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THE ROLE OF HUMAN RIGHTS TREATIES IN CONSTITUTIONAL ADJUDICATION IN BENIN

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DEDICATION

To the loving memory of my sister, Aline Sindani, who passed away when I was preparing my departure to South Africa for this Master's Program.

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ACRONYMS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
AfCLR	African Court Law Report
AHLR	African Human Rights Law Report
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DCC	Decision of the Constitutional Court
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OUA	Organisation of African Unity
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Committee
WAEMU	West African Economic and Monetary Union

CHAPTER ONE

GENERAL INTRODUCTION

1 Background

The Second World War, which had engulfed humanity from 1939 to 1945, had left cities in ruins, millions of people dead, millions more homeless or starving. As a consequence of the cruelty of the war, the conviction grew that safeguarding of human rights should no longer be the exclusive responsibility of the state authorities.[1] Indeed, the state had proved to be a great threat to the most basic rights of individuals, as well as to international peace and security. Important progress has been made since the World War II in broadening the normative scope of international human rights law and in enabling the expansion of human rights at the international level.[2] The protection of human rights was no longer seen exclusively as an internal matter for states. It had become a concern for the international community.[3]

In Africa, the catalyst arrived with certain delay[4] with the adoption in 1981 and the entry into force in 1986 of the African Charter on Human and Peoples' Rights (African Charter). The process that led to the adoption of the African Charter lasted about twenty years during which jurists and experts from various non-governmental organisations and politicians intervened through multiple meetings.[5] The African Charter was supplemented afterwards by several Protocols to strengthen human rights protection on the Continent, in particular by enshrining specific rights.[6] These are the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol), the Protocol to the African Charter on Human and Peoples' Rights on the Old persons, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, and the Protocol to the African Charter on Human and Peoples' Rights on Social Assistance and Social Protection. To date, the last three have not yet entered into force.

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[1] See generally M Halme-Tuomisaari & P Slotte 'Revisiting the origins of human rights: Introduction' in P Slotte & M. Halme-Tuomisaari (eds.) *Revisiting the Origins of Human Rights* (2015) 1-36.

[2] F Viljoen 'A short history of international human rights law' (2012) 46 *UN Chronicle* 8-13.

[3] J Rehman *International Human Rights Law* (2003) 1–3.

[4] For example, the European Convention on Human Rights entered into force in 1953; Inter-American Convention on Human Rights entered into force in 1969.

[5] See generally F Ouguergouz *La Charte africaine des droits de l'homme et des peuples* (1993).

[6] R Ben Achour "Les protocoles normatifs à la Charte africaine des droits de l'homme et des peuples" [The normative protocols to the African Charter on Human and Peoples' Rights] (2020) 4 *Annuaire africain des droits de l'homme* 83 at 93.

It should be noted that since then, in addition to the Organisation of African Unity (OAU) Convention on Refugee Problems (1974), which predates the African Charter, many other binding human rights instruments have been adopted at the African level to strengthen human rights protection. These include the African Charter on the Rights and Welfare of the Child adopted in 1990 and the African Charter on Democracy, Elections and Good Governance adopted in 2007. To date, the African Charter has been ratified by all the member states of the African Union except Morocco.

More frequently, preambles of constitutions of many African French speaking countries made specific reference to universal and regional human rights instruments.[7] From our point of view, firstly, the insertion of these instruments in the constitutions was intended to give legitimacy to the institutions set up by these constitutions, most of which were the result of negotiations between political and social actors during the national (sovereign) conferences.[8] Secondly, the insertion of human is an expression of the strong commitment to global and continental integration on the other hand. In this regard for example, the preamble to the 1990 Constitution of Benin reaffirmed the country's

> attachment to the principles of democracy and human rights as defined by the United Nations Charter of 1945, the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights, whose provisions make up an integral part of this Constitution and have a value superior to the internal law.[9]

The status of international human rights law and treaties in domestic legal systems in francophone countries in particular is clarified in the respective constitutions. Some constitutions explicitly incorporate specific international instruments as part of the constitution[10] or make treaties superior to national law but not to constitutional norms.[11] The international human rights treaties are therefore sought to overhang and complete the guarantees of fundamental rights protected by national constitutions in the form of justiciable bills of rights. Since rights and liberties protect individuals directly, the latter naturally can approach domestic constitutional or other jurisdictions as accessible fora for judicial protection of their rights under international law. Thus, the national courts have

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[7] Preamble of Benin Constitution (1990), Burkina Faso Constitution (1991); Gabon Constitution (1991); Guinea Constitution (2010); Mali Constitution (1992); Togo Constitution (1992).

[8] Inaugurated by Benin in 1989, the formula of National Conferences was adopted by seven other countries, French-speaking such as Mali, Niger, Togo, Poplular Republic of Congo, Zaire (DRC), Chad, Gabon.

[9] 1990 Benin Constitution. See Preamble.

[10] 1990 Benin Constitution art 7 (African Charter); Djibouti Constitution (UDHR and African Charter. See preamble) Constitution Burundi Article 19 gives constitutional value to the rights and duties guaranteed by the international human rights treaties.

[11] Constitutions of Côte d'Ivoire art 87; DRC art 215; Niger art 171; Rwanda art 190; Senegal art 98.

become an 'important force in the protection of the international rule of law',[12] especially in the field of human rights.

Following the so-called third wave of democratisation that swept through Africa in the early 90s, constitutional adjudication of human rights in Africa has been growing in number, not least in Francophone Africa. Most countries became constitutional democracies functioning in accordance with modern principles of constitutionalism like the recognition and respect of fundamental human rights and the rule of law. By the same token, the judiciary, including constitutional courts[13] has been conferred on significant powers to protect and promote human rights, the rule of law and the separation of powers.[14] The primary jurisdiction[15] of these constitutional jurisdictions generally includes three essential powers. First, they are empowered to review the constitutionality of infra-constitutional norms and can strike down any legislation or administrative action which violates any provisions of the constitution.[16] In this regard, they can interpret as well provisions of the constitution at the behest of designated political authorities.[17] Second, they can adjudicate human rights violations.[18] Some do have criminal jurisdiction to try certain central authorities.[19] Third, they can resolve jurisdictional disputes between central and local government and between intergovernmental agencies. This study focuses on the exercise of these three powers by the constitutional court to strength human rights protection. The most obvious example comes from the Constitutional Court of Benin, which is explicitly endowed by the Constitution with an original jurisdiction in matters of human rights protection.[20] Individuals can access the court directly for violations of the bill of rights[21] including provisions of the African Charter which are integral part of the Constitution.[22] The Court has exclusive and final jurisdiction over human rights and constitutional matters.[23]

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[12] A Nollkaemper *National courts and the international rule of law* (2011) 1.
[13] Constitutional courts also include constitutional councils, tribunals or supreme courts tasked with performing constitutional review (constitutional review mechanisms).
[14] C Fombad 'An overview of contemporary models of constitutional review in Africa' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 18.
[15] Primary jurisdiction refers to the powers that a constitutional court is typically created to exercise. See Fombad (n 12) 29.
[16] Fombad (n 14) 29.
[17] 1990 2006 DRC Constitution art 161(1).
[18] Benin Constitution art 120.
[19] 2006 DRC Constitution art 163. The Constitutional Court is the criminal jurisdiction of the Head of State and the Prime Minister.
[20] 1990 Benin Constitution art 120.
[21] 1990 Benin Constitution art 3 and art 122.
[22] 1990 Benin Constitution art 7.
[23] 1990 Benin Constitution art 124 and art 114.

Unlike many constitutional courts in the French-speaking African region, whose access is limited to certain categories of persons named in the constitution, the constitution of Benin allows direct access to the court for all citizens[24] for the violations of rights guaranteed. The violation can concern a rights guaranteed by the Constitution itself or the African Charter, which is part of the Constitution. The violation can concern as well a rights guaranteed by an international human right treaty duly ratified and gazetted, which is part of the domestic legal order and has a *supra-legislative* rank. Therefore, as source of law, international human rights treaty provisions may be invoked, autonomously or jointly, with national law in support of the judge's or petitioner's argument. To this end, the constitutional court is called upon to play a role in harmonizing international law and constitutional law. In fact, in the field of human rights, international norms permeate and complement national constitutional guarantees, forming together the norms of reference *(bloc de constitutionalité)*.

In the current context of regionalisation and even globalisation of human rights adjudication, the Constitutional Court can gain legitimacy by relying on international human rights treaties and by drawing on the jurisprudence of regional and global human rights bodies. The decisions of the treaty bodies can be used to support arguments and can be mobilised because of their persuasive effect. Some authors even argue that openness to foreign countries contributes to strengthening the international influence of jurisdictions, and even their independence.[25]

2 Problem statement

The role of the Benin constitutional judge as in the application of the international human rights law is highly esteemed. In view of the frequency of human rights litigation before the Benin Constitutional Court, this study aims to assess what role international human rights treaties and the jurisprudence of regional courts and UN human rights treaty bodies have played or can play in constitutional court's jurisprudence concerning the improvement of judicial protection of human rights in Benin.

Despite the fact that in the monist logic to which Benin adheres, a duly ratified international treaty becomes part of national law, and is therefore binding on both judges and parties, the reliance on international law treaties in constitutional human rights litigation remains weak. This state of affairs minimises the capacity of these treaties to improve the human rights situation at the national level. Moreover, it leads to a disparity in the standards of human rights protection rather than to their desirable universalisation.

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[24] 1990 Benin Constitution art 122.

[25] M Waters 'Mediating norms and identity: the role of transnational judicial dialogue in creating and enforcing international law' (93) *Georgetown Law Journal* (2005) 494.

3 Research questions

The main question the study seeks to answer is what role international human rights treaties and the jurisprudence of regional courts and UN human rights treaty bodies have played or can play in constitutional court's jurisprudence concerning the improvement of judicial protection of human rights in Benin?

In responding to this research question, the study addresses the following sub-questions:

- To what extent has the Constitutional Court of Benin resorted to international and regional human rights treaties?
- What human rights norms are most invoked?
- What accounts for or hinders the invocation of these norms and what implications, if any, can be drawn from this situation?
- What is the potential of human rights treaties and jurisprudence treaty bodies to strengthen constitutional human rights adjudication in Benin?

4 Literature Review

This study draws on the growing literature on constitutionalism, constitutional jurisdictions and constitutional adjudication of human rights in Africa. However, much of this literature does not address the focus of this study, which is the role of international human rights treaties in constitutional adjudication in Benin and their impact at the domestic level.

A number of authors explore the influence of international (human rights) law on the design of post-1990 African constitutions. Killander demonstrates how international law has impacted on African constitutional law and constitutional adjudication in Africa. The author affirms that international law tends to play a more important role in constitutional adjudication in African common law than civil law jurisdictions.[26] Therefore, in the section dedicated to the role of international law in constitutional adjudication, he analyses cases from the common law jurisdictions like South Africa, Zambia, Malawi or Seychelles.[27] Moreover, his analysis is not exclusively devoted to a constitutional court. This research focuses on a civil law country, Benin and tries to assess whether international (human rights) law have played a role, even if it is minimal, and explores what potential role it can play in constitutional adjudication.

[26] M Killander 'The effects of international law norms in constitutional adjudication in Africa' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 217.
[27] ibid 217–220.

A study on the impact of international (human rights) law in domestic litigation in two civil law countries (Cote d'Ivoire and Benin) was conducted in 2010 by Tanoh & Adjolohoun. The authors found that, unlike the Constitutional Council of Côte d'Ivoire, which does not have original jurisdiction over human rights, the Constitutional Court of Benin, having such a jurisdiction, refers to human rights treaties in the interpretation of constitutional provisions, but this is not clearly apparent in its decisions.[28] This research analyses if 12 years after, this still remains the case for the Benin Constitutional Court. If there is a jurisprudential evolution, what explains it and if the situation remains static, what hinders the invocation of these norms and what implications, if any, can be drawn from this situation.

