The 'right to reparation' as applied under the African Charter by Benin's Constitutional Court

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By

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DECLARATION

I, HORACE SEGNONNA A. T. ADJOLOHOUN, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirely or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ……

Date: ……..

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ……

Dr Patrice Ernest Vahard

University of Addis Ababa

Date: ……..

Dedication

Martha Adédogni, adorable wife.
For the year you spent without me.

Abraham Sèdégbé Adéyèmi, strengthening our faith.
For looking after them.

Ezéchiel Madiba, bearer of our prophecy.
I cannot wait to hold you in my hands.

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LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
African Children's Charter	African Charter on the Rights and Welfare of the Child
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
African Court Protocol	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
American Convention	American Convention on Human Rights
AU	African Union
African Women Protocol	Protocol to the African Charter on the Rights of Women in Africa
CCPR	International Covenant on Civil and Political Rights
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
DCC	Benin's Constitutional Court Decision
European Convention	European Convention on Human Rights and Fundamental Freedoms
European Court	European Court of Human Rights
IHRL	International human rights law
IHRR	International Human Rights Reports
Inter-American Court	Inter-American Court of Human Rights
OAU	Organisation of African Unity
Universal Declaration	Universal Declaration of Human Rights
UN	United Nations

CHAPTER I

Introduction

1 Background to the study

Ubi jus ibi remedium[1]

The very concept of right carries with it a duty to redress its violation. While lamenting that the question of remedies lacks clarity in International human rights law (IHRL), Musila promptly notes that 'no protected right would have any meaning to its claimant without the provision for effective mechanisms to give effect to it, including an effective remedy when breached'.[2] As Shelton mentioned, 'law and its institutions are the instruments through which fault is determined and its consequences are assessed in order to redress harm caused'.[3] Be they substantive or procedural, remedies are thus primarily aimed at 'rectifying the wrong done to a victim, that is, to correct injustice'.[4]

The right to remedy is also justiciable as well established in international human rights instruments at both global[5] and regional[6] levels. Remedial provisions are generally modelled on article 8 of the Universal Declaration of Human Rights (Universal Declaration) that provides 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws'. As it can be seen, Courts, as procedural remedies themselves, are given an important role in the law of remedies. Aristotle had rightly written long before that

> What the judge aims at doing is to make the parties equal by the penalty [s]he imposes, whereby [s]he takes from the aggressor any gain he may have secured. (…) This explains why the disputants have recourse to a judge; for to go to a judge is to do justice.[7]

There is no antinomy between remedial provisions emphasising the role of national courts under IHRL and the establishment of supra-national courts under universal and regional human rights systems. The end of it lies in the international law principle of 'complementarity' adopted by the law

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1 Latin maxim meaning: For the violation of every right, there must be a remedy.
2 GM Musila 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' *AHRLJ* Vol. 6 No 2 (2006) 442.
3 D Shelton *Remedies in International Human Rights Law* Oxford (2005) 10.
4 Shelton (n 3 above).
5 See among others, article 8 of the Universal Declaration, article 2(3) of the International Covenant on Civil and Political Rights (CCPR) and article 91 of Additional Protocol I to the Geneva Conventions of 1949.
6 See article 7 of the African Charter, article 25 of the American Convention on Human Rights (American Convention) and article 13 of the European Convention on Human Rights (European Convention).
7 Aristotle *The Ethics*, trans. J.A.K. Thompson (1955) quoted in Shelton (n 3 above).

of remedies.[8] Therein takes root the well-established international law principle of exhaustion of local remedies. The rationale is that remedies should be the closest to victims. In itself, giving effect to IHRL is primarily the duty of states.[9] International remedies are accessible only where domestic remedies have failed to address violation.

Under the African Charter, the African system has adopted the same corpus of principles. In its findings, the African Commission on Human and Peoples' Rights has repeatedly objected being treated as a court of first instance[10] and stressed the need of available but also effective and sufficient[11] local remedies, especially of judicial nature.[12]

The particular nature of human rights[13] and the importance of remedial laws and institutions devoted to their protection have guided modern societies to establish 'competent national tribunals' capable of providing effective remedy to constitutionally entrenched rights. In sub-Saharan Africa emerging democracies, constitutional Bills of Rights have largely been inspired of international human rights law.[14] Particularly, the strong demand for remedial justice that followed the end of autocratic regimes in the 1990s has led to the establishment of constitutional courts or councils vested as 'guardians of fundamental freedoms'.[15] Despite such similar nature, these courts and councils are given different competence and mandate reflecting constitutionally entrenched expectations of different peoples.[16]

It is contended that Benin's constitutional human rights entrenchment is unique in this regard, particularly when seen from the prism of its domestication of the African Charter on Human and Peoples' Rights. The history of democracy and the protection of human rights by the Constitution in Benin take roots in the popular struggle, which led to the demise of 17 years Marxist-Leninist dictatorial regime in March 1990. As a human rights activist rightly put it, 'the word liberty did not exist at that time' in Benin.[17] The regime actively abused the human rights of its citizens and transformed the country into a police state, sending the opposition underground.[18]

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8 For instance, international criminal courts and tribunals prosecute only where States are unwilling or unable genuinely to investigate (eg, article 117 of the Rome Statute of the International Criminal Court). See J Dugard *International Law A South African Perspective* 3rd Ed. Juta (2005) 193.

9 JB Marie 'National Systems for the Protection of Human Rights' *Human Rights: International Protection, Monitoring and Enforcement* J Symonides (Ed) Unesco Publishing (2003) 257.

10 Eg in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* African Commission on Human and Peoples' Rights Communication 71/92 para 10 and *Ceesay v The Gambia* ACHPR Communication 86/93.

11 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) Para. 32.

12 Musila (n 2 above) 450. See *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999) Para. 13.

13 See JJ Shestack 'The Philosophic Foundation of Human Rights' *Human Rights Quarterly* Vol. 20 (1998) 210.

14 See NJ Udombana 'Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies' *AHRLJ* Vol. 5 (2005) 47.

15 Udombana (n 14 above) 48. The author referred, among others, to the Constitutions of Benin, Central African Republic, Equatorial Guinea, Gabon, Mali and Togo.

16 See J Hatchard *et al. Comparative Constitutionalism and Good Governance in the Commonwealth* Cambridge University Press (2005) 28-29.

17 A Rotman 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights' *Havard Human Rights Journal* Vol. 17 (2004) 283.

18 See BA Magnusson 'Testing Democracy in Benin' *State, Conflict and Democracy in Africa* Richard Joseph (Ed) Lynne Rienner Publishers London (1999) 221.

Under a popular pressure, the then military regime led by President Mathieu Kérékou conceded to the idea of a national conference: the *Conference Nationale des Forces Vives de la Nation*.[19] The ultimate achievements of February 1990 Benin National Conference included the establishment of a Constitutional Commission. The Commission was tasked to draft a new constitution emphasising the 'promotion and the protection of human rights, as proclaimed and guaranteed by the African Charter'.[20] Benin's Constitutional Court was borne on this foundation in June 1993. Thus, the Court raised strong expectations.[21] Especially due to *expeditive* justice rendered in previous regime 'popular tribunals', the Beninois expected a Court vested with such powers to provide effective and compensatory justice.

In its earliest, Benin's Constitutional Court showed commitments to fulfil these expectations through strong declaratory pronouncements. It swiftly moved from simple declarations of violation to reparatory orders genuinely put in the formulation 'this violation opens up the right to reparations'.[22] Yet, subsequent decisions reveal inconsistency in the application of the right to reparation inferred by the Court mainly from the African Charter domesticated as law in Benin. Further, five years after its first reparatory order, the Court is yet to precise the content and scope of the right to reparation, competent remedial institutions and the quantum of the reparation in cases of monetary compensation. Thus, victims are sent back to the unskilled ordinary justice system[23] to seek compensation.

1.1 Objectives of the study

The purpose of the present study is to determine the extent to which Benin's Constitutional Court gives effect to the right to reparation under the African Charter and to examine relevant routes for the Court to discharge its duty fully and accurately. Ultimately, the study envisions suggesting Benin's Constitutional Court a more genuine approach to the right to reparation with an emphasis on the content and scope of the right to reparation, competent remedial institutions and determination of the quantum in cases of monetary compensation.

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19 As genuinely translated by Rotman (n 17 above) 283, 'an assembly of all the living forces of the nation, whatever their political sensibilities'.

20 JR Heilbrunn 'Social Origins of National Conferences in Benin and Togo' *Journal of Modern African Studies* Vol. 31 (1993) 112 quoted in Rotman (n 17 above) 284.

21 As witnessed the complaints that already almost tripled in 1996. As Rotman (n 17 above) 313 reported, in 2004, responding to the question whether citizens call on the Court with their human rights complaints, Glèlè-Ahanhanzo, a two-term Constitutional Court member, answered 'too much, already'.

22 The Court ordered the first reparation in Decision DCC 02-052 of 31 May 2002.

23 See B Codjovi *'La Place des Conventions Internationales dans le Droit Béninois: Le Juge Béninois devant les Conventions Internationales'* in *Actes du Séminaire sur le Bénin et les Conventions Internationales relatives aux Droits de l'Homm*e (2002) 56 and 64.

1.2 Research questions

The present thesis endeavours to answer three main questions: a) Is there a right to reparation under the African Charter and what does such right encompass? b) How does Benin's Constitutional Court apply the right to reparation and is such application in compliance with the Charter's and other relevant standards? c) In the negative, what are the impediments and which routes may the Court follow to discharge its duty fully and accurately?

1.3 Research methodology

The study will be qualitative, mainly through deskwork and library research. Yet, answering research questions will involve jurisprudential and case law analysis. For a better understanding of legal and other constraints related to judicial practice, the methodology includes consultation of members of Benin's Constitutional Court, experts and justices.

1.4 Limitations of study

This study is limited to Benin's Constitutional Court case law related to remedies for human rights violations under the African Charter. Emphasising the reparations' jurisprudence, particularly on compensation, case law analysis covers decisions rendered between 1993 and 2006 even though attention is given to the general human rights jurisprudence of the Court.

1.5 Literature survey

An extensive scholarship exists on remedies and reparations under the African Charter. Naldi,[24] Musila[25] and Enonchong,[26] among others, proposed interesting work on local remedies in IHRL with an emphasis on the practice of the African Commission.

Obviously, philosophic foundations of remedies had been set up by authors such as Aristotle,[27] Rawls[28] and, in a more practical approach by writers among which are Shelton,[29] Amerasinghe[30] and Mubiala.[31]

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24 GJ Naldi 'Reparations in the Practice of the African Commission on Human and Peoples' Rights' *Leiden Journal of International Law* (2001) 681-693.
25 Musila (n 2 above).
26 N Enonchong 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?' *Journal of African Law* Vol. 46 No 2 (2002) 197-215.
27 See n 7 above.
28 J Rawls *A Theory of Justice* quoted in Shestack (n 13 above).
29 Shelton (n 3 above).
30 CF Amerasinghe *Local Remedies in International Law* 2nd Ed. Cambridge University Press (2004).
31 M Mubiala *Le Système Régional Africain de Protection des Droits de l'Homme* Bruylant Bruxelles (2005).

In any case, the work of international[32] and regional courts[33] is notable in the development of remedies and especially the determination of the quantum in cases of monetary compensation for human rights violations.[34]

Despite this academic and practical interest, particular case study of Benin's Constitutional Court reparations' jurisprudence under the African Charter is wanting. It is to be acknowledged that Ndayikengurukiye,[35] Rotman[36] and Dossou-Yovo[37] have commented on Benin constitutional democracy and the role of its Constitutional Court in protecting fundamental rights. Rotman's study is quite comprehensive as it examined, among others, the lack of an efficient system of monetary compensation and follow-up of reparatory orders.[38] Yet, Rotman did not discuss reparation and determination of the quantum of monetary compensation as a duty of the Court under IHRL and particularly the African Charter. Moreover, account was not given of the end of current processes of reparation and recent progresses in the system, Rotman's study being limited to 2004.

To sum up, notwithstanding their interest for Benin's Constitutional Court, related studies emphasise only institutional role of the Court. Where the human rights protective mandate was examined, existing right to reparation inferred from the African Charter was hardly mentioned. No such analysis emphasised comparative approach with reparation under the Charter, which the present thesis endeavours to address.

1.6 Outline of the study

The present study is articulated into five chapters. **Chapter I** stands for introduction to the work. After presenting Benin's Constitutional Court, **chapter II** examines the status of the African Charter in Benin's constitutional order. **Chapter III** discusses the right to reparation under the Charter, namely from the practice of the African Commission. Then, under **chapter IV**, the reparation's jurisprudence of Benin's Constitutional Court is sketched and analysed in major relevant decisions. Concluding **chapter V** visits challenges and recommendations towards effective reparations for human rights violations in Benin's Constitutional Court.

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32 Namely the International Court of Justice. See MN Shaw 'The International Court of Justice: A Practical Perspective' *The International and Comparative Law Quarterly* Vol. 46 No 4 (1997) 831-865.

