

***Res interpretata* principle: Giving domestic effect to the judgments of the African Court on Human and Peoples' Rights**

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Summary: *The African Court on Human and Peoples' Rights is beginning to hand down decisions of constitutional salience and positioning itself as a quasi-constitutional court for Africa. However, as is the case with all regional human rights courts, its decisions lack erga omnes effect, and are binding only on the parties to the case. This means that the other members of the African Union are not required by law to implement rulings that were made by the African Court in cases in which they did not participate. While decisions of the African Court are res inter alios in relation to third parties, at least formally, it is argued that the Court may use the principle of res interpretata to ensure the collective enforcement of human rights commitments emanating from the African Charter.*

Key words: *judgments; res interpretata principle; erga omnes effect; African Charter on Human and Peoples' Rights; African Court on Human and Peoples' Rights*

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1 Introduction

Generally, the relationship between a treaty and third parties is governed by the principle of *pacta tertiis nec nocent nec prosunt*.¹ This fundamental principle forms part of state practice, is foundational to multilateral governance, and has hardly been challenged. It is founded on the principles of sovereignty, independence and equality of states and is reflected under article 34 of the Vienna Convention on the Law of Treaties (Vienna Convention).² The essence of this concept is that a treaty or convention may not impose obligations upon or create rights for a state that is not a party thereto. Such instruments create effects for contracting parties alone and may not impose obligations on third parties without their consent.³ On account of this rule, human rights treaty obligations constitute *pacta tertiis* and are inoperative in relation to third parties.⁴

Similarly, because rulings of interpretive organs or judicial mechanisms of treaties are part of the treaty system, they are *res inter alios acta vis-à-vis* third parties, that is, non-record parties. In terms of article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol),⁵ read with Rule 72 of the Court's Rules of Procedure,⁶ decisions of the African Court on Human and Peoples' Rights (African Court) are only binding *inter partes*. This means that the possibility of the *erga omnes* effect of these decisions is ruled out. Generally, states in respect of which a decision has been given are at liberty to determine the ways and means of giving effect to such decisions. However, they must always strive for *restitutio in integrum*.⁷

The other state parties to the human rights instrument concerned are not legally bound to give any concrete effects to the ruling, even if similar legal or factual situations may exist upon which the

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- 1 M Fitzmaurice 'Third parties and the law of treaties' (2002) 6 *Max Planck United Nations Yearbook* 38.
 - 2 Concluded at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series Vol 1155 331.
 - 3 OM Rahim 'International treaties and third parties' (2010) 1 *Opinio Juris* 35.
 - 4 GM Zagel 'International organisations and human rights: The role of the UN Covenants in overcoming the accountability gap' (2018) 36 *Nordic Journal of Human Rights* 74 77.
 - 5 Reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 41.
 - 6 Adopted in 2020, <http://www.african-court.org> (accessed 27 August 2018).
 - 7 J Gerards & J Fleuren 'Comparative analysis' in J Gerards & J Fleuren (eds) *Implementation of the European Convention of Human Rights and of the judgments of the ECtHR in national case law: A comparative analysis* (2014) 333 350. See also F Hoffmeister 'Germany: Status of European Convention on Human Rights in domestic law' (2006) 4 *International Journal of Constitutional Law* 722 725.

treaty-based court may make a comparable finding of violation in a subsequent case brought before it.⁸ It is argued that to make the terms of the African Charter on Human and Peoples' Rights (African Charter)⁹ effective and prevent future violations and other kindred human rights instruments over which the African Court enjoys jurisdiction, constitutional decisions of the Court must be considered to carry *res interpretata* effects (or interpretive authority).

Accordingly, the generality of the members of the African Union (AU) must take into account or take due notice of the interpretive guidance of judgments and decisions of the African Court, especially judgments of principle, in developing domestic legal policies. It no longer is permissible for states to ignore or fail to take on board the consequences, at the earliest opportunity, of a ruling finding a violation by another state when the same complaint or problem exists in their own system. It is argued that judicial *dicta* containing these *res interpretata* consequences simply are too useful to be neglected, and often are 'beacons of orientation'¹⁰ in the quest for legal clarity and certainty in compliance with international obligations.¹¹

2 Conceptual foundations of the *res interpretata* principle

By recognising and accepting the jurisdiction of an international court or tribunal, a state incurs a legal obligation to comply with judgments given against it. However, a state does not undertake to be bound by rulings in which it was not a party, nor does it forfeit or waive the right to contend that a new case should be distinguished from materially similar suits involving other states.¹² The authority of such rulings is limited to the primary parties to the case as they constitute *res judicata* and lack *erga omnes* effects, as only states found to have violated the relevant treaty are bound, at least in positive law, by the ruling rendered. Theoretically, owing to a lack of *erga omnes* effect, third party states are not directly concerned with such rulings and are not obliged to comply with them.¹³ The limited

8 Gerards & Fleuren (n 7) 350.

9 Reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 2.

10 F Berman 'The ICJ as an "agent" of legal development' in CJ Tams & J Sloan (eds) *The development of international law by the International Court of Justice* (2013) 21.