Concerning the approaches of the Benin Constitutional Court towards the African Charter, Makunya analyses its impact in constitutional adjudication in Benin. The author affirms that the African Charter is not relied upon as an international treaty but as a constitutional norm.[29] The Constitutional Court of Benin refers to the normative provisions of the African Charter without seriously engaging with their content and scope, and therefore, has reduced the ability of the African Charter to transform human rights-unfriendly behaviours and legislation.[30] Considering the fact that Makunya in this chapter focuses on a specific human rights treaty (the African Charter), this study goes further by exploring what role other international human rights treaties have played or can play in constitutional adjudication. Furthermore, this study will explore the potential of decisions of the organs in charge of interpretation or monitoring of international treaties in improving human rights litigation before the Benin Constitutional Court.

The originality of our work resides in the fact that it analyses the role played or that can be played by human rights treaties in constitutional adjudication in a French-speaking country with a civil law tradition and a monistic approach. Moreover, our research also analyses the role that the jurisprudence of human rights treaty bodies can play in the improvement of human rights constitutional adjudication.

5 Methodology

This research employs a mixed research method combining doctrinal approach and the functional approach to comparative law. The doctrinal approach is used to primarily analyse the content and scope of human rights guaranteed by the constitution and international human rights treaties. The doctrinal approach is also used in the analysis of the meaning,

[28] A Tanoh and H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in Magnus Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 118.
[29] TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen and others (eds) *A life interrupted: essays in honour of the lives and legacies of Christof Heyns* (2022) 476.
[30] Makunya (n 28) 489.

scope and significance of judgments and decisions rendered by the Constitutional Court of Benin and those of human rights bodies such as the African Court and Commission on Human and Peoples' Rights and the United Nations Human Rights Committee.

Furthermore, this research employs the functional approach to comparative law. This approach enables looking at how the practice of other African Constitutional Courts, especially the one from South Africa in relation with international law and decisions and soft law instruments of the treaty bodies can serve as an example for the Benin Constitutional Court. Despite the fact that these Courts operate in different legal systems, they fulfil similar functions within their legal systems.

From these approaches, the constitution of Benin, decisions of the Benin Constitutional Court, provisions of human rights treaties and the jurisprudence of human rights bodies are used as primary data, while articles published in academic journals, case commentaries, books, encyclopaedias and law reports are used as secondary data.

6 Limitations

Considering the central questions of our research, the present reflection will be limited to the constitutional adjudication of human rights by constitutional jurisdictions. Spatially, the present study focuses on the Constitutional Court of Benin. This choice is dictated by the remarkable activity of this jurisdiction in the adjudication of human rights. Materially, the research is focused on the constitutional adjudication of substantive rights by the Benin Constitutional Court.

7 Overview of chapters

The study consists of five chapters. Chapter one, which is the introduction, deals with the background to the study, problem statement, research questions and highlights the methodology used in the study. It further gives an overview of relevant literature and key limitations to the study. The second chapter discusses the legal status of international human rights treaties in Benin. The third analyses the approaches of French-speaking Constitutional Courts to applying international and regional human rights law norms. The fourth assesses the potential of human rights treaties in improving Benin constitutional human rights litigation and the possibility for dialogue between the Benin Constitutional Court with the international human rights mechanisms. The fifth presents highlights from the chapters, concluding ideas and recommendations to the Benin Constitutional Court concerning the adjudication of human rights.

CHAPTER TWO

THE LEGAL STATUS OF INTERNATIONAL HUMAN RIGHTS TREATIES IN BENIN

1 Introduction

The effectiveness of a human rights treaty is strongly determined by the value given to it under domestic law. The higher international law is placed in the hierarchy of norms, the better it is able to guarantee individuals the respect of their rights. The invocation of human rights treaties and the jurisprudence the treaty bodies before the constitutional courts depend as well on the normative rank of these treaties vis-à-vis the constitution.

The Benin Constitution of 1990 specifically devotes an entire title of the Constitution[31] to the legal regime for the application of international treaties or agreements in Beninese law. This legal regime intended to apply to all international treaties in a general way, irrespective of their field and their object or purpose. After analysing how international treaties are incorporated in the Benin legal order (2), the chapter assesses their normative rank *vis-à-vis* constitutional norms (3) and more protective national laws (4).

2 Incorporation of international human rights law in Benin domestic legal order

The status of international law within domestic law is generally defined by municipal law. In the Benin Constitution, international law finds its basis at Article 147, which provides that:

> Treaties or agreements that have been duly ratified have, from the time of their publication, an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party.

This provision clearly shows that Benin has opted 'theoretically' for legal monism. In this monist logic, international treaties relating to human rights are, when ratified and published in the Official Gazette (*Journal Officiel*), directly applicable and form part of the internal legal system, even though their stipulations have not been the subject of special measures aimed at incorporating them into national legislation.[32] In this case, petitioners and judges may directly invoke such treaty provisions before national courts. However, in order to become part of domestic law and to be invoked by litigants, treaties in general, according to the article 147 of the Benin Constitution, must meet certain conditions: ratification, publication

[31] 1990 Benin Constitution, Title IX from articles 144 to 149.
[32] F Viljoen *International Human Rights Law in Africa* (2012) 518.

and reciprocity. Whilst the condition of ratification, by which the state expresses its consent to be bound by a treaty, is not particularly problematic,[33] those relating to publication and reciprocity may pose some problems, especially with regard to international human rights treaties.

A ratified treaty only has 'authority superior to' national legislation upon its publication.[34] The publication of the human rights treaty is a purely material act that aims to give the treaty official publicity. Clearly, the purpose of publication is, first and foremost, to bring the treaty to the awareness of the public and to the law enforcement agencies and officials. In practice, beyond ratification, publication is undoubtedly a condition for the official insertion of the treaty in the national legal order. Before the Benin Constitutional Court, when Ms Marguerite Sinzogan attempted to rely on the best interest of the child principle in the UN Convention on the Rights of the Child (CRC) to challenge the constitutionality of disciplinary measures taken against her by the Minister of Foreign Affairs for abandoning her position, the Court held in its *Decision DCC 03- 009* of 19 February 2003 that a party could not rely on the CRC in litigation before it, because the CRC had never been officially gazetted and therefore was not 'part of the positive law of Benin'.[35] The decision of the Court is surprising because at the time the decision was rendered, Benin had already submitted its initial report CRC Committee in 1999.[36] The obligations under the treaty had started to run and the State had started to comply with its reporting obligations. Furthermore, from a strictly technical point, publication/gazetting is a domestic formality. The VCLT states can invoke its domestic laws to shy away from its international obligations.[37]

The case above demonstrates that subjecting the application of human rights treaties to their publication in the Official Gazette may negatively impact on the applicability of human rights, if the State does not properly comply with this formality. The publication requirement merely delays the applicability of the treaty. Benin has ratified the CRC since 3 August 1990, but curiously the treaty had never been gazetted until 2003 when the case was brought to the Court.

In the view of the above, in my opinion, for further human rights protection, the Constitutional Court should go beyond the 'formalist' condition of publication, especially in cases where the treaty is duly ratified and the State has started to comply with its international obligations under the treaty. In Tunisia for example, the Constitution states that

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[33] Vienna Convention on the Law of Treaties (1969) art 11.
[34] 1990 Benin Constitution art 147.
[35] *Decision DCC 03- 009* of 19 February 2003.
[36] *Benin Initial Report on CRC* (CRC/C/33/Add.52) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f33%2fAdd.52&Lang=en (Accessed on 9 October 2022).
[37] Vienna Convention on Law of treaties art 27.

'treaties have the force of law only after their ratification'.[38] The condition of publication is not required. Such provision should inspire the Beninese constitutional judge to make unpublished treaties enforceable against public authorities. In other words, in the absence of any publication, rights-creating treaties may be invoked by individuals in their vertical relations with the State. This solution is logical because the treaty generates obligations for the State and creates rights for the individual. Moreover, the State is the one that ratifies and publishes treaties. It cannot, therefore, take advantage of its own failure to act in order to paralyze human rights treaties.

In light of article 147 of the Beninese Constitution mentioned above, a treaty can only be implemented in the Beninese legal order subject to its reciprocal application by the other parties. Even if the Constitution of Benin does not establish any difference between the regime applicable to international treaties, international case law considers that the condition of reciprocity does not concern international treaties relating to human rights. [39] The UN Human Rights Committee, in its General Comment 24 has stated that because human rights treaties 'are not a web of inter-State exchanges of mutual obligations' and they concern the endowment of individuals with rights, this excludes the principle of reciprocity in the application of human rights treaties in general and the ICCPR in particular.[40]

3 The normative status of human rights treaties in relation to constitutional provisions

International legal instruments occupy a special place and are called upon to supplement the Constitution in the context of its interpretation, and even as reference standards in the constitutionality review. Of all these instruments (3.1), the African Charter has a special place (3.2).

3.1 Other international human rights treaties

The fact that the Preamble to the Constitution refers to certain international human rights instruments, including the Universal Declaration of Human Rights (UDHR) have a merely symbolic significance. The UDHR remains the formal source of global human rights standards, and its recognition as a source of rights and law by states throughout the world

[38] 2014 Tunisian Constitution art 32.
[39] *Ibid.*
[40] General Comment 24 of the UN Human Rights Committee (Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant), CCPR/C/21/Rev.1/Add.6 (11 November 1994), para 17.

distinguishes it from conventional obligations.[41] Virtually every international instrument concerned with human rights contains at least a preambular reference to the Universal Declaration, as do many declarations adopted unanimously or by consensus by the UN General Assembly.[42]

Does the fact that the constitution expressly cites the UDHR in the preamble mean that the drafters of the Beninese constitution had the intention to give greater value to the UDHR than to other human rights instruments? In my view, the answer to this question is negative. Indeed, at the time of the drafting of the Constitution of Benin during the *Conférence des Forces Vives de la Nation* (Conference of the Vital Forces of the Nation), held in Cotonou from 19 to 28 February 1990, only the UDHR[43] was already adopted in 1948 and the African Charter[44], among the list of human rights instruments, had already been ratified by Benin.[45] However, it can be noted that between the time of the drafting of the Constitution and its entry into force on 11 December 1990, through the vote by referendum on December 2, 1990, Benin ratified the Convention on the Rights of the Child (CRC) on 2 August 1990. Given that the CRC was not yet ratified at the time the final text of the Constitution was drafted at the Conference of the Vital Forces of the Nation, it is understandable that the drafters did not incorporate it into the preamble of the constitution. It is also possible also that the drafters just wanted to refer to something general at the international and regional level (UDHR and African Charter) and would not have mentioned other treaties, even if they had been in force for Benin.

In fact, for a constitution, such as that of Benin, which already has a catalogue of fundamental rights, the proclaimed values in the preamble become the necessary complement to that catalogue, filling in the gaps and extending the list. Together with the Constitution and the African Charter, they constitute a normative system with the constitution at its apex, serving as reference norms for the review of the constitutionality of other texts. The Constitutional Court can use these norms to establish the conformity or non-conformity of a law or a regulatory act with the Constitution. They are part of the *bloc de constitutionalité* (constitutional corpus).[46] However, other human rights treaties are 'formally' part of the *bloc*

[41] H Hannum 'The Status of the Universal Declaration of Human Rights in National and International Law' in *Georgia Journal of International and Comparative Law* (1995) 290.
[42] Ibid.
[43] Ratified by Benin on 20 January 1986.
[44] Ratified by Benin on 20 January 1986.
[45]See the Benin ratification status of AU treaties https://au.int/fr/treaties (Accessed on 10 October 2022) and for UN treaties https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=19&Lang=EN; (Accesed on 10 October 2022).
[46] JA Adeloui 'L'insertion des engagements internationaux en droit interne des Etats africains' in (25) *RBSJA* (2011) 51-92.

de constitutionnalité. The Beninese Constitutional Court uses or can use them as a reference standard to support and/or supplement constitutional provisions. In such circumstances, these treaties 'formally' fulfil the same function as those mentioned in the preamble, which are part of the constitutional corpus, alongside organic laws. The two following examples illustrate our point.

