

**WHEN RIGHTS COLLIDE WITH REALITY: AN ARGUMENT FOR A DIALOGIC
APPROACH BY THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS TO
THE 'EFFECTIVE REMEDY' PRINCIPLE BASED ON A DISTRIBUTIVE JUSTICE
ETHOS**

Submitted in partial fulfilment of the requirements for the degree LL.M

(Human Rights and Democratisation in Africa)

by

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30 October 2011

Declaration

I, the undersigned **BUSISWE DEYI**, do hereby solemnly state that this work is presented in its original state and has not been submitted to any other institution of learning for consideration in fulfilment of an academic requirement. While I acknowledge that some of the views used herein were taken from writings of other scholars, the sources have been fully acknowledged.

Signature

Date

Supervisor : CHRISTOPHER MBAZIRA

Signature.....

Date.....

Dedication

To the legal minds who have dedicated their intellectual power to giving a voice to the voiceless

Aknowledgements

My gratitude goes to the Centre for Human Rights for affording me the opportunity to take part in this wonderful and worthwhile programme for the advancement of human rights and dignity in Africa. Special gratitude is due to Prof. Viljoen, Prof. Michelo Hansungule, Martin Nsibirwa, ChaCha Murungu , Japheth Biegon and the lovely John Wilson for their academic and administrative guidance.

My sincere thanks are expressed to the members of the Faculty of law at Makerere University for their unconditional support during my stay in Uganda. I am particularly indebted to my supervisor, Dr Christopher Mbazira, for his tolerance and patience with my academic thought process. Most importantly I would like to express my love to my nunupants Lady Godiva Mrembo and Susan Mirembe.

I am grateful to my parents, family and friends whose support, help and prayers have contributed to the success of my LLM studies. The tireless support of my mother, Sylvia Deyi, father Curnick Deyi, and my aunts, Helen Pandliwe, Nombulelo Zuzan and my uncle Siqibo Ezra Deyi and his wife, deserves a particular mention.

Finally, I would like to thank my classmates of the LLM 2011 for providing vigorous mental and creative stimulation. Gina Nyalugwe deserves a special mention, thank you for the laughter, the support and the great cooking.

Acronyms

| | |
|---------|--|
| ACHR | American Convention on Human Rights |
| ACHPR | African Charter on Human and Peoples' Rights |
| AfCHPR | African Court on Human and Peoples' Rights |
| AfCmHPR | African Commission on Human and Peoples' Rights |
| AU | African Union |
| CAT | Convention against Torture |
| CEDAW | Convention on the Elimination of All forms of Discrimination Against Women |
| CERD | Convention on the Elimination of All forms of Racial Discrimination |
| CoM | Committee of Ministers of the European Council |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| ICCPR | International Convention on Civil and Political Rights |
| ICJ | International Court of Justice |
| PCIJ | Permanent Court of International Justice |
| WWII | World War Two |

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Chapter One

Introduction

1.0 Background

The African Court on Human and Peoples' Rights (AfCHPR) was created amidst great criticism to the ineffectiveness of the African Commission on Human and Peoples' Rights (AfCmHPR) in protecting human rights on the continent.¹ After much debate, spanning four decades the Protocol on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) was adopted by the Organisation of African Unity Assembly and entered into force on the 25th of January 2004. Later the 4th AU summit in January 2006 elected the eleven judges of the Court.

The motivation behind the formation of the AfCHPR was the need for greater protection of human rights on the continent. The recommendatory status of the AfCmHPR findings was viewed by many as the stumbling block that prevented states from implementing the findings of the AfCmHPR.² The creation of the AfCHPR is viewed as the bridge needed for the realization of human rights on the African continent.

On the regional level, the African human rights protection system has always been viewed as 'weak and ineffective as it lacked an institution capable of producing enforceable decisions mainly because the one body that has a protective mandate with respect to human rights can only make non-binding recommendations.'³ The ineffectiveness of the AfCmHPR due to the lack of judicial powers was seen as evidence of a lack of commitment to human rights by African states. In pursuance of a strong re- commitment to human rights and human rights enforcement the AfCHPR is vested with wide remedial powers.

Vested with relatively wide jurisdictional powers within its interpretational mandate⁴ and remedial mandate⁵, the AfCHPR is, in this authors view, at the cusp of ushering in and adding a

¹ E G Nalibandian 'The challenges facing the African Court of Human and Peoples' Rights' (2007) *Mizan Law Review* 75.

² Above,75.

³ Above .

⁴ Art 3(1).

⁵ Art 27(1).

new dimension to the discourse on the principle of an 'effective remedy' within the context of human rights protection.

One of the foundational principles of international human rights law has been that the victims of human rights violations have a right to an 'effective remedy'.⁶ The remedial rules underpinning this principle have been developed and adopted from rules based on inter-state disputes and consequently resulted in an individualistic approach to the issue of remedial construction.

Through its interpretational and remedial powers the AfCHPR can and should look at redefining the 'effective remedy' principle in a manner that will aid the inculcation and adoption of a culture of human rights respect and the systematic institutionalization of human rights guarantees.

The AfCHPR is competent in three ways, namely, a) contentious⁷, b) advisory⁸ and c) conciliatory.⁹ It is under its contentious jurisdiction⁹ that the Court has the power to condemn violations and to order 'appropriate remedies'.¹⁰ This jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights (ACHPR), the Protocol and any human rights instrument ratified by the state that is party to the preceding. This opens up the possibility of the incorporation of international obligations that do not arise from the African regional human rights system.

With the unique political, economic and social dynamics of the African continent, the court cannot and should not follow the current theoretical underpinnings that inform the contemporary form of justice and the remedies given in fulfilment thereto. This study argues for a re-conceptualization of the remedial rules and the theoretical foundations thereto. The AfCHPR must look at a form of justice that not only considers the individual complainants before it but a form of justice that will seek to ratify the systematic and institutionally sustained human rights violations.¹¹

The current absolutist 'full remedy'¹² approach to human rights remedies would only result in addressing the resultant symptom and not the root cause of the violations. The court needs to

⁶ SB Starr 'Rethinking Effective Remedies : Remedial deterrence in International courts' (2008) *New York University Law Review* 693.

⁷ Art 3(1).

⁸ Art 4.

⁹ Art 9.

¹⁰ n 5 above.

¹¹ C Mbazira 'Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice' (2008) *South African law Journal* Vol 125(1) 71.

¹² n 6 above, 699-706.

develop remedial alternatives that are based on equity and a balancing of the inter-dependent interests/needs/rights that inevitably come into play. In other words a remedial approach which recognises the polycentric nature of human rights.

1.1 Statement of the research objective

This study aims to critically analyse the theoretical underpinnings that anchor the 'effective remedy' principle in international human rights law. In this regard, this study aims to deconstruct and critically assess the suitability of the current approach to remedial redress.

The study will demonstrate the unsuitability of the current absolutist and individualistic nature of the current approach to the 'effective remedy' principle. It will further expostulate why in its current form, the prevailing theoretical approach to remedial redress is inappropriate in dealing with the human rights issues that are systematic and endemic in the African continent. The human rights violations, encountered on the African continent, are often symptoms of the much larger problem of impunity and a culture of disregard of fundamental human rights.

By demonstrating the viability of a reconstruction of the theoretical underpinnings of remedial principles by the AFCHPR, this study seeks to assist the court in constructing remedial orders that will be prospective and enable better observation of human rights by states on a national level. A critical analysis of the current shortfalls of the prevailing theoretical underpinnings which have informed the current jurisprudence on the 'effective remedies' principle will point to the need for a paradigm shift in how the court is to define its remedial jurisdiction.

1.2 Research Questions

This study will centre around the question of how through the re-conceptualization of the theoretical foundations of the 'effective remedy' principle the AfCHPR can begin to foster a culture of human rights compliance and enforcement.

In answering this question, this study will answer the following auxiliary questions;

1. Why is the current theoretical approach to the 'effective remedy' principle inadequate as the foundational basis for the granting of remedies, within the African context?
2. How a dialogic approach based on a distributive justice ethos will assist the AfCHPR in fulfilling its human rights mandate.

3. How the re-conceptualization of the prevailing theoretical foundations will foster a culture of human rights observance at the national level?

1.3 Literature Review

There has been a lot of writings on the AfCHPR by various academics exploring different aspects of the AfCHPR. *Nalibandian*¹³ has explored the challenges facing the AfCHPR with regard to the lack of consistency and co-ordination in the way that the common (human rights) goals are approached by the different AU bodies. *Elsheikh*¹⁴ wrote on the future relationship between the AfCHPR and the AfCmHPR. He argues that in view of the two institutions complementary relationship there should be a consultation between the two institutions rules of procedure in line with their complementary functions.

Various authors¹⁵ have written on various aspects and embarked on comparative analysis between the AfCHPR and its regional counter-parts.¹⁶ However there has been no focus on the subject of how the court will use its article 27(1) powers to ensure that there is a progressive inculcation of human rights through its decisions at the national level.

*Starr*¹⁷ explores the detrimental effects that are caused by the current remedial theories that informed effective remedy jurisprudence. She argues that International criminal courts, because of the absolutist nature of the current remedial theories were interpreting rights narrowly so as to avoid giving reparations. This she termed 'remedial deterrence'.

*Mbazira*¹⁸ in his PhD thesis sought to explain the theoretical foundations that informed the form of justice that the South African Constitutional Court (CC) was inclined towards. He made the observation that in order to address the systematic and institutionally enduring human rights violations, a court had to look at and balance the interests of third parties.

¹³ Nalibandian (n 1 above).

¹⁴ IAB Elsheikh 'The future relationship between the African Court and the African Commission' (2002) *African Human Rights Law Journal* 252.

¹⁵ AP van der Mel 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) *African Human Rights Law Journal* 27, VO Orlu Nmehielle 'Towards an African Court of Human Rights: structuring and the Court' (2000) *Surv International & Comparative Law* 27, A O'Shea 'A Human Rights Court in an African Context' (2000) Vol. 6. 2 *Commonwealth Law Bulletin* 1313.

¹⁶ R Murray 'A comparison between the African and European Courts of Human Rights' (2002) *African Human Rights Law Journal* 195.

¹⁷ Starr (n 6 above).

¹⁸ Mbazira (n 11 above).

He however did not explore the re-conceptualization of the theories that inform remedial jurisprudence in the international sphere of human rights enforcement. The above authors do not explore the remedial capabilities and potential of the AfCHPR, more over they do not investigate into the appropriateness of the use of alternative remedial doctrines as a tool through which the AfCHPR can inculcate and foster a culture of human rights respect and observance. For these reasons this study is unique and relevant within the contemporary debate on possible mechanisms as how to better ensure the observance and respect of human rights at the regional African level.

1.4 Research Methodology

The research methodology is qualitative in nature and library based as it will rely on the workings of other scholars to inform its conclusions on the various aspects of this study. The second chapter will involve an exploratory documentary analysis and the third chapter will involve a comparative analytical documentary study.