33 The European Court and the Inter-American Court. See Jo.M Pasqualucci *The Practice and Procedure of the Inter-American Court of Human Rights* Cambridge University Press (2003), N Jayawickrama *The Judicial Application of International Human Rights Law: National, Regional and International Jurisprudence* Cambridge University Press (2002) and S Davidson 'Remedies for Violations of the American Convention on Human Rights' *The International and Comparative Law Quarterly* Vol. 44 No 2 (1995) 405-414.

34 See Shelton (n 3 above) 294-297.

35 M Ndayikengurukiye 'The IHRL as a Source of Law in the Burundian Judicial System' Unpublished LLM Dissertation Centre for Human Rights University of Pretoria 2005.

36 (n 17 above).

37 N Dossou-Yovo 'The Experience of Benin' *International Journal on World Peace* Vol. 16 (1999).

38 (n 17 above) 303-304.

CHAPTER II

The African Charter in Benin's constitutional order

2 Introduction

As pointed out in chapter I of this thesis, IHRL is aimed at being given effect at domestic level.[39] Nonetheless, concerns still stand in both doctrine and judicial practice regarding domestication. Relevant issues relate to enacting *ad hoc* legislation under dualism or dealing with technicalities such as publication under monism.[40] Adjami[41] exposes 'the widespread non-incorporation [by African States] of IHRL into national legislation'. For instance, the writer laments that 'of the dualist, African common law countries, only Nigeria has enacted implementing legislation to incorporate the African Charter into its municipal legal system'.[42] In this chapter, it is argued that even though ratification and publication would have sufficed for a monist country, Benin came up with a unique domestication of the African Charter. For a genuine comprehension of the status the African Charter enjoys in Benin's constitutional order, it is deemed preliminary to understand the legal constitutional framework in which the Charter was domesticated and should consequently operate. It is looked at the constitutionality of human rights law in Benin's 1990 Constitution and institutional features of its Constitutional Court.

2.1 Constitutionality of human rights law in Benin under the 1990 Constitution

> Any approach to the protection of human rights in Africa must take the constitution as its point of departure because a constitution is the foundation of the legal system and a protocol of survival and continuity for any social group, ensuring that no one attains salvation or offers a programme of salvation to the populace by another route.[43]

2.1.1 Human rights in Benin's Constitution of 1990

As Rotman rightly put it, 'unlike its numerous predecessors, human rights and freedoms are the focus of Benin's Constitution of December 11, 1990'.[44] Even though it shares general features of

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39 At least, self-executing provisions. See F Viljoen 'The Justiciability of Socio-Economic and Cultural Rights: Experience and Problems' (unpublished paper on file with the author) 7.

40 See J Dugard (n 8 above) 47 and ME Adjami 'African Courts, International Law and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?' *Michigan Journal of International Law* Vol. 24 (2002) 103.

41 As above.

42 Adjami (n 40 above) 103.

43 Udombana (n 14 above) 47.

44 Rotman (n 17 above) 284. Relying on Johanès Toudonou and Césaire Kpenonhoun in *Constitutions et textes Constitutionnels de la République du Bénin depuis les Origines Dahoméennes* 226 (1997), the author noted that the constitutions of 1959 and 1960 do not address human rights. The 1964 constitution devotes eleven articles to human rights, while the 1968 constitution devotes seven articles. The fundamental law of 1977 addresses human rights in twenty-six articles.

sub-Saharan Africa 1990's constitutions,[45] Benin's Constitution of 1990 was the result of a particular grown-home process.

A thorough analysis of the contributing factors to political changes in Benin in 1989 is outside the scope of this study. The social origins that support the 'Beniness' human rights entrenchment of the Constitution has been stressed in the precedent chapter. Both the Constitutional Commission tasked to author a new constitution and the High Council of the Republic emanated from the nine-day Benin National Conference.[46] It was a popular assembly that brought together representatives of teachers, students, the military, government officials, religious authorities, non governmental organisations, more than 50 political parties, ex-presidents, labours unions, business interests, farmers and dozens of local development associations.[47] The Conference recommended that new constitutionalism should emphasise 'the defense and the promotion of human rights, such as they are proclaimed and guaranteed by the African Charter'.[48]

The Council followed this recommendation faithfully traduced under article 7 of the Constitution, which importance in the uniqueness of Benin's constitutional human rights law is discussed below. The Constitution drafted by Benin experts under the recommendations of the *Forces Vives de la Nation* is articulated in a Preamble and 160 articles organised in 12 titles. The Bill of Rights' title II, "Rights and duties of the individual", devotes 35 articles (from article 7 to 40) to human rights and duties. In the Preamble, the Beninois people reaffirm

> Their fundamental opposition to any political regime founded on arbitrariness, dictatorship, injustice, corruption,[49] (…) and attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter (…).[50]

All internationally recognised human rights are presents in Benin's Constitution. Civil and political rights are covered by articles 7, 15, 18, 23, 24 and 25; socio-economic and cultural rights, by articles 8, 10, 11, 13, 30 and 31; and solidarity rights, by articles 9, 27, 28, 29 and 79. As expressly noticeable in the formulation of title II, the Constitution recognises individual duties in articles 32 to 37 thus mirroring the African Charter.

Finally, the fundamental law itself proclaims an unequivocal constitutional supremacy. As its concluding preambular paragraph reads, 'the Beninois people solemnly adopt the present

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45 Hatchard *et al.* (n 16 above) 28. The authors note that those constitutions were generally modelled on western constitutional standards.

46 The Conference was headed by the late Archbishop Isidore de Souza who became the President of the High Council of the Republic, the judicial and legislative body, which conducted the democratic change in Benin.

47 See Magnusson (n 18 above) 221.

48 See Heilbrunn (n 20 above).

49 Para. 1.

50 Para. 5.

Constitution which shall be the Supreme Law of the State and to which they swear loyalty, fidelity and respect'. To sum up, the 1990 Benin's Constitution is the result of a dramatic rejection of the successive turbulent political regimes the country experienced. Its drafting process inevitably gave birth to a unique constitutional judicial body charged with guaranteeing popular expectations the *Forces Vives de la Nation* made enshrine in the Constitution.[51]

2.1.2 Benin's Constitutional Court: A *sui generis* institution?

Compared to its African counterparts and to leading constitutional bodies in the world,[52] Benin's Constitutional Court takes from all without being any. The uniqueness of the Court thus makes it a *sui generis* model. Interest is given here to the human rights mandate, subject-matter, standing, investigation and decision making process of the Court.

Guarantor and guardian mandate

It is article 114 of the Constitution that gives Benin's Constitutional Court an unequivocal human rights protective mandate. It reads,

> The Constitutional Court shall be the highest jurisdiction of the state in constitutional matters. It shall be the judge of the constitutionality of the law and it shall guarantee the fundamental human rights and the public liberties. It shall be the regulatory body for the functioning of institutions and for the activity of public authorities.

Apart from the Court's function of 'guaranteeing the fundamental rights and the public liberties', all three other elements of article 114 are relevant to human rights protection.

Firstly, human rights are constitutional matters in which the Court is the highest jurisdiction. Consequently, its decisions in human rights matters are final. As article 123 of the Constitution confirms, 'the decision of the Constitutional Court shall not be subject to any appeal. They shall be imperative for public authorities and for all civil, military and jurisdictional authorities'. Second, its competence to control the constitutionality of the law gives the Court the power to check and scrutinise both Parliament and Executive legislative power,[53] thus it ensures constitutionality of any law related to the status of persons. Finally, as Rotman suggested, 'the Court's competence in regulating the competencies of other government institutions may reinforce the willingness of those institutions to cooperate in the Court's human rights investigations'.[54]

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51 See K Nwajiaku 'The National Conferences in Benin and Togo Revisited' *The Journal of Modern African Studies* Vol. 32 No 3 (1994) 439-440.

52 Reference is made to the Constitutional Courts of Senegal (francophone civil law country), South Africa (a leading system in Africa), France (model that inspired most civil law systems) and Germany (one of the world's pre-eminent courts with an outstanding human rights mandate).

53 Article 105(1) of the Constitution.

54 Rotman (n 17 above) 295.

Coming to its very mandate under article 114 of the Constitution, the Court 'shall guarantee the fundamental human rights and freedoms'. It is submitted that Benin's model went beyond some leading models in Africa and even in the world. Whereas these courts are generally vested only as 'negative legislature' or 'guardians of fundamental rights', Benin's Court is charged with 'guaranteeing' fundamental liberties and freedoms. For instance, the essential function of the French court is to protect fundamental rights from encroachment by the legislature, not by the administration or the courts.[55] As for the German court, it is vested as guardian of the 'Basic Rights' as fundamental rights guaranteed to all German people.[56]

In sub-Saharan Africa, constitutional courts are given either no clear human rights protective mandate,[57] only referred to as 'guardian of fundamental freedoms'[58] or 'guardian of human rights'.[59] It is submitted that the mandate of guarantor seems to go beyond the one of guardian from the perspective of their respective powers. For instance direct individual access, association complaint and *proprio mutu* action are so many tools given to guarantors but which guardians lack. The Senegalese Constitutional Council has experienced the difficulty to guarantee judicial human rights protection under unclear constitutional mandate. Indeed, it is using delicateness that the Council built on its regulatory and constitutional control powers[60] to adjudicate human rights cases.[61] Even though the South African constitutional model is said to be one of the most progressive in the world,[62] its Court has not been vested expressly as 'guarantor of human rights' but as the highest jurisdiction in constitutional matters[63] with conditional access as explored latter.

A broad and purposive subject-matter

The uniqueness of Benin's Constitutional Court is also to be found in its purposive and broad subject-matter defined in article 117 of the Constitution, which specifies that the Court

> Shall rule obligatorily on:
>
> The constitutionality of organic laws and of laws in general before their promulgation; …
>
> The constitutionality of laws and regulatory acts deemed to infringe on fundamental human rights and on public liberties, and in general on the violation of the rights of the individual; … …

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55 See A Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* 47 (1992) quoted in Rotman (n 17 above) 286.

56 See DP Kommers 'Fifty Years of German Basic Law: The New Departure for Germany' American Institute for Contemporary German Studies (Ed.) (1999) quoted in Rotman (n 17 above) 291.

57 E.g. Ethiopia (Council of Constitutional Inquiry, article 84 of 1994 Constitution) and Senegal (article 92 of 2001 Constitution).

58 As is the case in Central African Republic, Equatorial Guinea, Mali and Togo. See Udombana (n 14 above 48).

59 As in the constitutions of Burkina Faso, Burundi, Congo, Rwanda and Senegal. See Udombana as above.

60 See articles 74, 92 and 96 of the Senegalese Constitution of 2001.

61 See for instance, Decisions 15-94 of July 1994 and 11-93 of 23 June 1993. For a comprehensive overview of human rights and constitutional Senegalese case law, see *Association des Cours et Conseils Constitutionnels des Pays ayant en partage l'Usage de la Langue Francaise ACCPUF 'Jurisprudence nationale'* available at http://www.accpuf.org/ images/pdf/cm/senegal/051-jc-principe_ega.pdf (accessed on 11 October 2007).

62 J Crush 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' *International Migration* Abstract Blackwell Publishers UK/USA Vol. 38(6) (2000) 103.

63 Section 167(3) of the Constitution of the Republic of South Africa, Act 108 of 1996.

Whereas complaints may only be filed against government action under the German model,[64] the referral of enacted laws to the French *Conseil Constitutionnel* has become a procedure for challenging them on substantive grounds, particularly for breaches of human rights.[65] The French and Senegalese models share the same particularities. As for the South African system, constitutional matters include 'any issue involving the interpretation, protection or enforcement of the Constitution'.[66]

Liberal rules of standing

The most important feature of Benin's Constitutional Court undoubtedly stems from its individual direct access. As provided under article 122 of the Constitution,

> Any citizen may complain to the Constitutional Court about the constitutionality of laws whether directly or whether by the procedure of the exception of unconstitutionality invoked in a matter, which concerns him before a court of law. This must grant a stay until the decision of the Constitutional Court, which must be reached within a period of thirty days.

This dual individual direct access as provided under article 122 of Benin's Constitution is fleshed out as follows:

> Any citizen may, by a letter comporting his[her][67] name, surname and complete address, seize directly the Court on the constitutionality of the laws. S(he) may also, in a matter concerning him[her], invoke the exception of unconstitutionality before a court of law ….[68]

Moreover, direct access for complaint about the constitutionality of laws and regulatory acts deemed to infringe human rights is given concurrently to the President of the Republic, individuals and any association or non governmental human rights organisation.[69] In the same cases, the opinion of the Court is automatic.[70] Means the Court may act *proprio mutu*.

