The notion of fairness in reparation litigation before the African Court on Human and Peoples' Rights

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ABSTRACT: Reparation is a general principle of law that applies both in the domestic and international order. The African Court on Human and Peoples' Rights (African Court) is no exception. In its jurisprudence it strives to rule on reparation on the basis of fairness. It is true that some provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) as well as the Rules of Court do not expressly define what is meant by fairness. The Court's exercise of its office reveals a case-by-case approach to the application of the principle of fairness. This construction is characterised by not only the humanisation, socialisation but also the moralisation of African law. In applying their discretionary power, the judges of the Court face a dilemma between the requirements of law and social order. The question that arises is what criteria the Court uses to evaluate the notion of fairness in the context of reparation litigation. In other words, do these criteria allow for an objective reparation of the applicants' damage? This article deals with the Court's case law, which takes into account an essential aspect of justice, namely, corrective justice, which aims to remedy the imbalance in the assessment of reparation when the notion of fairness dictates its solutions in African positive human rights law. Based on a global approach, the concept of fairness therefore enables the Court to ensure arithmetical equality and the proportionality of gains and losses without regard to individuals. Although the Court's case law strives to do this, certain shortcomings persist and hinder the Court's mission of fairness.

TITRE ET RÉSUMÉ EN FRANÇAIS:

La notion d'équité dans le contentieux de la réparation devant la Cour africaine des droits de l'homme et des peuples

RÉSUMÉ: La réparation est un principe général du droit qui s'applique à la fois dans l'ordre interne et international. La Cour africaine des droits de l'homme et des peuples ne fait pas exception. Dans sa jurisprudence, elle s'efforce de statuer en réparation sur la base de l'équité. Il est vrai que certaines dispositions du Protocole à la Charte africaine des droits de l'homme et des peuples ainsi que le règlement intérieur de la Cour ne définissent pas expressément ce que l'on entend par équité. L'exercice de son office par la Cour révèle une approche au cas par cas de l'application du principe d'équité. Cette construction est caractérisée non seulement par l'humanisation, la socialisation mais aussi la moralisation du droit africain. Dans l'application de leur pouvoir discrétionnaire, les juges de la Cour sont confrontés à un dilemme entre les exigences du droit et celles de l'ordre social. La question qui se pose est celle de savoir quels sont les critères utilisés par la Cour pour évaluer la notion d'équité dans le contexte d'un litige en réparation. En d'autres termes, ces critères permettent-ils une

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réparation objective du préjudice du requérant? Cet article traite de la jurisprudence de la Cour qui prend en compte un aspect essentiel de la justice, à savoir la justice corrective qui a pour objectif de pallier au déséquilibre dans l'évaluation de la réparation lorsque la notion d'équité dicte ses solutions dans le droit positif africain des droits de l'homme. A partir d'une approche globale, la notion d'équité permet donc à la Cour d'assurer l'égalité arithmétique, la proportionnalité des gains et des pertes sans égards aux personnes. Même si la jurisprudence de la Cour œuvre à le faire, certains manquements persistent et entravent la mission d'équité de la Cour.

KEY WORDS: fairness, reparation, compensation, African Court on Human and Peoples' Rights, fair trial

CONTENT:

1 INTRODUCTION

The African Court on Human and Peoples' Rights (African Court) is a continental court created by the member states of the African Union (AU) to ensure the protection of human and peoples' rights in Africa. To date, the Court has handed down a number of judgments relating to reparations, reiterating the hopes that Africans had when it was created. If the Court is considered by some to be the spearhead,[1] it is worth mentioning that it now plays an 'outpost' role in the protection of human rights by exercising its competence in particular with regard to the interpretation and application of texts relating to human rights in accordance with the Protocol establishing it.[2] The Court thus strengthens the African mechanism for the protection of human rights already initiated by the African Commission on Human and Peoples' Rights (African Commission)[3] for greater productivity.[4]

1 See M Kamto 'Introduction générale' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme et des peuples: commentaire article par article* (2011) 18-31.

2 See art 3 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).

3 African Court Protocol (n 2) art 2.

4 J-L Atangana Amougou 'Avancées et limites du système africain de protection des droits de l'homme: la naissance de la Cour africaine des droits de l'homme et des peuples' (2003) 176; see also O Delas & E Ntaganda *La création de la Cour africaine des droits de l'homme et des peuples: m*écanisme efficace de protection des droits de *l'homme* (1999) 103-109.