1.5 Chapter Overview

This study will consist of four chapters. **Chapter one** will principally set out the content and objective of the study. **Chapter two** will be a critical analysis of the contemporary theoretical foundations of the 'effective remedy' principle in international human rights law. This chapter will further explore the potential short comings, and reasons thereof, of the contemporary theoretical foundations to the 'effective remedy' principle within the African context. **Chapter three** will be aim to anchor the proposed dialogic approach based on a distributive justice ethos in international law principles and jurisprudence, within both international and national jurisdictions. Through an analysis of regional and national jurisprudence, this chapter will aim to demonstrate an evolving trend and shift towards a distributive justice ethos in the construction of remedial measures. **Chapter four** will comprise conclusions and recommendations drawn from the previous chapters.

Chapter Two

Chinks in the conceptual foundation

2.1 Introduction

The contemporary theoretical foundations that sustain the right of victims of human rights violations to an 'effective remedy' are substantially based on the private law tradition.¹⁹ The consequence of this private law approach is that the scope of the remedy flows directly from the right.²⁰ This 'rights-maximizing' paradigm in which remedies are designed to vindicate the underlying rights at all costs²¹ is fundamentally flawed as it is individualistic, victim orientated, monetary centred, and does not take into consideration the current nature, extent and character of human rights violations within the African continent.

Chapter two will critically analyse the contemporary normative framework and explore possible alternatives in the construction of remedial measures. This chapter seeks to explore the unsuitability of the current theoretical foundations that currently inform the right to an effective remedy. The purpose of this chapter is to highlight the lack of congruency between the inherited traditional paradigm of remedial adjudication and the nature and character of human rights in international human rights law. The discussion then explores possible sources from which the court could draw directive indicators in creating an alternative and relevant remedial approach for the African context.

2.2 A bipolar foundation too an amorphous structure

The principle which asserts that there is 'no right without a remedy'- *ubi ius ibi remedium* has become one of the core pillars that supports international human rights law.²² Although the exact status of this principle under customary law is disputed,²³ it has come to be a prominent feature in international and regional treaties. The Universal Declaration on Human Rights

¹⁹ SB Starr (n 6 above).

²⁰ Above,755.

²¹ Starr (n 6 above),698.

²² GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 446.

²³ TM Antkowiak 'Remedial approaches to human rights violations: The Inter- American Court of Human Rights & beyond' (2008) 46 *Columbia Journal of Transitional Law*,355.

(UDHR) provides that every person has the right to an effective remedy by a competent tribunal in cases of human rights violations under law.²⁴ Taking the baton from this milestone document, other international human rights treaties have also included a provision to this effect.²⁵

However, the above provisions do not adequately address the dual nature of the 'effective remedy' principle. The right to an effective remedy essentially has two aspects, a procedural element which entails the right to have access to and be heard by judicial, administrative or other similarly designated authorities when alleging a violation of human rights. The second element is a substantive, one which entails the result of those proceedings, that is the relief resulting from the procedural process/aspect.

Regional human rights instruments have gone some way in providing some substantive flesh on the issue, but the provisions are scant and vague.

The European Convention on Human Rights (ECHR) provides:

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford *just satisfaction* to the injured party.²⁶

Its Latin- American counter-part is much more expansive in jurisdictional scope but still as vague in depth and substantive scope with regards to the types and nature of remedies that the Inter-American Court on Human Rights may grant. Article 63(1) of the American Convention on Human Rights (ACHR) provides that:

[A] violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

The youngest addition to regional human rights protection, the AfCHPR also contains, in its constitutive document, a similarly generously worded provision on remedial redress, however the content of the meaning and scope of remedial redress has been left open to judicial interpretation. Article 27(1) of the Protocol provides:

²⁴ Art 8.

²⁵ Art 2(3) ICCPR, art 14 CAT, art 2 CEDAW and art 6 CERD, art 7(1) ACHPR provides for the right to have ones cause heard by a national tribunal but does not provide explicitly for the right to an effective remedy.

²⁶ Art 41, emphasis added.

If the Court finds that there has been violation of a human or peoples' right, it shall make *appropriate orders* to remedy the violation, including the payment of fair compensation or reparation. (*emphasis added*)

All three of these regional instruments do not expand on how the 'consequences' of human rights violations may be 'appropriately' remedied and the scope of and meaning of 'just satisfaction'. Judicial interpretation has been the space that victims have turned to in order to give the provisions depth and scope.

2.3 Flawed foundation makes for a flawed result

The theoretical foundations that have anchored this principle in international human rights law have resulted in an almost ironclad rule that cannot sufficiently address the systematic, institutionalized and endemic nature of human rights violations within the African continent.

The right to an effective remedy evolved from remedial principles that were based on the equality of the parties. The right is premised on the idea that the purpose of remedial vindication should be to make good the injury caused to persons or property by a wrongful act.²⁷

The transplantation of the principles governing inter-state responsibility into the arena of human rights has inadvertently widened the gap between the right and the ability of a remedy to vindicate the right.

The basic principles governing the remedial law were set out in the *Chorzow Factory Case* in the judgment of the Permanent Court of International Justice (PCIJ). The court held that:

'The essential principle contained in the actual notion of an illegal act...is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'²⁸

The basic purpose of the principle is to re-establish the position of equality-between equal states- that was rendered unequal by the wrongful act. The presumptive basis of the purpose was reflected in how the PCIJ conceptualized the effective ways through which a party could discharge their international obligation.

'[R]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; award, if need be, of damages for loss sustained which would not be

²⁷D Shelton *Remedies in International Human Rights Law* (2005) ,20.

²⁸ *Factory at Chorzow (Germ. v. Pol.)* PCIJ (16 December 1927) 1928 Ser A No 13.

recovered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.²⁹

This position was reflected and anchored in the PCIJ perception of who had rights and obligations in terms of international law when it stated that:

‘[T]he rules of law governing reparations are rules of international law in force between the two states concerned and not the law governing relations between the state which has committed a wrongful act and the individual who has suffered damage’³⁰

In other words only states, as the subjects of international law, could exercise their right to claim reparations where there had been a breach of an obligation with regard to and entitlement.

This principle has filtered through into contemporary international law without modification, in the nature of the claim and the theoretical underpinnings of remedial construction. The International Court of Justice (ICJ) confirmed the full reparations approach underlying the substantive aspect of the ‘effective remedy’ principle in *DRC v. Uganda*³¹ ;

‘[T]he Court observes that it is well established in general international law that a state which bears responsibility for an internationally wrongful act is under an obligation to make *full reparation* for the injury caused by that act...’³²

The remedies that flowed from this principle are ones that, within the nature of the human rights violations on the continent, do not and cannot ensure the non-reoccurrence/ or a limiting of the violation.

The current jurisprudence on remedial law has centred around the deterrence of human rights violations. ‘Arbitral tribunals frequently restate the theory that reparation ‘must wipe out all the consequences’ of the illegal act’³³, the language is one of retrospective deterrence, ‘like remedies in private law cases, human rights remedies also must aim to deter behaviours that presents a danger that exceeds its social value’.³⁴ This private law tradition was reiterated in

²⁹ *Chorzow Factory*(n 28 above).

³⁰ *Factory at Chorzow Case (Germany v. Poland)* PCIJ (13 September 1928) 1928 Ser A No 17.

³¹ *Advisory Opinion Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* ICJ (19 December 2005) (1999) I C J para 259.

³² Above, para 259.

³³ Shelton (n 27 above), 53.

³⁴ Above.

the ICJ's characterization of a claim in its advisory opinion on *Reparations for Injuries Case*³⁵ when the ICJ espoused that;

'[s]uch a claim takes the form of a claim between two political entities, equal in law, similar in form...'³⁶

This private law formulation of a claim feeds into an approach that seeks to redress the inequality caused by a violation, negating the inequality of the parties and the intersectional character of human rights interests.

This formulation is underpinned by the 'rights maximizing' approach, an approach which has as its central consideration only the rights of the victims before it. This absolutist approach does not allow for 'a remedy that does less than eliminate all the vestiges of the violation.'³⁷

The retrospective restoration principle was transposed into the jurisprudential history of human rights as a means to anchor state responsibility and hold states liable for the violation of human rights. The requirement that the victim of the violation be restored to a 'notional *status quo ante*'³⁸, although highly inspirational and commendable, fails to take into consideration the 'amorphous and sprawling'³⁹ character of human rights violations in the African context.

Rooted in a traditional private law adjudication model where the right and the remedy are necessarily linked by liability and causality, the restorative principle allows for little judicial discretion in the crafting of a judicial remedy that not only addresses the violation but also seeks an innovative manner to regulate the state party's future interaction with its citizens.

The received tradition is well suited for defining features of inter-state, as opposed to party-citizen, litigation. However the *Chorzow Factory* corrective remedial model is ill equipped in dealing with the public law features of human rights law litigation, which necessitate an interest/needs balancing-equitable approach.

³⁵ *Reparation for Injuries Suffered in the Service of the United Nations* ICJ (11 April 1949) (1948).

³⁶ *Reparations for Injuries* (n 35 above), 7.

³⁷ P Gerwitz 'Remedies and Resistance' (1983) 92 *The Yale Law Journal* 590.

³⁸ A Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1281.

³⁹ Above 1284.

2.4 Morphology of the litigation landscape

The contemporary approach to the substantive aspect of the principle of the right to an effective remedy is essentially based on corrective aspirations. The *restitutio in integrum* principle recognizes the need to direct efforts in the rectification of wrongs committed in the past. In other words it seeks to purge the present of the past but fails to build foundations for the future. This theoretical approach is fundamentally flawed as it fails to recognize the institutional and systematic nature of the human rights violations that occur in the African context.

The make-whole theory is based on a notional conception of equality between two adjudicating parties. In tracing the historical origins of the right to a remedy, one can see that the contemporary approach of remedial redress and construction are best suited for the rectification of bilateral obligations based on the notional presumptions of sovereign equality. The transposition of this 'self-contained rationality'⁴⁰ to the multi-dimensional, interdependent and polycentric nature of human rights, although justifiable, was ill conceived.

Put differently, the narrow adjudicative space created through the adoption of the corrective theoretical approach is a product of the institutional composition and theoretical underpinnings that informed international law at the time. The ICJ, as the judicial arm of the United Nations (UN) was constituted on the premise of state sovereignty and on abstract notions of the equality of states as members of the international community. Individual citizens and their rights as autonomous and collective holders of rights were relegated to the position of incidental beneficiaries of international relations between state actors.

In other words citizens could only vindicate their 'rights' for wrongs done upon them through their domicile states. The relationship between the government of a particular state and its citizens was not privy to international scrutiny by a supranational judicial body. The ICJ was to oversee the vertical relations of states and not the horizontal relationship between a state and its citizenry.

