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RESEARCH ARTICLE

# Improving Constitutional Adjudication in Francophone Africa through Human Rights Treaties and Case Law: the Benin Constitutional Court

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**Abstract**

This article demonstrates how international human rights treaties have the potential to fill the gaps in constitutional provisions and constitute therefore the extension of the constitutional bill of rights. Since human rights are formulated in approximately the same way in both the Francophone countries' constitutions and in regional and international human rights treaties, through a casuistic approach, the article argues that the decisions of the human rights treaty bodies should serve as a guide to the interpretation of constitutional provisions by the Beninese constitutional judges. By being reluctant and disinterested in the decisions of its treaty monitoring bodies, the Beninese Constitutional Court deprives itself of an interpretation technique that is susceptible to strengthening the court's legitimacy and independence. Hence, the article posits a dialogue between the Constitutional Court and the regional and international human rights treaty bodies. If at the global level, the use of UN treaties in constitutional adjudication is an essential step towards judicial globalization in human rights adjudication, 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.

**Keyword:** African Charter; African Union; Benin Constitutional Court; human rights litigation; Pan-Africanism

## Introduction

Following the so-called third wave of democratization that swept through Africa in the early 1990s, constitutional adjudication of human rights in Africa has been growing in number, particularly in Francophone Africa. Most countries have become constitutional democracies functioning in accordance with modern principles of constitutionalism, such as the recognition and respect of fundamental human rights and the rule of law. In the same vein, the judiciary, including constitutional

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courts,[1] has been conferred significant powers to protect and promote human rights, the rule of law and the separation of powers.[2] The primary jurisdiction of these constitutional jurisdictions generally includes three essential mandates. First, they are empowered to review the constitutionality of infra-constitutional norms and can strike down any legislation or administrative action that violates any provisions of the constitution.[3] Second, they can adjudicate human rights violations.[4] Some of them have criminal jurisdiction to try certain highest authorities.[5] Third, they can resolve jurisdictional disputes between central and local governments and between intergovernmental agencies. This article focuses on the second mandate, namely the protection of human rights. The most obvious example comes from the Constitutional Court of Benin (Constitutional Court), which is explicitly endowed by the Constitution of the Republic of Benin (Constitution) with original jurisdiction in matters of human rights protection.[6]

The Constitution allows all citizens direct access to the Constitutional Court for violations of rights guaranteed.[7] The violation can concern a right guaranteed by the Constitution itself or the African Charter on Human and Peoples' Rights (African Charter), which is an "integral part" of the Constitution.[8] The violation can concern as well a right 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, according to article 147 of the Constitution.[9] Therefore, as a 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. Consequently, the Constitutional Court is the preferred forum for appealing human rights violations by Beninese citizens who tend to refer to the Constitutional Court rather than to the jurisdictions of the judicial and administrative orders when defending their constitutionally guaranteed freedom.[10] This preference can be interpreted as an expression of the citizens' 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.[11]

The Constitutional Court is a specialized tribunal, operating outside the ordinary judicial hierarchy. In accordance with the provisions of article 114 of the Constitution, "the Constitutional Court is the highest jurisdiction of the State in constitutional matters. It rules on the constitutionality of the law and guarantees fundamental human rights and public freedoms. It is the regulatory body for the functioning of institutions and the activities of public authorities". In relation to the high frequency of human rights litigation before the Constitutional Court, this study adopts a casuistic approach, focusing on case-by-case reasoning rather than systematic comparisons across multiple jurisdictions. It examines the role that international human rights treaties, as well as the jurisprudence of regional courts and UN human rights treaty bodies, have played – or could play – in shaping the Constitutional Court's case law to strengthen judicial protection of human rights in Benin.

1 Constitutional courts also include constitutional councils, tribunals or supreme courts tasked with performing constitutional review (constitutional review mechanisms).

2 C Fombad "An overview of contemporary models of constitutional review in Africa" in CM Fombad (ed) *Constitutional Adjudication in Africa* (2017, Oxford University Press) at 18.