Further, from the Court's practice, there is no need for the complainant to prove interest or act within a prescribed time.[71] Recalling the *actio popularis* of the African Commission, such liberal standing rules made a commentator[72] witness that 'on the lips of frustrated Beninois has become common the warning "I will go up to the Constitutional Court"'.[73] An overview of the Court's human

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64 See VC Jackson & M Tushnet *Comparative Constitutional Law* (1999) 520 quoted in Rotman (n 17above) 287.
65 See Jackson & Tushnet as above 507.
66 Section 167(7) of the South African Constitution.
67 Our own gender sensitive emphasis.
68 Articles 24(1) and 24(2) of the *Loi No 91-09 du 4 Mars 1991 Portant Loi Organique sur la Cour Constitutionnelle modifiée par la Loi du 31 Mai 2001* (the *Loi Organique*).
69 Article 22 of the *Loi Organique*.
70 Articles 121(2) of the Constitution and 33 of the *Loi Organique*.
71 See C Gangnon *'Les Droits Fondamentaux de la Personne Humaine' Séminaire de formation des journalistes* Cotonou 2 August 2005 (unpublished conference paper on file with the author) 1.
72 Cyrille Gangnon, *Doctoral candidate University of Fribourg Switzerland*.
73 See Gangnon as above.

rights case law since its inception confirms the popular confidence the institution gained among Beninese. On 22 August 2007, the Court handed down 807 decisions on human rights. The year 2003 saw a record of 112 decisions.[74] In response to this upraise of complaints – compared with the 87 cases of 2002 – the Court organised sensitization seminaries intended to various stakeholders in human rights activities in Benin.[75] Such initiative arguably resulted in a breakdown of complaints to 91 in 2004 and 79 in 2005. Yet, 2006 recorded 97 cases. Four months to the end of this year, only 63 cases have been handed down.

Individual direct access exists in the German system[76] but only upon exhaustion of all other legal remedies.[77] Furthermore, overwhelmed by the flood of complaints by the mid-1980s, the German Constitutional Court established three screening committees to filter out 'frivolous complaints'.[78] In France, individual direct access is granted only in the event of electoral dispute and citizens cannot challenge the unconstitutionality of the laws or treaties.[79] Under the South African Constitution, 'the interest of justice and the leave of the Constitutional Court condition direct access or appeal from any other court'.[80] No such vagaries face the Beninois complainant.

Investigation and decision making process

Borne by the Court, investigating human rights violations is costless for the petitioner. The procedure is free from charge, written and secret.[81] The Beninois thus only need a piece of paper and a pen to call on the Court with their human rights' complaints.[82] Investigation methods include hearings, written solicitation of information and visit of the location of alleged violations.[83] A *Conseiller Rapporteur* is assigned by the President to draft a report on alleged violations. The report is reviewed by all the members for deliberation. Decisions are taken at simple majority and abstention is not permitted.[84]

Given the above examination, it is not exaggerated to agree with Rotman that by combining so important features and strong mandate, 'Benin's institution is optimally situated to address human rights violations'.[85] The particular way of domesticating the Charter seems to reflect the uniqueness of Benin's constitutional order.

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74 Annex 1 & 2 of this thesis provide comprehensive details the Court's case law by year, matters, Constitution and Charter provisions violated.
75 Annex 3 of this thesis provides details on the participants' origins.
76 Article 93(1)(4)a.
77 See Jackson & Tushnet (n 64 above) 521.
78 See Rotman (n 17 above) 291.
79 See Rotman as above.
80 Section 167(6) of the South African Constitution.
81 Article 28 of the *Règlement Intérieur* of the Court.
82 See M Afouda-Gbèha *'La Procédure de Règlement des Recours par la Cour Constitutionnelle du Bénin'* (unpublished conference paper) 2.
83 See Afouda-Gbèha (n 82 above) 2.
84 See Afouda-Gbèha (n 82 above) 4.
85 Rotman (n 17 above) 95.

2.2 The status of the African Charter in Benin's Constitution

The extent to which IHRL may be applied and relied on at domestic level will largely depend on the status such norms enjoy in the municipal legal system.[86]

2.2.1 A model of complying with international law obligations?

Under article 1 of the African Charter, parties must 'recognise the rights, duties and freedoms of the Charter and … undertake to adopt legislative or other measures to give effect to them'. As Adjami noted, 'this creates an obligation of domestic incorporation of the African Charter for States Party, which failure constitutes a breach of the Charter'.[87] Benin's domestication of the Charter is a particularly strong compliance with its incorporation obligation.

Benin ratified the African Charter on 20 January 1981. By this ratification a monist country brings international law home, making it superior to domestic law with internal applicability upon publication.[88] Yet, being prior to the democratic renewal and the drafting of the 1990 Constitution, such domestication did not apparently suffice to respond to the new order envisioned by the Sovereign National Conference. As a matter of fact, the *Forces Vives de la Nation* recommended a Charter-oriented Constitution.

2.2.2 A Charter-oriented Constitution: Triple incorporation

The status of the Charter in Benin's Constitution is the logical result of the High Council remaining true to its purpose. Consequently, apart from ratification, a triple incorporation makes the African Charter international, constitutional and ordinary law in the Benin legal order.

Comes first the Preamble.

> We, the Beninois people,
>
> Reaffirm our attachment to the principles of democracy and human rights as they have been defined (…), by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Benin on 20 January 1986 and whose provisions make up an integral part of the present Constitution and of Beninois law and have a value superior to the internal law (…).[89]

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86 See F Viljoen 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa' *Journal of African Law* Vol. 43 No 1 (1999) 1.

87 Adjami (n 40 above) 103.

88 As required by article 147 of Benin's Constitution. IHRL gains applicability no matter implementing legislation only needed under dualist systems. See Dugard (n 8 above) 47, Jayawickrama (n 33 above) 95-96 and the Permanent Court of International Justice (1998) Series B No 15, 17.

89 Para. 5 of the Preamble to Benin's Constitution.

This preambular provision makes the African Charter constitutional law by virtue of the constitutional value of the preamble. Further, the Charter is made both domestic and international human rights law.

Coming in second, article 7 of Benin's Constitution gives direct constitutional status to the Charter by providing that

> The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Benin on January 20, 1986 shall be an integral part of the present Constitution and of Beninese law.

As the drafting history of Benin's Constitution teaches, duplication of domestic incorporation used by the drafters is purposive. Indeed, until recently,[90] the debate on constitutional value of the preamble still prevailed in most African countries of civil law tradition. Besides, whereas article 7 composes the Bill of Rights, the preambular incorporation of the African Charter does not.

Finally comes to achieve this legal incorporation, the material annexure of the Charter to the Constitution. In a 'copy and paste' style, the whole Charter is annexed to Benin's Constitution.

2.3 Conclusion

It was argued in this chapter that the particular status the African Charter enjoys in Benin's Constitutional system stems from both a strong African Charter-oriented Constitution and a *sui generis* Constitutional Court. By its broad guarantor and guardian mandate as well as generous and purposive standing rules, the Court exhibits similar features with the African Commission. However, the Court is a judicial body rending final and enforceable decisions. The relevant question is whether such uniqueness advances the human rights mandate of the Court in the particular respect of providing effective remedies under the African Charter. Before addressing this question, the forthcoming chapter is devoted to an examination of the right to reparation under the African Charter.

[90] Namely after the French Court of Cassation's Decision No 71-44 of 16 July 1971.

CHAPTER III

The right to reparation under the African Charter

> At the regional level, although the African Commission has repeatedly pronounced itself on the question of effective remedies, demonstrably, it has not usefully illuminated it, a fact that perhaps has led commentators to afford but fleeting attention to the question in the African regional human rights context.[91]

3 Introduction

As the introductory chapter of this thesis underscored, remedies are of great importance to human rights protection for 'without an effective remedy a right is largely worthless'.[92] Here, it is examined what the right to reparation encompasses under the African Charter, mainly, from the practice of the African Commission. To set the scene, it is firstly dealt with terminological uncertainty on the subject of remedies in international law with an emphasis on the framework of this thesis. Then the argument proceeds to answer the question whether there is a right to reparation under the African Charter from normative and jurisprudential standpoints. As it is submitted in the closing development, far from being a lonely and marginal instrument, the Charter has become today the node of a whole system. Promises of effective remedies, including monetary damages, are overlooked within the prism of forthcoming and awaited judgments of the African Court and the extension of its jurisdiction to the African Children's Charter and the African Women Protocol.

3.1 The subject of remedies: Clearing terminological uncertainty

Based on Aristotle's doctrine of corrective justice,[93] remedies aimed at awarding to the injured person the equivalent of his loss (*restitutio integrum*) or, if impossible, at least a compensation for what is his[her] due under the law of rights. For this to be done, remedies should 'enter into the body of rights and animate them'.[94]

According to Shelton, remedies encompass two separate concepts, the first being procedural and the second substantive.[95] In its substantive sense, 'remedy connotes the outcome of proceedings and the relief afforded to the claimant'.[96] Remedy covers under its substantive sense, among others, declarations, compensation and reparations. The process by which arguable claims of

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91 Musila (n 2 above) 445.
92 Enonchong (n 26 above) 203.
93 See n 7 above.
94 A Zidar 'The European Court of Human Rights and the Question of Remedies' *European Master's Degree in Human Rights and Democratisation Awarded Theses of the Academic Year 1998/1999* Marsilio (Ed) Venise (1999) 337.
95 See Shelton (n 3 above) 7.
96 Musila (n 2 above) 446.

human rights violations are heard and decided, whether by courts, administrative agencies or other competent bodies constitute the procedural aspect of remedies.[97]

In international and national law of remedies, both practice and doctrine seem to use remedy, redress and reparation indifferently.[98] One of the reasons advanced by Shelton as for there is no exact equivalent for 'remedies' in French and other official UN languages may be of particular interest to this study. Indeed, in its remedies' jurisprudence, Benin's Constitutional Court always refers to the '*droit à la réparation*' but not to the '*droit au recours*' or '*droit de recours*' that would have been the literal translation of 'right to remedy' in French.[99] In any case, the French word *recours* may have both meanings of institution[100] and law[101] to which victims turn to seek justice.

As used in the present thesis – sometimes indifferently with remedy and redress – 'reparation' is meant to cover both procedural and substantive aspects. Such approach is justified by Benin's Constitutional Court practice of remedies. As examined later, the mere declaratory orders of the Court send back the victims to the ordinary judiciary. It is thus deemed logical to find out whether such pronouncements reflect a genuine approach to reparations as including procedural remedies.

Further, 'reparation' is most frequently used to refer to the various means by which a state may repair the consequences of a breach of international law for which it is responsible.

The subsequent comparative analysis highlights the following aspects: effectiveness of remedies including competent national tribunals, respect of fair trial rights emphasising timely human rights justice, award of monetary compensations and monitoring of remedial orders.

3.2 Normative basis of the right to reparation under the African Charter

The absence of express mention of the right to remedy or reparation in the African Charter has demonstrably led scholars to assert that there is no right to an effective remedy under the Charter.[102] Yet, as they promptly noted, the unequivocal justiciability of rights under the African Charter makes the right to reparation 'so self-evident that there was no need for it to be specifically enshrined'.[103]

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97 Shelton (n 3 above) 7.

98 See Musila (n 2 above) 446 and Shelton (n 3 above) 7.

99 See Harrap's Law Dictionary Dalloz (2004) 109.

100 Namely a competent court. See article 3, 121 and 122 of Benin's Constitution.

101 Articles 126(1) and 131(1) of Benin's Constitution. In administrative litigation for instance, every citizen has a *droit au recours administratif* against the State in case of acts violation individual rights.

102 See Musila (n 2 above) 447 quoting G Naldi 'Future Trends in Human Rights in Africa: The Increased Role of the OAU?' in M Evans & R Murray (Eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 1.

103 Musila as above referring to N Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (1995) 17.

In any case, a number of references are made to remedies in the formulation of certain rights.[104]

A general remedial right stems from article 1 of the African Charter, which provides:

> The Member States of the Organisation of African Unity [AU], parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

Both substantive and procedural remedies are constituent of the obligation underlined by this provision. More specifically, the right to local remedies is provided under article 7(1)(a) as 'the right to an appeal to competent national organs against acts violating [one's] fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force'. As to 'the right to be tried within a reasonable time by an impartial court or tribunal', it is guaranteed by article 7(1)(d).

It is on this scattered normative basis that the African Commission has developed its jurisprudence on remedies.

3.3 The right to reparation from the jurisprudence of the African Commission

3.3.1 "Local remedies" in the practice of the African Commission

The practice of local remedies by the African Commission takes source in the well-established international law rule of exhaustion of local remedies. Formulating such rule under the African Charter, article 56(5) provides:

> Communications relating to human and peoples' rights referred to in article 55 [communications other than those of States, meaning mainly individual communications][105] received by the Commission shall be considered, if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

In practice, is it in *Jawara v The Gambia*[106] that the African Commission set out the characteristics of local remedies as provided for under the African Charter, which are availability, effectiveness and sufficiency. As the Commission elucidated:

> A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complaint.[107]

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104 For instance, articles 7(1), 21(2) and 10 of the Charter.
105 Our own emphasis.
106 (2000) AHRLR 107 (ACHPR 2000) para. 31.
107 At para. 32.

Applied to this study, Benin's Constitutional Court would be an effective local remedy if individual direct access to the Court[108] offered a prospect of success and if, at the end of the day, the Court was a sufficient tool capable of repairing human rights violations.