Thus the current status quo with respect to the structuring of remedial redress is derived from an adjudicative regime that was meant to regulate bilateral interactions, based on notional

⁴⁰ K Roach 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* 870.

sovereign equality of the state actors. Thus the 'effective remedy' principle is structured along the following features⁴¹;

1. The remedy is **bipolar**- there is an underlying presumption of equality that permeates to the resultant product/remedy of the adjudicative process. The Courts focus on the retrospective correction of past wrongs is informed by a presumption of rectifying an inequality between equals.
2. The effect of the remedy is **retrospective**- The primary purpose/aim is to make the victim whole, as if the impugned violation had not occurred.
3. The **right and the remedy are interdependent** - thus the court fashions a remedy that addresses the violations upon which the complaint is rooted in. In other words there is a reactionary causal relationship between the right and the remedy.
4. The cumulative effect of the above characteristics render the remedial redress which is the end product of the litigation process, one that is **self-contained**. The impact of the process and the end result, the remedy, is confined to the parties directly involved and affected in the case.

Because the adjudication system is geared towards addressing bilateral transactions, based on abstract notional equality, the remedy that was espoused to be fitting in addressing instances of inequality, brought about by the actions/inaction of one of the sovereigns, was structured along the precepts of re-establishing a *status quo* of equality.

Therefore the theoretical foundations of remedies transposed into human rights law are laced with vestiges of a system whose defining characteristics are victim-centred, thereby creating a unitary and diametrical adjudicative space.⁴² This space produces an end result which is retrospective as per the parties involved and fails to address the root cause of the violations.

⁴¹ Chayes (n 38 above) 1282-1283, adapted from the authors capsule description of traditional conception of adjudication.

⁴² Roach, (n 40 above).

2.4.1 An alternative approach to a human rights model

As has been expounded above, the current theoretical foundations that inform the right to a remedy are informed by the application of a private law methodology to human rights disputes. Although the aspirations of the retrospective corrective approach are noble, it will fail to inculcate a culture that fosters a respect for human rights.

This is a result of incoherence in the adjudication methodology applied and the interdependent and cross-sectional nature of human rights. The AfCHPR needs an alternative approach to remedial redress. An approach that is not only alive to the complexities of human rights adherence and respect on the African continent but is also alive to social, economic and cultural interests that inter-mingle on the compliance landscape.

Many of the human rights guaranteed in human rights instruments cannot be enjoyed individually. The perception that the state can guarantee human rights through non-interference has long been proven as a fallacy within the context of human rights. This is especially true with regards to the African continent. The African Charter on Human and Peoples' Rights (ACHPR) recognized the integrated and cross-sectional nature of human rights in its preamble. Accordingly central to the ACHPR conception of the right to development is the recognition that civil and political rights and socio-economic rights are mutually supportive and that one cannot satisfy the former without addressing the latter.

The socio-economic and political landscape of the African continent is heterogeneous and as such human rights have to be applied with a deliberate, systematic and purposeful commitment to the eradication of the culture of impunity and disregard of human rights. The ACHPR must approach remedial redress as a means through which it can not only give redress for past wrongs but as a means to continuously build on the future in order to address the continuing needs of entire populations/groups/classes of people.

In order to begin to build a jurisprudence that is fitting for the African context, the AfCHPR must recognize the public nature of human rights and come to the inevitable realization that human rights and their violation are characteristically public and therefore the disputes adjudicated upon must necessarily be treated as public disputes.

The current jurisprudential interpretation and remedial construction will not serve the African context and most importantly will not halt and eradicate the perpetuation of human rights violations.

The traditional conception of a human rights dispute, and the remedial measures that result, as a self-contained process must be disregarded by the AfCHPR. The AfCHPR must begin with a perspective that is rooted in the public law legal paradigm. The trail justices will necessarily have to disregard the traditional conception as 'neutral arbiters' and their role as being to merely apply the law to the facts presented before them.

Further, the court will have to be conscious of the multiparty structure. There has to be judicial recognition that the litigation space stretches beyond the parties to the dispute and that there are social and third party interest to be taken into consideration.

In recognising the public nature of the dispute the court must also disregard the traditionally adversarial methodology that has been characteristic of the judicial process. The justices must be able to temper the process with processes of negotiation and compromise, particularly at the point of issuing a remedy.

Most importantly the AfCHPR must approach the adjudication process not as a dispute but as a comparative evaluation of competing interests. This will enable the court to peel open the dispute and identify alternatives to a winner-takes-all outcome.⁴³

With this approach in mind, the determination of the law becomes not 'simply a pronouncement on the legal consequences of past events, but a prediction of what is likely to occur in the future.'⁴⁴

Should the AfCHPR begin to approach a dispute, not as a private process but, as a public process and thereby adopt a public law methodology, it will be able to issue remedial redress that addresses the needs of the African peoples.

The court should approach the remedial stage and the process of structuring a remedy as a way to 'adjust future behaviour not to compensate for past wrongs'.⁴⁵ This work should not be perceived as an argument for the total rejection of the current approach to remedial redress, but

⁴³ Chayes (n 38 above), 1282.

⁴⁴ Chayes (n 38 above), 1294.

⁴⁵ Chayes (n 38 above), 1298.

rather than the current conceptualization of remedial redress should be an alternative adjustable and applicable on a case-by-case basis.

The courts formulation of the remedy will be informed this public law model and thus will begin the process of structuring a remedy with an orientation based on negotiation. This means that the Court will approach remedial redress as a 'complex, on-going regime of performance rather than a simple, one-shot, one-way transfer...[this approach will have] the effect of prolonging and deepening the Courts involvement in the 'dispute''.⁴⁶

2.5 A dialogic approach

The AfCHPR has to approach the issue of remedial structuring with dialogic pragmatism tapered with flexibility and innovative creativity. The overall approach that the AfCHPR should adopt should be one that creates a dialogue between the parties to the dispute as well as the affected absent third parties.

The remedial measures should be an organic consequence of the adjudicative process, rather than a result imposed by the court. Therefore there should be certain indicators that the court uses in determining the kind of approach that it will utilise in determining remedial redress in a particular case. The European system of human rights is has also made progressive steps and adopted a prospective and reformative perspective with regards to the issue of remedial redress.

The Pilot Judgement Procedure (PJP) contained in Resolution Res (2004) 3⁴⁷ of the Committee of Ministers of the European Council (CoM) is instructive on this point. This procedure was developed in co-operation between the European Court of Human Rights (ECrHR) and the enforcement arm of the European human rights system, the CoM, as a pragmatic response to the number of repetitive cases coming before the ECrHR.

The object of the PJP is to rectify those conditions at the national level that create fertile grounds for potential claims of human rights violations before the ECrHR. In pursuance of this

⁴⁶ Chayes (n 38 above), 1298.

⁴⁷ Adopted by the Committee of Ministers on judgments revealing an underlying systematic problem (12 May 2004 114th Session) <https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=fr> (accessed 2 October 2011), see also E Fribergh 'Pilot judgements from the Court's perspective' address at Stockholm Colloquy (9-10 June 2008) <http://www.echr.coe.int/NR/ronlyres/43C75D00-0F57-4176-8A7C0AE28DBD4EE8/0/StockholmdiscoursFribergh0910062008.pdf> (accessed 2 October 2011).

objective the CoM invited the ECtHR to, through its judgements, when finding a violation that it considers to be a *systematic and the source of the repetitive cases*⁴⁸ before the ECtHR and in particular when the cause is likely to further give rise to numerous applications. Upon such a finding the court would then advise the respondent state/government on how to deal with the problem accordingly and solve the systematic problem.

The key conditionality in the PJP is the existence of a systematic source of the human rights violations at the national level. The PJP was the basis for the progressive reparations that is ordered in *Broniowski v Poland*⁴⁹, the court held that;

[I]t is inherent in the courts findings that the violation of the applicants rights guaranteed by article 1 of Protocol No.1 originated in a *widespread problem* which resulted from a malfunctioning of polish legislation and administrative practice and which has affected and *remains capable of affecting a large number of persons*.⁵⁰

The PJP marks an innovative and progressive move from a largely declaratory remedial structuring approach towards a more innovative and expansive approach by the ECtHR. The courts remedial scope is expanded beyond the diametrical remedial space. This space potentially allows for a dialogue to be created between the parties to the dispute and any other third parties whose interests might be affected on a national level.

Essentially the PJP brings a reformative and prospective dimension to remedial structuring. This can serve as inspiration for the AfCHPR. Where a case before the court displays the symptoms elucidated by the PJP, this could serve as a normative trigger for the AfCHPR to adopt a dialogic, pragmatic and flexible approach when it comes to remedial measures. This allows for the court to achieve two goals that are essential for human rights protection. The first is to establish reform and human rights respect at the national level and the second is to prevent a situation of having similar repetitive cases against the same respondent state.

⁴⁸ PJP (n 47 above), Emphasis added.

⁴⁹ Case *Broniowski v. Poland* (22 June 2004) application no 31443/96.

⁵⁰ Above, para 189.

2.6 Removal of a remedial hierarchy

In the determination of remedial redress, it has become an implied rule that restorative remedial measures enjoy a position of primacy. Should absolute restitution not be possible then the court or tribunal should endeavour to achieve a restorative parallel in monetary terms through the use of compensation.

Auxiliary to these restorative methods of restitution is remedial satisfaction and guarantees of non-repetition.⁵¹ However this author is of the opinion that the AfCHPR must turn the remedial hierarchy on its head and begin to approach the less prominent forms of remedial redress first.

In ensuring that the root cause of systematic human rights violations are addressed at the national level the AfCHPR will have to consider a remedial approach that targets institutions and organizational structures at the national level. Therefore from a remedial perspective that is informed by the PJP model, the court would then taper its remedial methodology with remedial measures geared to words rooting out the cause of the systematic violations.

Thus in pursuance of the goal of non-repetition of human rights violation the court would look at remedial measures that have a reparative effect such as measures that ensure effective civilian control of the military and security forces⁵², prescribing a restrictive jurisdictional scope for military tribunals⁵³, instructing the respondent state to put mechanisms that strengthen judicial independence⁵⁴, legislative and administrative measures that ensure protection of legal, media professions and human rights defenders⁵⁵, state sponsored/funded continual human rights strengthening and training in all sectors of society⁵⁶, particularly military and security forces.

Human rights violations in the African context are the symptom of an endemic, enduring and systematic culture of impunity. The provision of individualistic and restricted human rights remedies will not serve to transform the continent into a human rights respecting environment. The AfCHPR needs to adopt a systematic, deliberate and purposeful approach that recognises the amorphous and interdependent character of human rights.

⁵¹ Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law E/CN.4/2000/62.

⁵² Above, 25(i)(i).

⁵³ Above, 25(i)(ii).

⁵⁴ Above, 25(i)(iii).

⁵⁵ Above, 25(i)(iv).

⁵⁶ Above, 25(i)(v).

Further the court needs to recognize and be able to identify those human rights violations that are symptomatic of a deeper, systematic, continual and enduring root cause and tailor make remedial measures accordingly.

2.7 Some lessons from the African Commission on Human and Peoples' Rights

The AfCmHPR was created as a quasi-judicial body⁵⁷ to oversee the observance of the ACHPR.⁵⁸ Its findings were intended to be recommendations at best and had little binding or obligatory force on state parties to observe them.⁵⁹

Although the AfCmHPR jurisprudence on remedial redress have lacked in 'depth, consistency and co-ordination'⁶⁰, this author believes that through the cases that the AfCmHPR has given recommendations in terms of remedial redress, the AfCHPR may be able to glean important guiding jurisprudential patterns.