In the exercise of its function, the African Court sometimes has recourse to certain principles of law in order to award reparation for any damage. In international law, the obligation to pay reparation is the consequence of a breach of a primary obligation that has caused damage.[5] Indeed, when the Court finds a violation of a right establishing the responsibility of the defendant state, it is entitled under article 27(2) to order appropriate measures to remedy the situation by awarding reparation. In African human rights law, reparations follows the *restitutio in integrum* approach, which means that the Court 'must, as far as possible, erase all the consequences of the unlawful act and re-establish the state that would probably have existed if the said act had not been committed'.[6] The Court awards reparations either in the context of a judgment on the merits, which also addresses the question of reparations, or by means of a separate reparations judgment. It is true that both the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and the Rules of Court (Rules) recognise this possibility, although the Court now seems to favour the former option. In any event, the Court awards reparations based on fairness.

In law, fairness is one of those flexible concepts or 'notions with variable content' that are difficult to define.[7] In its etymological sense, the term 'equity', of which the origin dates back to the Latin word *equitas*, refers to the notions of equality, justice and impartiality that are associated with the principles of natural justice.[8] According to this first meaning, fairness designates an ideal of justice to which a society aspires with a view to 'ensuring equality between persons, by rendering to each what is rightfully theirs'.[9] Taken in this way, the concept of fairness encompasses the institutions and rules of law designed to achieve this objective of justice.[10] In its second meaning, fairness refers to a form of contextualised or individualised justice in which the judge seeks the fairest solution. As Jean Carbonnier pointed out when he spoke of the special mandate of fairness in these terms: 'an opposition to the rigidity of the law, strict law'.[11] In order to prevent injustice, fairness derogates from the rules of positive law by taking into account the particular circumstances of the case.[12] In its third sense, fairness has a suppletive function, particularly when the judge is called upon to

5 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001) II *Yearbook of International Law Commission* UN Doc A/56/10, art 31; *Chorzow Factory* case (*Germany v Poland*), CPJI Rep série A No 9 21.

6 CPJI *Usine de Chorzow* (*Allemagne v Pologne*), Rec 1927 para 47.

7 See C Perelman 'Les notions à contenu variable en droit – essai de synthèse' in C Perelman and others (eds) *Les notions à contenu variable en droit* (1984) 363.

8 *Black's law dictionary* (2009) 9.

9 G Cornu and others *Vocabulaire juridique* (2018) 894.

10 See R Crête 'Le raisonnement judiciaire fondé sur l'équité dans les conflits entre actionnaires de petites sociétés: l'éclairage d'une approche consensuelle' (2006) 47 *Les Cahiers de droit* 37.

11 J Carbonnier *Droit civil – Introduction* (1997) 34.

12 P Jestaz 'Equité' (1972) *Encyclopédie juridique Dalloz: répertoire de droit civil* (1972) 1.

supplement the express terms of the law by taking into account the particular circumstances of the case.[13] In other words, fairness here plays an essential role in supplementing the shortcomings of the law. In this case, it is up to the judge to interpret fairness by taking into account the particular circumstances of each case.[14] As Cornu points out, the role of fairness is to attenuate or modify the law in the light of the circumstances of the case.[15] In all likelihood, the concept of fairness covers a number of meanings which it will be useful to explore by drawing on the full range of the Court's case law.

In order to demonstrate this, the article first examines the content of the concept of fairness in African human rights law, since neither the African Charter on Human and Peoples' Rights (African Charter) nor the African Court Protocol provides any definition. At first sight, fairness is a way of resolving disputes outside the rules of law.[16] This is the case, for example, when the judge uses criteria such as reason, utility, love of peace or morality.[17] Here, fairness does not have a legal character and is opposed to law, which confers an obligation on the judge to rule on the basis of fairness.[18] On the other hand, equity is a form of justice that is superior to positive law, natural law and ideal justice.[19] This can happen when the judge rules *aequo et bono*, that is, in accordance with justice and impartiality, according to what is just and right in accordance with fairness and conscience.[20] In this case, fairness does not depend on existing legal rules. In short, fairness means respecting the balance of situations in order to prevent inequalities. Here, fairness will encompass terms such as equality and justice. Through equitable judgments, regional human rights courts, in particular the African Court, protect the rights of individuals to reparation. The latter means 'recompense given to one who suffered legal injury at the hands another; to make amends, provide restitution, or give satisfaction or compensation for wrong inflicted; it also refers to the thing done or given to the injury party'.[21] Reparation defined in this way has several meanings. First, it refers to compenation, that is, the elimination of damage.[22] Second, it refers to a pecuniary method of compensation through the award of a sum of money.[23] Third, it may refer to a method of compensation in kind, that is, it involves restoring the situation prior to the damage (*restitutio in integrum*).[24] In view of

13 As above.
14 D Carreau & F Marrella *Droit international* (2012) 357.
15 Cornu (n 9).
16 As above.
17 As above.
18 As above.
19 As above.
20 *Black's law dictionary* (1979) 500.
21 D Shelton 'Reparations' in A Peters and others (eds) *Max Planck encyclopedia of public international law* (2015) 367.
22 Cornu (n 9) 1897.
23 As above.
24 As above.

the above, the use of the concept of reparation in this study will incorporate these three meanings.

