should have been dealt with in a more practical manner; the Court however refused to award compensation for lack of certainty. Under the present global environment of multi-layered crises, acknowledging macroeconomic damage, if a minimum threshold is met, and awarding commensurate compensation seem not only appropriate but also necessary to provide states with an effective remedy for some of the most egregious harms stemming from other states' internationally wrongful acts. As long as a general nexus is confirmed to exist and an estimation of the damage is available even if specific numbers are not calculable, compensation could and should be provided for macroeconomic damage.

Macroeconomic harm is not a narrow or isolated category, but rather a phenomenon that often attends complex international crises. Russia's 2022 invasion of Ukraine is likely to raise various claims of macroeconomic consequences once the hostilities are over. But these problems are not limited to the consequences of hostilities. Compensation claims for macroeconomic consequences may also arise, for instance, in the context of pandemics or other public health emergencies where it can be established that some state or states bears responsibility for the outbreak—requiring an examination of the scope and extent of any compensation due. Given the unprecedented depth and breadth of the diverse crises in the global community at the moment, sorting out what is compensable and what is not under the existing jurisprudence would become all the more important and complex going forward. What should be included in any future contemplation of compensation is how best to account for macroeconomic damages so as to provide for "full reparation," even in the absence of easy quantifiability.

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African Court on Human and Peoples' Rights—vagrancy laws—right to non-discrimination and equality—right to dignity—right to liberty—right to fair trial—right to freedom of movement—right to the protection of the family—children's rights—women's rights—obligations of state parties to the African Charter

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. *At* https://www.african-court.org/cpmt/details-advisory/0012018.
African Court on Human and Peoples' Rights, December 4, 2020.

On December 4, 2020, the African Court of Human & Peoples' Rights (African Court) issued an advisory opinion on national laws that criminalize vagrancy, i.e., "the state or condition of wandering from place to place without a home, job or means of support" (para. 57).[1] The Court considered such laws to be incompatible with the African Charter on Human &

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[1] 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

Peoples' Rights (African Charter), the African Charter on the Rights & Welfare of the Child (Children's Rights Charter), and the Protocol to the African Charter on Human & Peoples' Rights on the Rights of Women in Africa (Women's Rights Protocol). The Opinion declares that all state parties to the African Union (AU) have a positive obligation to amend or review vagrancy laws, which the court explicitly recognized as reflecting the colonial perception of "individuals without any rights" (para. 79).[2] This Opinion highlights the role of the African Court in promoting human rights and championing legal reform in African states. Particularly, it demonstrates how the Court adopts a widely permissive interpretation of its constitutive rules to assert an expansive power to issue guidance to all AU member states.

The Opinion was initiated by a Request from the Pan African Lawyers Union (PALU), one of the leading civil society organizations in Africa. PALU has a memorandum of understanding (MOU) with the AU in which both organizations agreed to cooperate, *inter alia*, toward strengthening the rule of law and promoting legal reform and harmonization of laws on the continent.[3] Prior to filing its Request, PALU engaged in a continent-wide advocacy campaign for the decriminalization of petty offenses. The campaign entailed raising awareness on the disproportionate impact of vagrancy laws on the poor, and advocating for the repeal of those laws. It culminated in the filing of this Request before the African Court.[4]

PALU presented four main arguments as to why vagrancy laws violate African human rights instruments. All but one of these arguments go to common rule of law concerns. First, PALU contended that vagrancy laws punish the status that individuals involuntarily find themselves in, rather than specific acts. Second, they argued that vagrancy laws tend to be overly broad and grant law enforcement officers an impermissibly wide discretion to arrest and detain people, open to abuse and arbitrariness by providing leeway for police officers to harass suspects, investigate unclear offenses, and clear the streets of people the state considers "undesirable." Third, PALU contended that vagrancy laws typically use very imprecise words to define criminality/vagrancy—e.g., "a known or reputed thief," "having no visible means of support," and "give no good account of themselves" (para. 47), further enhancing the state's impermissibly wide discretion. PALU submitted that these terms lack clarity and precision required under the African Commission's Guidelines on the Use and Conditions of Arrest, Police and Pre-Trial Detention in Africa. Lastly, PALU argued, from a broader justice standpoint, that the enforcement of these laws leads to congestion in police cells, overcrowding, and further degradation of prison conditions. Taken together, PALU suggested that these laws functionally criminalize poverty in violation of human rights.

in Africa, No. 001/2018, Advisory Opinion (Afr. Ct. Hum. Peoples' Rts. Dec. 4, 2020), *at* https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/0c6/49b/5fd0c649b6658574074462.pdf.