In the *Free Legal Assistance Case*⁶¹ the AfCmHPR noted that the main goal of the communications procedure was to initiate a *positive dialogue* between the parties to the dispute. Fact finding is one of the components essential for the proper structuring of prospective remedial redress. Chayes opines that negotiation is critical in the remedial formulation stage as it allows for greater party control and further mitigates a 'major theoretical objective to affirmative redress- the danger of intruding on an elaborate organic network of inter-party relationships.'⁶²

He further espouses that the formulation of remedial redress through negotiation is advantageous to the demanding party as a solution reached through accommodation rather than judicial imposition will be performed in a more willing and satisfactory manner rather than grudging compliance.⁶³

Musila notes the 'futuristic'⁶⁴ phraseology that the AfCmHPR employed in structuring its remedial recommendations. This author is of the view that the general style and approach to

⁵⁷ L Louw & F Viljoen 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1993-2004' (2009) 7 *International Journal of Civil Society Law* 23.

⁵⁸ Art 30 AfCHPR gives the African Commission a protective and promotional mandate. The African Commission was not created as a judicial organ.

⁵⁹ Louw & Viljoen (n 57 above), 23.

⁶⁰ Musila (n 22 above), 455.

⁶¹ *Free Legal Assistance & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

⁶² Chayes (n 38 above), pg 1299.

⁶³ Above.

⁶⁴ Musila (n 22 above) 455.

remedial redress of the AfCmHPR could be a useful compass for the AfCHPR. This approach is best evidenced through the *Endorois Case*⁶⁵ where the AfCmHPR was of the view that the respondent state had to ensure conditions that were favourable to the development of the peoples and in pursuance to this obligation found that the respondent state recognise the land ownership rights of the Endoroise peoples, ensure unrestricted access by the community to Lake Bogoria and surrounding cultural and religious sites.⁶⁶ The AfCmHPR further recommended that the respondent state engage in dialogue with the complainants for the effective implementation of the recommendations.

In both cases the AfCmHPR had to deal with human rights violations that had been perpetuated on a large number of victims as well as a multiplicity of rights being the subject of the violations.

The AfCmHPR approach, although not well reasoned, exhibited the flexibility and pragmatism needed in placing the interests of the affected societies directly on the remedial agenda.⁶⁷

2.8 Conclusion

The AfCHPR in the structuring of its remedies needs to move away from the restorative, make-whole approach that has become entrenched in the human rights remedial discourse in a definitive manner. There needs to be a clear paradigm shift in the theoretical underpinnings that inform the courts remedial considerations. The courts adjudication approach needs to shift from a private law methodology that was informed by the political and legal considerations of a time when human individuals were considered indirect beneficiaries of international law to a public law methodology and perspective.

The AfCHPR cannot root the structuring of its remedial orders on a theoretical foundation that is inconsistent with the reality within which it will function. For the court, remedial redress will not merely be a one-shot, self-contained episode. Rather, remedial redress must become a deliberate, continuous and structured process towards reform.

In constructing its remedies the court must approach the process of reparations as discretionary policy choices that address broad structural reform rather than mere findings.

⁶⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Community v Kenya* AfCmHPR communication 276/2003 (November 2009).

⁶⁶ *Endorois* (n 64 above), para 298.

⁶⁷ Roach (n 40 above), 859.

Because of the heterogeneous nature of the African continents socio-political landscape and the systemic nature of the human rights violations, remedial orders need to be reformatory and biased towards the future. Remedies must seek to address not only the violations of the past, but must seek to pre-empt violations that are born from governance systems plagued by impunity, disregard of the rule of law, corruption and a culture of disrespect for human rights.

With the systematic nature of human rights violations within the continent, the AfCHPR would need to find an experimental and dialogic-remedial approach that considers the intersectional character of human rights and an approach that admits trade-offs in which some achievable remedial effectiveness may be sacrificed because of other social/rights interests.⁶⁸

Contemporary human rights jurisprudence has been narrowly fixated on the 'full restitution' principle as a theoretical approach to remedial redress. This approach has narrowed the space for judicial influence through remedial redress.

The victim orientated approach adopted into international human rights gives redress to past human rights violations, but does not address and pre-empt violations that are the result of a systematic and institutionalized culture of human rights disrespect and impunity.

The Inter- American Court (IACrtHR) provides an alternative approach to the construction of remedial redress. Although not explicit in the courts jurisprudence, one can see a clear move away from the retrospective and victim orientated approach towards a broad based prospective approach.

This shift is presumably a result of the incompatibility between the private law based *restitutio in integrum* principle with the public law nature of the claims that have been brought before the IACrtHR. The IACrtHR has provided the alternatives to remedial construction that the AfCHPR can utilize in informing its remedial jurisprudence.

The AfCHPR should approach remedial redress and the structuring thereof as one of the tools in its arsenal it can use to ensure not only redress, but reformatory remedial redress. The AfCHPR must use remedial redress as a bridge between human rights ideals and state compliance and respect for human rights.

⁶⁸ Gerwitz (n 37 above), 599.

Chapter three will be a build on to chapter two by exploring the principles in international human rights law that support a more dialogic and equitable approach to the structuring of remedial measures. It will further explore how the AfCHPR can manoeuvre around the issue of challenges to its remedial authority and competency.

Chapter three

Translating the dialogic approach into International human rights law

3.1 Introduction

Chapter two aimed to demonstrate the incongruence between the prevailing theoretical underpinnings of the 'effective remedy' principle and to make an argument for a move away from the prevailing retrospective, individualistic and one-shot nature of contemporary remedial orders. The unifying underlying argument that runs through chapter two is the need for the AhCHPR to be context specific and approach remedial redress as a continuous and dialogic process rather than an adversarial and zero-sum process.

In continuing this line of thought, chapter three aims to anchor the proposed dialogic approach in international human rights law principles, in simpler terms, this chapter will be an exploration of the legal basis in international law that the AfCHPR may base the proposed remedial approach. Further, this chapter seeks to demonstrate an evolving and shifting paradigm towards a distributive justice approach to remedial redress both at the regional and national sphere.

The task of fostering a culture of adherence and respect for human rights must not be dependent on serendipitous instances of compliance but must be a deliberate, systematic and continuous discourse between the court and state members. This approach must not only be evident in the interpretation of the rights embodied in the various African Union (AU) human rights instruments but must permeate in every aspect of the judgment of the AfCHPR, including how it constructs its remedies.

This chapter will then narrow down and give an analytical exposition on how other regional judicial bodies have utilised their remedial mandates in structuring reformatory and prospective remedial measures. The chapter further seeks to transpose the dialogical approach espoused in chapter two into international law and further to locate its practical application in other jurisdictions.

3.2 State sovereignty v the dialogic approach

States often raise sovereignty and its corollary principle of non-interference as a means to try and bar international tribunals from making remedial orders that the state regards as usurping its supreme authority with its territory.

The courts competence to order remedial measures that might have economic, legislative and social effects within a state has to be understood within the context of the changed construction of the concept of state sovereignty.

Following the atrocities of WWII the issue of what states do in their territory became part of the international relations discourse. The years immediately after saw an evolution towards the inclusion of the individual in international relations discourse thus began the process of interweaving human rights within the tapestry of international law.⁶⁹

Thus the absolutist approach to the conception of state sovereignty and the principle of non-interference has little credibility within the current context of international human rights law. Thus when states enter into human rights treaties they do so with the understanding that they are opening the door and shedding their entitlements to claim 'non-interference' in the enforcement of their human rights obligations. This contractual premise is based on the *pacta sunt servanda* principle contained in article 26 of the Vienna Convention.

In other words by ratifying the Protocol, the member states showed their willingness to subject themselves and their actions to the scrutiny of the AfCHPR and where the court there has been a human rights violation in its interpretation of the ACHPR and any other relevant human rights instruments, it may order any measures it would deem appropriate for the ratification of the violation.

Reisman opines that the definitional contours of sovereignty have changed and become internal, 'the referent to sovereignty in modern international law is to a sovereignty of the people rather than the sovereign's sovereignty.'⁷⁰

Therefore, although '[i]nternational law is still concerned with the protection of sovereignty...in its modern sense, the object of protection is not the power base of the [ruling government] but the continuing capacity of the population freely to express and effect choices about the identities and policies of its governors.'⁷¹

Most importantly in pursuance of its mandate the AfCHPRt must create a dialogue between it, the member states and the population/citizenry of the state concerned. This dialogue must be

⁶⁹ K Mills 'Reconstructing sovereignty: A human rights perspective' (1997) 14 *Netherlands Quarterly of Human Rights* 267.

⁷⁰ WM Reisman 'Sovereignty and human rights in contemporary International law' (1990) 84 *Yale Law School Faculty Scholarship Series Paper* 872 869.

⁷¹ Reisman (n 70 above), 872.

based on co-operation and the AfCHPR's primary means of communication is through its judgements. A dialogic approach fits in with this changed dynamic in that it facilitates a dialogue between the decision-makers (the government), the decision-bearers (the population) and the court.

Lastly, a dialogic approach to human rights, based on the ethos of distributive justice is complementary to a governments' role as the primary shaper of national budgetary, economic and social policies. The AfCHPR only intervenes where there has been an incongruence or a direct disregard by the state of its duties as the primary protector of individual citizens and the primary provider of certain economic and social goods.

3.3 Transposing the dialogic approach in international human rights law

Germane to the issue of adopting a dialogic, prospective and equity based remedial redress is the question of what international law principles will the African Court's remedial methodology must be rooted. The issue of competence is important and integral to the issue of the African Court's legitimacy. The proposed adjudicative and remedial methodology is bound to intrude into the guarded sphere of state sovereignty and consequentially the principle of non-interference.

The Constitutive Act of the African Union has the defence of the sovereignty, territorial integrity and independence of its member states as one of its objectives⁷², sovereign equality⁷³ and non-interference⁷⁴ are further provided for as elements to the principles of the African Union (AU). The question of whether the African Court has the judicial competency to order remedial measures that have an impact beyond narrow, bilateral and diametrical adjudication space will be brought to the fore and the African Court will have to base its competence on accepted international principles.

International tribunals have espoused several principles that support the construction of remedial measures that are broad based and equity based. International tribunals challenged on adjudicative processes related to or peripheral to remedial redress have relied on general principles such as *pacta sunt servanda*, obligation to repair and *effet utile* in anchoring their

⁷² Art 3(b).

⁷³ Art 4(a).

⁷⁴ Art 4(g).

legitimacy and authority with regards to their remedial jurisdiction. These principles will be elucidated upon below.

3.3.1 *Pacta sunt servanda* principle.

The court derives its competence to order extensive remedial measures from the basic principle of international responsibility that obligates states to comply with their international treaty obligations in good faith. This principle, which has become part of international customary law⁷⁵, has its origins in article 26 of the Vienna Convention on the Law of Treaties.

