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Embedding regional human rights in adverse times: The judgments of the African Court on Human and Peoples' Rights as interpretive precedents for national actors

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Summary: *This article argues that the impact of the African Court on Human and Peoples' Rights should not be measured solely by direct compliance with its contentious judgments, which remains weak and is undermined by withdrawals of individual-access declarations. Instead, it builds on the concept of* res interpretata *as a theory of authority: The idea that the Court's judgments and advisory opinions serve as interpretive precedents that generate general principles that, while not formally binding* erga omnes*, provide heightened persuasive guidance for all state parties facing analogous issues. Grounded in treaty obligations, good-faith commitments and the Court's mandate to interpret and apply AU and other human rights treaties, these precedents can orient domestic courts, legislatures, policy makers and administrators towards convergent standards on matters as diverse as form of punishment,*

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criminal procedure, election management and the protection of indigenous peoples. The article compares European and Inter-American approaches, proposing a hybrid model for Africa that is sensitive to legal pluralism and the domestic context. It calls for deliberate diffusion of the Court's jurisprudence through constitutional incorporation of AU treaties, an explicit requirement that courts consider the Court's case law, possibilities for advisory references, and systematic use of Court principles in law reform, policy design and parliamentary oversight. AU organs, in particular the African Court itself, the Pan-African Parliament and the AU Commission on International Law, are urged to coordinate efforts, create accessible case law tools, and develop model laws. Ultimately, embedding the Court's jurisprudence via res interpretata*, supported by informed elites, active civil society and reoriented legal education, offers a pragmatic path to constructing a nascent pan-African human rights common law even in adverse political conditions.*

Key words: *African Court; judgments;* res interpretata*; interpretive precedents; general principles; embeddedness*

1 Introduction

So far, the overriding impression is that the judgments of the African Court on Human and Peoples' Rights (African Court) have had little effect on the lives of ordinary Africans. This view stems from a focus on the African Court's decisions in contentious cases. Disillusionment with the very low implementation rates with respect to these judgments seems to have overshadowed other possible ways of evaluating the Court's impact. By shifting the analytical gaze from implementation by *respondent states* in contentious cases (viewed as adherence to the Court's case-specific orders) to the broader impact (or influence) of the Court's judgments in *all state parties*, this article interrogates the legal basis and the potential of conceptualising and using the Court's judgments as *interpretive precedents (res interpretata)*. It also considers the related role of the Court's advisory opinions.

Distinguishing between *a state party to a particular case*, on the one hand, and *all other state parties to the relevant treaty that were not party to the case proceedings* (third states), on the other, this article contends that the more indirect effects of the Court's judgments should be brought into the spotlight. Although the orders in a particular contentious case by virtue of binding country-specific precedents (*res judicata or* 'already judged') require obedience only by the respondent state, a purposive interpretation

of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court (African Court Protocol) supports an understanding of the Court's judgments as *res interpretata*. This means that the Court's authoritative interpretations in a given case should, in substantially similar circumstances, serve as strongly persuasive normative guidance for third states. In this way, the individual case serves as a stimulus for legal, policy and administrative change beyond the case and contributes to prevent similar violations, thereby reducing the number of cases submitted to the Court. To be clear, neither the Court nor any African Union (AU) body has expressed a view on the *res interpretata* effect of the Court's judgments.

This article draws from and builds on scholarly contributions that have explored the notion of *res interpretata* as a theory of authority in the African,[1] European[2] and Inter-Americana human rights systems,[3] and aims to contribute to its further theorisation.[4] While much of the scholarly discussions and policy debates have focused on the role of courts, this article takes a closer look at legislatures and policy makers.[5] By locating the discussion firmly in the Court's jurisprudence, it adopts a practical solutions-oriented approach. The African Court depends on national authorities and other domestic actors to implement its decisions.

In the social sciences, generally, 'embeddedness' refers to – among other elements – the shaping of social institutions by their

1 O Jonas '*Res interpretata* principle: Giving domestic effect to the judgments of the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 736-755; see also 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.

2 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 Y Haeck & E Brems (eds) *Human rights and civil liberties in the 21st century* (2013) 223; 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; C Giannopoulos 'The reception by domestic courts of the *res interpretata* effect of jurisprudence of the European Court of Human Rights' (2019) 19 *Human Rights Law Review* 537; A Kallidou 'The binding effect and the implementation of the judgments of the European Court of Human Rights with special regard to Germany and Greece' Doctoral thesis, Freie Universität Berlin, 2019 105-111.

3 J Contesse 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights' (2017) 15 *International Journal of Constitutional Law* 414.

4 Kallidou (n 2) 105 ('the legal principle of *res interpretata* has not yet been adequately approached in legal theory').

5 Bodnar (n 2) 256 (drawing a distinction between 'passive' (use of interpretive precedents in adjudication) and 'active' (inferring from and using interpretive precedents as basis for law reform) effect.

context.[6] Applying the ordinary meaning of the word to international human rights, 'embed' entails establishing international norms 'very strongly within' as an 'integral part' of the municipal system.[7] 'Embeddedness', therefore, lies at the heart of the relationship between any international human rights treaty and municipal law. In the context of international human rights courts, 'embeddedness' captures the idea that international courts exercise authority within, and are shaped by, the various national political and institutional ecosystems within which their judgments need to be implemented. Under the principle of subsidiarity, it is the primary task of the state to give effect to (to 'embed') the rights guaranteed in the treaty; supranational oversight enters into the fray only to fill national gaps or rectify national shortcomings.[8] In this article, embeddedness is understood as a mechanism of national reception of international human rights law. It is aimed at diffusing international norms in a broad, organic and gradual process through which norms spread across countries in the region, towards the ideal of eventual norm internalisation.

In the context of the article, 'diffusion' is a process that increases the probability that a norm adopted by the Court in respect of one country (or countries) would steer norm evolution in a non-adopting country (or countries).[9] These processes are enabled by 'translating' supranational norms into local languages and – more importantly – by situating them within 'local contexts of power and meaning'.[10]

Following this introduction, the article proceeds to contextualise the Court's merits judgments against the backdrop of increasing non-compliance and in light of comparative regional practice. It then turns to the concept of *res interpretata*, examining its rationale, legal foundations and persuasive authority. Building on this analysis, it explores how general principles of law may be derived from the Court's interpretive jurisprudence and offers an illustrative list of such principles. Shifting the focus to domestic adjudication, the article assesses the limited extent to which national courts have drawn

6 See, generally, M Granovetter 'Economic action and social structure: The problem of embeddedness' (1985) 91 *American Journal of Sociology* 481-510.

7 To 'embed' is to 'make something an integral part' (*Merriam-Webster dictionary*); or to 'establish something very strongly within something else, so it becomes a part of it' (*Collins English dictionary*).

8 See generally LR Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime' (2008) 19 *European Journal of International Law* 130-131; see also Jonas (n 1) 744.

9 Adjusted from D Strang 'Adding social structure to diffusion models' (1991) 19 *Sociological Methods and Research* 324, 353.

10 SE Merry 'Human rights and transnational culture: Regulating gender violence through global law' (2006) 44 *Osgoode Hall Law Journal* 53, 55.

interpretive guidance from principles emanating from the Court's case law and proposes avenues for strengthening judicial dialogue between the African Court and domestic courts. It broadens the lens to consider how the Court's interpretive precedents may serve as the basis of law reform, highlighting the role of multiple stakeholders. A conclusion situates the article's core insights within a broader analytical framework.

2 Context

2.1 Ongoing non-compliance

On 13 June 2013 the African Court for the first time found an African state in violation of its commitments under AU human rights law.[11] In the 12 years since then, the Court found violations in a further 97 cases.[12] As the number of decisions grew, scholarly and popular interest increasingly turned to questions about the implementation of these decisions.[13] Reduced to an assessment based on a narrow compliance optic focused on state adherence to orders in contentious case 'to which they are parties',[14] the Court's impact has indeed been rather bleak.[15] The two most celebrated instances of 'full' compliance, *Konaté v Burkina Faso*[16] and *Zongo v Burkina Faso*,[17] were decided in the Court's early years. In line with *Konaté*, Burkina Faso

11 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (Merits) (2013) 1 AfCLR 34 (*Mtikila*); see also *Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72.

12 Court's 2024 Activity Report, Annex II (Status Report on Implementation of Decisions Delivered by the African Court 2024, as at 31 December 2024) (87 judgments are pending 'full implementation'). It is assumed that this number excludes *Konaté v Burkina Faso* (Merits) (2014) 1 AfCLR 314 (*Konaté*) and *Zongo v Burkina Faso* (Merits) (2014) 1 AfCLR 219; *Zongo v Burkina Faso* (Reparations) (2015) 1 AfCLR 258 (*Zongo*), bringing the total of violations findings to 89. During 2025, the Court found violations in a further 9 cases (https://www.african-court.org/cpmt/latest-decisions/judgments) (accessed 22 December 2025), bringing the total of merits violations by the end of 2025 to 98. Although provisional measures orders also need to be implemented, they are not included in this article, since they do not constitute decisions on the merits, and provisional measures orders do not provide reparations to redress established violations.

13 See eg the Dar es Salaam Communiqué (3 November 2021), issued at the end of the International Conference on the Implementation and Impact of the Decisions of the African Court: Challenges and Prospects (1-3 November 2021, Dar es Salaam, Tanzania); and the conference on the implementation of the decisions of the African Court, co-hosted by the Court, the Centre for Human Rights and the Coalition for an Effective African Court (27-28 June 2024), https://www.youtube.com/watch?v=qijsWfKXJIA) (accessed 16 December 2025).

14 Art 30 African Court Protocol.

15 See eg the Court's 2024 Activity Report, para 56 ('less than 10%' of decisions 'have been fully implemented'); and annexures on status of implementation and compliance in other Activity Reports.