11 Tams & Sloan (n 10) 3.

12 As above.

13 Speech delivered by former president of the European Court, Dean Spielmann, at a conference 'Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges',

binding effect of rulings of international courts and tribunals is an artefact of the principles of sovereignty and independence.¹⁴

If a contracting state refuses to accept or recognise a decision reached through proceedings to which it was not a party, there are no means of forcing that state to accept such a ruling, even if the decision deals with a problem that exists in that other state as well.¹⁵ The only option is for the individual concerned to launch a fresh proceeding against the offending state for the court to give a new ruling that is binding on such a state.¹⁶ This does not comport with judicial economy since the limited effect of decisions of a court may sometimes result in repetitive litigation where the only significant difference between the cases is the identity of the parties involved in a case.¹⁷

Where there is a ruling on a particular legal situation of a state, there generally is no need for re-litigation against different states with respect to a similar situation, and new condemnatory verdicts given, before such states can rectify the anomaly in their own legal systems. In such cases, third parties in the same treaty system are indirect addressees of the rulings of the relevant judicial tribunal. Clearly, if the *inter partes* approach were to be slavishly adhered to, international litigation would be highly individualistic, atomistic and inefficient.¹⁸ However – and this is an emerging and growing trend in the European and Inter-American human rights systems – there is nothing that prevents a contracting state from amending its legislation or modifying its conduct, following a finding of a violation against a different state on a similar issue.¹⁹ In line with this thinking, in practice international courts and tribunals consider their decisions to have interpretational value for all states subject to their jurisdiction, and not merely to those states that are party to a case to which the ruling relates.²⁰

https://www.echr.coe.int/Documents/Speech_20141024_OV_Spielmann_ENG.pdf, Baku, 24-25 October 2014 (accessed 13 November 2018).

14 LR Helfer 'The effectiveness of international adjudicators' in C Romano et al (eds) *The Oxford handbook of international adjudication* (2014) 465-471.

15 S Beljin 'Germany: *Bundesverfassungsgericht* on the status of the European Convention of Human Rights and ECHR decisions in the German legal order: Decision of 14 October 2004' (2005) 1 *European Constitutional Law Review* 558-559.

16 As above.

17 Helfer (n 14) 471.

18 As above.

19 Speech by Dean Spielmann (n 13).

20 A Huneeus 'Compliance with judgments and decisions' in Romano et al (n 14) 442.

In the *South West Africa* case the International Court of Justice (ICJ), for instance, stated without elaborating that a ruling by an international court may carry with it ‘an effect *erga omnes* as a general judicial settlement binding on all concerned’.²¹ This demonstrates that supranational courts commonly expect state parties to adjust their behavioural patterns or conduct and re-orient their legal policies in line with the existing case law even when such states have not been parties to the specific case.²² The pilot judgment procedure developed by the European Court of Human Rights (European Court) and the practice by the Inter-American Court of Human Rights (Inter-American Court) of alerting state parties to new judgments suggests this practice or trend.²³ Indeed, Rule 66 of the Rules of Procedure of the African Court makes provision for the pilot judgment procedure. However, no judicial practice has yet been developed by the African Court on this procedure.

To place the present discussion into proper perspective, it is important to distinguish the concept of a *res interpretata* effect from the concept of an *erga omnes* effect, with which it cohabits the same doctrinal and conceptual spaces. The former concept describes the normative consequence or implications or ‘force of interpretation’ of a ruling against third party states that were not party to the case on which the ruling in question was made.²⁴ It means nothing more and nothing less than the duty or obligation on national authorities to take into account a human rights treaty norm as interpreted by the relevant interpretive mechanism even in cases concerning violations that have occurred among other contracting parties. It connotes ‘the idea that the interpretative authority of international judgments reaches beyond the parties to the case’.²⁵

On the other hand, the term *erga omnes* means ‘towards all’ or ‘towards everyone’ or ‘flowing to all’, and dates as far back as Roman law.²⁶ The difference between the two concepts relates to ‘bindingness’ of decisional effects or a lack thereof. While the *res interpretata* principle connotes non-bindingness but interpretational persuasiveness of decisions of courts beyond the record parties, the

21 *South West Africa Cases (Second Phase) Judgment*, 18 July 1966, ICJ Reports (1966) 6 para 70. Similarly, see *Aegean Sea Continental Shelf (Greece v Turkey) Judgment*, 19 December 1978, ICJ Reports (1978) 3 para 39; CJ Tams *Enforcing obligations erga omnes in international law* (2010) 104.

22 Helfer (n 14) 471.

23 ST Eboobrah ‘International human rights courts’ in Romano et al (n 14) 247.

24 Gerards & Fleuren (n 7) 248.

25 OM Arnardóttir ‘*Res interpretata*, *erga omnes* effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights’ (2017) 28 *European Journal of International Law* 819 822.