The Protocol in article 30, in recognition of this principle, provides that state parties to the Protocol undertake to comply with the courts judgment.⁷⁶ AU member states that have ratified the Protocol of the court have consented to being bound by the Protocol and by implication the decisions that the court will produce, this includes the remedial measures that will be ordered by the court.

3.3.2 Obligation to repair

The core presumption implied in the right to an effective remedy is that every obligation carries with it a duty to repair the harm caused, it is clearly provided for in existing international law.

The PCIJ pronounced that;

'[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention...'⁷⁷

The obligation to repair is a derivative of the responsibility that states have to take measures in discharging their international legal obligations resulting from their breach of international laws/norms.⁷⁸ The scope, nature, methods and determination of beneficiaries are regulated by international law.⁷⁹

In other words where a state breaches an international obligation contained in a treaty or customary law a direct corollary of that entails the duty to make reparations. Thus the AFCrHR is the newly created custodian of monitoring and ensuring that member states make adequate reparations where they have transgressed an international obligation.

⁷⁵ *Beana- Ricardo et al v Panama* IACHR (22 February 2001) Ser. C No. 71, para 61

⁷⁶ See also art 27 which provides that a state may not rely on internal law to avert international obligations.

⁷⁷ *Chorzow Factory* (n 28 above).

⁷⁸ *Beana- Ricardo* (n 75 above), para 62.

⁷⁹ *Chorzow Factory* (n 28 above).

In giving effect to this principle article 27(1) of the Protocol gives the court discretion in deciding what other means of reparation/redress the court may issue where it deems has been a violation of human or peoples' rights. The inclusion of the word 'including' opens the remedial doorway to other methods of remediation, in other words the court is not limited to purely monetary compensation when considering remedial redress.

3.3.3 *Effet utile*

The *effet utile* principle was first intimated in the Advisory Opinion No 13 of the PCIJ, where the court held that:

'[I]n determining the nature and scope of a measure, [the court] must look to its practical effect rather than the predominant motive that may be conjectured to have inspired it.'⁸⁰

Importantly both the ICJ and the Inter-American Court affirmed in this principle in the *Corfu Channel Case*⁸¹ and the *Beana-Ricardo et al v Panama* case, respectively. The *effet utile* principle looks beyond the normative nature of human rights treaty obligations, it is rather concerned more about the practical effect of those treaty obligations. 'The provisions contained in the said [treaties] must be interpreted and applied so as to ensure that the protected guarantee is truly practical and effective, recalling the special nature of human rights treaties and their collective implementation'⁸²

This principle validates the notion that national law cannot be relied upon to regulate international responsibility. Thus it places emphasis on the procedural issues that need to be taken into consideration in discharging an international obligation.⁸³

Article 3(1) of the Protocol provides that the Court shall have jurisdiction in all cases and disputes concerning the *interpretation and application*⁸⁴ of the Charter, this Protocol and any other human rights instrument ratified by the states concerned. This clearly, interpreted purposively gives the Court the competence to direct how a state party must discharge its obligations to make reparations. This includes the nature, scope and method of implementation of the remedial measures.

⁸⁰ *Advisory Opinion No. 13 PCIJ* (23 July 1926) Ser. B No. 13, p 19.

⁸¹ *The Corfu Channel Case (merits)* I.C.J (9 April 1949).

⁸² *Beana-Ricardo* (n 75 above), 66.

⁸³ T Mutangi 'An examination of compliance by states with the judgments of the African Court on Human and Peoples' Rights: challenges and prospects' unpublished PhD thesis University of Pretoria 2010 146.

⁸⁴ Art 3(1), emphasis added.

The above principles singularly and collectively form the international law basis of the courts competence to construct remedial measures that are extensive and have implications on a states legislation, policy and economic decisions.

Auxiliary to these principles are the legal perimeters derived from the courts inherent role, international legal norms and the constitutive documents.

3.3.4 *Compétence de la compétence* principle

Anchored in the doctrine of implied powers, this principle recognizes the inherent functions of a juridical body and thus allows for the court to have that power and authority necessary for the determination of its own jurisdictional ambit.

This principle recognizes the inherent authority, derived from the jurisdictional functions of an international tribunal, to determine the scope and of its own competence. This principle was enunciated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Blaskic*.⁸⁵ When the Croatian government challenged the ICTY's authority and power to issue binding compulsory orders to a sovereign state, the ICTY examined its authority in relation to its inherent jurisdictional competence derived from the judicial nature of the tribunal.

The ICTY held that by virtue of its nature, a judicial body is vested with the inherent powers to define its jurisdiction and the ambit thereof.⁸⁶ The court continued to hold that although the tribunal was a subsidiary organ, it should not be viewed as an integral part of its creator but should rather be viewed as a satellite, complete and independent in character.⁸⁷

A judicial body's competence to determine the parameters of its own jurisdiction, to be a 'master of its jurisdiction'⁸⁸, is the vested power that lies at the core of the *competence de la competence* of body.⁸⁹

⁸⁵ *Prosecutor v. Tihomir Blaskic* ICTY (18 July 1997).

⁸⁶ *Prosecutor* (n 85 above).

⁸⁷ Above, Para 23

⁸⁸ Mutangi (n 83 above), pg162.

⁸⁹ Above, pg 162.

3.3.5 Power in light of access to justice and the right to a fair trial

Further justification of the African Courts jurisdictional authority to construct extensive remedial measures lies in the individuals' right not only to have access to a competent court or tribunal but to have their cases heard effectively.

Part of the judicial process is not merely to determine that the international responsibility of a state, the court or tribunal must also proceed to design remedial measures to remedy this violation.⁹⁰

The right to a fair trial also encompasses the right to an effective remedy. The effectiveness of a court in the administration of justice lies in the end result of the adjudication process, the remedy. The entire process of adjudication is primarily instituted with, not merely a remedy in mind, but an *effective* remedy in mind. Access to justice is included in the African Commission's resolution, *Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa*, as part of the right to an effective remedy.

The African Courts jurisdiction must not be restricted to merely stating the law and giving restricted and temporary measures. Rather the remedial jurisdiction must be interpreted to include the competence to establish and implement mechanisms for the materialization of justice.⁹¹

The IACHR has held that remedies are not effective if...owing to the general conditions of the country or even the particular circumstances of a case, are illusory cannot be considered effective.⁹² Thus remedial measures must be tailored in accordance to the prevailing circumstances within the particular state in order for the complainants and other subsequent victims to truly have access to justice.

In the same breath, right to a fair trial implies the existence of both procedural mechanisms, access to court/tribunals, and substantive redress of a violation in other words the claimant must have the available to him/her a means to an individual claim to protection of the law. The remedial process is a means through which the courts/tribunals give depth and scope of the substantive aspect of the right to a fair trial.⁹³

⁹⁰ *Beana- Ricardo* (n 75 above), 72.

⁹¹ *Beana-Ricardo* (n 75 above), 72.

⁹² *Beana- Ricardo* (n 75 above), para 77.

⁹³ Shelton (n 27 above), 9.

For the AFCrthR to give effective remedial redress it must have the competence to give effect to the substantive aspect of the right to a fair trial and this entails more than merely giving declaratory and one-shot remedial measures.

3.3.6 Jurisdictional Competence provided for in the AU legal framework

The various constitutive documents within the AU legal framework support the proposition that the African court is within its jurisdictional competence to issue remedial measures that are informed by considerations of distributive justice rather than the current corrective justice approach.

The supreme law of the AU, the AU Constitutive Act does not give much guidance as it speaks of the Court of Justice⁹⁴ rather than the Court currently under consideration, the African Court on Human and Peoples' rights. ;

In its main constitutive document, the African Court has a wide discretion, the Protocol, in determining how it will approach the issue of remedial measures. Article 3(1) gives the Court wide interpretational powers with regards to the interpretation and *application* of the charter, the protocol and any other relevant human rights instruments ratified by the state concerned. Therefore it will be up to the court to interpret the substantive and practical meaning of the right to an 'effective remedy'.

Of central importance is article 27(1) which gives the court the authority to, when there has been a determination of a violation, make 'appropriate orders' to remedy the violation. This enables the court to remedy not only the end result –the violation- but enables the court to structure remedial orders that address the root cause of the violation. The root causes are numerous, intersectional, systematic and enduring. Further the causes might be sustained by laws, procedures and policies of that particular state. A distributive justice approach penetrates the superficial veneer and seeks to address the central cause of the violations.

⁹⁴ Art 5(d).

3.3.7 The uniqueness of human rights treaties

In steering its jurisdictional competence the AFCrHR must take into consideration the object and purpose of the Protocol. Unlike other treaties whose object is to regulate bilateral relations between states and protect the interests of states as singular and autonomous creatures. States enter into human rights treaties in furtherance of a collective objective, not with them as the intended beneficiaries, but in furtherance of the individual and collective rights of all individuals within their jurisdiction.

The distinct character of human rights as a collective obligation that is for the benefit of the 'African peoples' is recognized in the preamble of the African Charter of Human and Peoples Rights (the Charter). Being the first of its kind to recognize the collective character of human rights, states that have ratified the Charter do so with the knowledge that the obligations that emanate therein are rooted in the collective interests of the African peoples.

The two-fold objective of the African Charter, the promotion and the protection of human rights, is further recognized in the Protocol of the AFCrHR. Thus pursuant to these objectives the AFCrHR is obligated to adopt an approach that further enhances the promotional and protective mandates of the African Charter.

The importance of taking into consideration the objects of a treaty during the interpretation process was enunciated in the ICJ's Reservations advisory Opinion⁹⁵, where the court stated that:

The objects of such a Convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose...[i]n such a convention the contracting states do not have any interests of their own, they merely have, one and all, a common interest, namely the accomplishments of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or the maintenance of a perfect contractual balance between rights and duties.⁹⁶

The IACrHR expressed a similar sentiment in its *Effect of Reservations*⁹⁷ advisory opinion emphasizing that human rights characteristically are not multilateral treaties of the traditional

⁹⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ (11 April 1949).

⁹⁶ Above.

⁹⁷ *Effect of Reservations on the entry into force of the American Convention on Human Rights* IACHR (24 September 1982) Ser A No 2, para 29.

type centered around the regulation reciprocal obligations and rights between contracting states but rather are concerned with the protection of the basic rights of human beings.⁹⁸ Similar views are expressed in the Vienna Convention.

Therefore in interpreting its remedial jurisdiction and competence the AFCrHR must use the objects and purpose of the Protocol as an interpretational yardstick to measure the depth and scope of its remedial jurisdiction. Further the objects and purpose of these documents must form part of the supportive foundational theories that inform the courts approach in how it structures its remedial measures.

3.4 An Inter-American perspective- from Velásquez- Rodríguez to de Sánchez

3.4.1 A paradigm shift in remedial construction

For comparison purposes the Inter-American system is more favourable for several reasons. Firstly, both regions, the Latin America's and Africa, have been marred by massive and gross human rights violations and which still continue. Secondly the Inter-American Court has seen an emergence of remedial activism and a move away from individualistic-monetary specific remedies towards remedies that seek to achieve legislative and institutional reform in the states concerned. Lastly the remedial provisions of both courts are similarly worded, providing generous interpretive scope and a space for remedial activism.

