a public place to the annoyance of the public”;¹⁵³
- “urges or permits any dog or other animal to pursue any vehicle”;¹⁵⁴
- “employs any means whatsoever which are likely materially to interfere with the ordinary comfort, convenience, peace or quiet of the public or any section of the public, or does any act which is likely to create a nuisance or obstruction”.¹⁵⁵

114. These laws are vague and overbroad, making them open to misuse and abuse and create “petty offences” that carry fines and potential detention. These laws also do not comply with general principles of criminal law, including the principle of legality and of harm, nor do they comply with international human rights law and standards. In addition, they give too much leeway to law enforcement agencies.

¹⁴⁷ Southern Africa Litigation Centre, Vagrancy laws: discrimination based on poverty and status (9 June 2023), available at: <https://www.southernafricalitigationcentre.org/2023/06/09/vagrancy-laws-discrimination-based-on-poverty-and-status/>.

¹⁴⁸ Criminal law (codification and reform) Act (2004), available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/72803/74195/F858899812/ZWE72803.pdf>

¹⁴⁹ *Ibid.*, section 46.

¹⁵⁰ *Ibid.*, schedule 3, 2(a).

¹⁵¹ *Ibid.*, schedule 3, 2(f).

¹⁵² *Ibid.*, schedule 3, 2(g).

¹⁵³ *Ibid.*, schedule 3, 2(m).

¹⁵⁴ Criminal law (codification and reform) Act (2004), available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/72803/74195/F858899812/ZWE72803.pdf>, schedule 3, 2 (u).

¹⁵⁵ *Ibid.*, schedule 3, 2 (v).

J. Conclusion

115. The ICJ thanks the Special Rapporteur on the right to adequate housing and the Special Rapporteur on extreme poverty and human rights for the opportunity to provide an input for their upcoming report. The ICJ remains available for further engagement in relation to this submission.