26 A Memeti & B Nuhija ‘The concept of *erga omnes* obligations in international law’ (2013) 14 *New Balkan Politics* 32.

erga omnes effects are binding on non-parties.²⁷ However, when grappling with the terminology suitable to describe the general interpretational authority of the judgments of the European Court, Besson argues that the term *erga omnes* should be used to refer to the *res interpretata* or general 'interpretational' or jurisprudential authority with which the rulings of the European Court are imbued.²⁸

Besson distinguishes this from enforceable 'decisional' authority that is binding *inter partes*, rendering the case *res judicata*.²⁹ Yet, she acknowledges that the use of the concept of *erga omnes* in this way is somewhat problematic in that it does not distinguish between the two related but different elements in a judgment, namely, its operative part or the depositif (comprising the findings and remedies, which are only binding *inter partes*) and its interpretational authority or authoritative effect (giving rise to systemic effects in the treaty system) which has a wider impact than its binding effect.³⁰ In sum, the two concepts are kept apart by the fact that the *res interpretata* principle creates a legal obligation under international law, albeit of a special kind that only requires states to 'take into account' the interpretive value of the rulings against other states that did not participate in the proceedings, while the *erga omnes* principle, by default, engenders real binding obligations.³¹

The concept of the *erga omnes* effect of a given human rights norm must also not be conflated with the concept of *erga omnes* obligations adumbrated by the ICJ in the *Barcelona Traction* case,³² namely, obligations that are of concern to the entire mankind or the international community as a whole.³³ The *erga omnes* effect (also referred to as the *erga omnes* binding force) concerns the scope of addressees of a ruling (that is, against whom the ruling can be invoked).³⁴ In this way, it operates like the *res interpretata* effect principle, except that the latter principle lacks binding force,

27 LR Helfer & E Voeten 'International courts as agents of legal change: Evidence from LGBT rights in Europe' (2014) 68 *International Organisations* 77.

28 S Besson 'The *erga omnes* effect of the European Court of Human Rights: What's in a name?' in S Besson (ed) *The European Court of Human Rights after Protocol 14 – First assessment and perspectives* (2011) 125 132.

29 As above.

30 As above.

31 Arnardóttir (n 25) 826.

32 *Barcelona Traction, Light and Power Company Limited, Second Phase Judgment*, 5 February 1970, ICJ Reports (1970) 3 para 33. See also T Ahmed & I de Jesús Butler 'The European Union and human rights: An international law perspective' (2006) 17 *European Journal of International Law* 771 779.

33 A Gourgourinis 'General/particular international law and primary/secondary rules: Unitary terminology of a fragmented system' (2011) 22 *European Journal of International Law* 993 1011.

34 As above.

as explained above. In this sense, the principle of *res interpretata* may be referred to as the *de facto erga omnes* principle.

The *res interpretata* principle derives from two related notions, namely, the duty of states to comply with obligations that they incurred under international law and the desirability to streamline or align their national laws with international law to avoid possible conflicts.³⁵ In addition, the *res interpretata* effect is also implicit in the principle of 'autonomous interpretations' of human rights texts, in terms of which an interpretation is assigned to a treaty-based term or concept that is transversely applicable to all member countries subscribing to a treaty and does not depend on the meanings of such terms given or developed under national law.³⁶ In this regard, implicit in the *res interpretata* effect of rulings is that all national authorities, including domestic courts, have a duty to comply with the human rights treaty concerned as clarified in the case law, even if the relevant third party state did not participate in the proceedings in which a certain definition or application was formulated.³⁷

When the jurisprudential interpretive authority guides the future interpretation and application of the law by the tribunal itself, it becomes a precedent.³⁸ It must be noted, however, that international courts and tribunals are not formally bound by their precedents. The principle of *stare decisis* does not form part of international judicial practice.³⁹ Despite this, if a judicial organ of a treaty regime has pronounced itself on a particular issue, it is expected that such treaty is to be interpreted and applied in the same manner in similar, subsequent cases.⁴⁰ The European Court has stated that it usually follows its earlier judgments as precedents in its adjudicatory function, since this engenders certainty, legal security and the orderly creation and development of its case law for application throughout Europe.⁴¹

The objective of establishing a uniform, basic level of protection of fundamental rights and freedoms in a region can only be achieved if national courts of contracting states are willing and prepared to adopt interpretations rendered by the interpretive supranational

35 D Feldman 'Monism, dualism and constitutional legitimacy' (1999) 20 *Australian Yearbook of International Law* 105.

36 J Gerards 'The European Court of Human Rights and the national courts: Giving shape to the notion of shared responsibility' in Gerards & Fleuren (n 7) 13 23-24.

37 As above.

38 Besson (n 28) 150.

39 G Guillaume 'The use of precedent by international judges and arbitrators' (2011) 2 *Journal of International Dispute Settlement* 5 9.

40 As above.

41 *Cossey v UK* (1990) Series A 184 para 35. See also A von Bogdandy & I Venzke *In whose name? A public law theory of international adjudication* (2014) 70.

body concerned and integrate them into national law.⁴² This is because, as stated above, when an international court or tribunal authoritatively determines interpretative questions, its decision is not only binding *inter partes*, but also has general effects across all the contracting parties. Therefore, it may be contended that a disregard for clear legal principles in the relevant case law can be seen as a violation of the state parties' obligations incurred under the relevant human rights text irrespective of against which contracting state the relevant judgment was given.⁴³ Such disregard in turn would fall foul of the contracting parties' commitment under article 26 of the Vienna Convention to carry out treaty obligations in good faith.⁴⁴

Some authors contend that the principle of *res interpretata* should be considered a general principle of international law that places a duty on states to interpret and apply national law in line with principles of international law.⁴⁵ This position finds basis in article 27 of the Vienna Convention, in terms of which a party may not be excused from carrying out the obligations of a treaty on account of its domestic law. The import of this provision is that the legislature cannot be taken to have intended to legislate in breach of rules of international law and comity.