The Inter-American Courts remedial powers are provided in article 63(1) of the American Convention on human Rights (the Convention), the article provides:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

However the Convention provides no clear guidance as to how the Inter-American court may structure remedies that appropriately address the consequences resulting from a breach.

In seeking interpretational guidance the Inter-American Court adopted the monetary centred remedial model. The *restitutio in intergrum* principle espoused by the PCIJ in the *Chorzow*

⁹⁸ *Effect of Reservations* (n 97 above), para 29.

Factory case was adopted in its original form into the Inter-American jurisprudence through its initial cases on reparations. In *Velasquez-Rodriguez v. Honduras*⁹⁹, the Court reasserted the international law principle that considered it a general concept of law that every violation of an international obligation which results in harm creates a duty to make adequate reparation.¹⁰⁰ The Court further adopted the remedial principle of full restitution-*restitutio in intergrum*¹⁰¹- which includes the restoration of the victim to the situation they were in prior to the violation.

It would take the Court nearly a decade to move away (although momentarily) from its restrained approach to remedial relief. The 90's saw a minor shift in the construction of remedies by the court. In *Aloeboetoe v. Suriname*¹⁰², the court showed great remedial activism by ordering as part of the compensation due, the government was under the obligation to reopen the school and to staff it appropriately as well as reopen the medical dispensary and making it operational.¹⁰³ However Antkowiak¹⁰⁴ opines that this shift in remedial construction cannot be regarded as representative of the Courts general approach. He cites the case of *el Amparo v. Venezuela*¹⁰⁵ in which the Court refused the granting of non-monetary relief similar to the *Aloeboetoe Case*.

The Courts approach in the construction of its remedies was individualized and victim centred. Its concentration of monetary redress resulted in unimaginative and static remedial mechanisms. The remedial rhetoric of the Court was retrospective and did not foster the development of human rights law. This is evidenced by the systematic and institutionalized nature of the human rights violations that came before it during and after this period.

The year 2001 saw a diversification in the remedial model of the Court. This change has brought about possibilities in how the African Court can anchor the effective remedy principle through the construction of its remedies within the African continent.

The following section looks into the different types of remedies that were granted by the Court prior during and after 2001 and aims to glean the possible theoretical underpinnings that might have informed the formulation of the remedies.

⁹⁹ *Velasquez Rodriguez v. Honduras* IACHR (21 July 1989) Ser C No 7, see also *Godinez- Cruz v. Honduras* (21 July 1989) IACHR Ser C No 8.

¹⁰⁰ *Velasquez Rodriguez* (n 99 above), para 25-26.

¹⁰¹ *Velasquez Rodriguez* (n 99 above), para 26.

¹⁰² *Aloeboetoe et al v Suriname* IACHR (10 September 1993) Ser C No 15.

¹⁰³ *Aloeboetoe* (n 102 above), para 96.

¹⁰⁴ Antkowiak (n 23 above), 366.

¹⁰⁵ *El Amparo v. Venezuela* IACHR (14 September 1996) Ser C No 28.

3.4.2 Age of enlightenment and Innovation

The Inter-American Court gradually moved from remedies that although innovative in their construction where individualistic and retrospective in purpose to remedies that were fashioned in manner that was directed at legislative and societal reform but were geared for 'the prevention of future harm and had a distinct bias in favour of the future.'¹⁰⁶

In the late 90's the Courts approach to its construction of remedies took a more forward looking expansive character, although it was still very much victim centred, retrospective and individualistic. In *Loayza- Tamayo v. Peru*¹⁰⁷, the Court incredibly expansive and far reaching remedies. The court held that the state had an obligation to reinstate Ms Loayza- Tamayo 'in the teaching positions she held in public institutions at the time of her detention...[further] the salaries and benefits should be equal to the full amount she was receiving for teaching in the public and private sectors at the time of her detention...'¹⁰⁸

Although the structure of the remedies granted was within a retrospective and individualistic reparative framework, this decision represented a willingness to approach remedies through a constructive and forward-looking paradigm. However the momentum built was short lived as the Court rescinded to its *Velasquez- Rodriguez* remedial construction. In *Castillo-Páez v Peru*¹⁰⁹, and *Blake v Guatemala*¹¹⁰ the language with respect to the states obligation to investigate was less exacting and authoritative.

It would be another four years before the Court took the bold step into the arena of constructing remedies that not only had the potential of creating a continual rights enforcing effect but also had reformative consequences on multiple societal and legislative levels.¹¹¹

The year 2001 not only saw an increase in diverse remedial construction but also saw a change in the conceptual character implicit in the purpose of the remedies. Perhaps this change in remedial construction ensued as a result of the multiple complainants that were involved in the

¹⁰⁶ JC Jeffries Jr 'The Right- Remedy gap in constitutional law' (1999) 109 *The Yale Law Journal* 105.

¹⁰⁷ *Loayza- Tamayo v Peru* IACHR (27 November 1998) Ser C No 42.

¹⁰⁸ Above, para 113, see also *Garrido & Baigorria v. Argentina* IACrHR (27 August 1998)

[http://www.worldcourts.com/iacthr/eng/decisions/1998.08.27_Garrido_v_Argentina.pdf#search="garrido baigorria v argentina"](http://www.worldcourts.com/iacthr/eng/decisions/1998.08.27_Garrido_v_Argentina.pdf#search=) (accessed 15 September 2011), although the remedies granted were still within the restricted compensatory normative framework, the language of the Court in framing the states obligation was more authoritative.

¹⁰⁹ *Castillo Páez v. Peru* IACHR (27 November 1998) Ser C No 43.

¹¹⁰ *Blake v. Guatemala* IACHR (22 January 1999) Ser C No 48, 107-108.

¹¹¹ *Effect of Reservations* (n 97 above).

cases before the Court. The case of *Baena- Ricardo v. Panama*¹¹² wherein the Republic of Panama had dismissed 270 government employees who had participated in a demonstration for labour rights, and were accused of complicity for perpetrating a military coup.¹¹³ The court held that the state must reinstate all the 270 workers in the positions and where not possible provide for alternative employment equivalent in position benefits and financial remuneration to their previous positions. The court added that should this not be possible then the alternative would be payment of indemnity corresponding to the termination of employment in conformation of the states internal labour laws.¹¹⁴

This case is important in understand the paradigm shift in how the Court began to construct its remedies. The Court was moving away from the unimaginative monetary-centered remedial framework of *Velasquez-Rodriguez* towards an innovative and reformative manner of constructing remedies. Although these initial decisions were still victim centred and backward-looking, it is important to note that they were an indication of a move towards an innovative and much more expansive manner of constructing remedies that went beyond the victim-perpetrator dynamic, in other words, the Court showed a willingness to stretch its influence beyond the court room.

The Courts monetary compensation of medical and psychological damages evolved into a remedy that required the state be much more proactively involved in repairing the consequences of the violations. In the *Nineteen Merchants*¹¹⁵ Case the Court ordered that the state provide, through its specialized health institutions, the medical and psychological treatment required by the next of kin of the victims.¹¹⁶ This change in tact stretched the reformative influence of the Court directly into the states psychiatric department. Indirectly this would place an obligation upon the state to provide psychiatric treatment to the victim's next of kin on an acceptable level. The reformative capabilities of this alternative construction of the rehabilitative measures remedy was fully realised in the *Juvenile Reeducation Institute Case*¹¹⁷ wherein the Court ordered the state:

within six months, the pertinent State institutions, in partnership with civil society, are to prepare and map out a State policy for the short, medium and long term on the subject of juveniles in conflict

¹¹² *Baena- Ricardo* (n 75 above), see also *Ivcher Bronstein v. Peru* IACHR (6 February 2001) Ser C No 74.

¹¹³ *Baena- Ricardo* (n 75 above), para 1.

¹¹⁴ *Baena- Ricardo* (n 75 above), para 214.

¹¹⁵ *19 Merchants v. Colombia* IACHR (3 July 2004) Ser C No 109.

¹¹⁶ *19 Merchants* (n 115 above), para 278.

¹¹⁷ *Juvenile Reeducation Institute v Paraguay* IACHR (2 September 2004) Ser C. No.112

with the law. That policy is to be fully in keeping with Paraguay's international commitments....The State's policy must include, inter alia, strategies, appropriate measures and the earmarking of the resources needed so that children awaiting or standing trial can be housed separately from those already convicted, and for the establishment of education programs and full medical and psychological services for all children deprived of their liberty....the Court is ordering the State to provide, free of charge and through its own specialized health institutions...To that end, the State is to create a committee to evaluate their physical and psychological condition, and the measures that each individual requires. The Tekojó Foundation should be actively involved in this committee. Should it decline or find itself unable to undertake the task, the State will have to identify another nongovernmental organization to replace it. Within six months, the State is to inform this Court of the formation of the committee.¹¹⁸

The manner in which the non-pecuniary measures were structured moved away from the victim-perpetrator dynamic and stretched beyond the court room. These types of injunctions Gerwitz¹¹⁹ argued to be more preferable in that they fostered a culture of development and were 'biased in favour of the future. Perhaps the Courts alternative construction of remedial redress was a result of the sheer magnitude of the victims, a population of over 3000, which came before it.

As evidenced from the above case, the *Velasquez-Rodriguez* remedial framework, drawn from a purely plaintiff-centred approach, although it is sufficiently appropriate in dealing with inter-party 'private' disputes, as characteristic of state responsibility law, it is deficient when it comes to the cases that are based on a public interest litigation model- particularly class actions- which have 'broader, policy-oriented interest balancing'¹²⁰ considerations at play within a single case.

This is seen in the Inter-American Court moving away from the 'rights-maximizing' approach which considers remedies as a means of giving redress to the victim before it to an 'interest-balancing approach that takes into consideration broader policy issues. This is reflected in how the Inter- American Court is structuring its remedies in a structural and forward looking manner.

The Inter-American Courts shift in remedial perspective is evidenced in the *Plan de Sanchez Massacre v. Guatemala*.¹²¹ The Court noted that although in order to discharge an international obligation arising out of damage caused by a violation full restitution was required, in the

¹¹⁸ Gerwitz (n 37 above), 314-321.

¹¹⁹ Gerwitz (n 37 above).

¹²⁰ Starr (n 6 above), 752.

¹²¹ *Plan de Sanchez v. Guatemala* IACHR (19 November 2004) Ser C No 116.

instance that this was not possible, it was necessary that the Court inter alia add any positive measures the state must adopt to ensure non-reoccurrence of the harmful acts.¹²²

The Court further acknowledged that an important component of the individual reparations was reparation that would give redress to the Mayan community as a whole owing to the collective nature of the damage inflicted.¹²³ In other reparations the court ordered the Guatemalan state to conduct effective investigation into the facts of the *Plan de Sanchez* massacre¹²⁴, make public acknowledgements of the states international responsibility to make reparations and commemorate the massacre¹²⁵, provide adequate housing through the implementation of a housing program¹²⁶ and the implementation of numerous development programs in the affected communities.¹²⁷

The nature of these remedial orders addressed the issue of the prospective development of the *Plan de Sanchez* community. This is a marked different from the retrospective nature of the full restitution-rights maximizing approach, towards an interest-balancing biased towards the future approach to remedial redress.