16 *Konaté* (n 12).

17 *Zongo* (n 12).

decriminalised defamation in the print and online media.[18] In *Zongo*, the state complied with all elements set out in the Court's order.[19] In at least four other instances, partial compliance can be identified: *Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire;*[20] *Alex Thomas v Tanzania* and other cases dealing with the right to free legal aid;[21] *Ajavon v Benin*;[22] and *Wangwe v Tanzania.*[23]

The withdrawal of direct access declarations by the states against which the majority of cases were brought has led to a marked decrease in submitted applications, thereby significantly diminishing the prospects of the Court issuing merits decisions.[24] This is unlikely to change in the near future. In respect of four of the eight states that have such a declaration in place, the Court has so far found *no violations*.[25] Of the remaining four, two are under military rule,[26] a factor that may constrain the prospects of cases being submitted – and eventually implemented – in respect of those countries. Indirect access, through the African Commission on Human and Peoples' Rights (African Commission), has yielded only two merits decisions.[27]

18 See 2018 Mid-Term Activity Report of the African Court on Human and Peoples' Rights, EX.CL/1088(XXXIII) June 2018). It also paid the awarded sums, published the judgment summary, expunged the conviction and revised the domestic sanctions.

19 Re-opening investigation; payment of monetary damages and costs over US $1 million.

20 *Actions pour la Protection des Droits de l'Homme v Côte d'Ivoi*re (2016) 1 AfCLR 668 (*APDH*). A subsequent case*, Suy Bi Gohore Emile & Others v Côte d'Ivoire* (Judgment) (2020) 4 AfCLR 406 para 170 *(Suy Gohore*) confirmed broad compliance and identified remaining shortcomings.

21 *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 (*Thomas*) paras 123, 124. Although not directly ordered to do so, the government replaced the 1969 Legal Aid (Criminal Proceedings) Act with the 2017 Legal Aid Act. In *Swaga v Tanzania* Application 14/2017 (Merits and Reparations) (7 November 2023) (*Swaga*) para 112(viii); para 87, the Court noted that the Legal Aid Act 2017 did not fully align with the Charter and its case law.

22 *Ajavon v Benin* (Reparations) (2019) 3 AfCLR 196 para 144 (4 December 2020): Benin amended the law establishing the Anti-Economic Crimes and Terrorism Court, which set up the Appeal Court as ordered in the judgment (Court 2021 Activity Report (based on media reports)).

23 *Wangwe & Another v Tanzania* Application 11/2020 (13 June 2023); see T Magoti 'The implementation by Tanzania of orders of the African Court on Human and Peoples' Rights requiring constitutional and legislative reform' LLM dissertation, University of Pretoria, https://repository.up.ac.za/items/991dcf73-a84f-42f0-afdd-807ab636fea1 (accessed 21 October 2025).

24 The withdrawing states are Rwanda (withdrew in 2016), Tanzania (2019), Benin (2020), Côte d'Ivoire (2020), Tunisia (2025). However, the withdrawal by Tunisia, deposited in 2025, only takes effect a year later – on 6 March 2026. The number of applications submitted annually decreased from a high of 66 in 2019 to 15 in 2024 and 5 by the end of 2025, https://www.african-court.org/cpmt/statistic (accessed 18 December 2025).

25 The Gambia, Ghana, Guinea Bissau, Niger.

26 Burkina Faso, Mali.

27 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153 (*Saif Al-Islam); African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9 (*Ogiek*). This situation looks unlikely to change in the near future (see African Commission and African Court Guidelines on

2.2 Inter-regional trialogue

While also contending with the cross-system reach of Court judgments in contentious cases, the two other well-established regional human rights systems have taken divergent paths, thereby positioning the African system as a potential hybrid between the two.

An example from the early years of the European Court of Human Rights (European Court) illustrates the need for a principled approach to its judgments radiating beyond the parties to the case. Although the European Court held that criminalising consensual homosexual acts between consenting adults violated the European Convention on Human Rights,[28] it took more than a decade, involving litigation in near-identical cases, to get Ireland and Cyprus to reform their laws.[29] Today, there seems to be agreement that the effect of *res interpretata* is to endow the judgments of the European Court with strong persuasive interpretive authority,[30] but that it falls short of a binding (*erga omnes*) obligation in respect of all state parties.[31] The leeway allowed to domestic courts to depart from the European Court's ruling, provided that detailed reasons are provided,[32] aims to uphold the principle of subsidiarity, as captured in the European Court's use of the 'margin of appreciation'.

The approach of the Inter-American Court of Human Rights (Inter-American Court) is different. The Inter-American Court requires all domestic courts to exercise 'conventionality control'.[33] They must, within their legal and constitutional competences,[34] and even if

Submission and Transfer of Cases (3 June 2025), https://achpr.au.int/en/soft-law/submission-and-transfer-cases (accessed 22 November 2025).

28 *Dudgeon v United Kingdom* Application 7525/76 (22 October 1981).

29 *Norris v Ireland* Application 10581/83) (26 October 1988) and *Madinos v Cyprus* Application 15070/89) (22 April 1993). See also LR Helfer & E Voeten 'International courts as agents of legal change: Evidence from LGBT rights in Europe' (2014) 68 *International Organisation*

30 See, however, *Norris v Attorney-General* [1984] IR 36 (the Irish Supreme Court rejecting Norris's arguments that 'more than persuasive' authority should be given to *Dudgeon*, on the basis that no presumption of conformity existed between the European Convention and Irish law, since the Convention had at the time not been incorporated into Irish law).

31 Arnardóttir (n 2) 823 points out that *erga omnes* can be used in different senses: either as indicating normative force (as *jus cogens*), or as speaking to reach (directed at all states). Adopting the understanding that 'the idea that when an international court authoritatively settles interpretative questions, it is not only legally binding on the parties the case, but it also has an *erga omnes partes* effect across all of the contracting states', she argues (827) that *res interpretata* allows for a *de facto erga omnes partes* effect of the European Court's judgments.

32 Kallidou (n 2) 241.

33 *Almonacid-Arellano & Others v Chile* (Preliminary objections, Merits, Reparations and Costs) Series C 154 (26 September 2006) para 124 (*Almonacid*).

34 *Gelman v Uruguay* (Monitoring Compliance with Judgment) (10 March 2013 para 69 (*Gelman Monitoring*).

litigants do not raise the issue,[35] interpret national law not only in line with the American Convention on Human Rights but also *in line with the Court's relevant case law*.[36] This requires that the national court must either interpret domestic law in line with inter-American norms or, if that is not possible, invalidate or decline to enforce the relevant domestic law.[37] Commentators have criticised the 'doctrine' as an overbearing 'top-down' approach through which the Inter-American Court dictates national interpretation and undermines democracy.[38] The Inter-American Court clarified that the responsibility lies not only on courts, but on all other national authorities, including law makers.[39] Arguably, this approach also serves the principle of subsidiarity by making domestic judges 'the first line' of Inter-American Court judges, thereby pre-empting the role of the actual inter-American system.[40]

Africa's plural legal landscape makes the Inter-American model normatively attractive but institutionally unrealistic; hence, diffusion through persuasive authority along the lines of the European system seems to be preferable.

3 *Res interpretata* as a *sui generis* form of embeddedness

This part of the article discusses embeddedness as the rationale of *res interpretata*, and elaborates on the *sui generis* legal basis and persuasive value of the African Court's judgments.

35 *Case of the Dismissed Congressional Employees (Aguado-Alfaro & Others) v Peru* (Preliminary Objections, Merits, Reparations and Costs) (24 November 2006) para 128 (*Dismissed Employees*); *Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations and Costs) (23 November 2009) para 339.

36 *Almonacid* (n 33) para 124.

37 *Gelman Monitoring* (n 34) para 72.

38 E Malarino 'Judicial activism, punitivism and supranationalisation: Illiberal and antidemocratic tendencies of the Inter-American Court of Human Rights' (2012) 12 *International Criminal Law Review* 665; AE Dulitzky 'An inter-American constitutional court? The invention of the conventionality control by the Inter-American Court of Human Rights' (2015) 50 *Texas Journal of International Law* 45, 52.

39 *Gelman Monitoring* (n 34) para 69 (conventionality control affects 'other organs involved in the administration of justice at all levels', and extends to the 'enactment' of laws).

40 *Gelman Monitoring* (n 34) para 70; see also J Contesse 'Contestation and deference in the Inter-American human rights system' (2016) 79 *Law and Contemporary Problems* 123 (arguing for a more deferential approach in an era of greater democracy in the Americas).

3.1 Its rationale

The *res interpretata* effect of the Court's judgments is to embed African regional human rights and to potentially shape municipal law towards greater regional cohesion.

The national embedding of the African Court's judgments is based on the premise that the African human rights system, of which the Court is part, is not autonomous or detached from and external to the national legal system, but is rooted within, and shaped by domestic normative or institutional frameworks. Because they are embedded in national law, regional norms no longer serve as a source for reactive recourse to the supranational Court, but – inspired by the concrete cases resulting from other state parties – as a proactive national norm on which reliance can be placed to anticipate and prevent similar violations. By allowing the Court's judgments to take root in all state parties, thereby reducing the need for regional recourse, the *res interpretata* effect serves the principle of subsidiarity.

Res interpretata reliance also promotes coherence and harmonisation by advancing the consistent interpretation of relevant norms across states,[41] turning the Arusha Court's jurisprudence into a shared interpretive framework for all states. The rationale for diffusing the African Court's jurisprudence rests, in part, on the aspiration toward legal harmonisation and the presupposition of a community of shared – or at least cultivatable – articulated values. It anticipates a *standard of protection of an African public order*,[42] or *emerging pan-African ius commune* (or *African common law*) through gradual convergence of national, sub-regional and continental legal norms, institutions and practices around shared African values and treaty commitments.