In 2010, the Constitutional Court found the violation of the Constitution by referring to the Economic Community of West African States (ECOWAS) Additional Protocol A/SP1/12/01 of 21 December 2001, to consider that the vote of the law repealing the law on the Permanent Computerized Electoral List and the Comprehensive National Electoral Census violated the requirements of the said protocol in terms of transparency and reliability of the electoral list.[47] This orientation of the Beninese constitutional judge proves that the Constitution, considered in the strict sense, is not the only reference standard of this judge. International human rights treaties are therefore norms of reference when interpreting the Constitution because they are part of the *bloc de constitutionalité* and, consequently, the sources of constitutional law.[48]

In 2011, to validate Article 9 of the Law on General Rules applicable to Military Personnel, Public Security Forces and Similar in the Republic of Benin voted in the National Assembly on 25 and 26 September 2011, which provides that "Military personnel, public security forces and similar are required to carry out their mission in all circumstances and may not exercise the right to strike", the Benin Constitutional Court, in its *Decision DCC 11-065* of 30 September 2011, used as reference standards International Labour Organization (ILO) treaties ratified by Benin. It relied first on Article 31 of the Constitution", but also invoked Article 8 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which specifies that the constitutional guarantee of the right to strike does not prevent the exercise of these rights by members of the armed forces, the police or the public service from being subject to legal restrictions'. On the basis of all these norms, the Court concluded that 'it must therefore be said and judged that section 9 of the law under review does not violate the Constitution or the fundamental principles of the International Labour Organization".[49] By this decision, the Constitutional Court referred to international treaties as an element of the *bloc de constitutionalité* and therefore a reference norm in the interpretation of constitutional provisions.

[47] *Decision DCC 10-049* of 5 April 2010.
[48] H Akerekoro 'La Cour constitutionnelle et le bloc de constitutionnalité au Bénin' *Revue d'étude et de recherche sur le droit et l'administration dans les pays d'Afrique* (2016) 18-19.
[49] Decision *DCC 11-065* of 30 September 2011.

3.2 Special case of the African Charter

The constitutional status of the African Charter finds its basis in the Constitution itself. Article 7 of the Constitution states 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 20 January 1986 are an integral part of the present Constitution and of Beninese law.

Something is said to be 'an integral part' of another when it is important or necessary and that the other part cannot function without it. In other words, the Benin Constitution cannot be separated from the African Charter.[50] The Benin Constitutional Court uses provisions of the African Charter as reference norm without need to invoke any constitutional provision because the African Charter is part of the Constitution.

In a decision concerning the right to legal defence in disciplinary matters, the Constitutional Court was seized by M. Gouhouede Antoine, a magistrate, who had been suspended from his duties for disciplinary proceedings, by decision of the Superior Council of the Judiciary dated 13 March 1995. He complained of not having had the possibility to exercise his rights of defence, even if it was true that the procedure followed was in conformity with article 46 of the law No. 83-005 of 17 May 1983 bearing statute of the Beninese judiciary. M. Gouhouede asked the Court to base itself on article 17 of the Constitution and article 7 of the African Charter to note the unconstitutionality of the decision taken against him. The Constitutional Court noted that M. Gouhouede was not able to exercise his right to defence, as prescribed by the Constitution, and declared the decision to suspend him unconstitutional. It decided that "the aforementioned law not having organized the rights of the defence, at this stage of the disciplinary procedure, disregards the requirements of the protection of the fundamental rights of the human person and public freedoms, guaranteed by the Constitution, *in particular article 7 of the African Charter on Human and Peoples' Rights"*.[51]

In the decision above, the Court no longer even feels the need to invoke article 17 of the Constitution in its reasoning, even if in the operative part, it concludes that (only) the Constitution has been violated. Consequently, as an integral part of the Constitution, the Constitutional Court bases its reasons on the African Charter directly. Therefore, by referring directly to the African Charter provisions, the Court apply them as domestic law,[52] because the Charter is a constituent element of the constitutional corpus.

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[50] Makunya (n 29) 471.
[51] *Decision DCC 95-065* of 26 September 1996. Emphasis added.
[52] Tanoh and Adjolohoun (n 28) 115.

4 Normative status of less protective international treaties in relation to more protective national laws

The *Decision DCC 19-287* of 22 August 2019 rendered by the Benin Constitutional Court constitutes a new turning point in the understanding of the relationship between community and international norms and national norms. In this case, M. Eric Dewedi, associate professor of law, lodged an appeal for unconstitutionality against the decision to reject his application for registration on the Order of the Bar in accordance with article 17(7) of law No. 65-6 of 20 April 1965. According to the applicant, the rejection of his application is contrary to his right to equality, as other Associate Professors before him were enrolled under the aegis of article 20 of the national law of 1965 instituting a derogatory way of access to the legal profession for associate professors. Reacting to these claims and arguments, the President of the Bar Association maintains that the West African Economic and Monetary Union (WAEMU) Regulation of September 25, 2014 in its Article 92 'repeals and replaces all previous provisions to the contrary' and institutes an incompatibility between the two professions since Article 35 of the Regulation clearly states that 'the profession of Lawyer is compatible with the profession of temporary teacher'. For the Bar, only the Community regulation must prevail, because it is superior to national laws according to a widely accepted legal and jurisprudential translation of the superiority of the Community over national legislation.

The legal problem that arises in this case is that of the relationship between norms, and more specifically between community law and national law. To answer this question, the Constitutional Court began by comparing Article 35(1) of Regulation No. 05/CM/WAEMU of 25 September 2014 on the harmonization of rules governing the profession of lawyer in the WAEMU area and Articles 5, paragraph 1 and 26, paragraph 2 of Beninese Law 65-6 of 20 April 1965. Then, the Court analysed in an incidental way the conformity of the Community regulation with the Constitution to assess if this text (which directly applies in Beninese municipal law) does not contain vices of unconstitutionality. The incidental control of constitutionality of the Community act leads the Court to find that the Community regulation is unconstitutional because it has transcended the field of its competences.[53] To conclude this, the Constitutional Court carried out a double constitutionality review. On one hand, the Court made a constitutionality review of the 1965 law (Article 5(1); Article 26(2) and Article 40 (3)) in relation to the preamble and article 147 of the Constitution, which resulted in conformity with the Constitution. On the other hand, the Court made a constitutionality review of the Community regulation, which resulted in it being contrary to the Constitution

[53] *Decision DCC 19-287* du 22 August 2019 at 4.

and was therefore set aside in favour of the national law, despite the fact that the WAEMU Court of Justice, in its opinion no. 001/2003 of 18 March 2003, states:[54]

> The primacy benefits all community standards, primary as well as derived, immediately applicable or not, and is exercised against all national administrative, legislative, jurisdictional and even constitutional standards.

Two lessons can be learnt from this decision. Firstly, the Constitutional Court has engaged in a process of reconfiguration of the relationship between community or international norms and national norms. It states clearly and precisely that 'a national legislative provision that grants citizens more advantageous rights than those resulting from a *Community or international standard* is not contrary to the Constitution, whether the Community standard is earlier or later". [55] Although the decision does not offer sufficient ground for generalisation, it suggests that national law could be preferable to international or community law when Community or international norms lead to a reduction of rights.[56] More practically, national law would prevail whenever a community or international norm would be contrary to it and unfavourable to the rights and freedoms granted to individuals.

Secondly, the decision shows that the Benin Constitutional Court does not feel bound by the jurisprudence of regional bodies. The Court considers that they have been adopted on the basis of a different normative system than the Constitution, the supreme norm. The Court has asserted the supremacy of its decisions over those of international or community bodies by showing that it could not overturn its decisions simply because they were deemed incompatible with community law [57] or the African Charter. [58] This state of affairs could have two major consequences in terms of the better protection of human rights in Benin. First, by refusing to follow the decisions of regional human rights bodies, Benin is minimising the effects and capacity of these treaties to improve the human rights situation and thus, a regression of international law given that by ratifying human rights treaties, Benin commits itself to fulfilling its treaty obligations in good faith. Second, this situation discourages litigants, since they know that even if they succeed in obtaining a more human rights-protective decision from these treaty bodies, they will have difficulty to enforce it in their country if it is in contradiction with the decision of the Constitutional Court, which shall prevail over any other jurisdiction.[59]

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[54] WAEMU Court of Justice Opinion No. 001/2003 of 18 March 2003

[55] *Decision DCC 19-287* of 22 August 2019 at 4.

[56] D Gnamou 'Juridictions constitutionnelles et normes de référence' (2019) 1 *Revue constitution et consolidation de l'Etat de droit de la democratie et des libertés fondamentales en Afrique* 89.

[57] *Decision DCC 20-641* of 19 November 2020 at 5.

[58] *Decision EP 21-003* of 17 February 2021 at 3.

[59] Makunya (n 29) 489.

5 Conclusion

This Chapter discussed the legal status of international human rights treaties and concludes that these treaties occupy a special place and are called upon to supplement the Constitution in the context of its interpretation, and even as reference standards in the constitutionality review. Practically international treaties, except the African Charter, have a *supra-legislative* rank and therefore national laws must be in consistency with them. However, in case of less protective international treaties, the Court could apply more protective national laws irrespectively to its rank.

CHAPTER THREE

THE BENIN CONSTITUTIONAL COURT'S APPROACHES TO INTERNATIONAL HUMAN RIGHTS LAW

1 Introduction

This chapter aims to assess the extent to which the Constitutional Court of Benin has made use of international human rights treaties in constitutional adjudication of human rights. The Benin Constitutional Court is an avenue of choice for human rights complaints.[60] Beninese citizens tend to refer to the Constitutional Court rather than to the jurisdictions of the judicial and administrative orders when defending their constitutionally guaranteed freedom.[61] This preference can be interpreted as an expression of the citizen's confidence in constitutional justice, based on the prestige and authority of the judges, whose decisions are not subject to appeal, but above all on the celerity, simplicity and gratuity of the procedure.[62]

At the same time, Benin is party to several human rights treaties concluded under the aegis of the United Nations (UN)[63], to instruments of the African Union (AU)[64] for the protection of human and peoples' rights and even to instruments of the Economic Communities of African Integration (ECAI). In light of the monistic approach adopted by Benin concerning Article 147 of the Constitution, these treaties have supra-legislative status and are directly applicable in Benin Law. Similarity, petitioners can invoke before the Court the provisions of these treaties to support their claims, just as the Constitutional Court can rely on them to found its decision.

2 Reliance on the African Charter on Human and Peoples' Rights

The Benin Constitutional Court has often 'directly' applied a provision of the African Charter autonomously without embedding it in or invoking it in conjunction with a provision of the Benin Constitution.[65] However, the Constitutional Court of Benin holds a *sui generis* human rights mandate, its practice is quite unprincipled especially with regards to use of the African

[60] Tanoh and Adjolohoun (n 28) 115.
[61] Ibid 110.
[62] Holo (n 96) 120.
[63] See the Benin ratification status of UN treaties https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=19&Lang=EN (Accessed on 9 October 2022).
[64] See the Benin ratification status of AU treaties https://au.int/fr/treaties (Accessed on 9 October 2022).

[65] Viljoen (n 32) 528.

Charter.[66] The Constitutional Court often invokes the African Charter in its reasoning but then concludes that only the Constitution was violated, because, as integral part of the Constitution, the Court relies as a constitutional norm.

This can be illustrated with a petition for arrest and detention related to an unfulfilled contract, where the petitioner argued that the measure of detention against him for not paying a civil debt is unrelated to a criminal offence and therefore, violates the article 6 of the African Charter, without citing any other constitutional provision. The Constitutional Court, in *Decision DCC 19-128* of 4 April 2019, in analysing the regularity of his detention, relied on Article 6 of the African Charter invoked by the applicant. It quoted the text of the provision that '[n]o one may be deprived of his liberty except for reasons and under conditions previously determined by law; in particular, no one may be arrested or detained arbitrarily'. The Benin Constitution does not have any provision similar to that of Article 6 of the African Charter. Thus, the invocation of this provision by the Court shows that the African Charter complements and fills in the normative gaps of the constitutional provisions. The Court read the Article 6 of the African Charter in conjunction with articles 58 and 61 of Act No. 2012-15 of 18 March 2013 on the code of criminal procedure as amended by law N° 2018-14 of 02 July 2018 that the measure restricting liberty that is police custody that the judicial police is authorised to prescribe can only be ordered in the event of an infraction of the law. The court concluded that there was reason to say that the arrest and custody of M. Mathieu Houessinon at the central police station of Abomey-Calavi from 1 to 5 July 2018, including extension, were contrary to the Constitution, without relying on any article of the Constitution in its reasoning.