How, then, does the African Court apply the notion of fairness in disputes concerning reparation? First, the study sets out to demonstrate the strict application by the African Court. This will show the importance of examining the evidence and the substantive or procedural nature of the notion of fairness. Second, this study examines the moderation of strict rules by the African Court, the implementation of which allows for an objective application of the notion of fairness in reparations litigation. The study concludes with a comparison of the Court's behaviour with that of other regional human rights courts. Here the study analyses the particular approach that we will highlight in our concluding remarks.

2 THEORETICAL LEGAL FRAMEWORK OF FAIRNESS

In African human rights law, the concept of fairness derives its legal basis from the African Charter (2.1) and the African Court Protocol (2.2).

2.1 In the African Charter

The drafters of the African Charter were concerned about the notion of fairness and included provisions in this instrument to reflect its importance. Even if the term 'fairness' does not appear expressly in the Charter, certain provisions nevertheless relate to this notion. Every person is equal before the law. This equality before the law extends to equal protection of the law.[25] In addition, article 7 provides guarantees of a fair trial for all persons subject to the law.[26] In other words, the concept of fairness is contained in the Charter, albeit implicitly. The legal compass for the analysis that follows will therefore be the provisions of the Charter. Although the Charter implicitly takes account of the concept of fairness, it must be said that it is in the African Court Protocol that it is actually highlighted.

2.2 In the African Court Protocol

The concept of fairness is governed by article 27(1) of the African Court Protocol. In contentious matters, the African Court applies the Protocol and any other relevant human rights instrument. Clearly, to determine the notion of fairness in a trial, the Court refers to this provision to rule. In practice, it has done so in a number of cases, which we will examine below. In any event, article 27(1) states: 'If the Court finds that there has

25 African Charter art 3(2).
26 African Charter art 7.

been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.'[27] This provision will therefore be used to analyse the case law on fairness. The Court sometimes applies the concept of fairness strictly.

3 STRICT APPLICATION OF THE CONCEPT OF FAIRNESS BY THE AFRICAN COURT

The African Court is uncompromising when it comes to ruling on the basis of fairness. Its interpretation of the conditions necessary for fairness to be taken into account is fully in line with those of the regional human rights courts. In any event, taking into account fairness emphasises the requirements of sufficient evidence (3.1) and the causal link between the violation found and the harm suffered (3.2).

3.1 The importance of examining the evidence

In reparation cases before the Court, evidence plays a predominant role, especially when it comes to ruling in fairness. Evidence consists of elements used to support a claim.[28] Article 26(2) of the African Court Protocol gives the Court the latitude to accept the evidence it deems appropriate on which to base its decisions.[29] The international judges' assessment of evidence in human rights cases is less rigorous. This was observed in the judgment of the International Court of Justice (ICJ).[30] Similarly, the Inter-American Court in *Velasquez Rodriguez v Honduras* insisted that the evidence required should be less formal than that required before the domestic courts.[31] On the other hand, the African Court adopts an approach contrary to that of counterpart courts. This assertion is confirmed by legal doctrine, which considers that the assessment made by the African Court does not depart from the rules of evidence before international courts.[32] While the standard of proof is lower in the judgments of the international courts cited above, it is higher in the case law of the African Court. In fact, the Arusha Court positions itself as a body that reviews the evidence in a case. In the *Abubakari v Tanzania* (Reparations) case, it stated:[33]

27 African Court Protocol art 27(1).

28 J Salmon *Dictionnaire de droit international public* (2001) 874.

29 African Court Protocol art 26.

30 *Republic of Guinea v Democratic Republic of Congo* ICJ (2012) 15-16.

31 IACHR *Velasquez v Honduras* (1987) 128 and others. For the American judge '[t]he practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead conclusions consistent with the facts.'