The judicial nature and competence of local remedies seem to be key to the practice of the African Commission. Indeed, in its admissibility jurisprudence, the Commission adopted the view that effective local remedies should be of judicial provenance.[109] This practice of mainstreaming 'effective local remedies' to judicial recourse has received criticisms.[110] However, it is submitted that where a constitutionally competent and well empowered judicial body as Benin's Constitutional Court exists, remedies of non-judicial nature should not be admitted as effective local remedies. The correlated judicial nature and justiciability of the right to remedy have been examined above.[111] The African Charter largely mirrors these standards from which the African Commission may legally draw inspiration.[112]

The fair trial right guaranteed under, among others, articles 7(1)(a)[113] and 7(1)(d)[114] of the African Charter confirms the judicial and competent nature of local remedies. Timely human rights justice has also focused the attention of the African Commission in its jurisprudence[115] and procedural standards.[116] Clearly, the reiteration by the Commission[117] of undue delay in human rights justice as an exception to the rule of exhaustion of local remedies[118] sufficiently demonstrates that delayed remedies cannot be seen as effective. The justiciable right to timely human rights justice is extensively reiterated in a number of other international and regional instruments.[119]

As regards to the question of compensation, the African Commission has not recorded notable damages jurisprudence. Despite arguable normative impediments to compensation claims,[120] the Commission has used a purposive interpretation of its mandate to build an interesting remedies' jurisprudence. The far reaching finding is in the very recent *Bissangou* case discussed later. Nevertheless, the *Malawian African Association & Others v Mauritania*[121] and *Mouvement*

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108 As provided by article 122 of the Constitution.
109 See *Cudjoe v Ghana* (n 12 above) para. 13.
110 See Musila (n 2 above) 450-451.
111 See n 5, 6 and 7 above.
112 In virtue of articles 60 and 61 of the African Charter.
113 The right to have one's cause heard by a court of law.
114 The right to be tried within a reasonable time.
115 See *Amnesty International et al. v Sudan*, Communication No 48/90, 50/91 and 89/93 African Annual Activity Report, Annex V para. 31.
116 See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) Parts C(b), C(c) and N(5) in C Heyns & M Killander (Eds) *Compendium of Key Human Rights Documents of the African Union* 3rd Ed. (2007) 292 and 301.
117 In *Jawara* (n 11 above) para. 28-30.
118 In terms of article 56(5) of the African Charter.
119 Among others, article 41(c) of the CCPR (timely local remedy must be raised by the Human Rights Committee *proprio motu*), articles 2 and 5 of the First Optional Protocol to the CCPR, article 46(c) of the American Convention, articles 11(3) and 14(1)(a) of the CERD.
120 Namely, the breached provision should be cited. See article 56(2) of the Charter.
121 (2000) AHRLR 149 (ACHPR 2000).

Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso[122] cases can be referred to as relevant pronouncements in which the Commission ordered concrete and specific reparations.

As regards to the monitoring of its remedial orders, firm, clear and less ambiguous standards are still wanting in the practice of the African Commission.[123] Seemingly due to the silence of the African Charter on such competence, the Commission has undertaken follow-ups of its findings in very few cases.[124] Yet, states' reporting can be considered as a follow-up mechanism consistently used by the Commission.

Even though a right to reparation is self-evident under the African Charter as argued above, Musila rightly noted that 'the remedies jurisprudence of the African Commission is wanting in depth, consistency and coordination'.[125] It is interesting to see how laborious and hesitant has the practice of the Commission been in this respect throughout the years.

3.3.2 The declaratory stage: Moral satisfaction to remedy violation

In the remedies jurisprudence of the Commission, this stage was marked by mere declarations of violation[126] and, at the best, invitations to amicable settlements.[127] Otherwise put, as remedy to the harm they suffered, victims only remained with the moral satisfaction that States were found in violation of a considered provision of the African Charter. The prototype of decisions in relevant cases was worded as the following finding in the *Free Legal Assistance Group Case*: 'The failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine … constitute a violation …'.[128]

This early inability of the Commission to act as a forceful guardian of rights attracted more or less severe criticisms. Noting that such finding 'illustrates the tersely reasoned approach of the Commission's initial jurisprudence', Viljoen[129] lamented that the wordings of the decision 'invites some uncertainty'. According to Naldi,[130] such 'uncertain start' was to be attributed to various reasons among which 'subordination to the OAU, timidity and lack of transparency'. Mutua went

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122 (2001) AHRLR 51 (ACHPR 2001) where the Commission recommended that Burkina Faso draws all the legal consequences of this decision, by taking to court those responsible for the human rights violations under the African Charter.

123 See GM Mugwanya *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* Transnational Publishers Ardsley (2003) 274 and 376.

124 Eg *Constitutional Rights Project (in respect of Lekwot and Six Others) v Nigeria* Communication 87/93. See Mugwanya as above.

125 Musila (n 2 above) 463.

126 *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995), *Malawi African Association* (n 121 above) and *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR) 2000.

127 *Modise v Botswana* (2000) 25 AHRLR (ACHPR 1997) and *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000).

128 Para. 47.

129 (n 39 above) 23.

130 (n 24 above) 683.

further to describe the Commission as 'a façade, a yoke that the African leaders have put around our necks'.[131]

In some cases heard during this stage, the Charter-body exhibited particular lack of activism. For instance in *Henry Kalenga v Zambia*,[132] on the basis solely of a letter from the government claiming that the complainant has been released, and without hearing from the complainant, the Commission concluded that the case had been amicably settled. Observing that the Commission took the release of the complainant as sufficient, Mugwanya[133] thus rightly complained that the African human rights institution 'did not make any findings respecting violation of the complainants' liberty as well as remedies, such as compensation, for unlawful detention'.

These acerb, yet constructive views on the starting work of the Commission seemed to be premature as an analysis of subsequent findings shows notable improvements.

3.3.3 Hesitancy and lack of clarity in remedial orders

At this stage the Commission seemed to reject the opinion that simple declarations of violation in themselves, possibly leading to a change in law and practice, are often sufficient and appropriate remedies.[134] By already stating that one of its principal objectives is to remedy the 'prejudice complained of',[135] the African Commission had in fact accepted the principle of reparations in its jurisprudence. But the Commission went further, clearly inferring an individual right to reparation by stating that Malawi was 'responsible for the reparation' of numerous human rights abuses.[136] Moreover, the Commission wiped out some gaps in its previous findings. For instance, to the criticism that it has been quite generous with some States in respect of remedies,[137] the Commission replied that measures of release or repeal of laws do not nullify violations, nor absolve governments of their liability in respect of these violations.[138]

Despite this, the Commission remedies' jurisprudence remained mostly unclear, hesitant and thus incomplete.

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131 MW Mutua 'The African Human Rights System in Comparative Perspective' *Review of the African Commission on Human and Peoples' Rights* Vol. 3 No 5 (1993) 11.

132 Communication 11/88.

133 (n 123 above) 369.

134 See eg Shelton (n 3 above) 119.

135 See *Free Legal Assistance Group* (n 126 above) para. 39 and *Organisation Mondiale Contre la Torture and the Association Internationale des Juristes Démocrates & Others v Rwanda* IHRR Vol. 6 No 816 (1999) para. 19.

136 In *Krischna Achutan (on behalf of Aleke Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* Communication Nos 64/92 68/92 and 78/92.

137 See for instance *Henry Kalenga v Zambia* (n 132 above) and *Comité Culturel pour la Démocratie au Bénin v Bénin* (2000) AHRLR 22 (ACHPR 1994) para. 39.

138 See *Lawyers' Committee for Human Rights v Tanzania* Case 66/92 para. 11 and *Civil Liberties Organisation v Nigeria* (2000) AHRLR 179 (ACHPR 1994).

First, the Commission wasted several opportunities to construct its own theory of reparations under the African Charter. Apart from restricting remedies to national norms and mechanisms[139] which the Commission indicated to apply in tandem with article 7 of the Charter,[140] the Commission gave no particular attention to the content and scope of remedies under the Charter.

Further, the exhortatory and general wordings of the Commission's pronouncements left much to desire. Typical enunciation varied from 'inviting' and 'urging' to 'requesting' or 'recommending' States 'to draw all legal consequences', 'necessary legal conclusions'[141] of the Commission's decision[s]'[142] and 'take necessary steps'.[143] Nonetheless, some orders may be qualified as slightly more genuine. For instance, the Commission 'urged' Rwanda[144] and Nigeria[145] 'to adopt measures in conformity with its decision' or 'with the Charter'; and Ghana[146] 'to take steps to repair the prejudice suffered'. Though the Commission made unequivocal reference to international law,[147] related statements remained general and partial, leaving an unachieved sensation.

The evolving jurisprudence of the Commission recorded notable changes.

3.3.4 Restitution and damages orders: Towards an effective right to reparation?

More clarity and specificity deserve attention in the Commission's decisions analysed below. Quoting Naldi, the Commission explicitly 'accepted the concept of restitution and recognised the principle of compensatory damages'.[148]

Prescribing specific actions of restitution, the Commission for instance, further than calling for the release of detainees,[149] ordered to 'reinstate the victim in his right',[150] 'to allow the accused a retrial in the civil courts with full access to lawyers of their choice and to improve their conditions of detention'.[151] Shelton qualifies these more accurate enunciations calling for positive enforcement measures as 'close to injunctive orders'.[152] Pronouncements touched directly on changes in

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139 See NJ Udombana 'So far, so fair: The Local Remedies' Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) *American Journal of International Law* 97 (2003) 1.
140 Eg in *Jawara* (n 11 above) paras 33 and 34.
141 Eg *Pagnoulle (on behalf of Mazou) v Cameroon* (2000) AHRLR 57 (ACHPR 1997).
142 Eg *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (ACHPR 2000).
143 Eg *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).
144 In *Organisation Mondiale Contre La Torture* (n 135 above) 819.
145 In *Media Rights Agenda and Constitutional Rights Project v Nigeria* IHRR Vol. 7 (2000) 265.
146 In *Alhassan Abubakar v Ghana* IHRR Vol. 6 No 832 (1999) 833.
147 As in *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para. 48.
148 Naldi (n 24 above) 686-688.
149 As in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* where the Commission was quite specific in its order to 'release all those who were detained for contesting against the annulment of the elections'. See Communication No 102/93.
150 As in the *Pagnoulle Case* (n 141 above).
151 As in *Civil Liberties Organisation v Nigeria* (n 138 above).
152 Shelton (n 3 above) 117.

domestic legislation in the form of 'annulment of impugned decrees'.[153] At a point in the time, the Commission seemingly reached irretrievable stage towards such genuine orders as reparation in terms of monetary compensation.

Indeed, the Commission had already held that victims suffered damages,[154] ordered damages for prejudice suffered[155] or even observed that 'no award for compensation is called for'.[156] In a more elaborated pronouncement, the Commission recommended the 'payment of compensatory benefits to the widows and beneficiaries of certain victims'.[157] In *SERAC*,[158] one landmark case of the Commission, the latter provided quite progressive elaboration on the provision of effective remedies under the African Charter.[159]

At that stage Naldi submitted: 'it is only a matter of time before the Commission awards monetary compensation'.[160] The following consideration of the most recent and far reaching findings of the Commission seems to confirm the scholar's view.

3.3.5 *Antoine Bissangou v Congo*:[161] An award of monetary compensation?

The case is related to the refusal of Congo to execute a domestic court's final order to pay damages to the complainant in compensation for the prejudice caused to his personal assets and property by the soldiers and officers of the national Police Force during the socio-political upheavals of 1993. Finding Congo in violation of articles 3,[162] 7[163] and 14[164] of the African Charter, the Commission[165]

> (…)
>
> **4.** **Requests** the Republic of Congo to compensate the Complainant **as required** by paying him the amount **fixed** by the High Court of Brazzaville, namely the global amount of 195,037,000 FCFA equivalent to 297,333.00 Euros;
>
> **5.** **Further requests** the Republic of Congo to pay compensation for the loss suffered by the complainant, the amount of which shall be determined in accordance with Congolese legislation.[166]

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153 As in *International Pen, Constitutional Rights Project and Interights (on behalf of Ken Saro-Wiwa Jr.)* and *Civil Liberties Organisation v Nigeria Communications* Nos 137/94, 139/94, 154/96 and 161/97.

154 In *Embga Mekongo Louis v Cameroon* Communication No 59/91.

155 In *Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits l'Homme au Sénégal and Association Malienne des Droits de l'Homme en Angola v Angola* Communication No 159/96.

156 In *Amnesty International v Zambia* Communication 212/98.

157 In *Malawi African Association* (n 121 above).

158 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

159 See para. 47 detailing the content of States' obligation to protect.

160 Naldi (n 24 above) 689.

161 *Antoine Bissangou v Republic of Congo* Communication 253/2002 in 21st Activity Report of the African Commission presented at the 10th Ordinary Session of the AU Executive Council Addis Ababa 25-26 January 2007.

162 Equality before the law and equal protection of the law.

163 Right to fair trial.

164 Right to property.

165 In Report referred to at n 161 above 38.

166 Our own emphasis in bold.

This can be said to be the first decision of the Commission awarding monetary compensation. Indeed, it is arguable that the Commission did not leave it to domestic institutions to redress violation but rather confirmed the *res judicata* of the High Court of Brazzaville.