3 Id at 29.

4 Constitution of the Republic of Benin (1990) (Constitution), art 120.

5 Constitution of the Democratic Republic of the Congo (2006), art 163. The Constitutional Court is the criminal jurisdiction of the head of state and the prime minister.

6 Constitution, art 120.

7 Id, art 122.

8 Id, art 7.

9 Art 147 reads: "Treaties or agreements 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".

10 A Tanoh and H Adjolohoun "International law and human rights litigation in Côte d'Ivoire and Benin" in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010, Pretoria University Law Press) at 115.

11 T Holo "Handling of petitions by the Constitutional Court of Benin" in CM Fombad (ed) *Constitutional Adjudication in Africa* (2017, Oxford University Press) at 120.

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In addition to the introduction and conclusion, the article is divided into three sections. The first analyses the approaches of the Constitutional Court in applying international human rights law norms. The second assesses the potential of human rights treaties in improving Benin's constitutional human rights litigation. The last posits the need for dialogue between the Constitutional Court and the international human rights mechanisms.

## The Benin Constitutional Court's approaches to international human rights law

### *Reliance on African Union human rights treaties*

Benin is party to several human rights treaties concluded under the aegis of the African Union (AU).[12] Among them, the Constitutional Court has often "directly" applied a provision of the African Charter autonomously or invoked it in conjunction with a provision of the Constitution.[13] This is because the African Charter is an "integral part" of the Constitution.[14] Something is said to be "an integral part" of another when it is important or necessary and the other part cannot function without it. In other words, the Constitution cannot be separated from the African Charter.[15] Although the Constitutional Court holds a *sui generis* human rights mandate, its practice is quite unprincipled, especially regarding the use of the African Charter.[16] It often invokes the African Charter in its reasoning but concludes that only the Constitution was violated as illustrated by its jurisprudence.

Firstly, in a petition for arrest and detention related to an unfulfilled contract, 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 article 6 of the African Charter, without citing any other constitutional provision. In *Decision DCC 19-128* of 4 April 2019, the Constitutional Court examined the legality of the applicant's detention by referencing article 6 of the African Charter, as invoked by the applicant, alongside articles 58 and 61 of Act No 2012-15 of 18 March 2013, on the Code of Criminal Procedure, as amended by Law No 2018-14 of 2 July 2018. The Constitutional Court affirmed that the restriction of liberty through police custody, which the judicial police are authorized to impose, is permissible only in the event of a legal infraction. 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.

Secondly, in another *Decision DCC 19-184* of 18 April 2019 in an appeal for the unconstitutionality of an arbitrary detention, the applicant invoked the violation of article 147(6) of the Code of Criminal Procedure and article 6 of the African Charter arguing that the duration of his preventive detention exceeded the legal time limit, all extensions included. To answer the question raised, the Constitutional Court first 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 the African Charter, but in its operative part, it said and judged that there was a violation of the Constitution.[17]

12 See the Benin ratification status of AU treaties at "OAU/AU Treaties, Conventions, Protocols & Charters" *African Union*, available at: <https://au.int/fr/treaties> (last accessed 9 October 2023).

13 F Viljoen *International Human Rights Law in Africa* (2nd ed, 2012, Oxford University Press) at 528.

14 Art 7 of the Constitution reads: "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".

15 T Makunya "The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin" in F Viljoen et al (eds) *A Life Interrupted: Essays in Honour of the Lives and Legacies of Christof Heyns* (2022, Pretoria University Law Press) 468 at 471.

16 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 and Adjolohoun, above at note 10 at 114.

17 *Decision DCC 19-184* of 18 April 2019 at 3.

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Thirdly, the Constitutional Court, relying on article 7(1)(d) of the African Charter, 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.[18] The national legislation does not contain or define the concept of reasonable time in legal proceedings before the courts.