[2] *See also* Magnus Killander, *Criminalizing Homelessness and Survival Strategies Through Municipal By-laws: Colonial Legacy and Constitutionality*, 35 S. AFR. J. HUM. RTS. 70, 70–71 (2019); Anneke Meerkotter, *Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces*, 74 U. MIA. L. REV. CAVEAT 1 (2019); Sheryl L. Buske, *A Case Study in Tanzania: Police Round-Ups and Detention of Street Children as a Substitute for Care and Protection*, 8 S.C. J. INT'L L. & BUS. 87, 123 (2011).

[3] Memorandum of Understanding Establishing the Framework for Cooperation and Collaboration Between the African Union and the Pan African Lawyers Union, May 5, 2006, *at* https://lawyersofafrica.org/wp-content/uploads/Memorundum-of-Understanding-between-the-AU-PALU.pdf.

[4] Statement by PALU, *African Court Rules Vagrancy Laws Unlawful following Filing by PALU for Advisory Opinion (May 4, 2021)*, *at* https://www.lawyersofafrica.org/african-court-rules-vagrancy-laws-unlawful-following-filing-by-palu-for-advisory-opinion.

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PALU requested the Court's Opinion on the following questions:

1. Whether vagrancy laws and by-laws, including but not limited to, those that contain offences which criminalize the status of a person as being without a fixed home, employment or means of subsistence; and cannot give good account of him or herself violate the African Charter, particularly, the right to non-discrimination and equality; right to dignity; right to liberty; right to freedom of movement; right to protection of the family, and the right to a fair trial.
2. Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's deportation to another area violate the African Charter, and the Children's Rights Charter, particularly, the rights to dignity, freedom of movement, protection of the family, and the best interests of the child.
3. Whether vagrancy laws and by-laws, including but not limited to, those which allow for the arrest of someone without a warrant simply because the person has no "means of subsistence and cannot give a satisfactory account" of him or herself violate the above provisions of the African Charter, and related provisions of the Children's Rights Charter, and the Women's Rights Protocol.
4. Whether State Parties to the African Charter have positive obligations to repeal or amend their vagrancy laws and by-laws to conform with the rights protected by the African Charter, the Children's Rights Charter, and the Women's Rights Protocol, and if so, determine what these obligations are.

The Court also received supportive submissions from the African Commission on Human and Peoples' Rights which presented its Principles on Decriminalization of Petty Offences in Africa. Several regional and national human rights organizations also joined as amici curiae, in support of PALU's position.[5] Additional claims were made by the Open Society Justice Initiative (OSJI), and the government of Burkina Faso. OSJI argued that vagrancy laws are rooted in colonial-era criminal laws and that like colonial regimes, they reinforce patterns of class-based discrimination. The government of Burkina Faso argued that vagrancy laws go to conduct that is better addressed with social rather than penal responses.

The Court determined that it had personal jurisdiction to consider the Request as it was filed by an African organization that is recognized by the AU—considering that PALU has an MOU with the AU, and that PALU is registered in the United Republic of Tanzania but undertakes its activities in other African countries/regions (paras. 23–24). The Court also found that it had material jurisdiction to consider the Request pursuant to Article 4(1) of the Protocol to the African Charter and Rule 82(2) of the Rules of the African Court 2010 which grant it jurisdiction to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument (para. 26). Lastly, the Request was admissible as there was no related application pending before the African Commission (para. 31).