In other words, a deviant legal situation within a state does not release it from its obligations incurred under a treaty.⁴⁶ This is what is sometimes described as the rule of presumption.⁴⁷ The European Court and the Inter-American Court have developed an extensive interpretive practice of explaining the provisions in their respective treaties autonomously, independent from domestic law.⁴⁸ Although the African Court has not posited on this interpretive principle, there is no doubt that it forms part of the African Charter, since it is part of general international human rights law.

Writers have also convincingly argued that the *res interpretata* principle is an important tool for strengthening the principle of subsidiarity undergirding regional human rights protection systems.⁴⁹

42 Gerards (n 36) 23-24.

43 Arnardóttir (n 25) 825.

44 As above.

45 DT Björgvinsson 'The effect of the judgments of the ECtHR before the national courts – A Nordic approach?' (2016) *Nordic Journal of International Law* 303.

46 H Kreiger 'Article 25' in O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A commentary* (2011) 441 454.

47 Björgvinsson (n 45) 306.

48 M Killander 'Interpreting regional human rights treaties' (2010) 7 *SUR International Journal on Human Rights* 145 148. See also F Vanneste *General international law before human rights courts* (2010) 229.

49 A Bodnar 'Res interpretata: Legal effect of the European Court of Human Rights' judgments for other states than those which were party to the proceedings' in

In terms of the subsidiarity principle, the initial responsibility of securing the rights provided in the African Charter rests with the member states, and the role of the Charter's interpretive organs is limited to ensuring that the relevant local authorities have remained within the strictures of international law.⁵⁰ Thus, the principle of subsidiarity is concerned with a power balance between the national authorities of member states and the interpretive supranational organs⁵¹ of the African Charter.

The subsidiarity principle ordinarily limits intervention by an international court in the domestic domain of a state but allows greater intervention where domestic institutions are weak or manipulable.⁵² The *res interpretata* principle can operationalise the subsidiarity principle in the African human rights system in two principal ways, namely, (a) if African states heed the jurisprudential guidance of the African Court, they may avoid violations of rights affirmed in the African Charter and other applicable instruments; (b) even where human rights abuses have occurred, domestic courts may draw conclusions from the African Court's case law and sufficiently remedy such human rights abuses at home, thus making it unnecessary for the victim(s) to resort to the African Court for redress.

From the available literature, one is able to deduce two types of *res interpretata* effects: passive and active. The former occurs when a state party is using the whole body of the case of an interpretive judicial mechanism concerned in its legislative, executive and judicial practice.⁵³ This means that rulings of the court, regardless of the states involved, are used as general normative standards to test the legality or compatibility of legislation or practice with applicable international human rights texts or may be used as reference by domestic courts.⁵⁴

The active effect is more exacting on states. It requires them to actively obtain knowledge on new standards by the court or tribunal, thereafter applying these in the development of domestic laws, policies and practices.⁵⁵ This means that states must treat rulings

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- Y Haeck & E Brems (eds) *Human rights and civil liberties in the 21st century* 223.
- 50 Compare J Schokkenbroek 'The basis, nature and application of the margin of appreciation doctrine in the case-law of the European Court of Human Rights' (1998) 19 *Human Rights Law Journal* 30.
- 51 K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234 241; F Viljoen *International human rights law in Africa* (2012) 332.
- 52 Arnardóttir (n 25) 828-829.
- 53 Bodnar (n 49) 256.
- 54 As above.
- 55 As above.

with a *res interpretata* effect as if such rulings were specifically issued against them. If states discover that their legislation or practice falls foul of the relevant human rights treaty standards in the same way that was criticised by the court in a case concerning another state, they should implement the ruling as if it is binding upon them.⁵⁶

Finally, although the *res interpretata* principle remains controversial, from a strictly legal point of view, especially given the sovereignty concerns it raises by affecting domestic legal systems with the relevant states having not participated in the proceeding that yielded the judgment in question, one cannot quarrel with it as a sound policy of supranational adjudication.⁵⁷ The development of the *res interpretata* principle once again confirms the daring innovativeness of human rights courts to secure compliance with human rights norms contained in human rights treaties by addressing third party states without regard to their individual and 'egoistic' concerns.

3 Basis of the *res interpretata* effect of the judgments of the African Court

According to article 30 of the African Court Protocol, state parties to the Protocol 'undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'. Similarly, Rule 72 of the Rules of Procedure of the Court empathises that 'the judgment of the Court shall be binding on the parties'.⁵⁸ These provisions mean that judgments of the African Court are officially binding on record parties and *a priori* are not capable of giving decisions that bind *erga omnes partes*. This is the case with the majority of international courts, such as the ICJ, the European Court and the Inter-American Court.⁵⁹ However, one of the figureheads in this area of the law, the former president of the European Court, Jean-Paul Costa, has argued that the rulings of the

⁵⁶ As above.

⁵⁷ Björgvinsson (n 45) 98.

⁵⁸ See also GJ Naldi 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 *African Human Rights Law Journal* 367 385.