From these cases, all rendered in 2019 and taken as samples of recent decisions by the Constitutional Court, three major observations can be made. First, the African Charter is regularly invoked by petitioners to support their claims and by judges to motivate their decisions. Secondly, the Constitutional Court uses the provisions of the African Charter into its reasoning – either alongside relevant provisions of the Constitution or other legal or regulatory rules – but ultimately concludes in its operative part (*dispositif*) that only the Constitution has been violated. This may be explained by the fact that it considers the violation of the Charter to constitute a violation of the Constitution.[19] Third, the Constitutional 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[20] or to emphasize their enshrinement at the regional level.[21]

However, there is a notable absence of reliance on soft law instruments developed under the auspices of the AU human rights system. Furthermore, while the African Charter remains the most widely invoked, references to other AU hard law instruments before the Constitutional Court have been exceptionally rare. For example, in 2019, a petition was filed before the Constitutional Court in which a petitioner argued that the national school feeding programme launched by the Government of Benin in 2017, under which only students enrolled in elementary school are beneficiaries of this programme, 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.[22] 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. This shows that the Constitutional Court has not engaged in a debate on the allegedly violated provisions of these treaties and turned solely to the constitutional provisions. In the above reasoning, the Constitutional Court seemingly ignored article 3 of the African Charter on the Rights and Welfare of the Child, which 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[23] or other status. The argument of the Constitutional Court is based on a formal conception of equality, ignoring the real effects of the contested measure. An approach based on substantive equality would have made it possible to recognize that the exclusion of preschool children from the school feeding programme constituted indirect and unjustified discrimination, thereby violating the principles of non-discrimination and special protection of children enshrined in the African Charter on the Rights and Welfare of the Child.

18 African Charter on Human and Peoples' Rights (1981) (African Charter), art 7(d).

19 *Decision DCC 19-128* of 04 April 2019.

20 *Decision DCC 21-269* of 21 October 2021 at 5. In this case, the Constitutional Court invoked two relevant provisions of the African Charter that supported its conclusion especially article 3(1) and (2) and article 18(3).

21 Ibid.

22 1990.

23 The child's or his / her parent or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune or birth.

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### Reliance on United Nations human rights treaties

Benin is a party to international treaties on human rights concluded under the aegis of the UN.[24] However, cases of reliance by the Constitutional Court on these treaties are very rare. The Constitutional Court seems to rely on them 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.

Firstly, 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 Law No 2011-25 on general rules applicable to military personnel, public security forces and similar in the Republic of Benin violates the right to strike and to freedom of assembly. The 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 that law to the Constitution, the Constitutional Court has relied on article 8(2) of the International Covenant on Economic, Social and Cultural Rights[25] 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 Civil Service from being subject to legal restrictions".[26]

Secondly, in 2019, the Constitutional Court went further in interpreting the content of article 14(5) of the International Covenant on Civil and Political Rights (ICCPR)[27] which provides: "everyone convicted of an offense shall have the right to have his conviction reviewed by a higher tribunal according to law".[28] For the Constitutional 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.[29] It is nevertheless surprising to note that in interpreting this provision, the Constitutional Court makes no reference to the practice of the UN Human Rights Committee (UNHRC), in particular General Comment No 32 on article 14 of the ICCPR. In interpreting article 14(5), the UNHRC, based on its jurisprudence,[30] states that 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.[31]

Thirdly, in another 2019 decision, 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 UN Convention relating to the Status of Refugees[32] as "the circumstances in connection with which he has been recognized as a refugee have ceased to exist and that he was offered voluntary repatriation or social reintegration".[33]

24 For more information see "Benin" *UN Human Rights Office of the High Commissioner*, available at: <https://www.ohchr.org/en/countries/benin> (last accessed 9 October 2022).

25 International Covenant on Economic, Social and Cultural Rights (1966), UN Treaty Series vol 993.

26 *Decision DCC 11-065* of 30 September 2011.

27 International Covenant on Civil and Political Rights (1966), UN Treaty Series vol 999.

28 *Decision DCC 19-055* of 31 January 2019.

29 Ibid.

30 *Bandajevsky v Belarus* [1100/2002] UNHRC, para 10.13; *Aliboeva v Tajikistan* [985/2001] UNHRC, para 6.5; *Khalilova v Tajikistan* [973/2001] UNHRC, para 7.5.