In another *Decision DCC 19-184* of 18 April 2019 in appeal for unconstitutionality of an arbitrary detention, the applicant invoked the violation of articles 147(6) of the code of criminal procedure and 6 of the African Charter arguing that his duration of preventive detention exceeded the legal time limit, all extensions included. In his reply, the Prosecutor rejected the applicant's allegations and specified that the applicant was charged with robbery of cash and jewellery, facts constituting an economic crime and therefore excluded from the scope of the maximum duration of pre-trial detention of eighteen (18) months in accordance with the aforementioned article 147(6); and that in this case, the only obligation on the part of the judicial actors was to present the accused to the court of judgment within five (5) years. In order to answer the question raised, the Court first of all considered that the theft of cash and jewels could not be considered an economic crime, which is essentially characterized by an attack on the resources or the national economic order, and that consequently the applicant was arrested or detained arbitrarily, basing itself on article 6 of

[66] H Adjolohoun 'The right to reparation under the African Charter on Human and Peoples' Rights as applied by the Constitutional Court of Benin' cited by Tanoh & Adjolohoun (n 28) 114.

the African Charter, but in its operative part, it said and judged that there was a violation of the Constitution.[67]

The Constitutional Court, relying on article 7(1)(d) of the ACHPR, followed the same reasoning as in the two cases cited above, in *Decision DCC 19-284* of 22 August 2019, where it found that the fact that ten years of detention had elapsed without the detainee being brought before a court of law, indicated that there had been a violation of his "constitutional right" to be tried within a reasonable time. The concept of being tried within a reasonable time, as enshrined in the African Charter is one of the fundamental elements of the right to a fair trial. The national legislation does not contain or define the concept of reasonable time in legal proceedings before the courts.

These cases, all rendered in 2019 and taken as samples of recent decisions by the Constitutional Court of Benin, allow us to draw the following three conclusions. First, the African Charter is regularly invoked by petitioners to support their claims and by judges to motivate their decisions. Then, the African Charter contributes to improving the quality of human rights protection by applying directly in human rights litigation. [68] Secondly, the Court uses the provisions of the African Charter in its reasoning, either in combination with other provisions of the Constitution, or with other legal or regulatory provisions, but concludes in its operative part that there is a violation of the Constitution only. This may be explained by the fact that, the Court considers that since the rights and duties proclaimed and guaranteed by the African Charter are an integral part of the Constitution, the violation of the Charter constitutes a violation of the Constitution.[69] Third, the Court uses the provisions of the African Charter either to supplement constitutional provisions where there is no equivalent of the African Charter provision in the Constitution[70] or to emphasize their enshrinement at the regional level. [71]

Although it remains the most widely invoked, the African Charter on Human and Peoples' Rights is not the only African instrument that has been invoked by litigants before the Constitutional Court of Benin. In some other rare cases, other regional instruments have been invoked by petitioners. However, the Constitutional Court has not engaged in a debate on the allegedly violated provisions of these treaties. To reply to the plaintiffs' allegations, the Court has turned solely to the constitutional provisions. For example, in 2019, a petition was filed before the Constitutional Court in which a petitioner argued that the national school feeding program launched by the government of Benin in 2017, under which only students

[67] *Decision DCC 19- 184* of 18 April 2019 at 3.
[68] Viljoen (n 32) 527–528.
[69] *Decision DCC 19-128* of 04 April 2019.
[70] *Decision DCC 21-269* of 21 October 2021 at 5. In this case, the Court invoked two relevant provisions of the African Charter that supported its conclusion especially article 3(1) and (2) and article 18(3).
[71] Ibid.

enrolled in elementary school are beneficiaries of this program, excluding de facto those in kindergartens, violated article 26 of the Constitution and article 3 of the African Charter on the Rights and Welfare of the Child. In response to this claim, the Constitutional Court ruled that the principle of equality can be analysed as a rule according to which persons belonging to the same category must be subjected to the same treatment without discrimination and that in this case, elementary school students and kindergarten students belong to different categories; consequently, there was no violation of article 26 of the Constitution.

The Court seemingly ignored Article 3 of the African Charter on the Rights and Welfare of the Child, that states that every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of various determined factors[72] or other status. The concept 'other status' is too large to include the appurtenance of the child to a kindergarten or to an elementary school. The implication of this provision is that if a child is not able to avail from the protection of the Charter just because that child is a kindergarten, there is a violation of the principle of discrimination.

3 Reliance on United Nations human right treaties

Benin is party to international treaties on human rights concluded under the aegis of the United Nations.[73] However, cases of reference by the Beninese constitutional judge to UN international human rights treaties are very rare. The Benin Constitutional Court invokes these treaties only when they have been invoked by the parties to the proceedings to support their claims or when the Court wants to assert the universal existence of a specific right. The following decisions illustrate our point.

In its *Decision DCC 11-065* of 30 September 2011, the Constitutional Court was confronted with an alleged violation of a right to strike. In this case, the applicants alleged that Article 9 of the law on general rules applicable to military personnel, public security forces and similar voted by the National Assembly on September 2011 violated the right to strike and to freedom of assembly. The previous article provides that 'military personnel, public security forces and similar are required to carry out their mission in all circumstances and may not exercise the right to strike'. To assess the conformity of the Law No. 2011-25 on general rules applicable to military personnel, public security forces and similar in the Republic of Benin to the Constitution, the constitutional judge resorted to international treaties ratified by Benin. He therefore invoked article 8(2) of the International Covenant on Economic, Social and Cultural Rights [which] specifies that the constitutional guarantee of the right to strike 'does not prevent the exercise of these rights by members of the Armed Forces, the Police or

[72] The child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth.
[73] For more information see https://www.ohchr.org/en/countries/benin (Accessed on 9 October 2022)

the Civil Service from being subject to legal restrictions.'[74] However, the Court should have gone further in its reasoning by invoking article 22(2) of the ICCPR, which subjects the exercise of the right to strike only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

In 2019, the Constitutional Court went further in interpreting the content of Article 14(5) of the ICCPR which provides: 'everyone convicted of an offence shall have the right to have his conviction reviewed by a higher tribunal according to law'.[75] Thus, for the Court, it is to be expected from this provision, firstly, that this text confers an option on any person to have his case reviewed by a higher tribunal, and secondly, that when national legislation provides for such a review, it is not to be understood as a prescribed duty or an imperative obligation imposed on the States parties to institute a two-tier court system in all matters. From this analysis, it concluded that, although general, the principle of the double degree of jurisdiction is neither fundamental nor absolute; and that, on the other hand, the double degree of jurisdiction is not a constitutional principle and that, consequently, it is not imposed on the Beninese legislator.[76] It is nevertheless surprising to note that in interpreting this provision, the Constitutional Court of Benin makes no reference to the practice of the United Human Rights Committee (UNHRC), in particular General Comment 32 on article 14 of the ICCPR. In interpreting article 14(5), the UN Human Rights Committee, based on its jurisprudence,[77] the right to have one's conviction and sentence reviewed by a higher tribunal established under article 14(5) imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[78] In another decision of the same year, the Constitutional Court found that a petitioner seeking political asylum had no merit because Benin had complied with conditions provided for under Article 1(c)(5) of the United Nations Convention relating to the Status of Refugees as 'the circumstances in connection with which he has been recognised as a refugee have ceased to exist' and that he was offered voluntary repatriation or social reintegration.[79]

Although these kinds of cases are rare and encouraging, they reveal that the Beninese Constitutional Court uses UN international human rights treaties ratified by Benin as a

[74] *Decision DCC* 11-065 of 30 September 2011.
[75] *Decision DCC* 19-055 of January 31, 2019.
[76] *Decision DCC* 19-055 of 31 January 2019
[77] Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, para. 7.5.
[78] General Comment 32 of the UN Human Rights Committee (Article 14: Right to equality before courts and tribunals and to a fair trial) CCPR/C/GC/32 (23 August 2007) par 48.
[79] *Decision DCC* 19-481 of 3 October 2019.

reference standard. At the same time, the auxiliary character of these conventions is confirmed, since it is to support specific constitutional provisions or the African Charter that these international texts are invoked.

4 The obstacles to invoking international human rights treaties

Despite the fact that international human rights treaties enjoy a specific place in Benin's legal order and constitute reference standards for constitutional interpretation of the Bill of Rights, the reliance to them by the Benin Constitutional Court remains weak due to the structural obstacles such as the conception of hierarchy of norms (4.1), the attitudes of judges and lawyers vis-à-vis international law (4.2) and the difficulty of harmonisation of norms, given the multiplicity of human rights standards (4.3).

4.1 The problem of the hierarchy of norms

The first problem with the non-invocation or formalistic invocation by the Beninese Constitutional Court of international human rights treaties is undoubtedly the conception of the hierarchy of norms in Beninese law. The Beninese constitution has clearly opted for the primacy of the international legal order over all national legislation inferior to the constitution. Then, when it comes to interpreting international human rights norms, they read them together with constitutional provisions. In facts, in the conception of the hierarchy of norms in Benin, similar to other African French-speaking countries which share the civil law tradition inherited from the French colonisation, international treaties have an *infra-constitutional* and *supra-legislative* value. In other words, international treaties, including those relating to human rights, are part of the '*bloc de constitutionalité*'[80] (constitutional corpus) which has constitutional rules at its top.

The drafting of Benin's Constitution of 1990, like most post-1990 constitutions, has been influenced by international human rights law.[81] Consequently, the Benin Bill of Rights contains a catalogue of provisions roughly similar to those contained in international human rights instruments. Moreover, the African Charter, which is an integral part of the Constitution, also contains a catalogue of human rights provisions enshrined in other international human rights instruments. Thus, when a human rights violation is alleged before the Court, the tendency is for the Court to first look for a reference in the Constitution, which is considered superior to any other norm, before looking for one in the African Charter and possibly in other human rights treaties. Once the reference is found in the Constitution, the Court no longer feels the need to invoke another norm. Only when the reference is not

[80] *Decision DCC* 00-072 of 17 November 2000.
[81] Killander (n 26) 213.

found in the Constitution, the Court tends to turn to the African Charter as second alternative standard. Other human rights treaties, whether those of the United Nations, the African Union or the economic communities, are thus in third place of preference.

4.2 The attitude of constitutional judges and lawyers in approaching the sources of law

The second obstacle to invoking human rights treaties is the attitude and approaches of national lawyers and judges towards international human rights law norms. The legal profession (generally) tends to lack a detailed knowledge of international law and a sympathy for its culture. Even others, who may be more sympathetic to international law, and impressed with its potential, invariably endeavour to locate the basis of their judgments in the more familiar domestic law.[82]

Most of the judges and lawyers in Benin, as those from the rest of francophone countries, are generally trained in the legal system they inherited from colonization, the civil law. In the legal practice of this tradition, the approach to the sources of law is to give more primacy to domestic sources than to international sources. Clearly, lawyers and judges are not sufficiently exposed to international treaties and international law in general and their approach remain rigid, dogmatic and *kelsenian*.[83] This can be explained to some extent by the content of the academic education of the lawyer in francophone African countries. Indeed, although the classic public international law course is taught in law faculties, international human rights law is only taught in a few law faculties, national schools of administration and magistracy where future magistrates are trained. Furthermore, two members of the Beninese Constitutional Court are not necessarily lawyers.[84] Their lack of legal background can negatively impact on their approach to sources of law.

The difficulties of the familiarity with the content of international human rights law are real. It is important that States place special emphasis on the teaching of this branch of international law in universities and in judicial training institutes. Similarly, practicing judges should be able to benefit from training and refresher programs in a subject which is quite complex and which integrates concepts of public international law as well as notions of administrative law, public liberties and international criminal law. The initiative undertaken by the Association of

[82] Ibid.

[83] In reference to Hans Kelsen's pyramid, which is a hierarchy (or ranking) of legal norms in which each norm must necessarily conform to the superior norm in order to be applicable. At the top of Kelsen's pyramid is the Constitution, and the bloc de constitutionnalité. At the bottom is the block of legality and at the very bottom the regulatory block.

[84] Article 115 of Law No. 90- 32 of 11 December 1990 on the Constitution of the Republic of Benin

Supreme Courts of French-speaking Africa to organize courses on human rights for judges in national judicial training schools in Benin, Burkina Faso and Senegal should be highlighted.