The Court began its analysis by historicizing vagrancy laws in Africa. It noted that these laws were initially adopted to criminalize begging in order to guarantee the supply of cheap

[5] The Network of African National Human Rights Institutions, The International Commission of Jurists, Kenyan Section, The Centre for Human Rights at the University of Pretoria, the Dullah Omar Institute for Constitutional Law Governance and Human Rights at the University of Western Cape, The Human Rights Clinic at the University of Miami, Lawyers Alert in Nigeria, and the Open Society Justice Initiative.

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labor to land owners and industrialists; to reduce costs incurred by local municipalities and parishes to look after the poor; and to prevent property crimes by providing law enforcement officers wide discretion to deal with suspects. The Court suggested that although the justifications for vagrancy have changed, and some are more or less emphasized at different times, these original justifications still remain core to understanding these laws' disciplining function.

The legal definition of vagrancy has also shifted over time, and tends to vary from country to country. The Court found that the term generally alludes to offenses like: "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" (para. 58). Despite the variations, there tends to be a common core: vagrancy laws typically penalize individuals' inability to account for their presence in public spaces. The breadth of these laws is what allows them to fulfill their historical purpose and function, even when those justifications are de-emphasized or swept under the rug.

The Court then examined the compatibility of vagrancy laws with various provisions of the African Charter, the Children's Charter, and the Women's Rights Protocol. It found, first, that the formulation and application of vagrancy laws enables discriminatory treatment of the underprivileged and marginalized on the purported basis of their economic status, including the homeless, disabled, gender non-conforming, sex workers, hawkers, street vendors, and others. Further, it found that these laws' vague and imprecise language is prone to abuse by law enforcement officers. Vagrancy laws and their enforcement were therefore found to be incompatible with Articles 2 and 3 of the African Charter, which protect the right to non-discrimination and equality before the law.

Secondly, the Court found that the formulation and application of vagrancy laws is incompatible with the right to human dignity under Article 5 of the Charter. This is because vagrancy laws unlawfully interfere with the efforts of the underprivileged to maintain or build a decent life, which is an important part of the right to human dignity (para. 80). The labeling of individuals as "rogue," "vagabond," "vagrant," or other similar terms and subsequent forceful relocation to other areas was also found to be inimical to human dignity.

The Court found that vagrancy laws violated a number of further rights. Third, it found that the enforcement of vagrancy laws leads to arbitrary arrests and detentions in unjustifiable circumstances, and is thus incompatible with Article 6 of the African Charter, which guarantees the right to liberty and security of the person, and specifically precludes arbitrary arrest or detention. Fourth, it found that arbitrarily arresting individuals and asking them to prove that they are not vagrants violates the presumption of innocence, a key principle of the right to fair trial under Article 7 of the African Charter. Fifth, the Court found that the forceful relocation of individuals following the determination that they are vagrants is incompatible with the freedom of movement under Article 12 of the African Charter. Sixth, it held that enforcement of vagrancy laws leads to separation of families, and leaves vulnerable family members such as children, the elderly, and disabled without financial and emotional support, incompatible with Article 18 of the African Charter, which guarantees a right to protection of the family. Seventh, that targeting of street children and forceful relocation of vagrants during enforcement of vagrancy laws is incompatible with Articles 3 (right to non-discrimination), 4(1) (best interests of the child), and 17 (right to a fair trial) of the Children's Charter. Relatedly, the Court recognized that vagrancy laws disproportionately affect poor and marginalized women who earn a living by engaging in activities that leave them susceptible to arbitrary arrests and detention, incompatibly with Article 24 of the Women's Rights Protocol (obliging states to protect poor women and women heads of families).

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Finally, the Court declared that all state parties to the African Charter have a positive obligation to amend or repeal their vagrancy laws and bylaws to bring them in conformity with the African Charter, the Children's Rights Charter, and the Women's Rights Protocol. In its view, this obligation extends even to member states who had not ratified those instruments. The Court interpreted the act of ratifying the Constitutive Act of the AU as a positive commitment to uphold human rights for all.