⁵⁹ Eg, see art 59 of the ICJ Statute ('the decision of the Court has no binding force except between the parties and in respect of that particular case'); art 46 of the European Convention ('the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties'); art 68 of the Inter-American Convention ('the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties'). By contrast, the decisions of the European Court of Justice have binding *erga omnes* effects. See JL Murray 'The influence of the European Convention on Fundamental Rights on community law' (2011) 33 *Fordham Journal of International Law* 1388 1391.

European Court should carry *erga omnes* effects.⁶⁰ In his view, giving binding effect to the rulings of the European Court in respect of their construction of the European Convention

would strengthen the states' obligation to prevent Convention violations. It is no longer acceptable that states fail to draw the consequences as early as possible of a judgment finding a violation by another state when the same problem exists in their own legal system.⁶¹

This position has been rejected by European states. The Steering Committee for Human Rights, set up by the Committee of Ministers, and charged with compiling a report on the long-term future of the European Convention, noted that the contracting parties are under no obligation 'to abide by final judgments of the Court in cases to which they are not parties'.⁶² Similarly, strictly speaking, if the African Court finds a violation against the impleaded contracting state, the rest of the members of the AU are not required to comply with the ruling, even to familiarise themselves with it.⁶³ This arises from the plain meaning of article 30 of the African Court Protocol read *in tandem* with Rule 72 of the Court's Rules of Procedure, cited above.

As in the case of the European Convention on Human Rights (European Convention)⁶⁴ and the Inter-American Convention of Human Rights (Inter-American Convention)⁶⁵ the African Charter makes no provision for the *res interpretata* implications of the judgments of the African Court for other contracting states, which were made without their input. There appears to be no legal norm in international law addressing this issue.⁶⁶ This is not surprising as states generally are unwilling to cede their sovereignty to supranational bodies.⁶⁷ This argument holds special weight particularly in the

60 Council of Europe 'Memorandum of the president of the European Court of Human Rights to the states with a view to preparing the Interlaken conference' (2009), https://www.echr.coe.int/Documents/Speech_20090703_Costa_Interlaken_ENG.pdf (accessed 19 November 2020).

61 As above.

62 Council of Europe 'Report of the Steering Committee for Human Rights: The Longer-Term Future of the System of the European Convention on Human Rights', adopted on 11 December 2015, 64, <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> (accessed 19 November 2020).

63 Compare Gerards (n 36) 21-22.

64 The Convention was opened for signature on 4 November 1950 in Rome and entered into force on 3 September 1953.

65 Adopted at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969.

66 Bodnar (n 49) 226.

67 RJV Cole 'The African Court on Human and Peoples' Rights: Will political stereotypes form an obstacle to the enforcement of its decisions?' (2010) 43 *Comparative and International Law Journal of Southern Africa* 23 39; KO Kufour 'Securing compliance with the judgments of the ECOWAS Court of Justice' (1996) 8 *African Journal of International and Comparative Law* 1 7.

African context where states are still inflexibly wedded to the outdated non-relative Westphalian concept of sovereignty.

Given the fact that no provision in the African Court Protocol deals with the question of the legal value of the judgments of the African Court *vis-à-vis* third-party states, it therefore is necessary to look to the general provisions of the AU Constitutive Act⁶⁸ and the African Charter in order to resolve this issue.⁶⁹ Article 1 of the African Charter states that member states of the Organisation of African Unity (OAU), now the AU, shall recognise the rights, freedoms and duties contained therein and shall take necessary measures to 'to give effect to them'. In terms of article 3(h) of the AU Constitutive Act, state parties undertook to 'promote and protect human and peoples' rights in accordance with the African Charter'. Having been initially excluded from the African human rights architecture, the African Court is established under article 1 of its separate Protocol – the African Courts Protocol. It is the final interpretive authority of the African Charter and all AU human rights statutes.⁷⁰

The jurisprudence of the African Court constitutes an integral part of the African Charter system.⁷¹ The African Court clarifies and develops the normative content of the African Charter through its jurisprudence. Since the rights and freedoms contained in the African Charter and related instruments cannot be fully understood without regard to the jurisprudence of the African Court, state parties cannot possibly fulfil their treaty commitments without consulting important decisions of the African Court.⁷² When a court has elaborated on a treaty norm of constitutional salience, it is taken that the interpretation carries *res interpretata* effect or interpretive force.⁷³ It is argued that the African Court can assert the *res interpretata* effect of its rulings by giving broad interpretations of the norms, terms and concepts contained in the African Charter and other relevant statutes in order to give effective protection to human and peoples' rights.

Consequently, therefore, contracting states cannot deviate from the imperatives of the African Charter as construed by the African

68 Adopted in 2000 at the Lomé Summit, Togo, and entered into force in 2001.

69 Compare Bodnar (n 49) 226.

70 AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* 14.

71 Compare Bodnar (n 49) 226.

72 F Emmert & CP Caney 'The European Union Charter of Fundamental Rights vs The Council of Europe Convention on Human Rights and Fundamental Freedoms – A comparison' (2017) 40 *Fordham Journal of International Law* 1047 1160.