With the internationalization of constitutional law, it has become the duty of the constitutional judge to strive, as far as possible, to bring his decisions into harmony with the development of international law. In order to achieve this, judges must familiarize themselves with international law. It is also necessary for legal practitioners to familiarize themselves with the development of international law at law schools and in the context of continuing legal education.

4.3 The problem of coordination and harmonization of international human rights law norms

In the Beninese legal system, the combination of norms results from the juxtaposition or interweaving of rights and freedoms from constitutional, universal, regional and sub-regional sources. As a result, the constitutional judge is faced with a real "coordination challenge", [85] especially if they are not familiar with the norms of international human rights law. The multiplication of human rights conventions at the African and global level regularly leads to overlaps in terms of substance, since the provisions of international law are superimposed on similar or roughly similar guarantees provided for in the national constitution. Thus, when an allegation of human rights is brought before the Constitutional Court, the judge is called upon to determine the right to be applied according to the values it guarantees, its content and the legal qualification of the facts.

The constitutional Court must ensure the coherence of the constitutional system as a whole and can no longer see itself exclusively as the guardian of the state constitution alone. This is not an easy task and presupposes that the judges are sufficiently familiar with international human rights law and comparative constitutional law. It unfortunately appears that the Benin Constitutional Court is unwilling to engage in this coordination exercise that would allow it to align its jurisprudence with international standards through the most progressive and protective interpretation of human rights. The Court usually limits itself to the constitutional provisions with which it is much more familiar. However, in a context of regionalization and even globalization of human rights adjudication, the Constitutional Court would gain legitimacy by relying on international human rights treaties and by drawing on the jurisprudence of regional and international human rights bodies. Indeed, every time it renders a decision that is not in line with the approach of the treaty bodies, it opens the door for its

[85] M Hertig 'L'internationalisation de la juridiction constitutionnelle : défis et perspectives' in (2) RDS (2010) 269.

citizens to seize these bodies to challenge its decisions.[86] The court's legitimacy will be undermined, if its decisions are increasingly challenged before the UN human rights treaty bodies or the regional human rights bodies.

5 Conclusion

The approach of the Benin Constitutional Court vis-à-vis international human rights treaties is generally formalistic. The African Charter, which plays an important role in filling the gaps in the constitutional provisions, and which is an integral part of the constitution, is referred to by the judge as a constitutional norm and not an international treaty. Therefore impact of human rights treaties in constitutional adjudication in Benin remains weak and reliance to the decision of treaty bodies inexistent due to many reasons among them the problem of the hierarchy of norms, the reluctant attitude of judges and lawyers to invoke them during a lawsuit and their non-familiarity with international law or the problem of coordination of the multitude of sources of human rights.

[86] Benin has accepted individual complaints procedures under UN treaties. For more information see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=19&Lang=EN.
Under AU treaties, by ratifying the African Charter, Benin has accepted the procedure of individual communication. Benin has ratified as well the African Court Protocol but since 2020, Benin withdrew its declaration of acceptance of the jurisdiction of the African Court under Article 34(6) of the Protocol, which allowed its citizens and civil society organizations with observer status at the African Commission to bring cases of human rights violations before the Court. Benin also recognizes the jurisdiction of certain sub-regional courts in matters of human rights, including the ECOWAS Court of Justice

CHAPTER FOUR

THE POTENTIAL OF HUMAN RIGHTS TREATIES AND CASE LAW IN IMPROVING CONSTITUTIONAL ADJUDICATION IN BENIN

1 Introduction

The objective of this chapter is to show why the Constitutional Court should go beyond these obstacles for a better protection of human rights in Benin by demonstrating the potential of international human rights treaties in improving constitutional adjudication.

This chapter argues firstly that international human rights have a potential to fill the gaps in constitutional provisions and constitute therefore the extension of the constitutional Bill of Rights (2). Since human rights are formulated in approximately the same way in both the Beninese Constitution and in regional and international human rights treaties, this Chapter argues secondly that the decisions of the human rights treaty bodies should serve as a guide to the interpretation of constitutional provisions by the Beninese judges (3). By being reluctant and disinterested in the jurisprudence of human rights treaty monitoring bodies, the constitutional court deprives itself from legal sources and interpretation techniques that are susceptible to strengthen the court's legitimacy and independence. Hence the need for a dialogue between the constitutional court and the regional and international human rights treaty bodies (4).

2 Human rights treaties as an extension of the Benin Bill of Rights

This section aims to analyse how the Benin Constitutional Court could rely or has relied on international human rights treaties to assert the existence of certain rights which are not expressly provided by the Benin Constitution. To this end, international human rights treaties could play an important role in completing the Bill of Rights and therefore fill the gaps in constitutional provisions. The sections analyses two examples - the right to be tried within a reasonable time (2.1) and the right to reparations (2.2) - which are not expressly provided under the Benin Constitution.

2.1 Reading into the Constitution the right to be tried within a reasonable time

Articles 16, 17 and 18 of the Benin Constitution cover certain aspects of the right to a fair trial such as the presumption of innocence, legality of prosecutions, non-retroactivity of criminal laws and sentences, as well as the legality of crimes and sanctions, of arrest, and of detention. Although the Constitution cannot be expected to cover all aspects of the right to a fair trial, it

is worth noting that one of the generally recognized components of the right to a fair trial, the violation of which has been frequently[87] brought before the Constitutional Court, is not included: the right to be tried within a reasonable time. That notwithstanding, given that the right to a fair trial is incompletely formulated in the constitution, constitutional judges, in their function of interpreting the constitution, have referred to human rights treaties, essentially the African Charter to recognize the existence of a right to be tried within a reasonable time in Benin. Article 7 of the African Charter lays down the principles of the right of access to an impartial and independent judge, the right to a fair trial, the right to be tried within a reasonable time, and the right to defence. Article 7 of the African Charter and the rights it recognizes are routinely applied before the Constitutional Court, especially in cases where human rights and civil liberties are at stake. The issue of being tried within a reasonable time, for example, has given rise to several decisions of the Constitutional Court,[88] which has constructed and recognized the right to be tried within a reasonable time, largely on the basis of the African Charter.

In the determination of reasonable time, a reading of Constitutional Court decisions does not allow for an easy and clear grasp of its criteria for assessing what is reasonable or not. In two different decisions of the same year, the Court ruled that 20 months of pre-trial custody before a trial starting were unreasonable[89] while in another, it considered that five years taken by the Supreme Court to render its decision was reasonable.[90] In 2020, the Court ruled that four years of criminal court proceedings without a final decision was an undue extension,[91] while the Court has ruled before in 2007 that six years from the period of arrest until the seizure of the Court without a final decision was reasonable.[92] What time may be considered as 'reasonable' or 'unreasonable' before the Benin Constitutional Court?

Since the Constitutional Court constantly refers to the African Charter, more particularly to its article 7(1)(d), to find a violation of the right to be tried within a reasonable time, it would be advisable for the Court to refer in the future to the positions taken by the regional mechanisms of this treaty, in particular the African Court on Human and Peoples' Rights (African Court), in relation to the interpretation and scope of the said right, in order to remedy the volatility of the criteria for the assessment of the reasonable time. In fact, in assessing the reasonableness, the African Court proceeds to an evaluation on a case-by-case basis, by establishing a certain number of classic criteria which are: the complexity of the

[87] One can cite *DCC 12-158* of 16 August 2012, *DCC 14-108* of 3 June 2014, *DCC 14-191* of 11 November 2014, *DCC 15-071* of 26 March 2015, *DCC 15-113* of 26 May 2015, *DCC 16-032* of 4 February 2016, etc.
[88] Ibid.
[89] *Decision DCC 19-493* of 31 October 2019.
[90] *Decision DCC 19-492* of 31 October 2019.
[91] *Decision DCC 20-029* of 23 January 2020.
[92] *Decision DCC 07-153* of 22 November 2007.

case, the behaviour of the applicant, the behaviour of the judicial authorities or the stakes of the dispute.

First, with respect to the complexity of the case, it is essentially a factual assessment that combines several variables that relate to the subject matter and character of the case. In the case *Norbert Zongo v. Burkina Faso*, the African Court established the principle that the reasonableness depends on the particular circumstances of each case. [93] This may include, for example, interrogations, requests for expert opinions, confrontations of evidence and witnesses, letters rogatory, etc. Secondly, with regard to the attitude, behaviour and situation of the applicant, the court takes into account elements such as the degree of literacy,[94] indigence,[95] situation of detention or not of the applicant,[96] etc. Thirdly and finally, the conduct of the judicial authorities is obviously essential because only delays attributable to the state can lead to the conclusion that the reasonable time limit has been violated. In the cases of *Alex Thomas*[97] or *Mtikila,* [98] the African Court noted that the attitude of the judicial and/or administrative authorities could unduly prolong the outcome of a trial.

If such criteria were taken into account by the Constitutional Court of Benin, it could remedy its jurisprudential fumbling on the subject of reasonable time, which in turn threatens the legal security of petitioners. This notion imposes a certain clarity, a precision of reasonable time limits in order to avoid the instability of legal situations.

2.2 The construction of the right to reparation

The right to reparation for victims is a crucial element of the human rights system, as it aims to repair the damage caused by rights violations and to discourage perpetrators or responsible states from committing such violations in the future. Indeed, rights guaranteed by the constitution and other human rights treaties would be but a hollow proclamation if

[93] *Norbert Zongo v Burkina Faso* ACHPR (21 June 2013, preliminary exceptions).
[94] *Kijiji v Tanzanie* ACHPR (21 March 2018, Jurisdiction and Admissibility). The petitioner was proficient in the law, indigent and incarcerated and without legal aid, and furthermore, unaware of the Court's existence and how to get to it.
[95] *Nguza Viking v Tanzanie* ACHPR (23 March 2018, Jurisdiction and Admissibility). The petitioner was legally layperson, indigent, incarcerated, and without legal aid, and attempted to file a petition for review.
[96] *Amiri Ramadhani v Tanzanie* ACHPR (11 May 11, admissibility). The petitioner was legally layperson, indigent, incarcerated, without freedom of movement, limited access to information and without legal assistance.
[97] *Alex Thomas v Tanzanie* ACHPR(20 November 2015, Merits) 1 RJCA 482 par 74.
[98] *Mtikila v Tanzanie* ACHPR (14 June 2013, Merits) para 83.

not backed up by the guarantee of a right to restitution or compensation in the event of a violation.[99]

Before 2002, the Constitutional Court of Benin was content to note human rights violations without granting the victims a right to reparation. The major evolution in this sense dates back to the *Decision DCC 02-052* of 31 May 2002 (the *Fanou case*).[100] In this case, following a two-week leave of absence that was regularly granted to him, M. Fanou was dismissed by his employers when he returned to work. When he objected to this decision, his employers called the police. He was arrested and detained from 22 to 28 August 2001 without presenting him to a judge. He was subjected to cruel, inhuman and degrading treatment by police officers. On November 15, 2001, M. Fanou, with a medical certificate attesting to the beatings and abuse he had suffered, filed an application with the Constitutional Court to have these acts declared contrary to the Constitution and requested damages for his personal belongings (belt, wristwatch and eleven pay slips) which he was unable to recover upon his release from detention. The Constitutional Court, after having noted the facts alleged by the applicant, affirmed that the violence exerted on the person of M. Fanou by the police officers constituted inhuman and degrading treatment within the meaning of article 18(1) of the Constitution. It added that his detention in the police premises for more than 48 hours without presenting him to a magistrate was abusive and constituted a violation of article 18(4) of the Constitution and that the violations of these two provisions "*opened a right to reparation in favour of M. Laurent Fanou*". [101]

To conclude this, the Constitutional Court referred to the scholarly works and customary international law, in part because neither the Constitution nor the African Charter provide for an explicit right to reparation for unlawful detention, and stated that: [102]

> Considering that it emerges from the combined and crossed reading of these provisions [Constitution and African Charter] as well as from customary law that such prejudices suffered by any person give right to reparation; that in the case in point M. Fanou has the right to reparation for the prejudices suffered

However, the Court did not indicate which scholarly works it used nor demonstrated how it found the international custom it referred to in its decision. In our point of view, the Court could have simply referred to other relevant international human rights treaties ratified by Benin to clarify its position. In the case of unlawful detention such as that of M. Fanou, Article 9(5) of the ICCPR provides for a right to reparation for anyone who has been the victim of

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[99] Communication n° 302/05 *Mamboleo Itundamilamba v République démocratique du Congo*, ACHPR (18 October 2013) par. 133.
[100] *Decision DCC 02-052* of 31 May 2002.
[101] *Decision DCC* 02-052 of 31 May 2002. In French '(…) *ouvre le droit à la réparation en faveur de Mr Laurent Fanou*'.
[102] *Decision DCC* 02-052 of May 31, 2002. Unofficial translation by the Author.

unlawful arrest or detention. Furthermore, in the view of the UNHRCtee interpreting the ICCPR, Article 9(5) obliges States parties to establish the legal framework within which reparation can be provided to victims as an enforceable right and not on *an ex gratia* or discretionary basis. Reparation must not only exist in theory, it must be real and the payment of compensation must be made within a reasonable time.[103] The Committee goes on to say that paragraph 5 does not require that a single procedure be put in place to provide compensation for all forms of unlawful arrest, but only provides that an effective system of procedures must exist to provide compensation in all cases covered by the Article 9(5) of the ICCPR.[104] The reliance on this provision of the ICCPR and decisions of the UNHRCtee could have allowed the Benin Constitutional Court to adopt a progressive understanding of the right to reparation, especially in cases of unlawful detention.