This aspiration animates the broader project of regional integration embodied in the AU.[43] It finds expression in the AU Constitutive Act and continental governance and human rights frameworks, and is confirmed by the near-universal ratification of the three core AU human rights treaties – the African Charter on Human and Peoples' Rights (African Charter); the African Charter on the Rights and

41 None of the regional courts adheres to a strict doctrine of precedent, but all acknowledge the wisdom, for the sake of predictability and consistency, of avoiding unnecessary departures from their established case law; see, eg, *Swaga* (n 21) para 87.

42 See ECtHR Grand Chamber *Fabris v France* para 57, 'standard of protection of European public order'.

43 Declaration on the theme of the Summit: 'Towards greater unity and integration through shared values' AU doc Assembly/AU/ Decl.1(XVI) para 3.

Welfare of the Child (African Children's Charter); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). These core treaties articulate Africa's core shared values: democratic governance, popular participation, the rule of law, human and peoples' rights and sustainable socio-economic development.[44] When the African Court interprets and applies the open-ended treaty norms in concrete cases before it, it guides actors' potentially divergent normative expectations towards a predictable horizon of expected legal behaviour.[45] Its authoritative guidance provides certainty and predictability, thereby 'stabilising normative expectations' of states and other actors.[46]

While some regard this process as a form of 'law making', in this article the Court's role is rather viewed as *law shaping*.[47] Within a democratic structure, law making, as such, should remain the task of the legislature, whose democratic election legitimates this power. The Court's interpretive precedents may have an 'orientation' or 'fine-tuning' effect on national legislation and policy, but should not bypass democratic processes. The argument that unelected national judges lack the democratic legitimacy to review the decisions of the people's representatives is even more pertinent at the regional level, where there is a much greater distance between the electorate and the African Court judges. Rather, the Court's interpretive precedents should stimulate dialogue, debate and deliberation, and serve as a frame of reference to guide national law-making processes.

3.2 Its basis

Firmly rooted in states' treaty commitments voluntarily undertaken under treaty law, the legal basis of the *res interpretata* of the Court's judgments is state consent.[48] Ensuring that the Court's interpretive precedents are applied domestically to analogous cases, however, is not only rooted in specific treaties, but also serves to define the content of states' good faith commitment under general treaty law.[49]

44 Declaration (n 43) Preamble.
45 A von Bogdandy & I Venzke 'Beyond dispute: International judicial institutions as lawmakers' (2011) 12 *German Law Journal* 987 (highlighting that the Court provides 'general normative expectations').
46 See J Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* trans W Regh (1996).
47 Von Bogdandy & Venzke (n 45) 988.
48 Kallidou (n 2) 108-109.
49 Art 26 (to perform 'its treaty obligations in good faith' and art 27 VCLT (not to seek justification in domestic law for 'failure to perform a treaty').

A distinction should, however, be drawn between the Court's advisory and contentious jurisdiction. While the Court's advisory jurisdiction applies to all AU member states, the contentious jurisdiction applies only to state parties to the African Court Protocol. By allowing *all AU member states* to request advisory opinions,[50] the Court Protocol extends the potential reach of this part of its jurisdiction beyond the states that are party to the Court Protocol. The Court's Rules confirm this widening by requiring *all AU member states* to be informed of advisory requests and allowing them to make 'observations'.[51]

This broadening in reach, in the first place, can be explained by the non-binding nature of the Court's advisory opinions, from which no *res judicata* precedent of course emerges. For these states, the obligation to – at the very least – take the advice of the Court into account, derives from their commitment, under the AU Constitutive Act, to 'protect' human rights.[52] The requirement under the Court Protocol that the Court's judgments be disseminated to *all* AU member states also suggests the wider cross-country relevance of the Court's decisions.[53] In its *Vagrancy Opinion*, the Court confirmed that it has advisory jurisdiction over treaties that enjoy a 'high' (rather than 'universal') ratification status among AU member states.[54] Since the three core AU treaties on which the Court relied have all been ratified or acceded to by *most* AU member states,[55] it is unclear if, and at what point, the Court would consider that the extent of ratification falls short of grounding its advisory jurisdiction. In the operative part of the Opinion, the Court seems to suggest that its guidance to states is based on their ratification of the Charter.[56] A distinction may be needed between the Court's extended jurisdiction over AU treaties and United Nations (UN) treaties. Because the Court's advisory jurisdiction derives from AU membership, it may confine advisory jurisdiction over UN treaties to states that are parties to the Court Protocol, as only those states have expressly accepted the Court's expanded jurisdiction.

50 Art 4(1) African Court Protocol (in addition to all AU member states, AU organs or African organisations recognised by the AU may submit requests).
51 Rule 83(2) 2020 Rules of Court.
52 Art 3(f) AU Constitutive Act.
53 Art 29(1) African Court Protocol.
54 *Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa* (4 December 2020) paras 34-35 (*Vagrancy Opinion*).
55 African Charter (54 ratifications); African Children's Charter (then 49, at time of writing 51 ratifications); African Women's Protocol (then 42, at time of writing 44 ratifications), https://au.int (accessed 22 November 2025).
56 Para 155(vi) (Court declaring that '*State parties to the Charter* have a positive obligation … to comply with the Charter, the Children's Rights Charter and the Women's Rights Protocol (my emphasis).

While the Court's advisory opinions 'provide guidance' to *all AU member* states,[57] the same cannot be said for its judgments in contentious cases. The Court's interpretive precedents emanating from contentious cases have enhanced persuasive authority *only for state parties to the core human rights treaties and the Court Protocol*. All 34 state parties to the Court Protocol have ratified both the African Charter and African Children's Charter.[58] The *res interpretata* principle is derived from the overarching obligation of state parties to the African Charter and African Children's Charter to adopt legislative and *other measures* 'to give effect' to treaty rights.[59] In both treaties, the 'measures' not only relate to the implementation of specific cases, but also to 'giving effect' to the treaty provisions more broadly, including through the Court's interpretative precedents.

In addition, state parties to the Court Protocol agree to the jurisdiction of the Court as the 'independent body that was established specifically to supervise' the Charter,[60] with the exclusive and final judicial power to autonomously 'interpret' and 'apply' the Charter and other relevant human rights treaties ratified by the concerned states.[61] The underlying aim of the Court's power to make 'appropriate orders', namely, *to remedy violations*,[62] can also on a purposive reading of the Protocol be extrapolated beyond *inter partes* disputes. Although the Court Protocol specifically obliges states to comply with the Court's judgment in cases to which 'they are parties',[63] nothing in the wording of the provision excludes the 'general validity' of this obligation (for example, beyond the parties in the specific case).[64]

By including the interpretation and application of a wide array of other 'human rights' treaties within its jurisdiction, the Court's material jurisdiction goes beyond the three core AU treaties. Although there are some differences in treaty acceptance among the 34 states, their obligations largely converge. Although the ratification of the Court Protocol closely matches the ratification of the core AU treaties, treaties such as the African Charter on

57 *Vagrancy Opinion* (n 54) para 37.
58 However, the following four state parties to the Court Protocol have not ratified the African Women's Protocol: Burundi, Chad, Madagascar, Niger.
59 Art 1 African Charter.
60 ICJ *Case Concerning Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo*) (30 November 2010) (*Diallo*) para 66 (describing the Human Rights Committee); arts 1, 2 & 28(2) African Court Protocol (Court is autonomous, and its judgments are binding and not subject to appeal).
61 Art 3(1) African Court Protocol (without a qualification that would support the exclusion of the broader diffusion of its case law).
62 Art 27(1) African Court Protocol.
63 Art 30 African Court Protocol.
64 All 34 states have accepted ICCPR; only Mozambique has not accepted ICESCR.

Democracy, Elections and Governance (African Democracy Charter) reveal larger discrepancies.[65] As far as UN human rights treaties are concerned, all states under the Court's jurisdiction have accepted the Convention on the Rights of the Child (CRC) and almost all have accepted the two Covenants,[66] with the level of acceptance of other treaties varying more.

Taking ratification status as a strict yardstick, and as far as the Court's judgments are based on treaties other than the two core treaties, a 'variable geometry' of observing differing standards may evolve even among the 34 states. The possibility of variable standards applicable to different states within the pool of 34 further arises because the African Court also finds violations of sub-regional treaties, such as the Economic Community of West African States (ECOWAS) Democracy Charter. To the extent that a the African Court's judgment may be based exclusively on such a treaty, the resulting interpretive precedent should, from the strict perspective of state consent, only be applicable to ECOWAS member states that have also become party to that treaty.[67]

3.3 Its authority

Res interpretata has *sui generis* persuasive authority. Neither the term 'legally binding' nor 'legally non-binding' accurately captures its legal authority.[68] Depending on a set of complex contextual legal, political and normative factors, the persuasiveness of a particular *interpretive precedent* will be located on a continuum of normativity,[69] ranging from limited to highly persuasive weight.

It is clear what *res interpretata* effect is *not*. It does not bind states in the same way as treaty provisions. It does not have the immediate binding effect of a judgment concluding a contentious case *between the parties*.[70] It does not constitute binding precedent. In hierarchical

65 See *Houngoue Eric Noudehouenou v Benin* (Judgment) (2020) 4 AfCLR 749 (in which the Court on one aspect based its finding exclusively on the based exclusively on the African Democracy Charter). As of 30 October 2025, 10 states accepting the Court's jurisdiction (Burundi, Congo, DRC, Gabon, Libya, Mauritius, Senegal, Tanzania Tunisia and Uganda) have not become state parties to the Democracy Charter, https://au.int (accessed 30 October 2025).