The remedies granted by the Inter-American Court indirectly addressed rights that had not been alleged in the case. The housing program addressed the right to housing and the development programs addressed the rights to health and education.

The Inter- American Courts approach to remedial orders has become reformatory in nature and although the Court has not explicitly said so in its judgments, one can observe a paradigm shift in the theoretical underpinnings that inform the court remedial considerations. The Court no longer views its remedial orders as a means of addressing/redressing the violations committed against the victims before it. Rather in constructing its remedies the court approaches the issue of reparations as discretionary policy choices that address broad structural reform rather than mere findings.

Because of the heterogeneous nature of the Americas and the systemic nature of the human rights violations, remedial orders need to be reformatory and biased towards the future. Remedies must seek to address not only the violations of the past, but must seek to pre-empt

¹²² above, para 53-54

¹²³ (n 121 above), para 83, 93.

¹²⁴ (n 121 above), para 98.

¹²⁵ (n 121 above), para 100-101.

¹²⁶ (n 121 above), para 105.

¹²⁷ (n 121 above), para 110.

violations that are born from governance systems plagued by impunity, disregard of the rule of law, corruption and a culture of disrespect for human rights.¹²⁸

With the systematic nature of human rights violations within the continent, the African Court would need to find an experimental-remedial approach that considers the intersectional character of human rights and an approach that admits trade-offs in which some achievable remedial effectiveness may be sacrificed because of other social/rights interests.¹²⁹

3.5 Evolution in the European Courts remedial structuring

Criticised for its unimaginative and lack of innovation in its approach to remedial construction, the ECtHR has begun developing remedies that are progressive and more biased towards the future, in stark contrast to its previous remedies that were the result of its stringent interpretation of its powers to afford 'just satisfaction' to individual complainants.

The court repeatedly stated its lack of authority to issue specific remedial directives to states and limited its power and only ventured out of its narrowly defined remedial box in instances of violations of the right to property and the right to liberty and security.¹³⁰

The ECtHR has in the past repeatedly pronounced on its limited lack of authority to order specific remedial orders to state parties.¹³¹ Notwithstanding this primary position, the court has in certain instances stepped out of its stringent remedial perimeters and ordered specific non-monetary reparations, including *restitution in intergrum*,¹³² and it was in *Assanidze Case*¹³³ that

¹²⁸ JM Pasqualucci 'Victim reparations in the Inter- American Human Rights system: A critical assessment of the current practice and procedure' (1996) 3 *Michigan Journal of International Law*, pg 23, the author gives a similar argument as to how the IACtHR could use its contentious jurisdiction in providing reparations for future victims of gross and systematic human rights abuses perpetrated by states.

¹²⁹ Gerwitz (n 37 above), 599.

¹³⁰ I Nifosi-Sutton 'The power of the European Court of Human rights to order specific non-monetary relief: A critical appraisal from a right to health perspective' (2010) 23 *Harvard Human Rights Journal* 51, see also V Colandrea 'On the power of the European Court of Human Rights to order specific non-monetary measures: some remarks in light of the Assanidze, Broniowski and Sejdovic cases' (2007) 7 *Human Rights Law review* 396..

¹³¹ *Campbell & Cosans v. United Kingdom* ECHR (23 March 1983) application no. 7511/76; 7743/76, para 16, see also *Le Compte v Belguim* ECHR (2 October 1983) application no. 7299/75; 7496/76, para 9.

¹³² *Papamichalopoulos and others v Greece* ECHR (31 October 1995) application no. 14556/89, para 37, see also *Brumarescu v. Romania* ECHR (28 October 1999) application no. 2834/95.

¹³³ *Assanidze v. Georgia* ECHR (8 April 2004) application no. 71503/03, para 202-203.

the ECtHR intimated that nothing short of the release of the applicant would be the appropriate required remedial measure.¹³⁴

However the ECtHR remedial jurisprudence took a dramatic turn as it was faced with a deluge of repetitive cases concerning similar violations against the same state. The year 2004 heralded a drastic evolution in the ECtHR's remedial approach, following on the heels of Resolution Res (2004) 3 of the CoM¹³⁵, the court ordered the respondent state in the *Broniowski Case*¹³⁶ to 'ensure the expeditious and effective realisation of the complainants, and those in a similar position, entitlement through appropriate legal and administrative measures.'¹³⁷

These remedial orders came after the court had noted that the violations with regards to the 'territories beyond the Bug River'¹³⁸ were the result of a widespread and systematic malfunction of the Polish legislative and administrative practice capable of affecting a large number of persons.¹³⁹ In other words deficiencies in national law and practice identified in the case before the court could give rise to numerous subsequent and well-founded applications to the court.¹⁴⁰

In essence the PJP has innovatively developed the remedial jurisdiction of the ECtHR to encapsulate a class action dimension. Further the PJP is in line with a distributive justice ethos, it allows the court to take into consideration the needs and interests of unrepresented but similarly situated parties and permits the court to make remedial measures that give redress not only for the past violation but also pre-empt future violations.

The recognition of an underlying systematic and widespread problem is a critical guiding step in how a court approaches the remedial stage. The lesson to be gleaned from the ECtHR's jurisprudence in remedial redress is the importance of looking at a human rights violation holistically. Human rights respect and protection cannot be achieved on a case by case basis, the AFCrHR must utilise the remedial stage as part of its juridical arsenal to inculcate and foster a culture of human rights respect and observance at the national level.

¹³⁴ The court was at pains to reiterate that the discretion was still left to the respondent state to decide on the means it deemed appropriate, under the supervision of the Committee of Ministers, in discharging of its under art 46 of the ECHR.

¹³⁵ PJP (n 47 above).

¹³⁶ *Broniowski* (n 49 above).

¹³⁷ *Broniowski* (n 49 above) , para 194

¹³⁸ *Broniowski* (n 49 above),para 2.

¹³⁹ *Broniowski* (n 49 above) , para 189.

¹⁴⁰ *Broniowski* (n 49 above) ,para 189.

3.6 The dialogic approach in the national jurisdictions

The golden thread that runs through this dissertation is in answering the question of how the AFChR can best utilize the remedial process in achieving maximum human rights reform that permeates through the national level for the benefit of the maximum number of people.

The remedies that the AFChR gives in the cases that come before it must have a continuously reformatory affect. The court must always seek to answer the question of how can its judgements address the needs of individuals who are similarly situated as the complainants before it?

The answers to these questions can be easily answered should the court open its jurisprudential doors to the possibility of cross-fertilization from national courts. National courts hold a wealth of remedial wisdom that could help guide the court in devising appropriate remedial measures based on a distributive justice ethos.

3.6.1 The South African experience

The South African Constitutional Court (CC) is one such national court that has utilized a distributive justice approach in its remedial orders that is needs based rather than derived from the causation/restoration corrective justice paradigm.

Although the CC has been heavily criticised for its minimalist approach to remedial redress¹⁴¹, particularly with regards to socio-economic rights, there is merit in its approach. This is seen in the flexibility in contextual applicability of its remedial principles. Because the AFChR will be dealing with a multiplicity of states with varied social and economic landscapes it is vital that it choose a remedial approach is flexible and accommodative of the heterogeneous nature of the African context.

The 'reasonableness' review approach as elucidated by the CC in response to socio-economic rights violations is one such approach. The principles given by the Con Court could be adopted in instances where the AFChR feels that the issues brought by a litigant could be adequately dealt with at the national level.

¹⁴¹ C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective justice & distributive justice* 2009, 56-59.

Instructive in this regard is how the court defined, in the *Grootboom Case*¹⁴² the government's obligation in discharging its socio-economic obligations. The Con Court held the obligation as constituting three elements, (a) the obligation to 'take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the rights; and (c) 'within available resources.'¹⁴³

(a) Reasonable legislative and other measures

In expanding this element, the court held that reasonable and other measures entails the co-operative functioning of the different spheres of government in devising comprehensive plans of action geared towards the provision of financial and human resources for the realization of socio-economic rights in a sustainable manner to the communities they govern.¹⁴⁴

Germane to this element is the question of whether these legislative and other measures are reasonable. In fulfilling the element of reasonableness the Con Court held that;

[T]he state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. The policies and programmes must be reasonable both in their conception and their implementation...[a]n otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the states obligation¹⁴⁵

This element transposed into the international sphere would mean that when the AFCrHR reviews whether a respondent state has discharged its international obligations under the African Charter as well as any other human rights instruments under consideration, it would look into whether are there any legislative and other measures, consistent with the courts substance interpretation of the right in question in place for the actualization of the entitlement under dispute.

¹⁴² *Government of the Republic of South Africa and others v. Grootboom and others* 2001 1 SA 46

¹⁴³ *Grootboom* (n 142 above), para 37.

¹⁴⁴ *Grootboom* (n 142 above), para 39.

¹⁴⁵ *Grootboom* (n 142 above), para 42.

Further such legislative measures must be formulated and implemented in a reasonable manner. If not, the court would then instruct the respondent states government to ensure that it endeavours to put in place such measures.

(b) Achieve progressive realization

In line with the ICESR Committee's (the Committee) interpretation of the term 'progressive realisation', the Con Court held that although the term does not anticipate immediate realization of the contemplated right, it does envision a graduated approach to the realization of the particular right. And in furtherance of this goal, the state must progressively facilitate the reduction of legal, administrative, operational and financial hurdles over time.¹⁴⁶

Lastly in line with the Committee's interpretation, any deliberate retrogressive measures taken with regard to the facilitated progressive realization of the states obligation must be justified appropriately.¹⁴⁷

(c) Within the available resources

The crux of this element is in the courts acceptance of the fact that the scope of requisite measures as well as the rate of realization of the states obligation will be invariably be circumscribed by the availability of resources.

Thus the court would not expect legislative and other measures that unreasonably go beyond the particular states available resources.

Although the reasonableness review approach of the Con Court has received criticism as being vague and lacking in giving substantive content to socio economic rights, Mbazira¹⁴⁸ has reasoned that the courts approach to defining the states obligation is largely informed by a distributive justice ethos and therefore takes into consideration the polycentric nature of the interests that are presented by a particular dispute brought before it. Therefore instead of taking

¹⁴⁶ *Grootboom* (n 142 above), para 45.

¹⁴⁷ Above.

¹⁴⁸ Mbazira (n 141 above), generally.

providing remedial redress for the particular individual complainant/s before it, the CC takes into consideration those individuals outside the dispute who are similarly situated.

This approach, if coupled with judicial oversight, would allow a respondent state to play a greater role in creating responsive and reformative remedial measures with regards to a systematic and widespread problem rooted in legislative or administrative malfunction.