31 General Comment No 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), para 48.

32 UN Convention Relating to the Status of Refugees (1951), UN Treaty Series vol 189.

33 *Decision DCC 19-481* of 3 October 2019.

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Although these kinds of cases are rare and encouraging, they reveal that the Constitutional Court uses UN international human rights treaties ratified by Benin as a reference standard. At the same time, the auxiliary character of these conventions is confirmed. These international texts are specifically invoked to support specific constitutional provisions or the African Charter.

### *Obstacles to invoking international human rights treaties*

The first problem with the non-invocation or formalistic invocation by the Constitutional Court of international human rights treaties lies in the conception of the hierarchy of norms in Beninese law. The conception of the hierarchy of norms in Benin is that 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*"[34] (constitutional corpus) which has constitutional rules at its top. Thus, when a human rights violation is alleged before the Constitutional 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 Constitutional Court no longer considers it necessary to invoke another norm. It is only when the reference is not found in the Constitution that the Constitutional Court tends to turn to the African Charter as a second alternative standard. Other human rights treaties, whether those of the UN, the AU or the economic communities, then come third.

The second obstacle to invoking human rights treaties lies on 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, invariably endeavour to locate the basis of their judgments in the more familiar domestic law.[35] Most of the judges and lawyers in Benin 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. This also explains why the Constitutional Court does not systematically cite previous decisions, as the French-influenced civil law tradition does not emphasize precedent in the same way as common law systems. Instead, the Constitutional Court tends to base its reasoning on codified legal provisions and constitutional texts, reinforcing its preference for domestic rather than international sources. Lawyers and judges are clearly not sufficiently exposed to international treaties and international law in general and their approach remains rigid, dogmatic and Kelsenian.[36] Furthermore, two members of the Constitutional Court are not necessarily lawyers.[37] Their lack of legal background can negatively impact their approach to sources of law.

The third obstacle relates to 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. Therefore, the constitutional judge is faced with a real coordination challenge, in an attempt to 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 task is challenging and presupposes that the judges are sufficiently familiar with international human rights law and comparative constitutional law. It unfortunately appears that the Constitutional Court is unwilling to engage in

34 *Decision DCC 00-072* of 17 November 2000.

35 Ibid.

36 Referring 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, the constitution is at the top and the *bloc de constitutionnalité*. Second from the bottom is the block of legality and at the very bottom the regulatory block.

37 Constitution, art 115.

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this coordination exercise that would allow it to align its jurisprudence with international standards through the most progressive and protective interpretation of human rights.

A fourth obstacle arises from the legal requirement that a ratified treaty attains a status "superior to" national legislation only upon its official publication.[38] In the Beninese legal system, the primary purpose of publication of a human rights treaty is to ensure that the treaty is brought to the attention of both the general public and the relevant legal and administrative authorities. However, in practice, publication goes beyond mere awareness-raising; it constitutes a prerequisite for the treaty's formal incorporation into the national legal order. This legal technicality was evident in the case of *Ms Marguerite Sinzogan v Minister of Foreign Affairs*, where the Constitutional Court, in its *Decision DCC 03-009* of 19 February 2003, refused to apply the principle of the best interests of the child enshrined in the UN Convention on the Rights of the Child (CRC),[39] on the grounds that the CRC had never been officially gazetted and therefore did not form "part of the positive law of Benin".[40] This ruling is particularly striking given that, by the time the decision was rendered, Benin had already submitted its initial report to the Committee on the Rights of the Child in 1999, thereby acknowledging its obligations under the treaty and initiating compliance with its reporting duties.[41] From a strictly legal standpoint, the requirement of publication is a domestic formality that should not impede the direct applicability of international human rights instruments. As emphasized by the Vienna Convention on the Law of Treaties (VCLT), states cannot invoke their internal legal procedures to evade their international commitments, raising concerns about the compatibility of the Constitutional Court's reasoning with the principles of international treaty law.[42] 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 ratified the CRC on 3 August 1990, but curiously the treaty had never been gazetted until 2003 when the case was brought to the Constitutional Court.