However, despite the fact that the recognition of the right to reparation has been constant since the *Fanou case*, one issue remains: No provision of the Constitution allows the Court to award damages. The reading of articles 114 to 117 of the Constitution suggests that the Constitutional Court is not competent to make pecuniary evaluations, nor to determine the amount of a legal proceeding, and even less to award relative costs or damages. In recognizing that there is a right to compensation following a violation of a human right, the Constitutional Court does not set an amount, nor does it specify the nature of the compensation for the harm suffered. It is then up to the interested parties to bring their case before ordinary judges. This is an insufficiency of the guarantee of human rights by the Beninese Constitutional Court. Indeed, if the right to reparation is recognized before the Court, it suffers from the absence of a quantification and a means of enforcing the reparation. In the absence of an adequate reparation mechanism by the Court itself to fill the void that obliges the applicant to turn to the civil judge to obtain reparation, the solution would be, in my opinion, to put in place a mechanism of automatic referral to the ordinary judge in the event of a finding of human rights violation so that the latter can decide on reparation.

3 Treaty bodies' decisions as a guide to constitutional interpretation of human rights

Human rights are formulated in roughly the same way in all national, regional and international legal orders. National, sub-regional, regional or international human rights protection systems need to be open to each other, particularly to resolve a normative gap or to strengthen the argumentation of decisions. The Constitutional Court of Benin, as a

[103] General Comment No 35 of the Human Rights Committee (Article 9: Liberty and security of person, CCPR/C/GC/35, par 50.
[104] *Mulezi v République démocratique du Congo* (HRCttee) Application No 962/2001, par 7.

jurisdiction with a particular mandate to adjudicate human rights, should be in line with this inter-(quasi)judicial dialogue perspective. Indeed, the recourse to decisions rendered by regional human rights protection bodies by the Benin constitutional judge will be perceived both as a tool for legitimizing his decisions and as an added value in their methods of interpreting the law.

The Benin Constitutional Court remains, by virtue of the principle of subsidiarity of the international protection of human rights, the main guardian of individual rights and freedoms on Benin territory. Thus, in order to give effect to the idea of subsidiarity, the Beninese Constitutional Court must constantly harmonize the interpretation of constitutional provisions (similar to those contained in international human rights treaties) with African jurisprudence (3.1) and UN treaty monitoring bodies (3.2) to avoid the path of African and UN treaty bodies being more widely open than that of Cotonou, where it sits.

3.1 Reliance on decisions and soft law instruments of the African Court and Commission on Human and Peoples' Rights

The African Charter has its own quasi-jurisdictional monitoring mechanism, the African Commission on Human and Peoples' Rights (African Commission). In addition to the African Commission, an African Court on Human and Peoples' Rights (African Court) was established by the African Court to hear all cases and disputes brought before it concerning the interpretation and application of the African Charter, the African Court Protocol, and any other relevant human rights instrument ratified by the States concerned.[105]

The African Court and the African Commission respectively render judgments, decisions and soft law instruments[106] on the rights contained in the African Charter and other relevant human rights instruments especially for the African Court. In this light, the Benin Constitutional Court, which is mandated to apply the provisions relating to the rights and duties contained in the African Charter, finds itself in competition with two regional mechanisms for the application and interpretation of the same treaty. The abundant jurisprudence of these regional mechanisms could play an important role in the constitutional adjudication of human rights in Benin. However, the Benin constitutional judges have been side-lining the jurisprudence of these two mechanisms, despite having had ample opportunity to invoke them in several cases to inform their decisions and thus raise the standards of human rights protection in Benin, as the following analysis of its decisions demonstrates.

[105] African Court Protocol art 3(1).
[106] These are General Observations, Concluding Observations, Resolutions, Guidelines, etc.

Firstly, in a case where the applicant alleged violations of the rights of peoples recognized in Articles 19 and 22 of the African Charter, in its *Decision DCC 18 - 200* of 11 October 2018, the Benin Constitutional Court skipped a clear opportunity to refer to the jurisprudence of the African Commission to establish the same standard of human rights protection as that already enshrined at the regional level. Indeed, in its attempt to define the concept of 'people', the Constitutional Court affirmed that: [107]

> the notion of people, within the meaning of the Constitution and the African Charter on Human and Peoples' Rights, which univocally designates all citizens, without any distinction, is not reducible to the various socio-cultural groups, and that in the present case, the socio-linguistic and cultural groups invoked by the applicant do not constitute a 'people' within the meaning of the Constitution and the African Charter on Human and Peoples' Rights

As can be seen, the Constitutional Court of Benin adopted a restrictive approach to the notion of people by limiting it to citizens, yet it could have adopted a more flexible and globalizing conception of the notion of "people", already consecrated by the African Commission on Human and Peoples' Rights. Indeed, the African Commission, in the *Endorois case*, considers that a group of individuals should be considered as a "people" according to the following criteria: a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial linkage, and economic life or other links, identities and affinities that they enjoy collectively.[108]

In another case, the African Commission's jurisprudence could have served the Constitutional Court of Benin in its approach to how the treatment of defamation against persons holding public office could be addressed. In the case subject of *Decision DCC 10-013* of 4 March 2010, the petitioner challenged the constitutional validity of articles 23 and 32 of Benin's 1960 law on freedom of the press because the law treats the President of the Republic differently from other citizens. In the background, the petitioner invoked freedom of expression, a constitutional right that he claimed was illegally restricted by the press freedom law because the Constitution and the African Charter allow everyone to express and disseminate their opinions 'within the law'. In response, the Constitutional Court read Articles 3, 4 and 41 of the Constitution together and ruled that because the position of the President of the Republic is important, in that the office embodies the sovereignty of the people, it should not be treated like any other citizen, and that the President of the Republic should be protected from defamation, criticism and other types of insults in the media in order to protect the nation and its sovereignty.[109]

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[107] *Decision DCC 18 - 200* of 11 October 2018.
[108] Communication 276/03 *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya Endorois v Kenya* ACHPR at par 151.
[109] *Decision DCC 10-013* of 4 March 2010.

This above decision of the Court does not advance human rights and democracy in Benin for two reasons. First, it stifles the democratic debate that requires that people in state high official positions be subject to harsh criticism and citizen oversight. Second, the Constitutional Court should have ruled on whether a sentence of one to five years' imprisonment and a fine were proportional to the 'legitimate purpose' that the law sought to protect, namely to protect the president of the Republic. At this stage, the jurisprudence of the African Commission would be an indispensable help to the Beninese constitutional judges. On the question of how defamation of persons vested with public authority should be dealt with, the African Commission has emphasized that the right to equality must be upheld and that public authority cannot claim different treatment solely on the basis of official position.[110] In the 1994 case of *Media Rights Agenda and Others v Nigeria*, the African Commission ruled that "persons who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens, otherwise public debate may be completely stifled".[111] The Constitutional Court of Benin should therefore interpret freedom of expression in a manner consistent with the equality provision of the Constitution based on this decision of the African Commission, which predates its own, to advance democracy and human rights.

Finally, in another case, the Constitutional Court ignored the jurisprudence of the African Court in a case in which the applicant alleged that the principle of sponsorship instituted by articles 44 and 45 of the constitution as well as article 132 of law No. 2019-42 on the electoral code violated the African Charters, and by that virtue also the Constitution, in particular the articles the right of citizens to participate in the affairs of the State and the freedom of association enshrined respectively in articles 13(1) and 10(2) and 2 of the African Charter. In fact, Article 132(8) of Law 2019-43 of November 15, 2021 requires presidential candidates to be sponsored by a minimum of 10% of the members of the National Assembly and mayors. Each presidential candidate must gather 16 sponsors out of the 160 members of the National Assembly. This threshold is not easy to meet for independent candidates, who are automatically excluded from the presidential election race. In its decision, the Constitutional Court maintains that it cannot blame the National Assembly, which is the emanation of the will of the people, for having added a new condition to the election of the President of the Republic, which is sponsorship.[112] By its decision, the Constitutional Court has regressed the democratic process underway in Benin, yet it could have advanced it by taking inspiration from the jurisprudence of the African Court in the *Mtilikia case*,[113] since petitions before the Constitutional Court concerned similar political rights. The *Mtikila case* is the evidence of the

[110] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 74-75.
[111] *Ibid.*
[112] *Decision DCC 21-011* of 7 January 2021
[113] *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34.

African Court's commitment to preventing unjustifiable restrictions imposed on the right to political participation and the freedom of association.[114]

Since 1987, the African Commission has established an abundant jurisprudence interpreting different aspects of rights provided by the African Charter. These communications can provide persuasive arguments to court when interpreting human rights. In addition, in its protective mandate,[115] the African Commission receives and analyses states reports submitted by States parties to the African Charter and Maputo Protocol. In this regard, the African Commission formulates concluding observations which can assist courts in interpreting constitutional rights. Furthermore, the African Commission develops soft-law instruments in the form of thematic resolutions, guidelines, general comments and declarations that are pivotal for the enhancement of the quality of constitutional interpretation.[116] On the other hand, the African Court issues binding decisions and authoritative decisions on disputes[117] concerning the interpretation of the rights provided by the African Charter, as well as an it provides 'opinion on any legal matter relating to the Charter or any other relevant human rights instruments',[118] on which constitutional Court may base its interpretation. As both the African Court and the Benin Constitutional Court issues decisions interpreting the African Charter, the latter must be mindful of the first's jurisprudence position and evolution. In this light, the cross-fertilisation or the judicial dialogue between these two jurisdictions is imperative.

3.2 Reliance on UN Treaty Monitoring Bodies

Like for the regional treaty monitoring mechanisms, the Constitutional Court does not refer to the treaty mechanisms established by the United Nations human rights treaties. However, in many of the reasons for the Constitutional Court's decisions, the jurisprudence of the treaty monitoring bodies has been used by the Court to raise the standards of human rights protection and thus enrich its jurisprudence. These two decisions, analysed as examples, illustrate our point.