66 Among the 34 state parties, only Mozambique has not become a party to ICESCR.

67 Only 13 of the 34 states that have accepted the African Court Protocol are ECOWAS members. See, eg, *APDH* (n 20) and *Suy Gohore* (n 20), in which the Court found violations of the ECOWAS Democracy Charter. However, in none of these instances was the ECOWAS treaty the sole basis for the finding.

68 See also Kallidou (n 2) 178.

69 A Boyle & C Chinkin *The making of international law* (2007).

70 See also *Gelman Monitoring* (n 34) Separate Opinion of Mac-Gregor Poisot J (*Gelman Monitoring Mac-Grego*r) para 68.

judicial systems, mostly in the Anglo-American legal tradition, that follow the rule of precedent (*stare decisis*), the legal principles on which a decision of a superior court is based constitute a binding precedent that has to be followed by inferior and equally-ranked courts.[71] Even if the African Court's judgments do not set a binding precedent for states not party to the decided case, its judgments have some precedential value for those states. However, the precedential value must allow states the flexibility to depart from the established legal principle if they offer reasonably persuasive grounds to do so. Interpretive precedents can therefore be understood as not giving rise to an expectation of rigid obedience, but rather to a rebuttal presumption of adherence.[72]

The *res interpretata* effect is also different from 'ordinary' interpretative reliance that domestic courts routinely place on the decisions of international tribunals or foreign courts. For state parties to the African Charter, African Children's Charter and the African Court Protocol, *res interpretata* provides a special enhanced form of interpretive reliance, which prioritises the African Court's case law. 'Prioritisation' can take the form of a routine *consideration* (or taking judicial notice) (as opposed to application), or according presumptive weight to all relevant African Court case law. The African Court's judgments are qualitatively different: Among all international and foreign judicial decisions on which national courts may rely, they are the only ones originating from a judicial body whose *binding* human rights jurisdiction the state has *expressly accepted*.[73]

The interpretive precedents derived from contentious cases are akin to – but also different from – advisory opinions. While merits decisions are 'binding' (between the parties), advisory opinions are not binding, since there is no dispute and no parties. Advisory opinions do not give rise to a formal expectation of compliance. At the same time, since the opinion signals how the Court would likely rule if a similar question arose in a contentious case, a good faith commitment on the part of all relevant states can be assumed. In the Inter-American system, advisory opinions have often been regarded as highly persuasive.[74]

71 G Ulfstein 'Law-making by human rights treaty bodies' in R Liivoja & J Petman (eds) *International law-making: Essays in Honour of Jan Klabbers* (2014) 249-257.
72 Ulfstein (n 71).
73 An exception should here be carved out for ECOWAS member states, falling under the human rights jurisdiction of both the African and ECOWAS Courts; see also part 7 of this article.
74 JM Pasqualucci 'Advisory practice of the Inter-American Court of Human Rights: Contributing to the evolution of international human rights law' (2002) 38 *Stanford Journal of International Law* 284-287.

Although not necessarily constituting 'soft law', as such, the place of *res interpretata* between binding and non-binding makes it akin to 'soft law' standards such the 'views' and 'recommendations' of human rights treaty bodies. The International Court of Justice (ICJ) attached 'great weight' to the findings of the UN Human Rights Committee (HRC), even if it is not obliged to do so.[75] It did so on the basis that relying on the case law of the HRC, the independent supervisory body of the relevant treaty, would provide the clarity, consistency and legal security 'to which both the individuals with guaranteed rights and the states obliged to comply with treaty obligations are entitled'.[76] The same arguments apply to the Court's interpretive precedents.

4 From specific judgments to generalised principles

In this part, the contours of a process to distil principles from the Court's case law are explored, followed by indicative examples drawn from a few of the Court's contentious decisions and one of its advisory opinions.

4.1 The process

General principles are derived from a close reading of the Court's judgments. As the unit of analysis, 'judgment' refers to the operative paragraph (the finding on merits and the reparation orders) and the core reasoning supporting these findings in merits decisions, and the answer and reasons provided to the question(s) posed in a request for an advisory opinion.[77] The challenge is to infer an accurate and substantiated statement of principle from the specifics, without putting words in the Court's mouth by drawing inferences that go beyond the Court's collective finding and reasoning. One of the major factors relevant to identifying a 'general principle' is the clarity and quality of the Court's reasoning.[78] A general principle is most likely to emerge from a sufficiently detailed factual basis cogently linked to a reasoned legal conclusion,[79] and the specificity of the Court's remedial orders. Although it offers flexibility, ambiguity tends to impede the articulation of a general rule or principle. *Obiter dicta*

75 *Diallo* (n 60) para 66.
76 As above.
77 See T Buergenthal 'The advisory practice of the inter-American Human Rights Court' (1985) 79 *American Journal of International Law* 18 (these opinions 'lend themselves more readily than contentious cases to the articulation of general legal principles').
78 Bodnar (n 2) 239-240.
79 Arnardóttir (n 2) 841 (*res interpretata* should be applicable to judgments establishing 'unambiguous positions of principle').

and separate concurring opinions are distinguished from the Court's core reasoning and not made part of the analysis. While separate dissenting opinions do not generate general principles, a lack of unanimity may detract from the persuasive authority – and the *res interpretata* effect – of the Court's judgment.[80]

Given the Court's expansive remedial mandate,[81] a single judgment may give rise to multiple 'general principles'. From among the diverse range of reparations that the Court may order in a single case, guarantees of non-repetition are most likely to generate general principles because they are more readily suited to the inductive exercise of distilling the general from the specific. Judgments covering an 'objective sphere of application that exceeds the parties to the litigation'[82] lend themselves to generalisation. Judgments more firmly rooted in the specific facts and country context of the case, however, would be less suited to such a process.[83] While repetition of a line of reasoning in multiple judgments contributes to the emergence of a stable general principle, due to the limited number of judgments delivered by the African Court, it should be possible for such a principle to also emerge from a single judgment.

General principles emerge from the Court's jurisprudence that goes beyond what is already self-evident. A judgment that simply reaffirms an existing legal obligation, without substantially elaborating on its content when applying it to the facts, offers little by way of clarity beyond what is already well established. When the Court in its evolutive interpretation of particularly open-ended treaty norms, such as the right to dignity, the potential for extracting general principles useful to guide third states increases.[84]

General principles have a particular role when the Court's reasoning is located at the intersection between overlapping yet distinguishable treaty provisions. Because of its expansive substantive jurisdiction, the African Court is competent to find violations not only of AU human rights treaties, but also of the African sub-regional treaties

80 Bodnar (n 2) 241.
81 Art 27(1) African Court Protocol (allowing the Court to order 'any appropriate' remedy).
82 *Dismissed Employees* (n 32), separate opinion of J Ramirez, para 6.
83 See eg *Legal and Human Rights Centre and Tanzania Human Rights Defenders Coalition v Tanzania* Application 39/2020 (13 June 2023) (order not to prohibit bail in very specific circumstances (operative para)); *Centre for Human Rights & Others v Tanzani*a Application 19/2018 (5 February 2025) para 428 (order to amend the Witchcraft Act).
84 *Maige v Tanzania* Application 51/2016 (Merits and Reparations) (5 September 2023) para 143 (drawing heavily from African Commission, UN HRC and European Court decisions).

and UN human rights treaties.[85] However, the Court has tended to find violations primarily of the Charter, often using other treaties – and soft law instruments – to inform and steer its interpretation.[86] However, in a very limited number of cases, the Court *found violations of UN treaties* – either together with AU human rights treaties,[87] or as a self-standing basis of violation.[88] These judgments invite the formulation of general principles because they clarify to states the entitlements of rights holders that go beyond the text of the Charter.

4.2 A first look: General principles derived from the Court judgments in contentious cases

The Court's judgments across a variety of domains hold the potential for rich normative guidance. The general principles identified below, therefore, do not constitute an exhaustive list, but are illustrative of the sizable number and wide range of matters on which the Court has already provided – or at the very least implied – guidance to specific states.[89] The discussion aims to distil general, synthesised guidance from individual judgments that may potentially be applicable to national stakeholders in all concerned states. While some examples are provided here, compiling all the Court's interpretive precedents in a single source demands further research and effort.

Among the Court's considerable case law dealing with criminal justice, general principles may potentially be derived from judgments dealing with amnesties,[90] the nature of criminal offences[91] and forms of criminal punishment. An example of a general principle that has emerged in this domain may be formulated as follows: *States should*

85 Art 3(1) African Court Protocol.

86 See eg *Wanjara v Tanzania* (Judgment) (2020) 4 AfCLR 673 para 70; *Kisase v Tanzania* (Judgment) (2021) 5 AfCLR 728 para 90; *Rutakikirwa v Tanzania* (Judgment) (2022) 6 AfCLR 166 para 73 (Court found violations of art 7(1)(c) African Charter read together with art 14(3)(d) ICCPR).

87 See, eg, *Konaté* (n 12) para 176 (Court found violations of art 9 Charter, art 19 ICCPR and art 66(2)(c) revised ECOWAS Treaty).

88 See *Ajavon v Benin* (Judgment) (2020) 4 AfCLR 133 (*Ajavon*) paras 132-142 (Court found a violation of the right to strike art 8 ICESCR).

89 See also, eg, 'Domestic courts must have the jurisdiction to inquire into the validity of all elections, including presidential election' drawn from *Kambole v Tanzania* (Judgment) (2020) 4 AfCLR 460; 'Legislation should provide for the responsibility of corporate entities, including multinationals, for acts in relation to the environment and the handling of toxic waste' derived from *Ligue Ivoirienne des Droits de l'Homme & Others v Côte d'Ivoire* Application 41/2016 (5 September 2023).

90 See, eg, *Ajavon* (n 88) paras 238-239 (potential principle: States may not allow amnesty for serious crimes, unless, exceptionally, it benefits victims through restorative measures.