32 G Niyungeko *La preuve devant les juridictions internationales* (2005) 480.

33 See *Mohamed Abubakari v Tanzania (reparations)* (2013) 3 AfCLR 349 para 26.

> As regards, in particular, the evidence relied on to convict the applicant, the Court considers that it was not for it to decide on its value for the purposes of examining that conviction. However, in the Court's view, there is nothing to prevent it from examining that evidence in the context of the case before it in order to ascertain generally whether the national court's examination of that evidence complied with the requirements of a fair trial within the meaning of article 7 of the Charter in particular.

This approach of the Court, which requires a thorough verification of the evidence provided by one or other of the parties, is part of the search for certainty or veracity of the parties' allegations. In any event, the parties must provide standards of 'proof beyond reasonable doubt'.[34] In this case, for example, it found the evidence provided by the defendant to be insufficient.[35] Lack of evidence or insufficient evidence from one of the parties to the proceedings is likely to affect the fairness of the trial. While the principle of *actori incumbit probatio*, which is common to all litigation, is applied in the various jurisdictions of international human rights law in the absence of formalism and the judge's freedom to assess the elements of proof.[36] On the other hand, the Court has limited room for manoeuvre. The Arusha Court cannot judge in fairness on the basis of mere declarations. In *Mugesera v Rwanda* it stated that '[g]eneral statements that a right has been violated are not enough. Greater justification is required.'[37]

In addition, it is up to the party whose right has been violated to provide proof. This is what the Court decided in *Abubakari v Tanzania*, in which it ruled that 'the burden of proof lies with the party claiming to have been the victim of discriminatory treatment'.[38] With regard to the assessment of quantum, a twofold observation could be made about the burden of proof. On the one hand, the Court is flexible when dealing with victims whose material or moral loss has previously been established. In *Onyango Nganyi & Others v Tanzania* the Court held that '[t]he presentation of a business licence and delivery notes constitutes proof that a business existed and was in operation. However, these documents do not provide an exhaustive and detailed account of the income generated to justify the amount claimed.'[39]

In this case, the Court awarded the victim US $2 000 by way of compensation for the partial or incomplete proof of his allegations, whereas he was claiming US $288 889 for material damage.[40] The Court's case law is remarkably consistent with regard to claimants' unjustified claims for material damage. In its jurisprudence, the Court requires in virtually every case that the claimants provide material

34 See *Onyachi and Njoka v Tanzania* (judgment) (2017) 2 AfCLR 67 para 101.

35 *Onyachi* (n 34) para 87.

36 See H Tigroudja 'La preuve devant la cour européenne des droits de l'homme' in H Ruiz-Fabr & JM Sorel (eds) *La preuve devant les juridictions internationales* (2007) 114.

37 See *Mugesera v Rwanda* (Judgment and Reparations) (2020) 4 AfCLR 846 para 72.

38 See *Abubakari* (n 33) para 153.

39 See *Onyango Nganyi & Others v Tanzania* (Reparations) (2019) 3 AfCLR 322 paras 36-38.

40 As above.

evidence in relation to the damage they have suffered, failing which the claims are rejected. This means that when the evidence is provided, the Arusha Court judges in fairness by awarding direct victims compensatory costs for material loss. This is what it did in the case of *Ingabire Victoire Umuhoza v Rwanda* by awarding the full amount of 230 000 Rwandan francs requested by the applicant for the administrative handling of her legal case.[41] It follows that evidence is inherent in the Court's equitable judgment. It is for this reason that in its jurisprudence fairness has a substantive or procedural character.

3.2 The substantive and procedural nature of fairness

In African human rights law, fairness can be both substantive and procedural. With regard to the former, it refers to the decision itself and includes compliance with the relevant rules (legislation, policy, standards of practice) and consideration of individual circumstances in order to achieve a result that is fair to the parties.[42] From a substantive standpoint, the judge examines the nature, purpose and effects of an act performed by the lower decision-making bodies in order to determine whether it is fair. Here, the Court undertakes an exercise aimed at ascertaining the content of the legal arguments put forward by the parties in order to make a substantive finding. This is what emerges from its judgments in *Onyachi and Njoka v Tanzania*[43] and *Abubakari*.[44] In the first case, the applicants argued that their right to be presumed innocent had not been respected under article 7(1) of the African Charter because of their defence of alibi, which had been arbitrarily rejected by the Court of Appeal and the High Court.[45] In addition, they argued that evidence had been submitted that they had never been in Tanzania on the day and at the time the crime was committed. The Court noted that an alibi is an essential element with consequences for fairness, provided that it is supported by a witness. The Court, therefore, recalls the following:[46]

> His findings above that the evidence of the sole prosecution witness PW8 was obtained following a flawed line-up. Accordingly, the conviction of the applicants solely on the basis of the evidence of the sole witness PW8 and the unsubstantiated allegations that the applicants had used unlawful means to enter Tanzania violated the applicants' right to a defence guaranteed by article 7(1)(c) of the Charter and thus constituted a violation of the applicants' right to a fair trial.