In its *Decision DCC 03-088* of 28 May 2003, concerning the sanction of private reprisals for arbitrary arrest and torture or related treatment, the Constitutional Court, relied on article 18, paragraph 4, of the Beninese Constitution, which states: "No one may be detained for more

[114] Makunya (n 29) 480.
[115] Articles 47, 55 and 56 of the African Charter
[116] R Adeola, F Viljoen and TM Makunya 'A commentary on the African Commission's general comment on the right to freedom of movement and residence under Article 12(1) of the African Charter on Human and Peoples' Rights' (2021) 65 *Journal of African Law* 131-151
[117] Article 3(1) of the African Court Protocol.
[118] Article 4 of the African Court Protocol.

than forty-eight hours except by the decision of a magistrate to whom he or she must be presented. This period may be extended only in cases exceptionally provided for by law, and may not exceed a period of more than eight days". The Constitutional Court concluded that the arrest was arbitrary, even though the facts had occurred within the 48 hours provided for by the Constitution, beyond which the arrest could have been considered unconstitutional if the persons concerned had not been presented to a magistrate. In this decision, the Court should have clarified the concept of 'arbitrariness' based on the jurisprudence of the UNHRCtee, which had already interpreted article 9(1) of the ICCPR in 1990, noting that "the drafting history of article 9, paragraph 1, confirms that the word 'arbitrariness' should not be given the meaning of 'contrary to law', but rather interpreted more broadly from the point of view of what is inappropriate, unjust and unforeseeable."[119] Indeed, even if an arrest or detention is in accordance with the law, it is not sufficient to escape the charge of arbitrariness if an individual's arrest and detention are in all respects in accordance with the law. It must also be reasonably justified, taking into account the grounds on which it is based. [120]

Similarly, in its *Decision DCC 21-011* of 7 January 2021 analysed above, in which the Court endorsed the principle of sponsorship that *de facto* excludes several candidates, including independents, on the grounds that this sponsorship criterion was introduced by a law passed by Parliament, the Court could have rightly invoked, in order to block this democratic regression and participation in public affairs General Comment 25 of the United Nations Human Rights Committee (participation in public affairs and the right to vote), which elaborates on article 25 of the ICCPR, in which the Committee states that 'if a candidate is required to have a minimum number of supporters in order to be nominated, such a requirement must be reasonable and must not constitute an obstacle to candidacy'. [121]

Reliance on international and regional human rights monitoring bodies may offer useful arguments. By resolving case brought before it, the Benin Constitutional, international and human rights law may assist in interpreting constitutional Bill of Rights provisions, especially given that international human rights treaties have influenced the constitutions of many African countries.[122] Treaty body case law and the soft law they develop can be useful tools in assisting the Benin Constitutional Court, to capture the scope and the extent of constitutional and other fundamental rights. However, the Constitutional Court of Benin has a tendency to develop a national, even nationalistic logic, which seems to result in a 'territorialisation' of constitutional jurisprudence in the face of global problems related to human rights. This

[119] Communication N° 305/1988 *Van Alphen c. Pays-Bas* UNHRCttee (23 July 1990) par.5 (7) et 5 (8).
[120] O de Schutter, 'Article 9' in Emmanuel Decaux (ed.), *Le Pacte international relatif aux droits civils et politiques* (2011) 246.
[121] General Comment 25 of the United Nations Human Rights Committee, par 17.
[122] See Killander (n 26).

ultimately might lead to a contradiction in jurisprudence that could have been avoided. A harmonization of national constitutional and international jurisprudence through dialogue between constitutional and international judicial and quasi-judicial treaty bodies would be welcome. It would not only give meaning to the much-vaunted integration on the continent on the one hand, but also to the standardisation of human rights protection standards on the other hand, based on their universal character.

4 Possibility of a dialogue between the Benin Constitutional Court and the human rights treaty bodies

The multiplication of human rights norms and the diversification of regional and universal jurisdictions and quasi-jurisdictions mean that the national constitutional court no longer always has the last word on human rights adjudication, and it is certainly not the only actor to pronounce on them. Many treaties establish a mechanism of protection of rights they provide. Human rights norms intersect, clash, overlap, and become entangled, with each judge wanting to save the system that instituted him or her, and then to assert his or her place, while trying not to accentuate the legal complexity. However, respect and protection of human rights must be a common language allowing for mutual trust[123] between constitutional and regional jurisdictions. Hence the need for a dialogue of courts and human rights mechanisms more generally for harmonisation of human rights standards (4.1) and for human rights norms (4.2). The example from South African Constitutional Court in relying on decisions and soft law of treaty bodies can inspire the Benin Constitutional Court (4.3)

4.1 Jurisprudential dialogue for harmonisation of human rights standards

The regionalisation and globalisation of human rights adjudication lead to a new function of the constitutional court, that of harmonizing and ensuring the overall coherence between the constitutional norms and the reference norms of constitutional interpretation that form part of the *bloc de constitutionnalité*, including the human rights treaties ratified by Benin. In doing so, the Beninese Constitutional Court must also ensure that it finds solutions that fit as much as possible into the overall context. Therefore the Court could gain more by drawing on human rights treaty bodies when interpreting or applying human rights that overlap with constitutional rights.

If the term 'dialogue' refers to a constructive exchange, an opening, an evolution, it also evokes a need for appeasement. Indeed, the tensions revealed by the so-called dialogue are the symptoms of a transitional phase in which the norms - and their natural judge - are

[123] FX Millet 'Réflexion sur la notion de protection équivalente des droits fondamentaux' in *RFDA* (2012) 307.

seeking their respective place. The coexistence of judges is becoming a competition as legal spaces are overlapping rather than juxtaposed. The crisis between the African Court on Human and Peoples' Rights (African Court) and Benin is one of the recent examples of this type of conflict.[124] After Rwanda and Tanzania, Benin declared its withdrawal from the declaration of the competence of the African Court to be directly seized by citizens and NGOs under Article 36(4) of the African Court Protocol when the Court ordered on 17 April 2020, the suspension of the organization of communal and municipal elections scheduled for 17 May of the same year.[125] The Constitutional Court of Benin has flatly refused to execute a decision of the African Court.[126] In its press release and comments to the press, Benin accused the African Court of 'dysfunctions and slippages', and contested its 'interference in issues related to state sovereignty and issues that do not fall within its jurisdiction'. It criticized the African Court's decisions over the past several years for 'serious incongruities'.[127] This conflictual situation shows the non-existence of a real jurisprudential dialogue.

The first argument in favour of a dialogue of judges and relevant mechanisms of treaties is the pragmatic dialogue of jurisprudences. The openness to dialogue gives to the judges the possibility to benefit from the experience of other judges who, through their previous decisions, provide concrete examples of the application of a solution to a difficult case and its potential consequences. To this end, Justice Albie Sachs of the South African Constitutional Court states[128]

> I pay attention to the pronouncements of some of the justices of the United States Supreme Court ... not because I treat their decisions as precedents to be applied in our courts, but because their dicta elegantly and usefully articulates the problems ... facing any modern court. Although they are drawn from a different legal culture, they express values and dilemmas in a way that I find valuable in elucidating the meaning of our constitutional text.

The decisions of the treaty mechanism, whether judicial or quasi-judicial, are therefore like a 'toolbox' from which the Constitutional Court of Benin can draw to feed its reasoning and at the same time enrich the options available to it.

The second argument consists in demonstrating the progress, in terms of coherence, quality and legitimacy that decisions enriched by dialogue acquire. The reliance to human rights

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[124] Opinio Juris 'A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court' 19 May 2020 https://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/ (Accessed 8 September 2022)

[125] *Sébastien Germain Marie Aïkoué Ajavon v Benin* (Provisonnal measures), Application 027/2020

[126] *Decision EP 21-003* of 17 February 2021

[127] Retrait du Bénin de la CADHP - Déclaration du ministre de la Justice et de la Législation 28 April 2020 https://www.gouv.bj/actualite/635/retrait-benin-cadhp---declaration-ministre-justice-legislation/ (Accessed 8 September 2022).

[128] *S. v. Lawrence*, S. v. Negal ; S. v. Solberg (CCT38/96, CCT39/96, CCT40/96) 1997 (4) S.A.L.R. 1176, 1223 (C.C.) (Sachs, J.), § 141.

treaty bodies' decisions and soft law would also improve the quality and persuasiveness of domestic constitutional judgments.[129] Dialogue contributes to the rational legitimacy of judicial decisions by broadening the horizon given to these decisions, by giving them a more shared and therefore more 'universal' status. According to Sydney Kentridge, a former judge of the South African Constitutional Court, the comparative approach is particularly appropriate for the interpretation and application of fundamental rights guarantees, firstly because of the "family links" (…).[130]

Thirdly and finally, in a context of globalization and fragmentation of legal systems, judges would be in the best position to achieve an orderly synthesis of these systems around a few common principles. Thus, the expected hybridization of normative systems, with a view to rebuilding the legal order, but beyond the nation-state, is one of the objectives (or consequences) of the dialogue of jurisprudence.[131] This practice would make it possible to avoid conflicts of jurisdictions and jurisprudence, making it possible to strengthen the jurisprudence of each and to order pluralism by contributing to the rapprochement of legal orders around certain common principles.[132] This dialogue would thus lead to a common understanding of human rights by giving them a more precise content, while helping to reveal the contingency and particularism that guide the moral and political choices inherent in these norms. [133]

4.2 Jurisprudential dialogue for harmonisation of human rights norms

The jurisprudential dialogue would not necessarily mean sharing the same opinion. It can take different forms: avoidance, contestation or alignment.[134] The dialogue referred to here would consist of a Beninese constitutional judge taking note of the position of a judge or a treaty monitoring body on the same point of law, which would bring them out of their isolation to exchange views with his/her colleagues who interpret the same instruments as they do. In the light of the internationalization of constitutional law, an important role of the

[129] AM Slaughter *A New World Order* (2005).

[130] S Kentridge 'Comparative law in constitutional adjudication: the South African experience' (2005) *Tulane Law Review* 245.

[131] R Hertig 'L'internationalisation de la juridiction constitutionnelle : défis et perspectives' in (129) *Revue de droit suisse* (2010) 221 – 380.

[132] K Grabarczyk 'Dialogue des juges: éléments d'analyse, Propos introductifs' in (11) *Le dialogue des juges, Cahiers de l'I.D.E.D.H* (2007) 26.

[133] P Carozza 'Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights' in (73) *Notre Dame Law Review* (1997-1998) 1219.

[134] See generally ILA *Principles on the engagement of domestic courts with international law*. Johanasbourg Conference (2016); AO Hirschman *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970).

constitutional court is to reconcile international law and constitutional law. The conflict between the hierarchy of constitutional and international norms cannot be resolved solely on the basis of a formal hierarchy. This conflict calls for more nuanced solutions than those based either on the absolute primacy of international law or on the pre-eminence of the Constitution over all international law, adopted by the Constitutional Court of Benin. The judge is no longer there to give precedence to one norm over another, but to play the role of a 'switchman'[135] by directing the norm under review towards the appropriate reference norm: the systematization of the principle of the highest protection.

The application of the higher standard aims to establish priority between rights from different sources and consists for the judge to apply, among a set of applicable norms, the norm that is most protective of human rights, even if it has a lower rank. In other words, this principle consists in applying the substantial primacy (content) of a right in place of its formal primacy (origin or rank).[136] In this way, the real primacy of a fundamental right must be independent of its normative source.[137] The principle of highest protection, is based on the fact that international human rights law sets a minimum standard that states cannot transgress, but which may be exceeded.[138] Therefore, the national standard must prevail over the international standard if it is more favourable to the protection of fundamental rights.[139] The application of the higher standard, although apparently simple, is not easy. It requires the constitutional judge to have a thorough knowledge of the different systems of protection of human rights and to be able to analyse their jurisprudence in a comparative perspective. Beninese constitutional judge must turn to and examine the various international sources and jurisprudence in a comparative perspective. These include decisions on cases, concluding observations, general comments, guidelines, etc.

Moreover, it is not always easy to determine which solution is the most favourable in a concrete situation, because the rights protected by the same source or by different sources may conflict with each other. Otherwise, the mere transposition of this case law of the human rights treaty bodies in the constitutional adjudication could lead to a levelling down of the protection of human rights at the national level if it becomes less protective of human rights.

The systematization of the highest protection responds, moreover, to the philosophy of human rights, which is the need for greater protection of rights. The Constitutional Court, when interpreting norms, will put the ontological dimension of the norm under the carpet in

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[135] Expression borrowed from P Deumier, *Introduction générale au droit* (2013) 332.

[136] C Sciotti-Lam *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2004) 609.

[137] E Picard 'L'émergence des droits fondamentaux en France' (1998) *AJDA* 9.

[138] M Hottelier 'La CEDH et les règles suisses de procédure - Aspects historiques et développements récents' (2005) *RJJ* 11-51.