91 See, eg, *Konaté* (n 12) paras 163-166, 176(8), in which the Court found criminal defamation laws under the law of Burkina Faso incompatible with the state's obligations under the Charter and ICCPR (potential principle: States should not criminalise defamation).

abolish corporal punishment in criminal settings. The issue of corporal punishment in criminal settings came before the Court in three cases concerning Tanzania.[92] The Court found that Tanzanian law violated the right to dignity and the prohibition against torture and against cruel and inhuman punishment guaranteed under article 5 of the Charter.[93] Tanzania was ordered to 'expunge' corporal punishment from its national laws.[94] Even if the Court's orders allow for legal reform beyond the criminal setting, the general principle derived from these cases is limited to the criminal sphere.[95] As it is formulated, the rule is firmly rooted in three cases; it is clear; it has a comprehensive scope; and is of general application in African criminal justice systems. Another general principle pertaining to criminal justice, namely, that *states should abolish the mandatory death penalty*, can also be distilled from a series of cases against Tanzania in which the Court found that the mandatory imposition of the death penalty constituted an arbitrary deprivation of the right to life.[96] The Court ordered Tanzania to take all necessary measures to remove the mandatory imposition of the death penalty from its Penal Code.[97] In both instances, the emergent principle is based not only on the Court's judgment, but also reinforces the position expressed by the African Commission.[98]

General principles may also be derived from the Court's judgments on several aspects of criminal procedure.[99] The Court's most frequent violations finding relates to the state's failure to provide legal assistance at its own expense to accused persons.[100] Although the Charter does not expressly provide for a right to free legal aid, by relying on the International Covenant on Civil and Political Rights (ICCPR), the

92 *Maige* (n 84); *Kadumbagula & Another v Tanzania* (Merits and Reparations) Application 31/2017 (4 June 2024); *Mtega v Tanzania* (Merits and Reparations) Application 9/2019 (26 June 2025).

93 *Maige* (n 84) para 143; *Kadumbagula* (n 84) para 101; *Mtega* (n 84) para 69.

94 *Maige* para 143; *Kadumbagula* para 101; *Mtega* para 106(xiii).

95 *Maige* para 178(xvi) (ordering Tanzania to amend 'its laws, *including but not limited to* the Penal Code, Criminal Procedure Code and Corporal Punishment Act (my emphasis)).

96 *Rajabu & Others v Tanzania* (Merits and Reparations) (2019) 3 AfCLR 539 para 171 (xv); *Rashidi Nyerere v Tanzania* Application 23/2018 (13 November 2024) para 145.

97 *Rashidi Nyerere* (n 96) (state ordered to 'immediately' remove the mandatory death penalty from its Penal Code (para 145(xv)).

98 See *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) paras 42-44; and General Comment 3 on the Right to Life (art 4) para 24: ('In no circumstances shall the imposition of the death penalty be mandatory for an offence').

99 See eg on the right of detained foreign nationals to be informed of the right to consular assistance *Niyonzima Augustine v Tanzania* (13 June 2023) (violation of art 7(1)(c) Charter, as read together with art 36(1) VCCR, to which Tanzania is a state party).

100 See eg *Thomas* (n 21); *Maige v Tanzania* (5 September 2023) para 172; *Swaga* (n 18) para 112(viii); *Alistedes v Tanzania* (5 February 2025) para 105(xii)); *Noriega v Tanzania* Application 13/2018 (26 June 2025) (finding violations of art 7(1)(c) read together with art 14 ICCPR).

Court developed the following standard:[101] Legal representation at state expense has to be provided to accused persons as a matter of course, without the need for their request, in all serious criminal cases, that is, all offences for which lengthy custodial sentences can be imposed.[102] The emergent rule can in abbreviated form be stated as follows: *Accused persons charged with serious offences should, as a matter of course, be granted free legal assistance.*

Cases brought before the Court have also required it to rule on key governance issues, in particular the management of elections. A principle that has emerged is: *The government should not be over-represented in the composition of the national electoral oversight body.* In *APDH*, the Court found Côte d'Ivoire in violation of the African Charter, the African Democracy Charter and the ECOWAS Protocol on Democracy and ordered it to amend the relevant legislation to provide for a more balanced composition of its Independent Electoral Commission, to guarantee the independence and impartiality of the electoral body.[103] A more complete picture of the legislative expectations of state parties in respect of legislation on electoral oversight bodies emerge from a cumulative reading of *APDH* and *Suy Gohore,* in which amendments to the Ivoirian legislation were subsequently challenged: The composition of the electoral body cannot be 'overly dominated by any political group',[104] and the representation of government and opposition must meet the test of 'balanced' representation.[105] However, the mere representation of political parties does not, as such, undermine the body's independence or impartiality.[106] Other possible general principles emerging from this much litigated area are that (i) candidates who are not affiliated to political parties should be eligible to stand for elected office (at presidential, parliamentary and local government level);[107] and (ii) states should ensure that national consensus is observed when amending or revising their constitutions.[108]

101 Based on reading of art 7(1)(c) Charter in light of art 14 ICCPR, as well as HRC soft law.
102 *Swaga* (n 21) para 87.
103 *APDH* (n 20) paras 116-125, 133, 153(5).
104 Paras 184, 186; see also *XYZ v Benin* (Judgment) (2020) 4 AfCLR 49 para 123 (an imbalance is created when 7 out of the 11 members of an electoral oversight body are under government control).
105 *Suy Gohore* (n 20) para 186.
106 *Suy Gohore* (n 20) para 172.
107 *Mtikila* (n 11) para 111.
108 *Noudehouenou* (n 65) para 123(xii) (Court finding Benin in violation of art 10(2) of the Democracy Charter).

The Court has handed down only a handful of judgments concerning vulnerable groups. In *Ogiek*[109] the Court found Kenya in violation of the African Charter for evicting the Ogiek people from the Mau forest without their free, prior and informed consent. Kenya was required to take 'all necessary legislative, administrative or other measures' to ensure the effective consultation of the Ogiek, 'with the right to give or withhold their free, prior and informed consent'.[110] Although based on a single case, the following general principle – based on the shared core characteristics and challenges faced by indigenous peoples across Africa – can be postulated: *In states where 'indigenous peoples' are present, they should be accorded official recognition and their effective consultation in matters affecting them should be ensured.*

4.3 Principles derived from advisory opinions

As a means of assisting states 'in fulfilling their international human rights obligations', advisory opinions may potentially contribute to shaping public policy.[111] Of the Court's four advisory opinions, its *Vagrancy Opinion* has the greatest potential to steer states towards legal reform.[112] In this opinion, the Court held that the 'vagrancy' laws, starkly reflected as part of legal coloniality across Africa, violate multiple rights in the African Charter, the African Children's Charter and the African Women's Protocol. It expressed particular concern that these laws are often overly broad and allow for abuse, and are disproportionately directed against poor people. Consequently, the Court affirmed that states should repeal or amend laws that criminalise 'being idle and disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer'.[113] From this, the following principle can be formulated: *States should repeal vagrancy offences, especially those targeting vulnerable people exposed to homelessness, poverty or unemployment.*

109 *African Commission v Kenya* (Reparations) Application 6/2012 (23 June 2022) (*Ogiek Reparations*) para 144.
110 *Ogiek Reparations* (n 109) para 150.
111 Advisory Opinion OC-1/82 (24 September 1982), 'Other Treaties', para 25; W Arévalo-Ramírez & A Rousset-Siri 'Measuring the impact of advisory opinions in the Inter-American human rights system: Categorising the effects of advisory opinions in states and the organs involved in their implementation' (2025) 27 *International Community Law Review* 62-79.
112 *Vagrancy Opinion* (n 54); of the other three, only Opinion 1/2020 provides general principles applicable to states.
113 *Vagrancy Opinion* (n 54) para 58.

5 Role of domestic courts in diffusing the Court's case law

This part looks at the role of domestic judiciaries in aligning their interpretations of human rights with the interpretive precedents of the Court.

5.1 Emerging practice

Domestic courts in Africa have only to a very limited extent drawn on the Court's decisions to resolve issues at the national level that are similar to those decided by the African Court in respect of *other states*. Domestic courts' reliance on the Court's judgments in *Konaté* and *Mtikila*, along with its *Vagrancy Law* Advisory Opinion, provide a few examples.

The most pertinent example is the Court's December 2014 ruling in *Konaté*, which found criminal defamation laws under the law of Burkina Faso incompatible with the state's obligations under the Charter and ICCPR. Domestic courts in three African states (Kenya, Lesotho and Malawi)[114] have subsequently made at least some reference to, and decided analogous cases in line with *Konaté*. However, these examples are few and far between and have so far been limited to countries following the common law tradition in which reliance on judicial precedent is more common than in civil law jurisdictions. Not only the scope, but also the extent of reliance has been limited. The three courts have made little effort to integrate the Court's decisions into their reasoning, leaving the impression that these courts' judgments largely mention the *Konaté* judgment when restating the content of counsel's arguments, rather than engaging in a thorough analysis of its persuasive weight as an analogous case with a particular status under international law.

In the first of these decisions, *Jacqueline Okuta & Another v Attorney General & 2 Others*,[115] the High Court of Kenya in 2017 declared unconstitutional the offence of criminal defamation under section 194 of the Kenyan Penal Code. In its reasoning, the Court directly mentions *Konaté* twice, but conducts no analysis of the judgment.[116]

114 Before *Konaté* was decided, the Constitutional Court of Zimbabwe declared unconstitutional a law criminalising defamation (without, of course, referring to Mtikila) (*Madanhire & Matshazi v Attorney-General* Constitutional Court of Zimbabwe (12 June 2014); see also *Madanhire & Another v Attorney General* Constitutional Application CCZ 78 of 2012 [2015] ZWCC 2 (18 February 2015).
115 Kenya High Court [2017] eKLR (6 February 2017).
116 At 3 of judgment.