3.6.2 The Canadian experience

In its formulation of norms and principles that will guide the AFCrTHR's in giving effect to its remedial mandate, the court would be best advised to look into the Canadian Supreme Courts (SCC) approach to remedial construction. Like the CC, the CSC has held that it is within its jurisdictional competence to afford injunctive relief¹⁴⁹ and in pursuance of its constitutional mandate the SCC has laid down what it regards as the normative content of an effective remedy.

In *Doucet- Boudreau v Nova- Scotia*¹⁵⁰, the SCC advocated for a purposive approach to remedial construction. This required that courts construct remedial measures that are both 'responsive' and 'effective'. In elucidating on these elements the court stated that a remedial approach;

*'requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft 'responsive' remedies. Second, the purpose of the remedies provision must be promoted: courts must craft 'effective' remedies.'*¹⁵¹

The AFCrTHR can follow the CSC approach in giving a new dimensional perspective and depth to the right to an effective remedy principle in international human rights law.

¹⁴⁹ K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 325.

¹⁵⁰ *Doucet- Boudreau v Nova- Scotia (Minister of Education)* 2003 SCC 62, para 24.

¹⁵¹ *Doucet* (150 above), para 25.

3.7 Conclusion

Germane to the adoption of a dialogic approach in the AFCrHR structuring of its remedial approach is the consideration of what principles of international human rights law will form the foundational framework that informs the courts remedial approach.

The systematic and endemic nature of human rights violations require a remedial approach that is continuous, deliberate that has the effect of bringing human rights down from the regional level and into the national sphere. A dialogic approach is the best possible manner through the AFCrHR can filter human rights principles into the national legislative, judicial and societal dialogue.

International law principles and practice provide an intersecting support system for a more broad-based and progressive remedial approach. The last decade has seen an evolutionary trend in remedial redress by regional judicial bodies and the AFCrHR has a wealth of both positive and negative judicial experience that is expansive in both depth and scope.

The purpose of the following chapter is to make some recommendations as to how the court could approach the remedial stage. The issue of remedial measures can be a minefield that needs to be negotiated with flexibility and persistent dedication. The AFCrHR has to use its procedural rules and its relationship with the African Commission wisely in order to create an environment in which states begin to interact and comply with its decisions. Lastly the chapter will make closing conclusions.

Chapter Four

Conclusions and Recommendations

4.1 Introduction

Rights and the ideals they encapsulate are of little use if the people they are meant to protect cannot claim redress for their violation. Human rights are vindicated through their transposition into reality through effective and creative remedial orders. The construction of these remedial orders does not happen serendipitously, it happens through deliberate and purposeful judicial action supported by a framework of norms, principles and judicial mechanisms that are geared towards a particular judicial objective- the attainment of justice for the largest number of possible victims.

Chapter four will offer some possible mechanisms, norms and principles that the AFCrHR can utilize in constructing remedial measures through the prism of distributive justice. The distributive ethos must manifest and permeate in every aspect of the remedial process. The justices of the court must understand their new roles as individual judges and as a collective within the structure of the AFCrHR. The handing of a judgement does and will not end the courts involvement in the case and the court might need to revisit its remedial orders and re-tailor and reconstruct them as the circumstances of the case require and as new information resurfaces and creates a clearer picture for the court.

4.2 Some conclusions

The process of humans rights reform and their inculcation at the national level within the has to be a systematic process, achieved through the adoption of a flexible, innovative and dialogic approach supported by norms, principles and mechanisms based on the ethos of distributive justice. Such an approach will allow the AfCHPR to cater for the specific and general needs that are brought to the fore by a particular case. This requires for the court to have the understanding that human rights violations by themselves are not the end-problem but the manifestation of deeply rooted, systematic and continuous institutional, legislative and attitudinal causes.

By their very nature they need remedial redress that will address them through a continuous and structured manner.

International tribunals have slowly and progressively moved towards a more distributive justice based manner in the structuring of remedial orders. Both the ECtHR and the IACtHR are showing a leaning towards structuring remedial orders that not only ameliorate the complainants situation but also address the structural root cause of the violation.

Lending from the rich jurisprudential experience of regional human rights courts and national jurisdictions, the court can tailor make an approach to remedial redress that is flexible and appropriate for the needs and interests that are presented by each case. International human rights law has grown and evolved to accommodate a more proactive court that seeks to give

The following recommendations are geared towards assisting the court in understanding its role as a mediator and negotiator rather than an impartial arbiter.

4.3 Recommendations

4.3.1 Widening the definition of victim

The AfCHPR is the last port of call for victims of human rights violations. Therefore the remedial measures that the court gives will have to reverberate through to those victims that do not have the power, economic and social resources to mount a case before the court.

Further given the lengthy periods between the filing of a complaint before the Inter-American Commission and it reaching the IACtHR, it is a fair presumption that the AfCHPR will face the same predicament and therefore needs use every case before it as an opportunity to ameliorate the situation of those victims who are unable to come before the court.

This involves a widening of the definition of the term 'victim'. A victim should not be limited to only those persons that have been 'directly-harmed' by the violation/s brought before the court. Rather the court should identify those indicators that point to a pattern that is systematic, institutional and would likely give rise to violations in the future which could be a legitimate basis for a claim of human rights, thus enabling the AfCHPR to identify those victims who will be affected by the continued existence of the systematic indicators.

Rule 53 of the AfCHPR Interim Rules allows for a joinder of cases and pleadings. Interpreted in a purposive manner the court may use this rule to allow an interested party to make written submissions with respect to the structuring of the remedial order. This rule should be utilized by

the court to order an investigation into the depth and scope of the violations should it be of the opinion that the victims before it are representative of a larger victim group or potential victim group. In other words the term 'victim' should be given a wider interpretation to encompass possible 'invisible' victims and potential future victims.

This approach to would widen the level of access to the court and broaden its scope of influence.

4.3.2 Participation

Because of the nature of the human rights violations within the African continent, the Court will face cases that involve a multiplicity of parties, interests and rights. The Court therefore needs to include within its remedial approach the principle of participation. Participation in the remedial process will allow for the representation of divergent interests. This will give the court a clearer view of the cross-cutting rights and issues that need to be taken into consideration by the court in its remedial formulation stage.

Participation allows for the remedy to come from amongst the participants instead of being imposed on them. This element is crucial for the facilitation of the implementation aspect as a respondent who has been part of the remedial creation process is more likely to willingly carry out an order, in good faith, in which they were active contributors to rather than one which they feel was imposed.

Finally, participation allows for the court to structure a remedial order that is less likely to need continuous reconsideration if the remedial order was created with due weight and consideration being given to the needs, circumstances and unique disposition of the complainants both before the court and outside the court.

4.3.3 Legitimacy

Flowing from the principle of participation is the creation of legitimacy in the courts remedial orders. In order for the courts remedial orders to be accepted as legitimate, there has to be an element of participatory decision making. This gives both the respondent state and the complainants to make a contribution towards the resolution of the dispute.

Further the legitimacy created through a participatory process gives both parties a sense of ownership of the resultant product of the remedial negotiation process thus creating sub-conscious self monitoring mechanisms. This relieves the court from requiring strict supervisory oversight over the implementation process.

In other words, when the process of remedial structuring is viewed as legitimate by the respondent state, it is more likely to pursue implementation of the remedial order in an effective and consistent manner thus shortening the time between the granting of the order and the amelioration of the victims' circumstances and those who are similarly situated. A normative foundation consisting in legitimacy is crucial in building an effective remedial approach.

4.3.4 Proportionality

The formulation of a remedial order that will have a continuous budgetary, legislative, administrative or policy affect on the decisions made by all organs of the respondent state have to be proportional in goal and in effect.

Proportionality is an important principle that the AfCHPR should adopt in its remedial practice and approach. Proportionality will aid the court in avoiding the pitfalls of excess. The court should avoid being perceived as being too excessive or too intrusive in its remedial orders. Where the participation process has failed to yield an appropriate remedial solution, the court may have to impose a remedy that it deems fit in the circumstances. However, the court has to use the yardstick of proportionality in balancing the appropriateness of the relationship between the end it seeks to achieve and the means through which it seeks to achieve it.

In other words, the principle of proportionality is self regulatory on the courts actions, it is a self reflectory principle that the court can use to guard against ordering remedial measures that are too intrusive and might end being disregarded or ignored by the respondent state. It is important to understand that the non-compliance by states to remedial orders is detrimental to the legitimacy of the court.

It is of crucial importance to the legitimacy a judicial body is not being perceived as impartial but being perceived as fair and equitable. The principle of proportionality should be part of the normative foundational framework that anchors the courts remedial approach within its jurisprudence.

4.3.5 Courts supervision of the judgement

The handing down of a judgement should not terminate the courts involvement in a case. The court should rather maintain a supervisory role and have some form of control in the manner that the remedial measures are carried out. This will ensure that victims of human rights violations receive the relief granted by the court in a timely manner and that the remedial measures are carried out in a satisfactory manner that meets the courts standards.

Rule 26 of the internal rules allows the court to interpret its own judgement and to review the judgement in light of new evidence. Interpreted purposively this provision may give the court authority to supervise its own judgements and to order a restructuring of remedial measures in a judgement it has already handed down in light of new circumstances that warrant a reconsideration of a previous remedial order.

The restructuring of remedial measures might be necessary where new information is brought to the court that would have had a significant impact on the courts structuring of its remedial order. At times a reconsideration of a remedial order might be warranted where the circumstances of the complainants change due to factors that were not present at the time that the matter was under consideration by the Court.

The Court may supervise in a variety of non-intrusive ways, for example, the use of national institutions, non-governmental organizations, organs of government of the respondent state as well the AfCmHPR as overseers of the implementation of the remedial order. The attachment of a report back procedure together with a time limit as to the when the goals outlined in the remedial order should be achieved.

4.3.6 Remedial measures must be structured and gradual in nature

It is crucial that the process of remedial supervision be structured and supervised in a graduated manner. In the initial stages of handing down a judgment the court should practice progressive remedial oversight whereby the court retains an oversight jurisdiction that is supervisory rather than instructive and allow the respondent state to formulate an appropriate remedy plan on how it intends to remedy the infringement.

However the remedial plan should be assessed by the court to ensure that the plan has a reasonable chance of success and that the plan upon implementation would address the specific needs of the complainants and those who are similarly situated.

Thus in a situation where the court has identified that state X has violated a right in the ACHPR or any other international human rights instrument, the court would set guidelines for the formulation of a remedial plan by state X, e.g. the plan must take (a) reasonable legislative and other measures; (b) to achieve the progressive realisation of the rights violated; and (c) the remedial plan must take into account the available resources.

It is with these guidelines that state X would then formulate a plan and present it to the Court, which it can either accept as is or with the Courts modifications. However, the acceptance by the Court of the remedial plan does not terminate the Courts involvement, rather state X would be required to give reports on the progress made on the implementation of the remedial plan.

Thus although the court does not intrude on the decisions of the respondent state, it still has some control in the formulation and implementation of the remedial plan. This would allay fears that states might have with regards to their sovereign integrity being violated by the court.

Word Count 17,046 excluding table of contents and bibliography

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