[139] G Cohen *Aspects européens des droits fondamentaux - Libertés et droits fondamentaux* (1996) 61.

favour of its teleological dimension. From this point of view, the Court ensures that the purpose of the interpretation of a norm, whatever its origin, is to advance rights and not to regress them. In other words, whenever an interpretation of a norm would have a negative impact on acquired rights, it could be eclipsed in favour of the one that offers the broadest protection. This is what Maurice Kamto calls 'the ethics of the human being',[140] highlighting a 'socialization of a human being'.[141] It is a question of considering the human being as the centre of gravity of the actions of interpretation of the norms because 'human being is hoisted on the promontory of the sacred and nothing that touches his dignity leaves him indifferent'.[142]

4.3 Example from South African Constitutional Court: Cross-fertilisation of Constitutional ideas

Like the Constitutional Court of South Africa, the Constitutional Court of Benin, when adjudicating, should take into account normative and jurisprudential developments on the interpretation of human rights. The South African Constitution provides that when interpreting the Bill of Rights, the Court should refer to international law. According to the South African Constitutional Court, international law includes international agreements, customary international law, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights …'[143]

In this regard, in interpreting constitutional provisions, the South African Constitutional Court has used authoritative positions taken by international treaty bodies[144] to interpret constitutional provisions. In the New *Nation Movement* case,[145] the South African Constitutional Court referred to the decisions of the African Court in the *Tanganyika Law Society case*[146] in its analysis of the right to freedom of association, especially in the political sphere and further cited some quotes from this African Court's decision.[147]

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[140] M Kamto 'La volonté de l'Etat en droit international' in (310) *RCADI* (2004) 315.
[141] Ibid.
[142] Ibid. 317-318.
[143] *S v Makwanyane and Another* (CCT3/94) [1995] par 35.
[144] See C Rautenbach 'South Africa: 'Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)' in T Groppi & M-C Ponthorea (ed) *The use of foreign precedent by constitutional judges* (2013) 185-210.
[145] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).
[146] *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 53.
[147] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) para 38-44.

In another case, the South African Constitutional Court referred to the UN Human Rights Committee's decision in *Marshall v Canada*, holding:[148]

> The precise nature and scope of the international law right to participate in the conduct of public affairs is a matter for individual states to determine through their laws and policies. Under article 25 of the ICCPR, states are to establish powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 in national constitutions and other laws. As the Human Rights Committee has explained, 'it is for the legal and constitutional system of the state party to provide for the modalities of such participation'.

In the same case, the South African Constitutional Court referred and quoted the General Comment 25 of the UN Human Rights Committee:[149]

> Whatever form of constitution or government is in force, the [ICCPR] requires states to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.

The examples of the South African Constitutional Court shows how Constitutional Courts may learn from the treaty mechanism decisions and their soft law instruments to understanding better the South African Bill of Rights and to align its jurisprudence with regional and international standards. This may be useful as well for the Beninese Constitutional Court. However, the reliance to treaty body decisions is encouraged, to some extent, by the legal tradition to which the South African Constitutional Court belongs, namely common law. In its approach to the sources of law, the common law tradition seems to be more flexible and open to international law than the civil law. The constitutions of the African states that follow the civil law legal tradition, especially the French-speaking ones, do not have a provision that authorizes the Court to refer to international law when interpreting the Bill of Rights like those of the common law.[150] Nevertheless, the constitution of Portuguese-speaking African countries of civil law tradition provide that the interpretation of the Bill of Rights must be done in accordance with the UDHR,[151] not with international law in general.

Nonetheless, even if the Beninese and South African Constitutional Courts do not belong to the same legal tradition, since both these two jurisdictions are expecting to fulfil similar functions in their respective systems, they can borrow from each other irrespective of their structure and history. By drawing inspiration from the practice of the South African Constitutional Court, the Beninese Constitutional Court will engage in a cross-fertilisation of

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[148] *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) [95] (17 August 2006).
[149] Ibid.
[150] Constitutions of South Africa section 39; of Zimbabwe section 46(1).; of Malawi section 11(2); of Somalia art 40(2).
[151] Constitutions of Angola art 26(2); of Cape Verde art 16(3); of Mozambique art 43.

constitutional ideas, which is a powerful tool that enables courts to draw inspiration from the constitutional practice of their counterparts in other countries. The cross-fertilisation of constitutional ideas requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders.[152]

5 Conclusion

Some rare encouraging cases analysed revealed that the Beninese Constitutional Court uses the international human rights treaties ratified by Benin as a reference standard or as an extension of Beninese Constitutional Bill of Rights. However, no reliance on decision of human rights treaties bodies in constitutional rights treaties whereas such reliance should offer a more robust jurisprudence than what is available from domestic precedent, allowing for more expansive interpretations and firmer defence of progressive principles. Hence, the Chapter posited for the need for a dialogue between the constitutional court and the regional and international human rights treaties bodies for harmonisation of human rights standards and norms.

[152] A-M Slaughter 'Judicial Globalization' (40) *J. Int'l L.* (1999) 1103-1104

CHAPTER FIVE

GENERAL CONCLUSION

1 Introduction

This Master thesis has examined the impact of human rights treaties on constitutional adjudication of human rights in Benin. The assessment was spread over three chapters, namely Chapters two, three and four. This Chapter summarizes the main findings from the chapters (2), before providing some concluding ideas and recommendations to the Benin Constitutional Court with regard to the adjudication of human rights (3).

2 Main findings

Since the effectiveness of an international human rights treaty is strongly determined by the value given to it in domestic law, chapter two of this research analysed the status of human rights treaties in the Benin legal system. After discussing the manner in which international human rights treaties are incorporated in Benin legal order, the conclusion was that these treaties occupy a special place and are called upon to supplement the Constitution in the context of its interpretation, and even as reference standards in the constitutionality review. Although rarely, the Benin Constitutional Court has relied on them as such but to fill the gaps or to interpret constitutional provisions. Of all international human rights treaties, the African Charter has a special place. As integral part of the Benin Constitution, the Court has relied on it, not as a treaty but as a constitutional norm.

The application of human rights treaties in a constitutional adjudication is strongly linked to the legal tradition to which belongs the Court and mostly to the attitude of the Constitutional judges in applying international law and lawyers in invoking it before the Court. Chapter three analysed the approaches of the Beninese Constitutional Court to applying human rights treaties in constitutional adjudication. The Chapter founds firstly, that with regard to African Union human rights instruments, the Court relies more frequently on the African Charter for different purposes: either to reinforce a constitutional provision, to fill the gaps in constitutional provision or to assert the regional consecration of the right under adjudication. Even when the Court uses African Charter's provision to motivate its decision, it generally conclude to a (only) violation of the Constitution. Except the African Charter, the Court does not generally rely on other African Union human rights treaties. Secondly, the Chapter found that the approach towards United Nations human rights treaties is more formalistic and even rarer. The practice of the Court reveals that UN treaties rank at the third place of reference when the Court adjudicates human rights. When the reference provision to the alleged violation of right is not found in the Constitution, the Court tends to turn to the African

Charter as second alternative standard. Other human rights treaties, whether those of the United Nations, the African Union or the economic communities, are thus in third place of preference. The fact that human rights are formulated in roughly the same way in the Constitution, the African Charter and UN human rights treaties, encourages this rarity of reliance of the Constitutional Court onto the latter.

The attitude of the Benin Constitutional Court towards human rights treaties is passive (except the African Charter) and generally it usually waits for the parties to invoke these treaties. Chapter four demonstrated the need for the Constitutional judges to adopt an active approach given the potential role that human rights treaties and decisions and soft law of their mechanisms can play in improving human rights adjudication, either as an extension of the constitutional or as an interpretative tool of the Bill of Rights. Nevertheless, it is through human rights treaties that the Constitutional Court of Benin has ascertained and built some rights like the right to be tried within a reasonable period of time, which is not expressly mentioned in the Beninese Constitution, or the right to reparation. However, the research found very limited reliance on decisions of human rights treaty monitoring bodies in constitutional court judgments whereas such reliance should offer a more robust jurisprudence than what is available from domestic precedent, allowing for more expansive interpretations and firmer defence of progressive principles. The decisions of the treaty bodies could be considered as a 'toolbox' from which the Constitutional Court of Benin can draw to bolster its reasoning and at the same time enrich the options available to it. Therefore, the Benin constitutional judge deprives himself of an interpretation technique that could be susceptible to strengthen the legitimacy and independence of their own decisions. Hence, the Chapter posited for the need for a jurisprudential dialogue between the constitutional court and international human rights treaty bodies. However, such a dialogue would not necessarily mean sharing the same opinion. The dialogue referred to here would consist of a Beninese constitutional judge taking note of the position of regional mechanisms or a treaty monitoring body on the same point of law, which would enable them to exchange views with colleagues who interpret the same instruments.

3 Concluding remarks and recommendations

The use of international human rights treaties ratified by Benin by the Constitutional Court when interpreting human rights provisions is legally supported by the fact that Benin is party to these instruments. In addition, the Constitutional Court may use jurisprudence in the form of decisions, communications and findings, and general comments and recommendations by international, regional and sub-regional human rights bodies. Therefore, in adjudicating human rights, the Constitutional Court of Benin may use international human rights treaties when interpreting constitutional provisions that are unclear, vaguely written or incomplete. In this respect, human rights treaties can provide the Constitutional Court of Benin with

contextual insight and the evolution of the universal or regional enshrinement of a human right, when that right is provided both in the constitution and in an international treaty. Furthermore, when the parties to the proceedings invoke any provision of an international treaty ratified by Benin, the Constitutional Court should endeavour to engage in an analysis of that provision, relying in particular on the decisions and soft-law norms adopted by the monitoring organ of that treaty. In addition, relevant human rights treaties must be invoked by the Court at its own initiative even if the litigants did not invoke them, since that treaties might offer a greater protection than the legal instruments invoked by parties.

According to Viljoen, 'international human rights law constitutes the collective responsibility of humanity's conscience and captures a shared vision for a humane world'.[153] In the context of increasing globalization, international human rights law is becoming a part of international cooperation and collaboration. At the global level, the use of UN treaties in constitutional adjudication is an essential step towards judicial globalization in human rights adjudication; whilst at the regional level, the use of African Union treaties in constitutional adjudication is a strong signal of African "judicial" integration and therefore of pan-Africanism.

In its constitution, Benin proclaims its commitment to the cause of African unity and undertakes to do everything - *including judicial integration*[154] - to achieve sub regional and regional integration.[155] The African Court and Commission have an abundant jurisprudence interpreting different aspects of rights provided in the African Charter. On one hand, after analysing state reports submitted by states parties to the African Charter and Maputo Protocol, the African Commission formulates concluding observations. Furthermore, the African Commission develops soft-law instruments in the form of thematic resolutions, guidelines, general comments and declarations. These positions of the African Commission can assist the Benin Constitutional Court, and every African Constitutional Court, with persuasive 'African' arguments and solutions when interpreting human rights at the national level. On the other hand, the binding decisions and advisory opinions issued by the African Court concerning the interpretation of the African Charter or any other relevant human rights instruments',[156] can provide authoritative 'African' arguments in interpretation of the Bill of Rights at national level. As both the African Court, African Commission and the Benin Constitutional Court issue decisions interpreting the African Charter, the latter must be mindful of the former's jurisprudence position and evolution. In that light, the cross-fertilisation or the judicial dialogue between these two jurisdictions is imperative.

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[153] Viljoen (n 32) 99.

[154] Emphasis added.

[155] Benin Constitution. Preamble

[156] Article 4 of the African Court Protocol in C Heyns and M Killander (eds) Compendium of Key Human Rights Documents of the African Union (2018) 42

It is therefore highly recommendable for the Benin Constitutional Court to rely and use African shared values translated in various treaties, standards, values and decisions adopted under the auspices of the African Union human rights mechanisms in interpreting the Bill of Rights.[157] The use of these instruments can provide to the Benin Constitutional Court 'African' historic and philosophic arguments when interpreting the Bill of Rights. Moreover, the Court by its decisions, as a state organ, would be fulfilling its constitutional obligation to ensure the dissemination and teaching of the African Charter on Human and Peoples' Rights and all duly ratified international human rights instruments.[158]

Words count: 19749

[157] See generally Adeola R, Viljoen, F and Makunya, T 'A commentary on the African Commission's general comment on the right to freedom of movement and residence under Article 12(1) of the African Charter on Human and Peoples' Rights' (2021) 65 *Journal of African Law* 131-151

[158] 1990 Benin Constitution art 140.

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