73 Gerards & Fleuren (n 7) 350.

Court without falling foul of the commitments they incurred thereunder.⁷⁴ Indeed, a contrary position will be difficult to reconcile with the African Court's function of developing a pan-African jurisprudence that provides a minimum or floor protection of human rights throughout Africa. It is assumed that the minimum standards of protection of human rights guaranteed under a treaty, as clarified by the relevant court in its case law, have *res interpretata* or *de facto erga omnes* effect.⁷⁵ The recognition and acceptance of the *res interpretata* principle in the African human rights system will help to enhance and assert the constitutional importance of the African Court in the reorganisation and judicialisation of African politics and the development of African public order.

Faced with a tidal wave of human rights violations on the African continent, the African Court has become increasingly concerned with the enhancement of the existential conditions of human rights violations in Africa. Indeed, some writers have predicted that the decisions of the African Court may in future have *res interpretata* effects. For instance, in the early years of the Court, Oder expressed the firm belief that '[t]he African Court's judgments will have a wider impact, beyond the country against whom an application has been brought'.⁷⁶

Recently, Enabulele argued that a decision of the African Court on the incompatibility of domestic law, policy, practice or conduct with the African Charter stands on a relatively higher normative pedestal 'and is set on a wider range of application than a decision that simply finds a violation of the right of an individual'.⁷⁷ Enabulele correctly argues that such decisions carry implications for all the states over which the Court exercises jurisdiction, including those that are not signatories to the African Court Protocol but nonetheless are parties to the African Charter.⁷⁸ This is because, as stated earlier, the function of the African Court is not merely to determine the conflicting claims between the parties but also the development and maintenance of public order, in the same way as its peers in the European and Inter-American systems. According to Enabulele,

74 As above.

75 D Frost 'The execution of judgments of the European Court of Human Rights: Limits and ways ahead' 42 *ICL Journal*, http://www.icljournal.com/download/f1527ce403500a9ec58b8269a9a91471/ICL_Vol_7_3_13.pdf (accessed 31 November 2019).

76 J Oder 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?' (2011) 11 *African Human Rights Law Journal* 495-506.

77 Enabulele (n 70) 7.

78 As above.

decisions of the African Court, as a judicial institution of the AU, are able to have implications beyond the states that are directly bound by them, to affect all state parties to the African Charter, whether or not they are also parties to the Protocol of the African Court. It is, therefore, possible for a finding of incompatibility made by the Court to benefit from a wider application as an authoritative interpretation of the Charter.⁷⁹

On every occasion that the Court decides cases, it not merely spells out the rights and obligations of the parties that happen to be involved in that case, but also develops the law. This is critical for the evolution of human rights on the African continent. Despite the fact that the African Court has not yet pronounced itself on the *res interpretata* effect of its decisions, it can hardly be gainsaid that the African Court is required to develop general standards of protection for human rights in Africa. The Court seems to have embraced this function as evidenced by the fact that it habitually starts its judgments by setting out general interpretive and normative principles, specifying their scope and using precedents from peer jurisdictions to establish their trends, and applies them to the merits of the case.⁸⁰ Only after laying down the principles on a broad canvass emphasising their applicability in the African setting, will it then apply it to the facts of the case.⁸¹

It also appears that the African Court has begun to deliver judgments of principle with possible *erga omnes* effects. In *Tanganyika Law Society & Others v United Republic of Tanzania*⁸² the African Court found a law that requires aspirants for political office to be affiliated to a political party for eligibility to be voted into office to be incompatible with the African Charter. In *Konaté v Burkina Faso*⁸³ the Court held, among other things, that a prison sentence and excessive fines are disproportionate punishments for the offence of criminal defamation.

It is argued that all AU members that retain laws similar to those that were found by the African Court to be incompatible with or repugnant to the African Charter and other relevant human rights texts must heed the aforesaid decisions of the Court and scrap such laws from their statute books. It can be predicted that the Court will come to the same conclusion if similar laws are challenged before it

79 Enabulele (n 70) 13.

80 Compare JH Gerards 'Judicial minimalism and "dependency": Interpretation of the European Convention in a pluralist Europe' in MR Malen et al (eds) *Fundamental rights and principles* (2013) 73.

81 As above.

82 Application 11/2011 para 32, Judgment of 14 June 2014.

83 Application 4/2013, Judgment of 5 November 2018.

in future. To do otherwise would replace uniformity, certainty and predictability in the application of the Charter with jurisprudential or interpretational cacophony as each contracting state will adopt its own level of protection in line with their respective domestic laws.⁸⁴ Indeed, the Interlaken Declaration,⁸⁵ *inter alia*, has called upon state parties to the European Convention to commit themselves to

taking into account the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system.⁸⁶

The same clarion call should be made with respect to AU member countries with regard to decisions of the African Court. Judgments of African Court must be taken by AU states to have an advisory character and must have a remedial effect across all the contracting states. Naturally, the immediate and strongest impact of the decision will be felt in the respondent state. However, all states in the AU region must stay abreast of developments by beginning to take notice and apply norms and standards developed by the African Court in its judgments handed down with respect to other states.⁸⁷

While formally binding *inter partes*, the case law of international courts and tribunals have a certain 'contagious characteristic' that extends beyond the actual decision in a case.⁸⁸ A relatively radical view has also been expressed that a repeated application of the interpretations by a judicial tribunal may ultimately be imbedded into the treaty and bind all contracting parties. In the words of Romano: 'When a dispute settlement organ has been empowered to interpret authoritatively a legal regime and when its judgments become an integral part of that regime ... then its judgments necessarily have an effect *erga omnes partes contractantes*'.⁸⁹

It may be argued, at least theoretically, that the elaboration of human rights norms contained in the African Charter by the African Court necessarily becomes internalised for parties to the African

84 *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 115.