41 See *Ingabire Umuhoza v Rwanda* (Reparations) (2018) 2 AfCLR 209 paras 38-40.

42 FH Buckley 'Three theories of substantive fairness' (1990) 19 *Hofstra Law Review* 36.

43 See *Onyachi* (Judgment) (n 34).

44 See *Abubakari* (n 33).

45 See *Onyachi* (n 34) para 90.

46 *Onyachi* (n 34) para 95.

The Court's reasoning is based on respect for the right to a defence enshrined in article 7 of the African Charter, which is the only provision of the Charter devoted to a fair trial.[47] With regard to the procedural dimension of fairness, the Court emphasises the following in *Abubakari*, where the Court held that the defence of alibi is established as a prerequisite for the right to a fair trial. It held:[48]

> Where an alibi is established with certainty, it can be decisive on the issue of the guilt of the person prosecuted. The alibi in the present case was all the more important because the applicants' indictment was based on the statements of a single witness, and no identification parade had been held.

In this case, the applicants were claiming procedural fairness, which unfortunately is not included in the list of fair trial rights contained in article 7(1)(c) of the African Charter. In this case, the African Court should have relied on other alternatives relating to general law, such as article 14 of the International Covenant on Civil and Political Rights (ICCPR)[49] or the Guidelines and Principles on the Right to a Fair Trial.[50] An analysis of the Court's case law shows that it favours the reasoning of the procedural nature of fairness based on the effects of procedural irregularities carried out by the judicial bodies of the African states, even though it has refused to examine the facts to determine whether there had been a miscarriage of justice. These requirements of the Court express the idea that '[f]or a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied'.[51] This was the conclusion it reached in *Onyachi*, where it stated in this context that 'the Court has no option but to conclude that the procedural irregularities in the identification parade affected the fairness of the trial and of the applicants' conviction'.[52]

On the other hand, in *Guehi v Tanzania*[53] the Court rejected the applicant's request to set aside the conviction and sentence imposed on him and to order his release.[54] To summarise the facts, the applicant, an Ivorian citizen, was convicted and sentenced to death for the murder of his wife. He lodged an application alleging a violation of his rights as a result of his detention without trial. The Court found that certain fair trial guarantees had been violated, but that certain remedies sought by the applicant, such as his release, were not justified.[55] In order to justify its reply, the Court lists the conditions under which the applicant's release may be ordered, in particular in special and compelling

47 See NJ Udombana 'The African Commission on Human and People's Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 302.

48 See *Abubakari* (n 33) para 192.

49 *Abubakari* (n 33) para 16.

50 See African Commission 'Directives et principes sur le droit à un procès équitable et l'assistance judiciaire en Afrique' (2003). This text sets out the rights to a fair trial in detail in section 'N'.

51 See D Zolo *Cosmopolis: Prospects for world government* (1997) 118-119.

52 See *Onyachi* (n 34) para 88.

53 See *Armand Guéhi v Tanzania* (Judgment and Reparations) (2018) 2 AfCLR 493.

54 *Guéhi* (n 53) para 160.

55 *Guéhi* (n 53) para 6.

circumstances, which is likely to broaden its powers.[56] In addition, the Court refers to the proportionality between the seriousness of the violation and the measure taken, which should be taken into account with a view to preserving fairness and preventing double jeopardy.[57] Finally, it concluded that the violations had no impact on the proceedings before the courts that could lead to an arbitrary judgment.[58] This reasoning is supported by Possi, who expressed the following view: 'Essentially, fairness in the administration of justice accommodates the rule of law and the maintenance of public confidence in the legal system. Significantly, fair trial norms facilitate due legal process aimed at preventing unlawful and arbitrary curtailment of individual rights.'[59]

However, just as the judge can apply equity strictly in the exercise of his or her office, he or she can also moderate his strict rules.

4 MODERATION OF THE STRICT RULES OF FAIRNESS BY THE PAN-AFRICAN JUDGE

The African Court sometimes makes its decision on the basis of fairness, while adopting a corrective approach (4.1) and taking into account the interests of the parties to the case (4.2).