However, the relevant question is whether it is an award of monetary compensation or a simple confirmation of a domestic judgment. In any case, the role of the Commission is not to be a tribunal of first instance but a supra national instance of control, confirmation or annulment of domestic laws or judgments.[167] Obviously, if no quantum was fixed by the domestic judgment, the Commission would have unlikely come up with such a precise monetary award. As a matter of fact, the Commission stated it does 'not consider itself in a position to put a figure to the lost'.[168] Consequently, further claims of the complainant were sent back to local remedies.[169]

At least, the Commission did not miss a unique opportunity to confirm the justiciability of the right to reparation under the African Charter by declaring 'the right to be heard to be ineffective if the execution of subsequent legal rulings is unduly prevented, nullified or delayed'.[170]

3.4 Providing remedies in the expanding substantive constellation of the African system

Subsequent instruments and bodies have been put in place under the auspices of the African Union to complete the African Charter in building a comprehensive African human rights system. Even though emphasis has been put on the creation of the now established African Court as a potential solution to the unclear question of remedies under the Charter,[171] attention should be given to the general normative development of the system. It is right that the African Court Protocol[172] clarifies the issue of applicable remedies under the Charter by providing that

> If the Court finds that there has been a violation of human and peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.[173]

Further, being a protocol to the African Charter, the former is intrinsically linked to the latter and aimed at facilitating the implementation of Charter rights. Therefore, it would be logical that any means of implementing the Charter becomes unachieved if regardless the Protocol. While justifiable apprehensions on the success of the African Court and its relationship with the

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167 As falling under the mandate of the Commission. See *Bissangou Case* n 161 above para. 47.
168 At para. 84.
169 The Commission referred to it previous most far reaching decision on reparation, namely *Embga Mekongo Louis v Cameroon* Communication 59/91 para. 2.
170 At paras. 73-75.
171 See Musila (n 2 above) 461-463 and Naldi (n 24 above) 689-690.
172 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights adopted on 10 June 1998 in Addis Ababa and entered into force on 25 January 2004. The first judges were sworn in during the July 2006 Summit of the AU in Banjul.
173 Article 27 of the African Court Protocol.

Commission considering their respective mandates do not constitute the focus of this thesis, the normative development of the African human rights system as a whole remains of particular interest. It is contended that, as Viljoen judiciously noted, more than only promising unequivocally bindings judgments,

> The Court Protocol expands the substantive jurisdictional scope of the Court beyond that of the Commission (which is limited to the Charter) to "any other human rights instruments ratified by the States"[174] concerned.[175]

Consequently, in respect of human rights adjudication and subsequent remedies, the scope of the African Court will include important instruments such as the African Children Charter[176] and the African Women Protocol.[177]

3.5 Conclusion

As examined in this chapter, the right to reparation under the African Charter stems from both Charter provisions and the jurisprudence of the African Commission. Over its long practice, the Commission has genuinely built its reparations' jurisprudence on the scattered normative basis of remedies in the Charter but also by relying on IHRL standards. Yet, reparation is still left to domestic incompetent, unskilled or unwilling institutions. The Commission could only make recommendations of redress and indicate remedy providers. Arguably, this is due to the institution's lack of normative competence to make enforceable orders under the African Charter.

The Charter being law in Benin, it is interesting to see how a judicial body, empowered to make enforceable decisions, has applied the right to reparation so far.

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174 Article 7 of the Court Protocol.
175 Viljoen (n 39 above) 24.
176 The African Charter on the Rights and Welfare of the Child.
177 The Protocol to the African Charter on the Rights of Women in Africa.

CHAPTER IV

The right to reparation as applied under the African Charter by Benin's Constitutional Court

> Considering that it emerges as much from a **combined and cross-reading**[178] of these provisions [among which articles 4 and 5 of the African Charter] as from international doctrine and custom that from the harms endured by any person opens the right to reparations; that in the instant case, [the petitioner] has the right to reparations for the harm that he endured.[179]

4 Introduction

Building on chapter 3, the current chapter analyses the application of the right to reparation by Benin's Constitutional Court under the African Charter. It is worth stressing that in its inaugurating remedies' pronouncement, the Court inferred the right to reparation from the African Charter, among other normative, customary and doctrinal sources. The Court's jurisprudence is sketched and analysed while compared particularly to the one of the African Commission and other relevant judicial practices. Redundancies and other inconsistencies inherent to the practice of the Court are also visited. Demonstrably, the Court and the Commission suffer same inabilities, among others, to award full and genuine compensation for human rights violations. As it is examined below, the declaratory stage of the remedies' jurisprudence of the Court (1993-2002) amazingly brings in mind the first decade of the Commission's hesitant and inaccurate remedies' jurisprudence. However, recent years (2005-2007) brought notable changes in the Court's practice.

4.1 Reparations in the practice of Benin's Constitutional Court[180]

4.1.1 The declaratory stage: From explanatory orders to warning pronouncements

Exhibiting similarities with the earliest of the African Commission, Benin's Constitution Court pronouncements at this stage resorted in mere declarations of violation punctuated with explanation of Constitution and/or Charter provisions. Neither a single remedial order nor recognition of an existing right to reparation stemmed from its case law. Besides, the Court adopted an inconsistent application of the African Charter provisions and impersonal liability of violators.

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178 Our own emphasis.

179 Benin's Constitutional Court 's Decision DCC 02-052 of 31 May 2002 para. 14, 7th *Considérant*.

180 The translation from French to English of the case law and other Court's material referred to in the following sections should be taken as our own. Exception is made of such translation quoted from Rotman (n 17 above) in which cases due reference was made. Annex 1 and 2 of this thesis provide an overview of the Court's human rights case law.

In DCC 95-024,[181] called to control the constitutionality of administrative acts taken in application of Benin's labour law, namely the Labour Code, the Court merely recalled that 'article 6 of the African Charter and articles 16 and 18(4) of the Constitution establish the principle of individual right to liberty'. Ultimately, the Court found the deferred acts in violation of the sole Constitution.[182] In some pronouncements, the Court would find violation of key Charter rights by referencing only constitutional provisions. It would thus hold that 'the treatments inflicted to citizens by the Gendarmerie are cruel, inhuman and degrading treatment, which are in violation of the Constitution'.[183]

Other instances resulted in laconic recitation, typically being, 'in terms of article 7 of the African Charter, no one shall be inflicted a sanction without priory having access to his case file and presenting his[her] arguments'[184] or 'the freedom of movement[185] is a fundamental right guaranteed by article 25 of the Constitution, which may only be restricted subject to law'.[186]

At this stage, the jurisprudence of the Constitutional Court of Benin has also been of some academic purpose where it explained for instance that

> The exigencies of surveillance of the territory and the guarantee of the security of persons and goods imply that account is taken of the right to freedom of movement ensured to every citizen by the Constitution.[187]

It is noteworthy that at a point in the time, the Court seemed to have pronounced stronger explanation when stating that 'the respect of articles 15 of the Constitution and 6 of the African Charter imposes itself to any holder of public power in the exercise of his [her] prerogatives'.[188]

Yet, finding undue delay in violation of the Charter, the Court observed silence on the automatic right to remedy attached to such violation as known in the practice of the African Commission. Further, even though the delays held as undue by the Court were at odds, the constitutional body gave no indication as to the common point of its several findings on the question. In DCC 97-006 for instance, the Court observed that 'a flagrance offence case, which was proceeded for 14 months, had accused an undue delay and does not respect the prescriptions of the African Charter

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181 Of 6 July 1995. In Benin's constitutional practice, cases are not named as the South African *Treatment Action Campaign* and *Grootboom* or the Bostwanian *Unity Dow*. Rather, they are numbered as DCC (for *Décision Cour Constitutionnelle*) followed with the two last numbers of the year and the number of the case. Yet, for practical purposes, some landmark cases are named in next sections, due mention being made nonetheless of the numbering style. Purposively, full date is mentioned only for certain cases to emphasis the difference of time between decisions.

182 See eg, DCC 03–071 of 16 April 2003 (violation of right to equal treatment in access to public service) and DCC 03-083 of 28 May 2003 (cruel treatment personally inflicted to the victim by the General Director of the National Police).

183 DCC 98-101 of 23 December 1998.

184 DCC 95-026 of 11 July 1995.

185 Which is expressly guaranteed under article 12(1) of the African Charter?

186 DCC 95-034 of 1 September 1995.

187 DCC 01-089 of 31 October 2001.

188 DCC 96-055 of 29 August 1996.

and the Constitution'.[189] In subsequent instances, 11 years for the Tribunal of First Instance of Abomey[190] to transmit the case file to the Appeals Court,[191] 15 years of proceedings without judgment[192] and two years to comply with a judicial decision[193] were held undue with no elaboration on comparative or differentiating criteria.

Quite strong enunciation in subsequent similar cases did not led the Court further than declarations of violations in response to which no remedy neither punishment of wrongdoers were ordered. DCC 00–007 made it clear that nothing shall justify undue delay. In the occasion, the *sept sages de Cotonou*[194] held that

> Procedural failures imputable to the litigants, irregular composition of chambers, the impossibility to hear the case, strikes in the judicial services, (…) re-appointment of magistrates do not absolve courts from their constitutional duty of ensuring justice within a reasonable time.[195]

Such pronouncement exhibits similarities with those of the African Commission examined under chapter 3.[196] However, no remedial order followed and only article 35 of the Constitution was referred to in the decision after article 7 of the Charter was expressly cited in arguments. At the same epoch (1997 to 2000), the African Commission already made quite stronger and more elaborated findings calling to 'repair the prejudice suffered', 'draw necessary legal consequence' or 'reinstate victims in their rights'.

Starting in 1998s, stronger elaboration on violation appeared as the manifestation of the Court's exasperation of having no constitutional express power to award remedy and sounded as warnings of forthcoming progressive enunciation. A manifestation of this malaise is expressed in DCC 98-029,[197] where the Court stated: 'the complainant failure to appear for the enquiry purposes shall not justify the undue delay of police custody or absolve a police officer from his responsibility'. After deciding in grave instances of discrimination in access to public service[198] and two months police custody,[199] the Court could not but find a way out of such institutional malaise in a short term. The year 2002 was chosen by the Court to put a step forward by resorting to law, especially IHRL.

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189 DCC 97-006 of 18 February 1997.
190 Historical capital city of Benin situated Centre of the country.
191 DCC 98-059 of 4 June 1998 in which lower courts were found in violation of article 7(d) of the African Charter.
192 DCC 03-084 of 28 May 2003 in which the Court found violation of article 7(d) of the African Charter.
193 DCC 03-146 of 30 October 2003.
194 Cotonou's seven wise personalities. The seven Members of the Constitutional Court seating in Cotonou are chosen among high-level jurists, professors, legal practitioners with at least 15 years experience and personalities of great professional reputation. See in general article 115 of Benin's Constitution.
195 Decision of 2 February 2000.
196 See n 118 to 131.
197 Of 26 March 1998.
198 DCC 01-058 of 27 June 2001 finding the Minister of Education in violation of article 26 of the Constitution (equality before the law) for authorising a teacher but not another one to compete, both belonging to the same professional category, registered for the same speciality and fulfilling the same conditions.
199 DCC 01-078 of 17 August 2001.

4.1.2 Reparations' era: A progressive approach?

***Inaugurating the right to reparation: The Fanou Decision*[200]**

On the facts, the complainant, Mister Laurent Fanou, exposed to the Court that following to a two-week leave granted by his employers, he has been dismissed without any otherwise information on related grounds. In response to his opposition to his dismissal, he was arrested and subject to cruel, inhuman and degrading treatments by four police officers, which inflicted karate beatings on his head and foot beatings on his genital organs. He was then kept in custody without seeing a magistrate from 22 to 28 August 2001. The complainant asked the Court to declare in violation of articles 17 and 18 of the Constitution, his arrest, detention and the treatment he had been subject to. He further claimed damages for the lost of his belt, watch and 11 pay-slips.

The Court made the following findings in respect of the three claims of the complainant:

- On the detention, the Court found it was 'abusive and in violation of article 18(4) of the Constitution'.
- On the violence the complainant was subject to, the Court found it was 'cruel, inhuman and degrading treatment in terms of article 18(1) of the Constitution'.
- The Court subsequently decided that 'these two violations open right to reparation to the benefit of the complainant'.
- Coming to the lost of his personal effects and damages he expressly asked for, the Court declared itself 'incompetent of entertaining such claim'.

The normative basis of the right to reparation thus inaugurated by the Court is deemed of further interest. The Court recalled that

> It results from the preamble of the Constitution (…) that ". . . fundamental human rights, public liberties, the dignity of the individual and justice are **guaranteed, protected and promoted**";[201]
>
> That according to articles 8 and 15 of the same Constitution "Human beings are sacred and inviolable." "The State has the absolute obligation to respect them and protect them . . ."; "Every individual has the right to life, liberty, security, and the integrity of his person";
>
> That the African Charter on the Human and Peoples' Rights in its articles 4 and 5 reaffirms: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right"; ". . . All forms of exploitation and degradation of man particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

200 DCC 02-052 of 31 May 2002.
201 Our own emphasis.

In concluding its argument, the Court inferred the right to reparation, among other norms, from the African Charter.[202] Noteworthy, no reference was made to the jurisprudence of the African Commission, which has got an improved practice of the right to reparation for over two decades. In any case, the African Charter, international customary law and doctrine agree on a justiciable right to reparation for human rights violations. The only standing issue is whether the Court's approach to the right to reparation meets the standards it was inferred from and which constitute its legal basis. It is submitted that the findings of the Court in this instance did not meet such standards.