The Court more extensively quotes the African Commission's Resolution 169, which provides more detailed guidance to state parties to repeal defamation laws,[117] but also does not engage it in its reasoning. It seems fair to conclude that the Kenya High Court gives a cumulative reading of the various international law sources (which extends beyond the African sources mentioned here) and does not seek to highlight the relevance or persuasiveness of any particular source.

In 2018, the Constitutional Court of Lesotho in *Peta v the Minister of Law, Constitutional Affairs and Human Rights* & *Others*[118] also made reference to *Konaté*. However, the Lesotho Constitutional Court merely mentions the *Konaté* decision in a brief two-sentence paragraph, without indicating its relevance or assessing the persuasiveness of the African Court's ruling. While it mentions the earlier Kenyan case of *Okuta*, it does not link that decision to the *Konaté* judgment. Drawing inferences from the more expansive reference to Resolution 169 of the African Commission, it would appear that the normative clarity of this soft law source was more influential in the Court's arriving at its decision than the *Konaté* judgment. However, it is beyond dispute that the Court was, at least indirectly, influenced by the *Konaté* case and the Resolution – among other considerations – in declaring unconstitutional the offence of criminal defamation under Lesotho's Penal Code.

In 2022 Malawi brought a criminal defamation ('libel') case under section 200 of the Malawi Criminal Code against Chisa Mbele over a Facebook post alleging that former defence force General Vincent Nundwe had received funds from a businessman implicated in corruption. Seeking to challenge the constitutionality of section 200, Mbele first had to persuade the Lilongwe High Court to refer the issue to the chief justice for certification as a constitutional matter.[119] The *Konaté* judgment featured prominently before this Court: The legal challenge was framed in terms mirroring its reasoning,[120] and the Court drew heavily on it in reaching its substantive finding in this case.[121] Once the matter had been certified, the Constitutional Court was convened, and concluded that section 200 was

117 Resolution on Repealing Criminal Defamation Laws in Africa ACHPR/Res.169(XLVIII)10 24 November 2010 para 22.

118 *Peta v Minister of Law, Constitutional Affairs and Human Rights* Constitutional Case 11 of 2016 [2018] LSHC 3 (18 May 2018) paras 1, 2, 24 & 25 (*Peta*).

119 *Mbele v R* Misc Criminal Case 4 of 2022 [2022] MWHC 74 (20 June 2022) (*Mbele HC*).

120 It was framed as a violation of the Constitution as well as international human rights standards (art 9(2) African Charter and art 19 ICCPR).

121 *Mbele HC* (n 119) paras 31-36.

unconstitutional.[122] While *Konaté* was one among several precedents cited by the Malawi Constitutional Court, it did receive prominence in the Court's reasoning.[123]

A second example relates to the African's Court's decision on independent candidates, *Mtikila*, handed down in 2013, which has been cited by the South African Constitutional Court in *New Nation Movement v President of RSA* (*New National Movement*).[124] In 2020 the Court declared the South African Electoral Act 73 of 1998 unconstitutional to the extent that it required that adult citizens may be elected to national and provincial legislatures only through their membership of political parties.[125] Madlanga J, who wrote the Court's 'first unanimous judgment', did not apply the 'rule' established in *Mtikila*, but rather explored the relevance of the African Court's judgment in so far as it deals with freedom of association, as provided for in article 10 of the African Charter. Despite noting the textual difference between the African Charter and the South African Constitution,[126] Madlanga J found the African Court's reasoning to be helpful in arriving at the conclusion that the freedom to associate also includes the freedom *not* to associate.[127] This particular finding – supported by *Mtikila* – played an important part in the South African Constitutional Court's conclusion in *New Nation Movement.*

The Court's *Vagrancy Opinion* provides a third example. Although the Malawi High Court did not, in *S v Henry Banda,*[128] strike down section 184(1)(b) of the Penal Code,[129] it nonetheless criticised this provision[130] and, in the process, made extensive reference to the Court's *Vagrancy Opinion*. In an *obiter dictum*, it 'strongly urge[d] the Executive and Legislature to urgently review the said provision'.[131]

122 *Mbele v The Director of Public Prosecutions* Constitutional Case 2 of 2024 [2025] MWHC 20 (17 July 2025) (empanelled bench of High Court judges sitting as a Constitutional Court) (*Mbele CC*).
123 *Mbele CC* (n 122) paras 94, 116, 122-125; the judgment has 165 paras, most of which set out comparative foreign and international case law.
124 *New Nation Movement NPC & Others v President of the Republic of South Africa & Others* CCT110/19 [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020) (*New Nation Movement*).
125 Para 128.
126 Paras 41-43.
127 *New Nation Movement* (n 124) para 43 (referring to the African Court as establishing the following: 'You associate or do not associate as you wish. It is a free exercise of choice. It makes sense that that must be so either way.')
128 *S v Henry Banda* Malawi High Court (22 July 2022) (*Henry Banda*).
129 Sec 184(1)(b) ('every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself; shall be deemed to be a rogue and vagabond').
130 *Henry Banda* (n 128) para 3.2.
131 *Henry Banda* (n 128) para 2.29 ('this Court is in agreement with the African Court's Advisory Opinion position').

The narrative of vertical judicial dialogue remains incomplete without acknowledging the extent to which domestic courts have turned a deaf ear to the African Court. The very dearth of illustrative cases of domestic judicial reliance on the African Court illustrates this point. This breakdown in communication is particularly striking in a country such as Benin, where the African Charter has been incorporated as an integral part of the law. Since the African Court's establishment, Benin's judiciary has shown little receptiveness to the Charter or the Court's jurisprudence, often ignoring, bypassing or deliberately declining to engage with relevant precedents even when cited by counsel.[132]

The reasons for the general avoidance or disregard are varied. Some of the reasons are structural. The question of the form and extent of reliance on the African Court's case law by domestic courts in African states arises in the course of the exercise of their usual and ordinary routine function of interpreting the law. Structural factors detracting from reliance include a lack of legal entrenchment of the treaties; a legal culture suspicious of international law; the status within the 'constitutional bloc' of international law as inferior to the Constitution;[133] and low levels of awareness of and rare reliance by counsel on AU human rights law, including the Cour,t and its case law. In many African states, domestic courts can simply explain that the relevant treaty is not ratified, has not been incorporated or enjoys infra-constitutional status. Factors may also be more case-specific. Domestic courts may contend that they are allowed to resist applying the Court's case law. Grounds for exemption or justification could be that the Court's judgment is against national sovereignty because it undermines the public interest or is 'against public policy'; that it misunderstands or is ignorant of local circumstances; that it represents an external imposition that undermines democratic legitimacy; or that it risks displacing detailed and developed national catalogues of human rights.

Clearly, national reliance on supranational principles is sensitive and complex. To overcome such tensions, it is suggested that an approach is adopted that accommodates this paradox – that it is accepted that the Court has been entrusted with the authoritative interpretation of the Convention and, at the same time, that domestic courts cannot be reduced to mere agents of Arusha,

132 T Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen and others (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 469-490.

133 F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1.

stripped of any discretion. The judicial conversation should not be a monologue. Interpretive authority cannot be unconditional and absolute, especially since it emanates from a source – such as *res interpretata* – that is not formally legally binding.[134]

5.2 Enhancing domestic judicial practice to better embed the African Court's decisions

The jurisprudential survey above reveals that there is little indication of an awareness or understanding among national judges of the uniqueness or importance of the African Court's judgments. On the rare occasions when its judgments are mentioned, they often appear as an indistinguishable part of the domestic court's reasoning, absorbed into a list of diverse sources. Domestic courts seem to view the African Court's judgments through the same prism through which they view the judgments of all other international tribunals and foreign domestic courts.

The argument is that the Court's *res interpretata* findings should in all state parties be afforded a heightened level of persuasive authority, as they represent judgments rendered by a regional court expressly empowered by the ratifying states to interpret a treaty to which they have all bound themselves. The underlying ethos and logic of this framework is the pursuit of interpretive coherence and the realisation of shared normative values among the state parties.

At present, judicial practice is governed by municipal law. Two possibilities of adjusting municipal law to improve the dialogic relationship between the African Court and domestic courts in Africa are outlined below.

The first is legally entrenching interpretive reliance by domestic courts on AU human rights treaties – including the Court's case law. To ensure consistent domestic application of the Court's jurisprudence, national judiciaries' competence – and duty – to apply international law, particularly AU treaties and the African Court's case law, should be entrenched in municipal law. Without such entrenchment, reliance on the Court's case law will be left to the capriciousness of judicial discretion. While this discretion may be effectively guided in legislation,[135] anchoring it in the Constitution

134 See the refusal by some European states to align with the model proposed by the European Court in some exceptional cases (Giannopoulos (n 2) 555-558).