85 The Interlaken Declaration is available at https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf (accessed 19 November 2020).

86 Interlaken Declaration (n 86) para B(4)(c).

87 Compare JG Merrills *The development of international law by the European Court of Human Rights* (1993) 12.

88 Enabulele (n 70) 10.

89 CPR Romano 'The proliferation of international judicial bodies: Pieces of the puzzle' (1998-1999) 31 *New York University Journal of International Law and Politics* 709 737.

Charter and they acquire a binding force as part of the obligations they assumed to give effect to the rights contained in this instrument.⁹⁰

4 *Res interpretata* principle and access challenges associated with article 34(6) of the African Court Protocol

The African Court is supposed to be the jewel in the crown of the African human rights system. However, the difficulty in accessing this Court by individuals and non-governmental organisations (NGOs) disqualifies it as a beacon of hope for the majority of disenfranchised African people. Article 34(6) of the African Court Protocol requires a state party to the Court Protocol to submit a special declaration with the Chairperson of the AU Commission accepting the jurisdiction of the Court before individuals and NGOs (enjoying observer status with the African Commission) can bring claims against it before the Court.

Of the 30 countries that have signed and ratified the Court Protocol, only ten countries have deposited the requisite declaration.⁹¹ The difficulty in accessing the Court has effectively turned states, the primary violators of human rights, into gate-keepers of the Court. As stated in the joint dissenting opinion in *Falana v Nigeria*,⁹² the ineluctable consequence of the restricted access to the Court has been that the vast majority of the African population who are in desperate need for redress have been barred from accessing the Court since their countries have refused and/or failed or ignored to make the necessary declaration.

The difficulty to access the African Court has led Ssenyonjo to conclude that despite this body being called 'an African Court', in reality it is a court for those few states that have deposited the article 34(6) declaration accepting its competence to determine suits brought by individuals and NGOs against them.⁹³ Indeed, during the first decade of its existence, the African Court decided a limited number of cases on the merits. This principally is on account of the

⁹⁰ Enabulele (n 70) 11.

⁹¹ See the website of the African Court <https://www.african-court.org/en/index.php/basic-documents/declaration-featured-articles-2> (accessed 19 October 2020).

⁹² *Falana v African Union* Application 1/2011, Dissenting Opinion (Akuffo VP, Ngoepe, Thompson JJ) 26 June 2012.

⁹³ M Ssenyonjo 'Direct access to the African Court on Human and Peoples' Rights by individuals and non-governmental organisations: An overview of the emerging jurisprudence of the African Court 2008-2012' (2013) 2 *International Human Rights Law Review* 17 28.

fact that in a majority of petitions the Court found that it lacked jurisdiction. This was mostly due to the fact that the respondent state had not deposited the required declaration.⁹⁴ To further limit access, the African Court has held that only NGOs accredited with the AU may request advisory opinions from it.⁹⁵ This undermines the Court's ability to utilise the constitutional approach to further its mandate.

To somewhat overcome the access challenges associated with the aforesaid article 34(6), it is argued that the African Court must place a 'constitutional interpretation' technique at the centre of its adjudicative task and proactively develop human rights principles of general application with a view to assert the *res interpretata* effect of its rulings in the AU region. A constitutional interpretation to a human rights treaty is intended to ensure the effectiveness of its terms even against those contracting states that did not participate in a case. It is broadly accepted today that constitutional courts make law. The process of law making by constitutional courts has more in common with law making by regional human rights courts.⁹⁶

As the African Court flexes its law-making muscles and entrenches the *res interpretata* effects of its rulings, its jurisprudence will reverberate even within the territories of all AU states, including those states that have not made the requisite declaration as well as those that have made the declaration but did not participate in the proceeding giving rise to the ruling in question. The gravamen of the argument being maintained is that AU states that have not made the requisite article 34(6) declaration will be required to take into account the interpretive guidance offered by the African Court in cases involving states that have made such declarations. This will pre-empt violations, making it scarcely necessary for individuals in such countries to approach the African Court for redress.

The constitutional approach discussed is important for the long-term future of the African human rights system as a whole in that it will keep the case docket of the African Court manageable in keeping with the principle of subsidiarity explained above. Finally, although the *res interpretata* principle is not the sole and adequate response to the functional deficits suffered by the African Court by virtue of the aforesaid article 34(6), it remains a vital one in that it

94 F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63 67.

95 App 1/2013 Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP) (Advisory Opinion).

96 BM Zupančič 'Constitutional law and the jurisprudence of the European Court of Human Rights: An attempt at a synthesis' (2003) 1 *Revus* 57.

is a supplementary tool that seeks to enhance compliance with the African Charter and other related instruments. An effective solution is to delete article 34(6) altogether from the African Court Protocol to allow for free direct access by individuals and NGOs.