4.1 Remedial measures

In its report on the work of its 31st session on state succession in respect of matters other than treaties, the International Law Commission took a position that fairness is

> more a balancing factor, a corrective designed to preserve the reasonableness of the connection between movable state property and the territory. Fairness allows for a more judicious interpretation of the concept of property linked to the activity of the Predecessor State in relation to the territory and gives it an acceptable meaning.[60]

Transposed to the field of international human rights law, the corrective nature of fairness should allow the judge to interpret it in order to avoid a considerable imbalance between the violations alleged by the victim and the reparation for the harm suffered. In African human rights law, it happens that when the applicant demonstrates the

56 *Guéhi* (n 53) para 164; *Alex Thomas v United Republic of Tanzania* (Reparations) Application 005/2013 para 157. On the notion of the imperium of the African Court, see SH Adjohohoun & S Oré 'Entre impérium illimité et decidendi timoré: la réparation devant la Cour africaine des droits de l'homme et des peuples' (2019) *3 African Human Rights Yearbook* 331.

57 See *Guéhi* (n 53) para 164.

58 *Guéhi* (n 53) para 166; *Evarist Minani v Tanzania* (Judgment) (2018) 2 AfCLR 415 para 82.

59 A Possi '"It is better than ten guilty persons escape than that one innocent suffers": the African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 *African Human Rights Yearbook* 313.

60 ILC Rapport sur la succession d'Etat dans les matières autres que les traités 31 (1979) para 16.

existence of an abuse or injustice, the African Court can order compensation for the harm suffered. The desire to correct injustice without undermining the rights of applicants is a constant concern for the African Court. Even if corrective justice is fundamentally a matter of climate justice,[61] it is relevant to this research. The principle of corrective justice as it is interpreted here is that reparation can be just if it attempts to re-establish an equality of fundamental rights between the victim and the perpetrator of the violation. This assertion is defended by Aristotle, who said that the 'reason is that the law is always a general statement, and yet there are cases which it is not possible to cover in a general statement. This is the essential nature of fairness: it corrects the law when it is imperfect because of its generality.'[62] To speak of corrective justice means for the judge, by means of ethics, to re-establish arithmetical equality without regard to persons but proportional to the gains and losses of the parties to a dispute.[63] Thus, the Court proceeds by a proportional evaluation of the gains and losses of the applicants when it considers that one of them goes beyond what can be reasonable. This reasoning of the African Court is reflected in *Mugesera v Rwanda*.[64]

In this case the applicant applied to the Arusha Court for a finding that his conditions of detention had been violated. He argued that the alleged violations had caused him atrocious psychological suffering. He therefore asked the Court to order the respondent state to pay him US $1 095 000 for the six years he spent in the respondent state's judicial system.[65] In response, while recalling that in the case of violations of the damage alleged by the applicant, the general standard applicable is that of lump sums,[66] the Court considered that the assessment made by the victim was excessive and decided to award him on the basis of fairness compensation for non-pecuniary damage of 10 million Rwandan francs[67] or approximately US $8 500, that is, approximately 0,77 per cent of the amount claimed. In ruling that the applicant's claim was excessive, the African Court based its decision on the totality of the violations of the applicant's rights in order to rule *ultra petita* and proportionally correct the victim's gains and suffering. However, the Court did not specify what constituted lump sums for non-pecuniary damage. On the other hand, the Court adopted the same reasoning but sorted out the rights violated by the respondent state in the *Abubakari* case, and it avoided certain rights of the applicant.[68]

61 D Owona 'Droits de l'homme et justice climatique en Afrique' (2019) 3 *African Human Rights Yearbook* 159. For the author 'la justice corrective est celle qui vise à corriger les inégalités causées par les changements climatiques et subies par les populations vulnérables'.

62 See Aristotle *Ethique à Nicomaque* (1934) 6.

63 P Cintura 'L'usage et la conception de l'équité par le juge administratif' (1972) 24 *Revue internationale de droit comparé* 669.

64 See *Mugesera* (n 37) 834.

65 *Mugesera* (n 37) para 142.

66 *Mugesera* (n 37) para 144.

67 *Mugesera* (n 37) para 145.

68 See *Abubakari* (n 33).

In the *Abubakari* case the applicant alleged that he had been a victim of the rights enshrined in articles 4, 5 and 18(1) of the African Charter and asked the Court to award him the sum of US $261 111 by way of non-pecuniary damage as a direct victim. He also asked the Court to take into account the duration of his imprisonment, namely, 19 years. The respondent state, for its part, refuted the allegations made against it.[69] In response, the Court noted that the rights violated by the respondent state related solely to the applicant's right to a fair trial and his right to a defence.[70] It added that the claimant's request was excessive and decided to award him, on the basis of fairness, the sum of 2 000 000 Tanzanian shillings by way of compensation for non-pecuniary damage.[71] Once again, the Court demonstrated its rationality in applying the principle of fairness. In comparison with the *Onyango Nganyi* case, the applicants asked the Court to award reparations to the indirect victims for the emotional suffering they endured as a result of the violation and the harm they suffered.[72] Despite the respondent state's opposition, the Court, while basing itself on the evidence, considered that 'the amount to be awarded to indirect victims by way of reparation must be proportional to the damage suffered by direct victims. It therefore considered that the amounts claimed by the applicants for indirect victims were exaggerated.'[73] It concluded that