The combination of these four obstacles suggests that the approach of the Constitutional Court can be contextualized within the broader framework of the French-influenced legal tradition, where judicial decisions do not hold the same precedential weight as in common law systems. This may partly explain the Constitutional Court's reluctance to engage extensively with international and regional legal instruments beyond the Constitution. Additionally, the Court's interpretative approach appears to favour a formalist reading of legal provisions, which could contribute to the limited international human rights instruments.

## Human rights treaties and case law as a toolbox in constitutional adjudication in Benin

This section posits that the Constitutional Court should go beyond these obstacles to better protect human rights in Benin. Indeed, international human rights have the potential to fill the gaps in constitutional provisions and constitute, therefore, the extension of the constitutional Bill of Rights. Furthermore, since human rights are formulated in approximately the same way in both the Constitution and in regional and international human rights treaties, the decisions of the human rights treaty bodies should serve as a guide to the interpretation of constitutional provisions by the Beninese judges.

38 Constitution, art 147.

39 UN Convention on the Rights of the Child (1989), UN Treaty Series vol 1577.

40 *Decision DCC 03- 009* of 19 February 2003.

41 Committee on the Rights of the Child "Benin initial report" CRC/C/33/Add.52 (4 July 1997), available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f3%2fAdd.52&Lang=en> (last accessed 9 October 2022).

42 Vienna Convention on Law of Treaties (1969), UN Treaty Series vol 1155, art 27.

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

### The right to be tried within a reasonable time

In determining a 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 Constitutional Court ruled that 20 months of pre-trial custody before a trial started was unreasonable[43] while in another, it considered that five years taken by the Supreme Court to render its decision was reasonable.[44] In 2020, the Constitutional Court ruled that four years of criminal court proceedings without a final decision was an undue extension,[45] while the court had ruled before in 2007 that six years from the period of the arrest until the seizure of the Court without a final decision was reasonable.[46] Therefore, what time may be considered "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 to the positions taken by the regional mechanisms of this treaty, in particular the African Court on Human and Peoples' Rights (African Court), 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 case, the behaviour of the applicant, the behaviour of the judicial authorities or the stakes of the dispute.

Firstly, with regard to the complexity of the case, this is essentially a factual assessment that combines several variables that relate to the subject matter and nature of the case. In *Norbert Zongo v Burkina Faso*, the African Court established the principle that the reasonableness depends on the "particular circumstances" of each case.[47] This may include, for example, interrogations, requests for expert opinions, confrontations of evidence and witnesses, letters rogatory, etc. Secondly, with regards to the attitude, behaviour and situation of the applicant, the court takes into account elements such as the degree of literacy,[48] indigence,[49] situation of detention or not of the applicant,[50] etc. Thirdly, the conduct of the judicial authorities is arguably essential because only delays attributable to the state can lead to the conclusion that the reasonable time limit has been violated. In *Alex Thomas*[51] and *Mtikila,*[52] the African Court noted in both cases that the attitude of the judicial and / or administrative authorities could unduly prolong the outcome of a trial.

If such criteria were considered by the Constitutional Court, it could remedy its jurisprudential fumbling on the issue of reasonable time, which in turn threatens the legal security of petitioners.

### The right to reparation

Until 2002, the Constitutional Court merely acknowledged human rights violations without granting reparations to victims. The major evolution in this sense dates to *Decision DCC 02-052* of 31 May 2002 (the *Fanou* case).[53] In this case, following a two-week leave of absence that was regularly