According to those standards, a genuine remedy is aimed at repairing the wrong done in a manner to restate the *statut quo ante* or at least provide a sufficient compensation, namely by the payment of monetary damages. Thus, the Court's findings in *Fanou* left rights worthless. Further, the criteria of availability, effectiveness and sufficiency set out by the African Commission under the African Charter are met neither. Indeed, even though Beninese complainants have direct access to the Constitutional Court, one knows by advance the unsuccessful outcome of constitutional complaints for human rights violations. Laurent Fanou has learnt that Benin's Constitutional Court and African Charter provisions domesticated as law in Benin are not capable of redressing the loss he suffered.

Yet, compared with the Court's jurisprudence before 2002, the *Fanou* case is a notable progress. It raises the very issue of the Court's competence to order reparations. It is therefore important to find out how the Court came to *Fanou*.

How the Court came to Fanou

The main dispute between Benin's Constitutional Court and the Judiciary results in the Court's constitutional competence to award reparations and order the Government to pay. Demonstrably, the Court itself has repeatedly admitted its incompetence.[203] Even in its post-*Fanou* jurisprudence, the Court still held 'it is not competent to give injunctive orders to the Government'.[204]

Supporting this view, some commentators[205] rightly held that even though the Court's judgments are legally binding, the institution is a jurisdiction of attribution, which means its competence is limited to pronouncing violations. This argument is outdated by the Court's inauguration of a right to reparation and one successful case of compensation obtained pursuant to the Court's order.

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202 See n 179 above.

203 Eg in DCC 95-024 of 6 July 1995 and DCC 95-029 of 17 August 1995.

204 DCC 03-003, DCC 03-004 of 18 February 2003 deciding on the right to go on strike and DCC 03-052 of 14 March 2003 Decision DCC 03-083 of 28 May 2003 known by Benin's judiciary as the Case of 813 or 438 *Agents Permanents de l'Etat* (civil servants)..

205 Eg M Afouda-Gbéha *'Les raisons de la reconnaissance du droit à la réparation par la Cour Constitutionnelle du Bénin'* (unpublished paper on file with the author), A Capo-Chichi (electronic consultation of 19 October 2007) and Rotman (n 17 above).

In fact, the Court inaugurating a right to reparation proceeded more from judicial activism than an express constitutional basis to do so.[206]

As examined in chapter 2 of this thesis, a protective mandate is given to Benin's Constitutional Court under articles 114 and 121 of the Constitution. Moreover, the Court is granted *proprio mutu* action[207] on the constitutionality of law or any other acts deemed to infringe human rights. Finally, the Court shall decide more generally on human rights violations. Seemingly, these provisions reasoned the Court restricting itself to declaratory orders in the earliest.

Yet, article 19 of the Constitution provides:

> Any individual or any agent of the state who shall be found responsible for an act of torture or of maltreatment or of cruel, inhumane or degrading treatment in the exercise of, or at the time of the exercise of his duties, whether of his own initiative or whether under instruction, shall be punished in accordance with the law. (…).

The law referred to is apparently criminal law, meaning the victim should seize a criminal court. However, given that violators are mostly high rank officials, ranging from police officers to ministers, victims are generally unable to institute proceedings against them. They rather choose to recourse to the Constitutional Court to seek a condemnation of violators, which condemnation is unfortunately of moral value due to normative limitations of the Court.

Considering this, the *sages de Cotonou* thought 'complainants who call on the Court with their rights should logically expect reparation for the prejudice they suffered'.[208] Several analysis and research undertook on the subject, namely drawing from the Constitution Preamble, the African Charter, international doctrine and the European Court's jurisprudence 'achieved to convince the Court to cross the Rubicon'.[209]

The message carried by the Court's own reasoning on its change in practice flows from both legal and institutional dynamic, but seemingly more from the later. It is suggested that *Fanou* is the recognition by the Court of its competence to pronounce reparations. As a matter of fact, the first legal basis cited by the Court in *Fanou* is the provision by the constitutional preamble that ". . . fundamental human rights, public liberties, the dignity of the individual and justice are guaranteed, protected and promoted".

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206 The arguments discussed here are taken from Afouda-Gbéha (n 205 above).

207 Which the Court has generously used in several occasions in the interest of law but also of petitioners' human rights. See for instance, Decisions DCC 95-024 of 6 July 1995 (invalidity of a petition for failure to mention the name, address and signature of the petitioner), DCC 95-026 of 11 July 1995 (inadmissibility of an association's complaint for defect of declaration or registration with the ministry of home affairs), DCC 02-034 of 10 April 2002 (defect of signature) and DCC 03-020 of 20 February 2003 (incapacity of an association to go to court). In a well-elaborated formulation, the Court would generally observe that 'as long as the petition invokes a human rights violation, the Court shall act automatically'.

208 Afouda (n 205 above) 1.

209 Afouda as above 2.

In any case, the right to reparation inaugurated in *Fanou* was ineffective as the complainant was sent back to ordinary courts to seek compensation. Mister Fanou did not pursue the case. However, in a subsequent instance, the petitioner has pursued her reparatory award and obtained the payment of damages.

4.1.3 The *Favi* Decision:[210] Effective monetary compensation?

It is to be mentioned first that in a similar case immediately preceding *Fanou*, the Court dismissed the complainant's claim of 10,000,000 CFA (about 15,244 Euros) damages.[211]

Immediately following the *Fanou* case, the *Favi* Decision is the only one so far pursuant to which the victim has obtained the payment of monetary damages awarded by the Constitutional Court. Madame Adele Favi challenged before the Court the treatment she was subject to by officers from the Presidential Guard. Finding that the complainant was subject to cruel treatments, the Court cited article 18(1) of the Constitution as in the *Fanou* case. Then, citing its precedent, the Court went on to decide that Favi has 'right to reparation for the prejudice she suffered'. No mention was made of the African Charter or any other source. This reliance on precedent made Rotman conclude rightly that 'with that, the Court redefined its responsibility to guarantee fundamental individual rights to include providing the victim the opportunity to collect reparations'.[212]

Demonstrably, such opportunity does not appear to be effective. How Madame Favi obtained reparations edifies on the issue.[213] On 14 August 2002, the victim instituted proceedings in claim of 25 000 000 CFA (about 38,112 Euros) damages against the Government in the Tribunal of First Instance of Cotonou. The victim obtained a judgment to collect 5 000 000 CFA.[214] Through her lawyer, Madame Favi seized the Judicial Agent of the State attached to the Ministry of Finance to have the judgment executed. Bearing in mind that the Constitutional Court's decisions are final, the State Agent entered into negotiation with the victim. Ultimately, Madame Favi had no choice but to collect 5 000 000 CFA damages, loosing about 1,952 Euros interests ordered by the first instance court.[215] She renounced to institute any further legal action against the State in this case.

Notwithstanding such payment, it is submitted that none of *Fanou* and *Favi* enjoyed an effective right to reparation. Firstly, it took two years and seven months to Madame Favi to obtain compensation in ordinary courts. This confirms the ordinary justice being notoriously slow and thus

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210 DCC 02-058 of 4 June 2002.

211 See DCC 02-037. The Court observed that articles 114 and 117 of the Constitution do not grant the institution such competence.

212 Rotman (n 17 above) 304.

213 Information obtained from Mr Arsène Capo-Chichi, Magistrate, Supreme Court of Benin (electronic consultation of 18 October 2007) and Ms Marcelline Afouda-Gbèha, Magistrate, Secretary General of Benin's Constitutional Court (interview of 10 January 2007 and electronic consultation of 26 October 2007).

214 See annex 4. Judgment No 07/04/4th Civil Chamber of 9 February 2004.

215 See annex 5. Agreement No 285/AJT/BGC/SA of 25 February 2005.

ill-skilled to adjudicate human rights matters.[216] Second, Benin's Constitutional Court is the competent and experienced tribunal capable of dealing with human rights matters in Benin as of yet.[217] Third, this compensation process incurred lawyer's costs on Madame Favi's charge, what ordinary Beninese citizens do not dispose of. Finally, reparations for human rights violations as applied by the Court is likely to open the way to informal means of obtaining reparation according to the State's good will.

Other insufficiencies are deemed of interest in the remedies' jurisprudence inaugurated by Benin's Constitutional Court.

4.1.4 Inconsistent application of reparations in the post-*Fanou* jurisprudence

First, the inauguration of the right to reparation in 2002 appears as a denial of the right to reparation for a number of other petitioners, which endured various violations between 1993 and 2002. Besides, the Court did not follow a consistent practice of reparations. Depending on instances, the Court recognised the right to reparation[218] but did not specify reparation in any subsequent case where it found violations of the right to equal treatment by the State.[219] Then, in a subsequent instance on provisional detention the right to reparation was mentioned in the arguments but not while specifying orders.[220] Thereafter, in a similar instance, the Court made a reparatory order.[221]

The lack of elaboration in the Court's decisions does not help in understanding legal argumentation and rationale behind its reparations' jurisprudence. Perhaps due the influence of the French civil law tradition on the judicial opinion writing, Benin's Court does not prefer elaborate opinion known in the practice of its South African counterpart for instance. The Court's decisions remain completely silent on, for instance, how its reparations' orders should be executed, the remedial institution and the urgency of the reparation or provisional measures if deemed necessary. The African Commission has got an improved practice in these respects. Finally, to date, the Court does not provide any guidance to the victims as to the process of claiming compensation. Even

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216 See Rotman (n 17 above) 310, Codjovi (n 23 above). See also in general *Association Africaine des Hautes Juridictions Francophones (AA-HJF)* (Ed.) *'Actes de la Réunion d'Evaluation de l'Application du Droit International dans l'Ordre Juridique Interne des Etats Africains Francophones'* Cotonou (September 2005).

217 It is important however to acknowledge that starting initiative has been taken to organise human rights training of about 350 magistrates in Benin, Burkina Faso and Senegal. The African Association of Francophone Highest Courts has undertaken such activities in 2003 and 2004 with the financial and technical support of international non organisations. See *La Voix de l'Intégration Juridique et Judiciaire Africaine Revue Juridique de l'AA-HJF* No 004 (2005) 245-261.

218 For instance, DCC 02-093 and DCC 02-121 dealing with provisional detention; DCC 02-114, DCC 02-131 and DCC 02-136 dealing with cruel, inhuman and degrading treatments.

219 DCC 02-081 and DCC 02-082.

220 DCC 02-089.

221 DCC 02-114.

though a well-established follow-up is still wanting, the Commission endeavours to follow implementation of its decisions through States reporting and its own bi-annual reports.

Since 2005, promising pronouncements seem to confirm that, alike the African Commission, the Constitutional Court of Benin is moving towards more genuine reparatory orders.

4.1.5 Recent progresses in the reparations' jurisprudence of the Court

Recent years apparently brought more elaboration in Benin's Constitutional Court pronouncements on human rights violations. The strongest and most elaborated order made by the Court is undoubtedly in DCC 06-016.[222] Deciding that

> 1. The *Relevé* of the Council of Ministers, which excludes the petitioners from the training of magistrates at the National School of Administration and Judicial Training, violates the *res judicata* authority of Decision DCC 05-067[223] of the Court and is contrary to the Constitution;
>
> 2. The acts of Mister … , Minister of Justice and Human Rights, constitute a violation of article 35 of the Constitution,

The Court consequently ordered that

> Misters Ousman ALEDJI & six other petitioners concerned by DCC 05-067 **must be registered** to participate in the training of magistrates (…) at the same title as their [30] other colleagues (…).[224]

While such order is quite clearer, it is an unequivocal injunction to the Government, which the Court had expressly declared itself incompetent to make in previous years.[225] Orders made in the *Alédji* case recall the South African Constitutional Court's pronouncements in which the highest jurisdiction 'requires the State to devise and implement' socio-economic programmes,[226] decides that 'the States and its organs must include reasonable measures' in their development plans[227] or 'extend the testing and counselling facilities' to determined categories of people.[228] Furthermore, compared to the recommendatory wordings of *Bissangou*, where the African Commission 'urges' and 'requests', the 'must' order in *Alédji* exhibits typical features of a judicial, binding and enforceable pronouncement. Apart from enlarging the adjudicatory equation of Benin's Constitutional Court, *Alédji* opens an avenue to the devising of a follow-up system within the Court.

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222 Of 31 January 2006. For the purpose of this work, the case is named the *Alédji Case*.
223 Of 12 July 2005.
224 Our own emphasis in bold.
225 See n 200 and 211 above.
226 *Grootboom v Oostenberg Municipality* 2000 (11) BCLR 1169 (CC) para. 99(2)(a).
227 *Grootboom Case* (n 226 above) para. 99(2)(b).
228 *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) para. 135.

However, in the instance, the initiative to sanction Government's failure to comply with a Court's prior decision came from unsatisfied petitioners.