135 In Europe, see, eg, sec 2(1)(A)(a) UK's 1998 Human Rights Act (the 'court or tribunal determining a question which has arisen in connection with a Convention right *must take into account* any judgment, decision, declaration or

guarantees greater stability.[136] By far the most comprehensive in this respect, the Constitution of the Seychelles *requires* domestic courts to take judicial notice of decisions and recommendations of UN and AU human rights treaty bodies.[137]

The second way of strengthening the African Court's relationship with national judiciaries is for domestic courts to be granted the explicit competence to request interpretive guidance from the African Court. While African states have the competence to submit such requests, only two states have to date done so.[138] Although not specifically mentioned in the African Court Protocol, the Court's mandate to hear 'any legal matter' encompasses requests concerning the 'compatibility of domestic laws'.[139] The question arises whether an apex court of an AU member state could under this competence direct a request for an advisory opinion to the African Court. Given the small number of requests submitted to the African Court, a generous interpretation of article 4(1) of the Court Protocol is called for. Allowing also courts – rather than only the executive – to make such a request on a politically sensitive matter may minimise overt national-level politicisation of an issue.[140] Since there is nothing in the Court Protocol to exclude this interpretation, and since 'courts are ordinarily part of the state structure', such an interpretation should extend the meaning of 'state', in this context, to include all organs of state.[141] However, arriving at such an outcome would require that the Court adopt a generous and purposive interpretive approach, which is not what it has consistently done.[142]

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advisory opinion of the European Court of Human Rights') (my emphasis); sec 10(4)(a) Irish European Convention on Human Rights Act 2003; art 17 Ukrainian Law 3477-IV of 2006. For an African example, see sec 24(1) Botswana's Interpretation Act 20 of 1984 (courts *may* use international law as an aid to interpretation).

136 Secs 39(1)(b), 233 South Africa Constitution, 1996; art 43 Mozambican Constitution, 2004; art 13(1) Ethiopia Constitution, 1995.

137 Sec 48 Seychelles' Constitution,1993.

138 These were submitted by Mali and Libya, and were both struck off for technical reasons.

139 See art 64(2) American Convention; also K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 238.

140 F Viljoen *International human rights law in Africa* (2012) 455.

141 See also CA Odinkalu 'Advice without consent? Assessing the advisory jurisdiction of the African Court on Human and Peoples' Rights' (2023) 45 *Human Rights Quarterly* 385-286 ('courts are ordinarily part of the state structure, and it is arguable that the reference to state parties should be ample enough to include them').

142 Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child, Advisory Opinion 2/2013 (4 December 2014) para 74; see also JW Mwangi 'Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, No 001/2018' (2023) 117 *American Journal of International Law* 121, 127 (characterising the Court's overall approach as an 'interpretive philosophy of convenience').

One way in which to strengthen the argument for the domestic judiciary's competence to make such requests under the Court Protocol is for national legal systems to explicitly allow domestic courts to make advisory requests to the African Court.[143] The idea is to enhance the interaction between the African Court and national courts, thereby reinforcing the implementation of the Charter at the national level – without cases actually reaching the African Court. Domestic legislation should, therefore, be developed and adopted to spell out the circumstances and conditions under which such requests may be made. In this regard, the criteria in Protocol 16 to the European Convention,[144] which allows national apex courts to refer requests to the Grand Chamber of the European Court, may be a useful guide.[145] Aimed at preventing Convention violations already on the national level, and at raising awareness of the importance of the Convention among lower courts, these criteria capture the European human rights system's spirit of subsidiarity. By stipulating that the Court's opinions are advisory, Protocol 16 underscores that the primary interpretive responsibility remains with national courts. Such a possibility also exists in the ECOWAS Court of Justice,[146] but the criteria for referral are not developed, and the procedure, to date, has seen limited use in practice.

At the level of the Court, it is disappointing that a related procedure – allowing respondent states, 'for the purpose of executing a judgment', to request the African Court for an interpretation of a judgment against them – has not yielded much fruit.[147] The potential of this procedure as a channel of communication between the African Court and domestic courts has been constrained by the 12-month period within which states must make requests, the limitation of the request to the judgment's 'execution', and uncertainty about when 'the interest of justice' allows for exceptions.

143 See Odinkalu (n 141) 386.

144 Protocol 16 to the European Convention (CETS 214), adopted in 2013, entered into force in 2018. It should be noted that by late 2025, only seven requests were decided, https://www.echr.coe.int/web/echr/advisory-opinions (accessed 17 October 2025).

145 J Gerards 'Advisory opinions, preliminary rulings and the new Protocol No 16 to the European Convention of Human Rights: A comparative and critical appraisal' (2014) 21 *Maastricht Journal of European and Comparative Law* 630-651.

146 See Protocol A/P.I/7/91 on the Community Court of Justice, as amended by Supplementary Protocol A/SP.1/01/05 (2005), art 10(f).

147 Art 28(4) African Court Protocol; Rules 77(1) and (2) 2020 Rules of Court. The procedure has been used successfully in only two cases (*Thomas v Tanzania* and *Abubakari v Tanzania* (28 September 2017)), but did not prove to be particularly enlightening.

6 Diffusing the Court judgments into legislation and policy

While much of the discussion so far has focused on the judiciary's role, reliance on *judicial embeddedness* has clear limitations. Its case-by-case nature – dependent upon access to justice and the initiation of litigation – makes it *ad hoc* and unpredictable and, in many African contexts, the absence of formal legal disputes precludes judicial redress altogether. Limited strategic litigation capacity, low public trust, and barriers faced by marginalised groups further diminish its effectiveness. Therefore, embeddedness must extend beyond judicial decisions to *legislation, policy making, administrative and other executive action*, which can provide more proactive, accessible and systemic protection. Domestic actors – law reform commissions, legislatures,[148] and academics – need to debate and consider the general principles derived from the Court's judgments.

6.1 Applying generalised rules at the national level

Assuming that the guidance outlined above can inform legislatures and policy makers in states beyond the parties to the case, questions arise regarding the *applicability* of these norms within the municipal laws and policies of other African states. Generalised rules should not be imposed on third states, but should be part of a contextual, participatory and dialogic process that is sensitive to legal, socio-political and other national peculiarities. The Court itself has highlighted the value of plurality and diversity when it underlined in *Suy Bi Gohore* that its judgment in *APDH* case does not dictate 'a one-size-fits-all solution on the structure and composition of electoral bodies across the continent, since there is a variety of possibilities that may potentially meet the Court's muster'.[149]

Several factors may shape the potential to transpose the generalised rule to different contexts. Applicability depends on the role of the rule in third states. On the one hand, if most states have already resolved the subject matter of the Court's judgment, the

148 The legal affairs and human rights committees of national parliaments (such as the UK Joint Committee on Human Rights) should, eg, track the evolution of the Court's case law 'in order to detect areas in which legislation and administrative practice in their countries need to be adjusted' (C Pourgourides, Chairperson of the Committee on Legal Affairs of the Parliamentary Assembly, Conference on the Principle of Subsidiarity, Skopje, 1-2 October 2010), http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf (accessed 22 November 2025); MC Tolley 'Parliamentary scrutiny of rights in the United Kingdom: Assessing the work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41-55.

149 *Suy Gohore* (n 20) paras 170-171.

broader continental relevance of the Court's judgment diminishes. On the other hand, where an identified principle is still widely ignored or overridden, its domestic application is potentially more relevant. There are, for example, numerous examples of 'vagrancy offences' inherited from colonial times that still persist in present-day African legislation and by-laws.[150] The persuasive force of the Court's *Vagrancy Opinion* could therefore potentially be brought to bear on all corners of the continent.

The question may be posed as to what the role of divergence or convergence in continental practice (an 'African consensus') should be in assessing applicability. While superimposing a crystallised rule on a society where conflicting values mitigate against its application would curtail diffusion in that country, allowing a state to contradict a core human rights principle would detract from the norm-setting goal of the African human rights system. A distinction may in this regard be drawn between a rule calling for the abolition of the mandatory death penalty, on the one hand, and for the abolition of the death penalty as such, on the other. Between 2007 and 2017, national courts in three of Tanzania's common law neighbours (Malawi,[151] Uganda[152] and Kenya)[153] declared unconstitutional the mandatory imposition of the death penalty. In *Rajabu*[154] the African Court extended this emerging sub-regional practice to Tanzania – at that time an outlier state in the region on this issue. Although this was not explicitly stated in the Court's reasoning, *Rajabu* can be read as an implicit application of the 'consensus' element of the European 'margin of appreciation' doctrine: Because a (sub-regional) consensus had emerged, Tanzania was not allowed much of a 'margin' to deviate. Arguably, the emergent sub-regional practice on the mandatory death penalty should find continental – and not

150 See eg M Killander 'Criminalising homelessness and survival strategies through municipal by-laws: Colonial legacy and constitutionality' (2019) 35 *South African Journal on Human Rights* 70-93; A Meerkotter 'Litigating to protect the rights of poor and marginalised groups in urban spaces' (2019) 74 *University of Miami Law Review Caveat* 7-14; W Holness 'Decriminalising vagrancy offences in Africa beyond the African Court's Advisory Opinion: Quo vadis?' (2021) 5 *African Human Rights Yearbook* 377-400.

151 *Kafantayeni v Attorney General* [2007] MWHC 1 (Malawi Constitutional Court); confirmed in *Jacob v Republic* MSCA Crim App 16/2006 (July 19, 2007) (Malawi Supreme Court of Appeal) (unreported); see also MJ Nkhata 'Bidding farewell to mandatory capital punishment: *Francis Kafantayeni and Others v Attorney General*' (2007) 1 *Malawi Law Journal* 103, 110.

152 *Attorney General v Kigula* [2009] 2 EALR 1 (Uganda Supreme Court).

153 *Mutiso v Republic* Crim App 17/2008 (30 July 2010) (Kenya Court of Appeal); confirmed in *Muruatetu v Republic; Katiba Institute & 5 Others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment) (Kenya Supreme Court).