43 *Decision DCC 19-493* of 31 October 2019.
44 *Decision DCC 19-492* of 31 October 2019.
45 *Decision DCC 20-029* of 23 January 2020.
46 *Decision DCC 07-153* of 22 November 2007.
47 *Norbert Zongo v Burkina Faso* ACHPR (21 June 2013, preliminary exceptions).
48 *Kijiji v Tanzanie* [2018] ACHPR (Jurisdiction and Admissibility). The petitioner was proficient in the law, indigent, incarcerated and without legal aid, and furthermore, unaware of the court's existence and how to get to it.
49 *Nguza Viking v Tanzanie* [2018] ACHPR (Jurisdiction and Admissibility). The petitioner was legally a layperson, indigent, incarcerated and without legal aid, and attempted to file a petition for review.
50 *Amiri Ramadhani v Tanzanie* [2015] ACHPR (Admissibility). The petitioner was legally a layperson, indigent, incarcerated, without freedom of movement, limited access to information and without legal assistance.
51 *Alex Thomas v Tanzanie* [2015] ACHPR (Merits), para 74.
52 *Mtikila v Tanzanie* [2013] ACHPR (Merits), para 83.
53 *Decision DCC 02-052* of 31 May 2002.

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granted to him, 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 being brought before a judge. He was subjected to cruel, inhuman and degrading treatment by police officers. The Constitutional Court affirmed that the violence exerted on the person of 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 being brought before a judge 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".[54] To conclude this, the Constitutional Court referred to scholarly works and customary international law, in part because neither the Constitution nor the African Charter provides for an explicit right to reparation for unlawful detention, and stated that: "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 the right to reparation; that in the case in point M. Fanou has the right to reparation for the prejudices suffered".[55]

However, the Constitutional 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 Fanou, article 9(5) of the ICCPR provides for a right to reparation for anyone who has been the victim of unlawful arrest or detention. Furthermore, in the view of the UNHRC 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, but it must also be real and the payment of compensation must be made within a reasonable time.[56] The reliance on this provision of the ICCPR and decisions of the UNHRC could have allowed the Constitutional Court to adopt a progressive understanding of the right to reparation, especially in cases of unlawful detention.

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

The 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, to give effect to the idea of subsidiarity, the Constitutional Court should constantly harmonize the interpretation of constitutional provisions (similar to those contained in international human rights treaties) with AU treaty monitoring bodies and UN treaty monitoring bodies.

#### *Reliance on African Union treaty monitoring bodies*

The African Court and the African Commission respectively render judgments, decisions and soft law instruments[57] on the rights contained in the African Charter and other relevant human rights instruments especially for the African Court. In this light, the 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 set aside the jurisprudence of these two mechanisms, despite having had ample opportunity to

54 Ibid. In French "*ouvre le droit à la réparation en faveur de Mr Laurent Fanou*".

55 *Decision DCC 02-052*, above at note 53. Unofficial translation by the author.

56 General Comment No 35 of the UN Human Rights Committee (Article 9: Liberty and security of person) CCPR/C/GC/35 (16 December 2014), para 50.

57 These are general observations, concluding observations, resolutions, guidelines, etc.

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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.

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 Constitutional Court missed 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:

> "[T]he 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."[58]

From the above, it can be observed the Constitutional Court adopted a restrictive approach to the concept of the concept of "people" by limiting it to citizens, yet it could have adopted a more flexible and globalizing conception already adopted by the African Commission. In the *Endorois* case, the Africa Commission considered 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.[59]

Secondly, in another case, the African Commission's jurisprudence could have served the Constitutional Court in its approach to how the treatment of defamation against persons holding public office could be addressed. In *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.[60] 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.[61] In *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".[62]

Thirdly, 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 Charter, and by that virtue also the Constitution, in particular, the right of citizens to

58 *Decision DCC 18-200* of 11 October 2018.

59 *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya Endorois v Kenya* [2003] ACHPR, para 151.

60 *Decision DCC 10-013* of 4 March 2010.

61 *Media Rights Agenda and Others v Nigeria* [1998] ACHPR, paras 74-75.