Notably, the Court has also departed from its previous quasi-automatic declarations of incompetence.[229] Similarly, the Court adopted a new trend in 'opening' right to reparation on a quasi-automatic basis for certain violations such as cruel treatment and unlawful arrest and detention, even where the sole Constitution was cited in the specification of the order.[230]

While an improved practice of application of the African Charter is noticeable at this stage, the Court is yet to adopt a consistent approach to the specification of the right to reparation and reliance on the African Charter in its decisions. For instance, in DCC 05-050[231] and DCC 05-114,[232] the Court interestingly decided on the violation of the sole Charter's articles 7(1)(a) and 7(1)(d) in cases of undue delay in proceedings. Charter provisions were cited in the decisions. Surprisingly, the Court did not 'open' the right to reparation in any of the two cases. In another instance,[233] the Court found violation of the right to freedom of religion and protection of the family. The African Charter was cited in the decision but no reparation was ordered. On the same date, reparation was ordered in a case of unlawful arrest and detention.[234] Respectively one month and three months thereafter, the Court failed to specify the right to reparation while finding violation of the sole Charter in cases of unlawful detention, violation of fair trial rights[235] and 18 months undue delay in deciding a case over land ownership conflict.[236]

Actually, the practice of the Court seems to teach that all human rights violations do not open the right to reparation, what is contrary to the *ubi jus ibi remedium* principle. Especially, cases handed down by the Court in the considered respects exhibit too many similarities. It is right that all violations do not have same extent or gravity, hence do not need same category or level of reparation. As voices from inside the Court mention, the institution decides in a sovereign manner on a case-by-case basis.[237] Yet, granted the internationally recognised nature of the right to reparation, the Court should enlighten its redundant reparations' jurisprudence for an improvement of its protective mandate. The call is thus for more elaborated and argued decisions.

Remarkable improvement has rather been recorded in the Court's reparations' jurisprudence from the standpoint of punishing wrongdoers. Shaming names has been used purposively and the rank

229 One case is recorded between 2005-2006.
230 See eg, DCC 05-066 of 8 July 2005 (arbitrary arrest, unlawful police custody and cruel treatment) and DCC 05-094 of 30 August 2005 (arbitrary arrest and detention).
231 Of 16 June 2005.
232 Of 20 September 2005.
233 DCC 06-080 of 27 July 2006.
234 DCC 06-081 of 27 July 2006.
235 DCC 06-103 of 11 August 2006. In the instance, the complainant was held in detention for six years and three months without being heard by a magistrate.
236 DCC 06-151 of 19 October 2006
237 See Afouda (n 205 above) 3.

of targeted officials reveals a clear moving from previous ambiguous and impersonal liability declared by the Court.[238] Unfortunately, the Court is still to order that administrative action, resulting namely in sanction, shall be taken by the violators' hierarchy, most of them being civil servants or high rank officials. Furthermore, no such order has been made as of yet to hold wrongdoers accountable in cases of personal criminal responsibility. They have rather taken advantage of their positions to avoid punishment. Cases have involved naming them police officers,[239] Presidents and Registrars of Tribunals[240] as well as Ministers.[241]

The failure to request administrative or other disciplinary action against high rank officials among the police and the judiciary raises apprehension as the concerned hold an important role in the Constitutional Court's remedial process at least as for now. Unfortunately, concerns have been raised as regards to timely administration of justice by the Court itself.[242] In some instances, fortunately only few, the decision-making process lasted four years,[243] whereas the Constitution[244] and the Court's Rules of procedure[245] prescribe clear time limits.

4.2 Conclusion

This chapter has undertaken an analysis of the reparations' jurisprudence of Benin's Constitutional Court by reflecting particularly the African Commission's remedies' jurisprudence. Alike the one of the Commission, the reparations' jurisprudence of the Court is a history of hesitancy in its first decade followed with the recognition of the right to reparation for human rights violation. While the Commission has arguably achieved its own process by 'requesting' the payment of an amount of money determined by a domestic court in the *Bissangou* case, the most far reaching enunciation of Benin's Court in *Alédji* is still to meet structural interdict.

In any case, *Alédji* is a notable progress compared with declaratory, vague and impersonal orders of the pre-*Fanou* era. However, the *Favi* case is the living expression of the ineffectiveness of reparations as applied by Benin's Court. With the Court's failure to deal fully in pronouncing

238 In relevant cases, judges, judicial personnel and police officers were found directly responsible of violations but only their institutions were named and the Court failed to request a single administrative or legal action against them. See, among other cases, DCC 03-084 of 28 May 2003 (15 years proceeding without judgment, undue delay, violation by the Tribunal of first instance of Lokossa of article 7.d/ of the African Charter, failure to pronounce right to reparation) and DCC 03-125 of 20 August 2003 (violation of article 7-c of the African Charter, right to defence, violation of article 35 of the Constitution by the judge sitting in the case).

239 DCC 06-057, DCC 06-059 and DCC 06-060 (violation of article 5 of the African Charter, degrading treatment, reparation), DCC 06-062 (violation of article 6 of the African Charter, unlawful arrest, reparation).

240 DCC 05-114, DCC 05-127 (involving the Registrar of the Supreme Court), DCC 06-046 and DCC 06-113.

241 DCC 06-016 (involving the Minister of Justice) and DCC 06-052 (involving the Minister of Education).

242 In several instance, the proceedings in the Constitutional Court suffered undue delay.

243 See Gangnon (n 71 above) 2.

244 Under article 120, 15 days for text of Bill or individual complaints reduced to height days in case of emergency. Under article 121, height days for constitutionality of laws and regulatory texts.

245 Under article 32, eight days in general and in *proprio mutu* action.

reparations, to obtain compensation becomes a hard task consuming time, expenses and other renunciations imposed to the victims under para-judicial mechanisms.

Given strong social expectations raised by the inception of the Court, it is important to assess existing or virtual impediments facing the institution in discharging its protective mandate fully and accurately.

CHAPTER V

Benin's Constitutional Court: From uniqueness to effectiveness

5 Introduction

As chapters I and II of this thesis developed, the human rights oriented democratic process launched in Benin in the earlier 1990's was established on two major foundations: a Constitution incorporating the African Charter *in extenso* and a Constitutional Court, demonstrably unique on the continent. Yet, over almost two decades after its inception, the Court is still to meet Charter's standards – namely effectiveness – in providing remedies to human rights violations. Gangnon[246] genuinely stigmatised this inefficiency when stating that:

> Despite great achievements of the Court, its decisions merely result in moral satisfaction. At most does the Court decide that victims are entitled to reparation. (…). The Court itself is reluctant to make a progressive interpretation of its constitutional mandate to provide effective reparation to complainants [by drawing especially from the African Charter].[247]

From the above argumentation, this concluding chapter endeavours to draw accurate answers to initial questions the study raised. Those are first, whether there is a right to reparation under the African Charter and if so, what such right encompasses. Second, whether Benin's Constitutional Court applies an effective right to reparation as inferred from the African Charter, among other norms. Finally, in the negative, which routes may the Court follow to discharge its protective mandate fully and accurately?

5.1 Nature and scope of the right to reparation under the African Charter

That there is a justiciable right to reparation for human rights violations under the African Charter is no longer disputable. As examined under chapter III of this thesis, such right stems from both normative[248] and jurisprudential sources.[249] Under the African Charter and in the African system as a whole, the right to reparation mirrors international standards as it encompasses both substantive and procedural remedies. The substantive aspect covers declaratory relief, restitution and compensatory damages, in clear monetary compensation. On the procedural side, States party to the Charter have a duty to establish competent national tribunals entrusted with the mission of guaranteeing substantive effective reparation when human rights are violated. Chapter III also stressed that effective remedies under the African Charter cannot ignore punishment of

246 (n 71 above) 2.
247 Our emphasis.
248 Namely articles 1, 7(1), 10, 21(2) and 56(5) of the African Charter and 27 of the African Court Protocol.
249 Namely the remedies' jurisprudence of the African Commission.

wrongdoers, that is, to hold violators accountable. Once the right to reparation under the African Charter examined, the thesis went on to assess the right to reparation as applied by Benin's Constitutional Court per Charter standards.

5.2 The right to reparation as applied by Benin's Constitutional Court

After almost a decade of hesitancy since its inception, Benin's Constitutional Court recognised the right to reparation 'emerging' in particular from the African Charter, which the Court inaugurated in 2002 with the *Fanou* case. While the ambiguous formula of 'opening right to reparation' was viewed as a progressive enunciation compared to the Court's precedent, inconsistencies still mark its reparations' jurisprudence. The undefined content and scope of the right to reparation, the inability or refusal of the Court to award monetary compensation, the lack of follow-up mechanism to ensure that reparation is obtained are so many challenges facing Benin's institution in elaborating a coordinated and comprehensive reparations' jurisprudence.

One major progress recorded by the Court since the *Fanou* case is yet the *Alédji* case, where the Court reversed its precedent with a quasi structural order, in form of injunction to the Government.

While shaming high rank officials' names has been reinforced in recent practice of the Court, no such initiative is underway as to holding those violators accountable through administrative action and personal criminal liability.

For the promises of the February 1990 National Conference not to go up into smoke, it becomes an emergency for the Court to find and go relevant routes towards an effective right to reparation. Next section of this chapter undertakes to go some of theses routes while pointing out related impediments.

5.3 Benin's Constitutional Court towards effective reparations

5.3.1 Ordering more genuine and accurate reparations

On its way to remedial effectiveness, the Court should achieve its injunctions into very structural orders, specifying who shall do what, within which time and steps schedule. Thus, the Court should engage in elaborated enunciation on the content and scope of reparations (relief, restitution, compensation, repeal of legislation and monetary damages[250]). In this, the Court may draw

[250] Constitutional damages generally carry the following objectives: vindication of the right infringed, deterrence and prevention of future infringements and punishment of wrongdoers. See I Currie & J de Waal *The Bill of Rights Handbook* 5th Ed. Juta (2005) 217-218 and 220.

inspiration from the South African Courts' relevant pronouncements[251] and the African Commission's practice examined under chapter III of this thesis.

In completing reparations, the Court's practice of shaming name should be reinforced with disciplinary and personal penal responsibility especially because concerned public officials play an important role in achieving remedial effectiveness as of yet. The Court should order that criminal charges be brought against perpetrators. Different views confirm the importance of punishing transgressors in providing effective remedies.[252] Again should the penal code incorporate violations of Charter and Constitution rights.

As immediate action to ensure effective reparations, especially monetary damages, the Court should put in place a follow-up mechanism for an accompaniment to victims in obtaining execution of the institution's decisions.[253]

5.3.2 Confronting normative and institutional impediments

Ordering the right to reparation and making injunctive orders are granted as within the competence of the Court, at least from the purposive interpretation undertaken by the Court itself over a progressive jurisprudence. The standing issue is about the legal competence of the Court to consider damages and specify their quantum. The opinion inside the Court itself seems to suggest that nothing in the Constitution or any other law gives such competence to the institution.[254]

It is suggested that once the Court inaugurated the right to reparation, to specify the quantum of such reparation is only a subsequent matter. The relevant question is: which law(s) empowered the Court to order reparation and make injunctive orders? As examined in this thesis, relevant sources used by the Court were the Constitution, the African Charter, international doctrine and jurisprudence, namely the European Court's. Those sources are constant on the justiciability of the right to reparation (including monetary damages) and its application by national and international competent tribunals.[255] As argued above, the ordinary justice system is not skilled enough to determine quantum of damages ordered by such a court as Benin's Constitutional Court, in respect of effectiveness and sufficiency. The number of undue delay cases involving ordinary judges demonstrates sufficiently that there are risks of ineffective human rights justice in leaving them with such an important task, at least as of yet. The difficulty is that undecided Constitutional Court's

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251 Eg in *Modderklip Boerdery (Edms) Bpk v President of the RSA* 2003 (6) BCLR 638 (T) and *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).

252 See Zidar (n 94 above) 338, MCR Craven 'The Domestic Application of the ICESCR' *Netherlands International Law Review* (1993) 367-368 and Shelton (n 3 above) 12-16, 21.

253 Recalling Benin's duty to ensure the availability and effectiveness of local remedies, the UN Human Rights Committee during its October 2004 Session has recommended the country to establish such mechanism.

254 See Afouda (n 205 above) 2.

255 See in general Shelton (n 3 above). See also HA Strydom *et al. International Human Rights Standards: Administration of Justice* Butterworths Durban Vol. 1 (1997) 24-25.

orders would comfort the opinion of its incompetence. Thus, the idea would prosper that an ordinary judge is not obliged by the Court's decision, which any judge may even decide to re-examine. Hence, the judge may reach different conclusions and refuse to execute Constitutional Court's orders.

Surprisingly, despite clear constitutional and other basis, the imperative character of the Constitutional Court's orders is still disputed.[256] The Court should adopt a less narrow interpretation of 'law' in article 19 of Benin's Constitution, by reading from the African Commission's practice and the incorporation of the Charter in the Constitution. Upon these considerations, law in Benin's legal order means quite more than merely domestic criminal law.