> the claimants and beneficiaries do not allege a differentiated level of prejudice and in the interests of fairness awards the following reparations: one thousand (1 000) US dollars to each of the wives, eight hundred (800) dollars to each of the children and five hundred (500) US dollars to each of the fathers and mothers.[74]

However, there was a lack of reasoning on the part of the Court with regard to the assessment of the amounts of reparation, an issue that will be developed further below.

Generally speaking, the Court's case law is intended to act as balancing role, that is, to satisfy the parties to the proceedings on an equal basis, ensuring in some way that the victim's claim does not exceed or is proportionate to the respondent state's violations, with a view to educating the victim in the culture of fairness or reasonableness. In any event, the principle of corrective justice is particularly important for the Court in determining the forms of damage.[75] In any event, the Court sometimes bases their rulings on the interests of the parties.

69 *Abubakari* (n 33) para 41.
70 *Abubakari* (n 33) para 45.
71 *Abubakari* (n 33) para 47.
72 See *Onyango Nganyi* (n 39) para 68.
73 *Onyango Nganyi* (n 39) para 73.
74 *Onyango Nganyi* (n 39) para 74.
75 See J Tasioulas 'International law and the limits of fairness' (2002) 13 *European Journal of International Law* 1009.

4.2 Balancing the interests of the various parties

In its role of moralising and humananising African human rights law,[76] the Court integrates a balance between the interests of the parties into its decision. At the end of an analysis that incorporates both subjective and objective evidence, as detailed above, the Court's interpretation of article 27(1) of the African Court Protocol is not to say whether or not an act was unjust, but to say whether or not there was a violation of a right. The Court can do this through the discretionary power conferred on it by article 27(1) of the Protocol, which requires it to take 'appropriate measures'. This power is relevant because there would be an infinite number of principles that the Court could have followed. As a 'judge of fairness', the African Court may decide to follow its own reasoning or to respond to the request of one of the parties to the proceedings. In short, the Court can decide in a discretionary manner or take into account the interests of the parties.

True fairness consists of 'balancing, as far as possible, the considerations of fairness invoked by both parties'.[77] Choosing to take the interests of the parties into account would thus make it possible to achieve an equitable result. This was the reasoning developed by the International Court of Justice in *Tunisia v Libya,* in which the Court defined its task as the obligation to 'weigh carefully the various considerations which it considers relevant, so as to arrive at an equitable result'.[78]

However, in the case law of the African Court, the balancing of the interests of the various parties can be assessed through two arguments. Thus, when the African Court reimburses the costs of proceedings and determines the amount of aid for legal representation and assistance, it is required to report on.

On the first point, the judge endeavours to rule with the aim of re-establishing the ex-post equality of the parties. Thus, the Court may grant reimbursement of travel and subsistence expenses for the applicants' representatives at its seat for the proper conduct of the trial, as it did in the case of the *Beneficiaries of late Norbert Zongo*.[79] In this case the Court found that the claimants were seeking compensation for both the non-material damage suffered by them and the material damage suffered by MBDHP.[80] To justify its reasoning, the African Court noted that damages can take several forms under article 34 of the draft articles of the ILC.[81] However, the claimant will not be entitled to

76 T Ondo 'La jurisprudence de la Cour africaine des droits de l'homme et des peuples entre particularisme et universalité' (2017) 1 *African Human Rights Yearbook* 253-255.

77 B Cheng *General principles of law as applied by international courts and tribunals* (1987) 48-49.

78 See *Recueil des Cours* ICJ (1982) para 71.

79 See *Beneficiaries of late Norbert Zongo v Burkina Faso* (Reparations) (2011) para 91.

80 *Zongo* (n 79) para 28.

81 *Zongo* (n 79) para 29.

reparation for amounts justified by evidence.[82] The Court is therefore right to adopt a 'maternalist' approach to the proceedings, taking into account the interests of the parties. On another front, the Court grants reimbursement of lawyers' fees, even though the principle is that each party bears its own costs, unless the Court decides otherwise.[83] It may, however, allow the applicant to claim reimbursement of costs by way of reparation. This was confirmed in *Mtikila v Tanzania,* where the Court stated:[84]

> Costs and expenses are part of the concept of reparation. Thus, when liability is established in a declaratory judgment, the Court may order the state to compensate the victim for the costs and expenses incurred in bringing actions to obtain justice at national and international level.