62 Ibid.

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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 2021 requires presidential candidates to be sponsored by a minimum of 10 per cent 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.[63] 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 *Mtilikia*,[64] since petitions before the Constitutional Court concerned similar political rights. *Mtikila* is evidence of the African Court's commitment to preventing unjustifiable restrictions imposed on the right to political participation and the freedom of association.[65]

### *Reliance on UN treaty monitoring bodies*

As for the AU treaty monitoring mechanisms, the Constitutional Court does not refer to the treaty mechanisms established by the UN human rights treaties. However, in many of the reasonings for the Constitutional Court's decisions, the jurisprudence of the treaty monitoring bodies should have been used by the court to raise the standards of human rights protection and thus enrich its jurisprudence. The two decisions, analysed below 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(4) of the Beninese Constitution, which states: "No one may be detained for more 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 Constitutional Court should have clarified the concept of "arbitrariness" based on the jurisprudence of the UNHRC, 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".[66] 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.[67]

Similarly, in its *Decision DCC 21-011* of 7 January 2021 analysed above, in which the Constitutional 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. However, in order to block this democratic regression and participation in public affairs, the Constitutional Court could have rightly invoked General Comment No 25 of the UNHRC, in which it recognizes that "if a candidate is required to have a minimum number of

63 *Decision DCC 21-011* of 7 January 2021.
64 *Mtikila v Tanzanie*, above at note 52 at para 34.
65 Makunya, above at note 15 at 480.
66 *Van Alphen v Pays-Bas* [1990] UNHRC Communication No 305/1988, paras 5(7) and 5(8).
67 O de Schutter "Article 9" in E Decaux (ed) *Le Pacte International Relatif aux Droits Civils et Politiques* (2011, Economica) 246.

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supporters in order to be nominated, such a requirement must be reasonable and must not constitute an obstacle to candidacy".[68]

## Need for jurisprudential 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 the rights they provide. However, respect and protection of human rights must be a common language allowing for "mutual trust"[69] between constitutional and international jurisdictions and quasi-jurisdictions. Hence there is a need for a dialogue between courts and human rights mechanisms for the harmonization of human rights standards and for human rights norms.

### *Jurisprudential dialogue for harmonization of human rights standards*

The crisis between the African Court and Benin is one of the recent examples of the conflict regarding human rights standards.[70] 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 non-governmental organizations under article 36(4) of the African Court Protocol when the African Court ordered on 17 April 2020 the suspension of the organization of communal and municipal elections scheduled for 17 May of the same year.[71] The Constitutional Court has flatly refused to execute a decision of the African Court.[72] In its press release and comments, 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".[73] This conflictual situation shows the non-existence of a real jurisprudential dialogue.

The first argument in favour of a dialogue of judges and relevant monitoring mechanisms of treaties is the pragmatic dialogue of jurisprudences. The openness to dialogue gives 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, former judge of the South African Constitutional Court states:

> "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 articulate 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."[74]

68 General Comment No 25 of the UN Human Rights Committee (Children's Rights in Relation to the Digital Environment) CRC/C/GC/25 (2 March 2021), para 17.

69 F Millet "Réflexion sur la notion de protection équivalente des droits fondamentaux" (2012) 28/2 *RFDA* 307.

70 "A court in crisis: African states' increasing resistance to Africa's human rights court" (19 May 2020) *Opinio Juris*, available at: <https://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/> (last accessed 8 September 2023).

71 *Sébastien Germain Marie Aïkoué Ajavon v Benin* (Provisional measures) Application 027/2020.

72 *Decision EP 21-003* of 17 February 2021.

73 "Retrait du Bénin de la CADHP – Déclaration du ministre de la Justice et de la Législation" (Press release, 28 April 2020) *Government of the Republic of Benin*, available at <https://www.gouv.bj/actualite/635/retrait-benin-cadhp—declaration-ministre-justice-legislation/> (last accessed 8 September 2022).

74 *S v Lawrence; S v Negal; S v Solberg* (CCT38/96, CCT39/96, CCT40/96) 1997 (4) SALR 1176, 1223 (CC) (Sachs J) at 141.