Besides, the Court's competence to make injunctive, structural and compensatory orders (including determination of quantum) are rooted in the Preamble to the Constitution, which the Court based itself on in inaugurating the right to reparation. The Preamble, which has constitutional value, provides that '… fundamental human rights, public liberties, the dignity of the individual and justice are guaranteed, protected and promoted'. It is worth stressing that

> A constitution is (…) a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values binding its people and disciplining its government.[257]

Moreover, the fact of inclusion of IHRL in a constitution is the notification that the State, including courts, will be judged according to those norms.[258]

In addition, despite its apparent vagueness, article 122 of Benin's Constitution, which provides that the Court 'must rule more generally on violations of the rights of the individual', could be interpreted broadly and purposively in making injunctions, structural and compensatory orders to the Government.[259] In its interpretative enterprise, Benin's Constitutional Court should draw inspiration from relevant experiences around the world. Being one of them, the Indian Supreme Court's jurisprudence is of particular relevance in laying down state's liability to pay compensation for human rights violations. As the Indian Court did using article 32 of the Indian Constitution,[260] Benin's Constitutional Court should inject remedy's accents into the body of Constitution provisions related to its competence and mandate.

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256 See Afouda (n 205 above), Capo-Chichi (n 205 above), Gangnon (n 71 above).

257 I Mohammed CJ in *State v Acheson* 1991(2) SA 805 (Nm) 813 A-B quoted in Hatchard *et al.* (n 16 above) 12.

258 See C Heyns & W Kaguongo 'Constitutional Human Rights Law in Africa: Current Developments' *South African Journal of Human Rights* Vol. 22 (2006) 674.

259 Rotman shares such view at (n 17 above) 309.

260 The progressive jurisprudence of the Indian Supreme Court was marked by *Rudal Sah v. State of Bihar* (1983, detention for 14 years beyond sentence due to negligence by state authorities, constitutional damages), *Rudal Shah v. State of Bihar* (1983) and *Nilabati Behera v. State of Orissa* (1993, murder of a young man by the police, State's liability to pay compensation, sovereign immunity did not apply).

There is also an opinion that if the Constitutional Court came to order monetary compensations and determined their quantum, petitioners would turn from the ordinary justice.

It is worth stressing that all courts are not competent tribunals in human rights adjudication. The German screening committees are not advisable in this case study because Benin's Court has already improved filtering through several inadmissibility decisions and case per case reparatory orders.[261] In any case, establishing a filtering mechanism would offend the direct access principle stated in the Constitution and the Court's Rules of Procedure.

Finally, nothing has suggested thus far that reparatory orders and injunctions to the Government impeded a smoothly functioning of the ordinary justice. The Constitutional Court awarding damages with determination of quantum would impede in nothing the well-separated and defined administrative, criminal and financial (commercial) jurisdictions of ordinary courts and tribunals. If the latter are granted competence to quantify damages in their respective matters, why would a Constitutional Court with such mandate and competence not be?

Ultimately, no such internal legal or other technicalities would help Benin justify its violation of a justiciable and effective right to reparation for human rights violation occurring within its territory. That is why, in addition to these initiatives, middle term reforms should be undertaken in Benin's judiciary and constitutional framework in general. Relevant measures would range from equipping the ordinary judge to adjudicate human rights matters[262] to envisioning a constitutional reform aiming at filling the foreseen normative gaps in respect of the Constitutional Court's competence to dispose of human rights adjudication fully.

5.4 Conclusion and recommendations

This thesis has raised the issue of the effectiveness of the right to reparation as applied under the African Charter by Benin's Constitutional Court. From consecutive examination and argumentation, the Court's practice appears as a human rights justice half-way. As the Court's human rights case-law review ascertained, the constitutional jurisdiction can hardly provide due compensation to victims, if not at all. Rather, Benin's Court limits itself to reparatory orders, which execution is left to the absolute discretion of the ordinary justice system with all related consequences.

Questions have been discussed as to the reasons of such situation. When concluding this contribution, it should be borne in mind that normative and legal impediments have been agitated regarding the competence of the Court to act over its attribution power. In this, the Court itself can

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261 See n 231-237 above.

262 What is as of yet a judicial elite's *apanage*.

be held responsible for its lack of judicial activism and purposive interpretation of its mandate under a Constitution incorporating the African Charter. Further, elaboration, consistency and coordination are particularly wanting in the reparations' jurisprudence of the Court.

Because an effective right to reparation is Benin's duty under IHRL,[263] immediate and middle term steps are deemed necessary to be undertaken at both the Constitutional Court and State's levels. The Court should engage in a progressive interpretation of its mandate to ensure an effective right to reparation for human rights violations according to the African Charter standards until such a time that substantive constitutional reforms are conducted in Benin legal system.

Word count: 17 860 including footnotes.

[263] As recalled by the UN Human Rights Committee at its October 2004 Session.

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Annex 1

Overview of Benin's Constitutional Court Human Rights Case Law:
Variance of numbers of complaints
(1993- 22 August 2007)*

Year	Number of cases	Increase	Decrease
1993	2	-	
1994	10	*	
1995	12	*	
1996	31	*	
1997	31	-	
1998	51	*	
1999	18		*
2000	52	*	
2001	71	*	
2002	87	*	
2003	112	*	
March 2004 Sensitisation seminaries organised by the Court in response to the raise up of complaints			
2004	91		*
2005	79		*
2006	97	*	
2007	63	-	
Total	**807**		

* Source: Table prepared by author. Data have been generously provided by Ms M Afouda-Gbéha, Secretary General of Benin's Constitutional.

Annex 2

Benin's Constitutional Court Human Rights Case Law:
Recurring Constitution/Charter Human Rights violated
(1993- 22 August 2007)*

Rights violated	Constitution provisions	African Charter provisions
Arbitrary and/or abusive detention	Arts 18(3), 18(4) and 19	
Cruel, inhuman and degrading treatment	Art 18(1)	Arts 4 and 5
Undue delay in proceedings		Art 7
Unequal treatment	Art 26	
Expropriation	Art 22	
Interference of the Administration in traditional or chieftaincies affairs	Art 23	
Freedom to demonstrate	Art 25	
Press freedom	Art 24	
Right to defence (fair trial)		Art 7(1)(c)
Trade union freedom	Art 31	
Presumption of innocence	Art 17	

* Source: Table prepared by author.

Annex 3

Origins of participants in sensitisation seminaries organised by the Constitutional Court

- Police agents
- Gendarmes
- Prison administration staff
- Human rights organisations
- Religious leaders
- Media representatives
- Prosecutors and Assistant Prosecutor

* Source: Information provided by Ms M Afouda-Gbéha,
Secretary General of Benin's Constitutional.

Annex 4

Judgment No 07/04/4th Civil Chamber (Tribunal of First Instance of Cotonou) of 9 February 2004 pursuant to Benin's Constitutional Court Decision awarding reparation to Madame Favi.
(see attached file Annex 4).

COUR D'APPEL DE COTONOU

TRIBUNAL DE PREMIERE INSTANCE DE COTONOU

G R E F F E

AFFAIRE :

Mme Adèle FAV1
(Maître YEDE)
C/

L'ETAT BENINOIS REP/

l'AJT

EXTRAIT DU JUGEMENT N° 007/04/4ème **CHAMBRE CIVILE DU 09 FEVRIER** 2004

——— Par Jugement N° 007/04/4e Chambre Civile en date du 09 Février 2004 rendu par le Tribunal de Première Instance de Cotonou statuant en matière Civile moderne dans l'affaire qui oppose Madame Adèle FAVI à L'Etat Béninois représenté par l'Agent Judiciaire du Trésor ;————————.————————————————————

11 a été décidé ce qui suit ; ———

-—-.-— LE TRIBUNAL

PAR CES MOTIFS

———— Statuant publiquement, contradictoirement, en matière. civile moderne et en premier ressort ;————————————

-EN LA FORME

Reçoit dame FAVI Adèle en son action ;-

———.--.-—.-.. -AU FOND-

- Se déclare compétent ;-———

- Condamne l'Etat Béninois à payer à dame FAVI Adèle, la somme de Cinq millions (5.000.000) de Francs pour toutes causes de préjudices confondues, avec les intérêts de droit à compter du 04 Juin 2002 ;

- Condamnons l'Etat Béninois aux entiers dépens dont distraction au profit de Maître Hippolyte YEDE, Avocat aux offres de droit./-

CONFORME,

POUR EXTRAIT CERTIFIE

COTONOU, LE

LE GREFFIER EN CHEF,

Placide T. GANMAVO.

Annex 5

Agreement No 285/AJT/BGC/SA of 25 February 2005 between Madame Favi and the Judicial Agent of the State in execution of Judgment No 07/04/4th of 9 February 2004.
(see attached file Annex 5).

République du Bénin

MINISTERE DES FINANCES ET DE L 'ECONOMIE

AGENCE JUDICIAIRE DU TRESOR

B.P. .410 COTONOU
30-11-40
30-11-25

PROTOCOLE D'ACCORD N°285/AJT/BGC/SA
.....000.

Entre :
L'Etat béninois représenté par l'Agent Judiciaire du Trésor ès-qualité en ses bureaux sis dans l'enceinte de la Direction Générale du Trésor et de la Comptabilité Publique, Route de L'Aéroport, 01 BP 410 COTONOU

d'une part,

Et

Dame FAVI Adèle, représentée par son conseil
Maître Hippolyte YEDE,
Avocat près la Cour d'Appel
Tel : 32 52 44 01 BP 2399 COTONOU

D'autre part,

PREAMBULE

Le 06 février 2002, aux environs de vingt (20) heures, de retour du parc Germanco, son lieu habituel de vente et en voulant traverser la route, dame Adèle FAVI a été arrêtée par des militaires qui se trouvaient à bord d'un véhicule Pajero

immatriculé R 0004 RB appartenant à la garde rapprochée du Président de la République. Ceux-ci lui ont porté des coups de pied prétextant vouloir dégager la voie pour le cortège présidentiel.

Dans le cadre de la mise en œuvre des mesures de sécurité pour dégager la voie lors du passage dudit cortège, les militaires ont, par inadvertance, porté atteinte à l'intégrité physique de l'intéressée.

Dame FAVI saisit alors la Cour Constitutionnelle qui, par DECISION DCC 02- 058 du 04 juin 2002, a jugé que les sévices et traitements cruels, inhumains et dégradants à elle infligés par la Garde rapprochée du Président de la République constituent une violation de la Constitution et qu'elle a droit à réparation pour les préjudices qu'elle a subis.

Se fondant sur cette décision, Dame FAVI Adèle a, par exploit d'huissier en date à Cotonou du 14 août 2002, assigné l'Etat béninois pour s'entendre condamné à lui payer, pour toutes causes de préjudices confondus, la somme de vingt cinq millions (25 000 OOO) F CFA avec intérêts de droit à compter du 04 juin 2002.

Le juge saisi a, par jugement N° 007/04/4^{e} Chambre Civile du 09 février 2004, condamné l'Etat béninois à payer à dame FAVI Adèle, la somme de cinq millions (5 000 000) FCFA pour toutes causes de préjudices confondues, avec les intérêts de droit à compter du 04 juin 2002. Le juge a également condamné l'Etat béninois aux entiers dépens dont distraction au profit de Maître Hippolyte YEDE, Avocat aux offres de droit, Conseil de la requérante.

A la date du 30 novembre 2004 la créance de dame FAVI Adèle, issue Je cette décision de justice est chiffrée à la somme de six millions deux cent quatre vingt mille deux cent soixante dix sept (6 280 277) F CFA .

Par lettre n° 531/HY/PG/2004 du 26 novembre 2004 le conseil a saisi l'AJT pour solliciter l'exécution du jugement N° 007 / 04 / 4e Chambre Civile du 09 février 2004, devenu exécutoire.

L'Agent judiciaire du Trésor a pu obtenir de l'autre partie la renonciation aux intérêts de droit.

Ceci exposé, les parties ont convenu de ce qui suit :

Article 1er : Le présent protocole d'accord porte sur l'exécution à l'amiable du jugement N° 007/04/4e Chambre Civile du 09 février 2004 et le règlement définitif du litige opposant l'Etat Béninois à dame FAVI Adèle, représentée par son conseil Maître Hippolyte YEDE, Avocat près la Cour d'Appel.

Article 2 : L'Etat s'engage à payer à dame FAVI Adèle, la somme de cinq millions (5 000 000) FCFA pour toutes causes de préjudices confondues en exécution du jugement N° 007/04/4° Chambre Civile du 09 février 2004.

Article 3 : dame FAVI Adèle, représentée par son conseil Maître Hippolyte YEDE, accepte cette offre et consent de renoncer à quelque action que ce soit contre l'Etat Béninois relativement au présent dossier.

Article 4 : Les deux parties reconnaissent qu'au moyen des présentes clauses elles consacrent l'exécution amiable de ce jugement et le règlement définitif de cette affaire.

Fait en quatre (4) exemplaires originaux à Cotonou, le 25 FEV.2005

L'Agent Judiciaire du Trésor

Par Intérim,

Ismath BIO TCHANE-MAMADOU.-

Pour Dame FAVI Adèle
Le conseil,

- **Maître Hippolyte YEDE**

Avocat près la Cour d'Appel.