* * * *

While this is the second of twelve requests for advisory opinions before the African Court,[6] it is the first Advisory Opinion to consider the broad compatibility of national laws with the African Charter and other human rights instruments. The Court employed impressive legal innovation to expansively interpret its jurisdiction, and the scope of application of its Advisory Opinion. Notably, the Court concluded that its Opinion applies to all state parties to the African Charter notwithstanding that not all of them have ratified the three human rights instruments under assessment. It based this finding on Article 3h of the Constitutive Act of the AU, whereby all member states of the AU undertake to "promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments." To the Court, this effectively meant that all member states accept to uphold the universal application of human rights for all persons within their jurisdiction regardless of whether they have ratified the various human rights instruments or not (para. 35).

Additionally, the fact that all member states of the AU have jurisdiction to request an advisory opinion from the Court meant that the Opinion would equally provide guidance to all member states of the AU regardless of whether they have ratified the Protocol to the Court or any other AU human rights instruments (para. 37). This expansive reading of jurisdiction illustrates how the African Court has cast itself as an accessible forum for defending human rights through permissive interpretations of the rules governing access, jurisdiction, and admissibility.[7]

This is indeed laudable. However, the effects are not likely to be widely felt because of the Court's past restrictive interpretation of standing to bring requests. In what follows, I analyze the decision briefly across three dimensions: first, the Court's impressive legal innovation in interpreting its jurisdiction, powers, and rights under the relevant human rights instruments; second, the limits of the Court's expansive interpretation for future requests; and thirdly, the question of "effectiveness" in matters that touch on poverty and human rights.

In sociopolitical contexts where colonial legacies pervade law and institutions despite constitutional transitions, courts and social movements can co-create legal openings. The combination of PALU's advocacy and the Court's expansive approach in handling this Request is

[6] Five of twelve were struck out, while five were dismissed for failing to meet jurisdictional requirements under Article 4(1) of the Protocol to the Court, namely that the African Organizations that filed these Requests were not recognized by the AU. *See* ACtHPR Cases, *at* https://www.african-court.org/cpmt/advisory-finalised.

[7] For more on the use of permissive interpretative approaches by regional courts to advance not only their material jurisdiction but also state obligations vis-à-vis substantive rights, see James Thuo Gathii & Jacquelene Wangui Mwangi, *The African Court of Human & People's Rights as an Opportunity Structure*, *in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (James Thuo Gathii ed., 2020). In the context of the European Court of Human Rights, see Julian Arato, *Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 BROOK. J. INT'L. L. 349 (2012).

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instrumental toward building an accessible forum for legal reform through advisory opinions. Being the first Advisory Opinion to consider the compatibility of domestic laws with human rights treaties since the Court's inception, it is worth unpacking what legal and extralegal factors worked to produce this outcome. A big part of this success seems to be a fortunate but contingent institutional alignment within the African Human Rights System, between PALU, the Commission, and the Court. First, PALU's wide experience in strategic litigation, its continent-wide advocacy work and MOU with the AU provided it with legal standing. Second, as much as PALU offered context on the manner in which vagrancy laws are enforced, the AU Commission's "Principles on the Decriminalisation of Petty Offences in Africa" provided an authoritative text for reference by PALU and the Court, avoiding assertions of generalization. Most significantly, the Court took the opportunity to expand its own powers by stating in obiter that its Advisory Opinions provide guidance to all member states of the AU regardless of whether they have ratified various human rights instruments (paras. 35, 37). Further, in examining the compatibility of vagrancy laws with the relevant human rights, the Court borrowed from other international treaties and the AU Commission's Guidelines to cover gaps in the African Charter. For instance, it relied on the International Covenant on Civil & Political Rights (ICCPR) and the AU Commission's Principles & Guidelines on the Right to a Fair Trial and Legal Assistance in Africa to read into the Charter the principle against self-incrimination (para. 90). Similarly, it relied on the ICCPR to ascertain the circumstances where freedom of movement may be limited (para. 98). And, as explained above, it extended the state parties' obligations under the African Charter to require amending or repealing their vagrancy laws or bylaws in conformity with not only the Charter itself, but also the Children's Rights Charter, and the Women's Rights Protocol, regardless of whether they have ratified all these instruments.