154 A Novak 'The abolition of the mandatory death penalty in Africa: A comparative constitutional analysis' (2012) 22(2) *Indian International and Comparative Law Review* 268, 277-295.

just sub-regional – application. However, should the Court find that the imposition of the death penalty, as such, violates the African Charter, a number of factors may militate against the application of the resulting interpretive precedent to all states.[155]

The extent of domestic application of a distilled principle will depend on a combination of action on the part of an informed legislature, often requiring the backing of the executive, and the existence of local constituencies and communities of practice evolving in support of the Court-inspired legal reform. Highlighting the role of government suggests a top-down approach. It may well be that such an approach is not inappropriate in much of Africa, where states and state institutions dominate decision making. Involving the relevant government ministries and parliamentarians in the embedding process, through elite learning and elite socialisation, is crucial to shifting the elites towards adopting 'new logics of appropriateness'.[156] In this 'new logic', the Court's case law is viewed as an authoritative source to societal transformation. As much as such a shift requires elite socialisation, this has to be complemented by domestic diffusion of international norms, supported by popularisation and societal pressure in the form of mobilised domestic constituencies. Popular support sometimes is a formal requirement, for example, when referenda have to precede constitutional amendment but, more fundamentally, only genuine popular support can legitimate legislative reforms.

6.2 Shared and specific responsibilities

Domestic action has to be supported regionally. Marching under the umbrella of their 'shared responsibility' for advancing human rights in Africa, all AU organs, but in particular the Court, the Pan-African Parliament (PAP) and the AU Commission on International Law (AUCIL), should strengthen their coordination to ensure that the Court's judgments are embedded at the national level. Political decision making should support the process. Policy organs have an

155 In its current formation, two judges have held this abolitionist view. Invoking the judicial 'praetorian' power of 'interpretation', Tchikaya J in a dissenting opinion (*Lazaro v Tanzania* para 21) takes the majority to task for not using its interpretive ('praetorian') power to declare the death penalty, as such, and the imposition of all forms death sentence, as violating the Charter. The majority steered a more cautious course. It noted that only 18 African states are party to the only UN treaty on the abolition of the death penalty (Second Optional Protocol to ICCPR), https://treaties.un.org (accessed 22 November 2025).

156 JT Checkel 'Norms, institutions, and national identity in contemporary Europe' (1999) 43 *International Studies Quarterly* 83, 90.

important role to play in resource allocation, and in their decisions on the Court's activities.[157]

To allow users to readily grasp the legal significance and implications of its case law, the Court should develop an analytical case law guide in the form of a comprehensive, accessible and regularly updated knowledge-sharing platform of all its decisions.[158] The Court should also systematically and consistently report on its consolidated case law to all relevant AU organs, including the PAP. Diffusion of the Court's interpretive precedents should be integrated into its advocacy missions, its networks and platforms for dialogue. Visits should be used as opportunities to engage with national authorities and domestic stakeholders with a view to infusing *all of its relevant case law* into the national legal system. Similarly, the Court's National Judicial Dialogues should primarily serve as informational and educational opportunities to reflect on how national judges could better understand and more frequently apply the salient principles emerging from the Court's case law.[159] The Court's reasoning should be more robust, detailed and consistent. The protracted nature of the process in *APDH* begs questions about the desired level of specificity in the Court's remedial orders. A strong case can be made that, if the Court's order was more detailed and precise, much of the back-and-forth could have been avoided.

The PAP is empowered to work towards the harmonisation and coordination of the laws of AU member states.[160] It is therefore well placed to derive legislative measures from the Court's work by adopting model laws or recommendations. It should under a standing item discuss the legislative implications of the Court's decisions at all its sessions.

The AUCIL is mandated to conduct research and take action towards the 'codification and progressive development of international law' in Africa, with specific 'attention' to AU treaties and the decisions of AU organs.[161] To this end, it may also propose 'model

157 See, eg, CoE Committee of Ministers, Rec (2021)4 (22 September 2021) para1.5.

158 An excellent example is the European Court's 'ECHR Knowledge Sharing platform' (containing case law guides on all provisions; recent case law updates; and thematic discussions of cases), https://ks.echr.coe.int/web/echr-ks (accessed 20 October 2025); see also HUDOC European Court's online database and search platform.

159 See also the Superior Courts Network under the auspices of the European Court of Human Rights, a key pillar of judicial dialogue within the European Convention system, https://www.echr.coe.int/superior-courts-network (accessed 20 October 2025).

160 Art 11(3) PAP Protocol; Rules 4(1)(d) & (e) PAP Rules of Procedure.

161 Art 4(a) AUCIL Statute.

regulations' emanating from 'emerging trends in states' practice'.[162] The AUCIL, therefore, appears very well placed to guide policy and legislative development across African states though researching and deliberating on the concrete content of the emerging practice emerging from the Court's judgments.

7 Conclusion

Even where direct compliance with the African Court's judgments is limited, its jurisprudence can, based on the principle of *res interpretata,* shape domestic law indirectly in third states when national constitutional, legislative and policy actors draw context-specific guidance from the Court's interpretative precedents. Important principles of law in areas as diverse as the imposition of the mandatory imposition of the death penalty, the provision of free legal aid, election management and official recognition of indigenous peoples can be generalised from the Court's relatively modest jurisprudence. For a court under the weight of challenge against its authority and legitimacy, this could be a timely boost.[163] While not legally binding on states beyond the dispute, the African Court's interpretive precedents have considerable persuasive weight. Where exactly their authority is located on a continuum of persuasion depends on factors such as the nature of the judgment (contentious or advisory) and treaty ratification by the relevant states.

To enhance the domestic effects of the Court's judgments, considerable legal reform is required. In most countries, the African Charter and other AU treaties need to be made an integral part of, and be accorded constitutional status under municipal law.[164] In addition, national law should expressly *require* domestic courts to take interpretive cognisance of AU human rights law, *including the Court's case law,* and should enable domestic apex courts to request interpretive guidance from the African Court.

Of course, embeddedness needs to go wider than the African Court. Beyond enforcing or diffusing the Court's judgments, states should adopt national legislation implementing regional decisions, integrate regional jurisprudence into legal education, and promote the Court's case law in law school curricula to foster the 'Africanisation'

162 Art 4(b) AUCIL Statute.
163 See Jonas (n 1) 748 (contending that recognising the *res interpretata* effect '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').
164 See the Commission's 1989 Guidelines for National Periodic Reports para I.4(a).

of legal culture. Civil society engagement, accessible information, reoriented legal education and an informed media remain essential to embed the African Court's jurisprudence within national legal and societal consciousness.

To be clear, the argument in favour of the third party effect of the Court's judgments is not a call for its prioritisation as 'continental constitutional court' at the expense of providing individual remedial redress.[165] Rather, the argument builds on the Court's practice of addressing *both* the victim's immediate distress *and* the need for longer term transformative reform.

The guiding role of the African Court's judgments, which is the focus of this article, should not be considered in isolation from the complementary and mutually reinforcing standard setting by the African Commission and African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).[166] The obvious difference is that the principles emanating from the Court are derived from binding judgments, while the other two bodies are quasi-judicial in nature. However, experience shows that such a distinction is not decisive, as the persuasive authority of a court's judgment (and soft law generally) depends on a complex network of context-dependent factors.

Although this article focuses on the African Court, it should be recalled that the ECOWAS Court of Justice is also empowered to interpret the African Charter, and has done so in hundreds of cases.[167] Despite its historically narrow remedial approach, the ECOWAS Court has broadened its reparations to include guarantees of non-repetition and orders for legislative alignment with the Charter.[168] A comprehensive review of its judgments is needed to

165 See the call by M Mutua ('The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342 361-362) for such a one-dimensional approach.

166 See, eg, *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011) AHRLR 90 (ACHPR 2011) para 275(iii); and numerous other General Comments, declarations, guidelines, model laws, etc. There may also be important differences between these. Like the Court, the Commission called for the abolition of the mandatory death penalty, but advanced a position favouring a moratorium on the death penalty with a view to its full abolition; see, eg, Resolution on the Abolition of the Death Penalty in Africa ACHPR/Res.416(LXIV) para 4; and ACHPR/Res.42(XXVI)99 and ACHPR/Res.136 (XXXXIV)08. See also African Committee on the Rights and Welfare of the Child and African Child Policy Forum *State of harmonisation of laws on children in Africa* (2025).

167 MT Ladan 'ECOWAS Community Court of Justice as a supranational court and engine of integration in West Africa: Achievements, challenges and prospects' Paper presented at the International Conference of the ECOWAS Court of Justice, Lomé, Togo, 22-25 November 2021 26-27 (347 judgments delivered by 2023).

168 *Incorporated Trustees of Expression now Human Rights Initiative v Nigeria* Application ECW/CCJ/APP/35/40; Judgment ECW/CCJ/JUD/37/23 (23 October

distil complementary general principles to guide national actors in those states that fall under the jurisdiction of both the African and ECOWAS Court.[169]

The question may be posed as to whether it is not wishful thinking to invest in the prospect of cross-country diffusion of the Court's judgments when its orders in specific cases have not been widely complied with. While scepticism is understandable given low compliance rates and state resistance to supranational oversight, a distinction must be drawn between contentious judgments, which are often politicised and resisted, and general principles derived from other cases or advisory opinions, which may face less opposition. Effective diffusion, therefore, requires a context-sensitive, dialogic approach that balances flexibility with the broader goal of building a pan-African human rights *ius commune* in human rights, grounded in convergent national laws and practices shaped by the Court's jurisprudence. As African states increasingly come to repeal and reform colonially-inherited laws, they are likely to look inward, for example, at their local customary laws, but they may also seek guidance from outside. In this process, the judgments of the only African binding judicial institution – the African Court – may serve as a catalyst for continent-wide deliberative engagement on the meaning of an authentic African legal culture based on human dignity.

2023); *Incorporated Trustees of Expression Now Human Rights Initiative v Nigeria* (ECW/CCJ/APP/41/23; ECW/CCJ/JUD/20/25) [2025] ECOWASCJ 17 (9 April 2025).

169 Of the (originally 15, now 12) ECOWAS members, only four (Cape Verde, Guinea, Liberia and Sierra Leone) are not party to the Court Protocol. In 2014, three states (Burkina Faso, Mali, Niger) withdrew from ECOWAS to form the Alliance of Sahel States.