5 Constitutional versus individual justice before the African Court

The African Court has started 'issuing strong merits judgments'⁹⁷ and this has led some authors to describe it as a 'constitutional court for Africa'.⁹⁸ Even many years before the Court started operating, Mutua argued that the African Court must assert the *de facto erga omnes* effect of its rulings and hear only those cases that have the potential to expound on the African Charter, and create jurisprudence that will guide African states in developing a legal and political culture in which respect for human rights is at the centre of the polity.⁹⁹ In the view of this author, this will help the African Court to avoid a docket crisis that is presently facing the European Court.

Mutua contends that the Court should not be concerned with individual claims seeking to correct or punish a past wrong committed by a state to an individual.¹⁰⁰ He reasons that the Court should be forward-looking and develop a corpus of law with precedential value and an interpretation of the substantive provisions of the African Charter and kindred universal human rights texts to guide and direct African states.¹⁰¹ According to Mutua, such forward-looking decisions would help to deter states from future conduct that is inimical to the African Charter by adjusting their behaviour.¹⁰² In terms of this author's logic, individual justice would occur as a mere coincidence in the few cases that the Court would hear.¹⁰³

There is no doubt that Mutua's thinking is heavily influenced by scholarship on the European Court that suggests that the European Court should move away from individual justice towards constitutional justice, in which situation it will deal with only a few

97 TG Daly 'The alchemists: Courts as democracy-builders in contemporary thought' (2017) 6 *Global Constitutionalism* 101 103.

98 A Abebe 'Taming regressive constitutional amendments: The African Court as a continental (super) constitutional court' (2019) 17 *International Journal of Constitutional Law* 89.

99 M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342 361.

100 Mutua (n 99) 362.

101 As above.

102 As above.

103 As above.

cases involving structural and systemic violations of the Convention, thereby addressing its docket crises by reducing its case load.¹⁰⁴ While this approach could work with the European Court, it appears ill-suited to the African environment. This is because as against African states, the overwhelming majority of European states have made huge strides in establishing vibrant oversight mechanisms for human rights protection and the consolidation of democracy in their territories. By contrast, many African states still have weak and dysfunctional judiciaries that are unable to provide redress for victims of human rights abuses.

The proposal made in this article is that the main focus of the African Court should be the delivery of individual justice, which is its *raison d'être*, while it keeps in mind its equally important function of formulating general jurisprudential canons underlying its decisions. It has been said that 'the evident result is that a resolution of the tribunal has a double role: *inter partes*, with respect to the facts and their immediate and direct consequences; and *erga omnes*, with respect to the conventional norms and their interpretation in all cases'.¹⁰⁵ In this way, the Court strives at reconciling the truths of individual justice and collective justice. While expressing sympathy for Mutua's logic, it is an idea of which time has not yet arrived in Africa.

6 Conclusion

Although article 30 of the African Court Protocol, read with Rule 72 of the Court's Rules of Procedure, excludes *erga omnes* effects from the rulings of the African Court, state parties to the African Charter have a special duty to heed decisions of this body that contain a *res interpretata* element for normative direction and orientation of domestic legal policy in line with the dictates of the African Charter and cognate human rights texts. Some judgments of the African Court bear enormous orientation value to states that were not parties

¹⁰⁴ L Wildhaber 'A constitutional future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161 164; L Wildhaber 'Changing ideas about the tasks of the ECtHR' in L Wildhaber (ed) *The ECtHR 1998–2006: History, achievements, reform* (2006) 138, noting: 'The inexorable accumulation of ... both inadmissible and substantial cases will increasingly asphyxiate the system so as to deprive the great majority of ... cases ... of any practical effect.' L Wildhaber 'Rethinking the European Court of Human Rights' in J Christofferson & R Madsen (eds) *The European Court of Human Rights between law and politics* (2011) 224; P Mahoney 'An insider's view of the reform debate (how to maintain the effectiveness of the European Court of Human Rights)' (2004) 29 *Nederlands Tijdschrift voor de Mensenrechten-Bulletin* 170.

¹⁰⁵ MS Abbott 'The Inter-American Court of Human Rights, the control of conventionality doctrine and the national judicial systems of Latin America' (2018) 7 *Ave Maria International Law Journal* 5 18.

to the proceedings, and carry valuable interpretive guidance on how such states may act.

Contracting states have a legal obligation incurred under international law to take into account the jurisprudence of the African Court when carrying out their obligations under the African Charter, irrespective of whether or not they were parties to the case in question in pre-emptive anticipation of possible human rights abuses. For the long-term future of the African human rights system, it is critical that in order to pre-empt violations, the contracting parties should take cognisance of the conclusions contained in decisions of the African Court, given in cases concerning other states, particularly where the same problem of principle obtains in their own legal systems. It has been argued that

judgments are binding upon the parties only cannot be exhaustive of all the uses to which judgments could be put, nor does it block the reformative power of the reasoning contained in a judgment within the sphere of the jurisdiction of the court that delivered it.¹⁰⁶

In addition, contracting states are also required, in line with their engagements under the African Charter, to integrate the norms, standards and practices developed by the African Court in its rulings into domestic law.

¹⁰⁶ Enabulele (n 70) 8.