But, on the other hand, the Court did not here explicitly turn away from its past restrictive interpretation of Article 4(1) of the Protocol to the Court, limiting access to the Court for advisory guidance. Article 4(1) of the Protocol states that: "At the request of a Member State of the OAU, the OAU, any of its organs, or any *African organization recognized by the OAU*, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments . . ." (emphasis added). In the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP),[8] the Court held that recognition by the AU is symbolized through the granting of observer status in the AU or the signing of an MOU between the AU and an African non-governmental organization or intergovernmental organization. Further, observer status before any African Union organ does not amount to recognition by the Union. The Court has relied on these interpretations effectively to lock out many NGOs that have sought advisory opinions on the basis of their observer status in the AU Commission.[9] The Court has repeatedly

[8] Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP), No. 001/2013, Advisory Opinion (Afr. Ct. Hum. Peoples' Rts. May 26, 2017), *at* https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/1ed/159/5fd1ed1596472204848898.pdf.

[9] *See* Request by L'Association Africaine de Defense des Droits de l'Homme, Advisory Opinion No. 002/2016; Request by Centre for Human Rights, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre, Zimbabwe Women Lawyers Association Advisory Opinion No. 001/2016; Request by the Centre for Human Rights and Coalition of African Lesbians Decisions Advisory Opinion No. 002/2015; Request by Rencontre Africain pour la defense des Droits de l'Homme Advisory Opinion No. 002/2014, *at* https://www.african-court.org/cpmt/advisory-finalised.

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held that such NGOs have no standing to bring requests for advisory opinions because they are not recognized by the AU.[10] This position has been heavily criticized[11] and is a highly restrictive reading of the Court's jurisdiction, because observer status in the AU Commission gives NGOs direct access to file cases before the Court when the state in question has made a declaration accepting the Court's jurisdiction.[12] In addition, it reveals a contradiction in the African Court's philosophy, in which it switches between textualist[13] interpretation of the African Charter, and a permissive approach as demonstrated by this Opinion and other cases[14]—an apparent interpretive philosophy of convenience. At this time, it is not clear whether there are other African civil society organizations besides PALU that have an MOU with the AU. Some scholars have argued that recognition by an organ of the AU such as the AU Commission ought to be construed as recognition by the AU.[15]

Lastly, while the Opinion may provide leverage to individuals and local/regional organizations that litigate rights nationally, the highlighting of intersections between vagrancy laws, poverty, underdevelopment, and degradation of human rights calls for more institutional linkages between AU organs and national institutions. In matters like this Request that touch on the living conditions of the most vulnerable groups in society, declarations from international courts are just one step in the process of legal and social change. In addition, advisory opinions are only aimed at contributing to the operation of institutions by providing non-binding guidance, therefore, questions of effectiveness or compliance do not arise. NGOs that have historically supported the growth of the African Human Rights System can be the link between international courts and national courts,[16] ensuring that there is an opportunity to follow up nationally. They may also lobby for national legislation that mandates institutions such as legislative organs or courts to consider the applicability of advisory opinions in the state in question. This would increase the opportunities for realizing the goals of strategic litigation in the African Court.

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[10] *Id.*

[11] Anthony Jones, *Form Over Substance: The African Court's Restrictive Approach to NGO Standing in the SERAP Advisory Opinion*, 17 AFR. HUM. RTS. L.J 320 (2017).

[12] Protocol to the African Court, Art. 34(6).

[13] For instance, by its strict interpretation of Article 4(1) of the Protocol to the Court which gives legal standing to request advisory opinions. According to the Court, "an organization recognized by the AU" strictly means organizations that have an MOU with the AU and does not include an organization recognized by an AU organ. *See* Jones, *supra* note 11, at 328.

[14] Gathii & Mwangi, *supra* note 7.

[15] Frans Viljoen, *Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights*, 67 INT'L & COMP. L. Q. 91 (2018); Jones, *supra* note 11.

[16] *See, e.g.*, Kevin Hopkins, *The Effect of an African Court on the Domestic Legal Orders of African States*, 2 AFR. HUM. RTS. L.J. 234 (2002).