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The decisions of the treaty mechanisms, whether judicial or quasi-judicial, are, therefore like a "tool-box" 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 of demonstrating the progress, in terms of coherence, quality and legitimacy, that decisions enriched by dialogue acquire. The reliance on human rights treaty bodies' decisions and soft law would also improve the quality and persuasiveness of domestic constitutional judgments. Dialogue contributes to the rational legitimacy of judicial decisions by broadening the horizon given to these decisions and by giving them a more shared and therefore, a 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.[75] The 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.[76]

The jurisprudential dialogue would not necessarily mean sharing the same opinion. It can take different forms: avoidance, contestation or alignment.[77] 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 their colleagues who interpret the same instruments.

### *Jurisprudential dialogue for harmonization of human rights norms*

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. The judge is not only assigned to give precedence to one norm over another but to play the role of a "switchman"[78] 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 of the judge applying, 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).[79] In this way, the real primacy of a fundamental right must be independent of its normative source.[80] 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.[81] Therefore, the national standard must prevail over the international standard if it is more favourable to the protection of fundamental rights.[82]

75 S Kentridge "Comparative law in constitutional adjudication: The South African experience" (2005) 80/1 *Tulane Law Review* 245.

76 P Carozza "Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights" (1997-1998) 73/5 *Notre Dame Law Review* 1219.

77 See generally ILA *Principles on the Engagement of Domestic Courts with International Law* (2016, Johannesburg Conference).

78 Expression borrowed from P Deumier *Introduction Générale au Droit* (2013, LGDJ) at 332.

79 C Sciotti-Lam *L'applicabilité des Traités Internationaux Relatifs aux Droits de L'homme en Droit Interne* (2004, LGDJ) at 609.

80 E Picard "L'émergence des droits fondamentaux en France" (1998) *AJDA* 9.

81 M Hottelier "La CEDH et les règles suisses de procédure - Aspects historiques et développements récents" (2005) 1 *RJJ* 11.

82 G Cohen *Aspects Européens des Droits Fondamentaux - Libertés et Droits Fondamentaux* (1996, Montchrestien) at 61.

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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, would put the ontological dimension of the norm under the carpet in 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",[83] highlighting a "socialization of a human being".[84] It is a question of considering the human being as the centre of gravity of the actions of interpretation of the norms because a "human being is hoisted on the promontory of the sacred and nothing that touches his dignity leaves him indifferent".[85]

## Conclusion

The approach of the Constitutional Court towards human rights treaties remains passive (except the African Charter). The reliance on 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. Therefore, in adjudicating human rights, the Constitutional Court 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 with contextual insights 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. Also, relevant human rights treaties must be invoked by the Constitutional Court at its initiative even if the litigants did not invoke them if treaties might offer greater protection than the legal instruments invoked by parties.

In its Constitution, Benin proclaims its commitment to the cause of African unity and undertakes to do everything – *including judicial integration* –[86] to achieve sub-regional and regional integration.[87] The African Court and Commission have abundant jurisprudence interpreting different aspects of human rights provided in the African Charter. Their position can assist the Constitutional Court with persuasive "African" arguments and solutions when interpreting human rights at the national level. Furthermore, 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,[88] can provide authoritative "African" arguments in the interpretation of the Bill of Rights at national level. As the African Court, African Commission and the Constitutional Court issue decisions interpreting the African Charter, the latter must be mindful of the former's jurisprudence position and evolution.

It is, therefore, highly recommended for the Constitutional Court to rely on and use African shared values translated in various treaties, standards, values and decisions adopted under the

83 M Kamto "La volonté de l'Etat en droit international" in (2004) 310 *RCADI* 315.
84 Ibid.
85 Id at 317–18.
86 Emphasis added.
87 Constitution, preamble.
88 Protocol to African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998), art 4.

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auspices of the AU human rights mechanisms in interpreting the Bill of Rights.[89] Employing these instruments can provide the Constitutional Court "African" historical 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 of the African Charter and all duly ratified international human rights instruments.[90]

**Competing interests.** None

89 See generally A Adeola, F Viljoen and T 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/S1 *Journal of African Law* 131.

90 Constitution, art 140.c.

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