On the second point, the Court rules in fairness on the basis of the interests of the parties in granting aid for representation and legal aid as a remedy. While article 10(2) of the African Court Protocol states that legal representation or assistance may be provided free of charge where the interests of justice so require,[85] there is a mitigating factor in article 31 of the Rules of Court. This provision makes the granting of aid for representation conditional on the financial resources available.[86] In its jurisprudential approach, the Court is fastidious in granting aid for legal representation and assistance. In *Cheusi v Tanzania*[87] the Court, basing itself on the seriousness of the offence committed by the applicant, notes:[88]

> It appeared from the file that the applicant had been charged with a serious offence punishable by a heavy custodial sentence of at least thirty years. Moreover, the case involved eight prosecution witnesses, two defence witnesses and five exhibits, reflecting the complexity of the issue. In the circumstances, it was clear that the interests of justice required that free legal assistance be provided to the applicant, in order to ensure fairness at first instance and on appeal.

In other words, legal aid should be granted for the entire duration of the proceedings. Since the applicant did not receive legal aid at first instance, the Court is entitled to conclude that the respondent state violated the right to legal aid guaranteed by article 7(1)(c) of the African Charter and article 14(3)(b) of ICCPR.[89] However, in *Mugesera* the Court recognised that the applicant's right to justice had not been violated by the respondent state.[90] In this case, the applicant claimed that his lawyer had been convicted of unreasonably delaying the trial.[91]

82 *Zongo* (n 79) para 93.

83 See Rule 32 of Rules of Procedure of the Court. It provides that '1 Proceedings before the Court shall be free of charge. 2 Unless the Court decides otherwise, each party shall bear the costs of proceedings.'

84 See *Mtikila v Tanzania* (Reparations) (2013) para 46; see also *Zongo* (n 79) para 79.

85 African Court Protocol art 10(2).

86 See art 31 of the Rules of Procedure of the African Court on Human and Peoples' Rights.

87 See *Cheusi v Tanzania* (Judgment and Reparations) (2020) 4 AfCLR 219.

88 *Cheusi* (n 87) para 109.

89 *Cheusi* (n 87) para 112.

90 *Mugesera* (n 37) para 61.

91 *Mugesera* (n 37) para 49.

Thus, the Court notes that states may impose sanctions on lawyers who violate professional or ethical obligations in accordance with the guidelines and principles on the right to a fair trial and legal aid in Africa.[92] From the above, the Court balances interests while ensuring that they do not violate human rights standards. However, concerns arise from the judge's application of fairness.

5 THE UNCERTAINTIES OF THE AFRICAN COURT'S USE OF FAIRNESS

Many key issues emerge from the jurisprudence of the African Court in assessing the quantum of reparations. This part examines two concerns that seem relevant to this study. One is the lack of a precise quantification mechanism; the other is the lack of precision in the scope of fairness.

When the conditions required for the African Court to award reparation are met, the judge is supposed to rule on the basis of fairness. However, the Court sometimes comes up against imprecise quantification leading to flexibility in the assessment of damages. In law, quantum is defined as the amount of reparation awarded to the victim as generally applied in the assessment of damages.[93] Thus, when the evidence analysed above has been gathered, the judge proceeds to assess the quantum of compensation. The judge's power to do this is recognised in article 27(1) of the African Court Protocol, which requires them to take 'appropriate measures' to remedy a human rights violation. It therefore is more relevant here to take a closer look at the Court's reasoning regarding the factors governing the assessment of quantum in certain cases. In its jurisprudential approach, the Court adopts a casuistic approach, that is, that it applies the legal rules relating to fairness by demonstrating by the specific facts of each case.

In the first approach, the Court applies general human rights law to an actual fact. In this case, the Court integrates factors such as the fact that the applicant has suffered the burden of fluctuations. This is what was decided in *Cheusi v Tanzania*. Asked to rule on the assessment of the quantum of non-pecuniary damage as alleged by the applicant, the African Court stated:[94]

> As regards the currency in which the amount of damages is to be assessed, the Court considers that, for reasons of fairness and considering that the applicant should not be obliged to bear the fluctuations inherent in financial activities, the amount of damages must be determined on a case-by-case basis. As a general rule, damages should be awarded, as far as possible, in the currency in which the damage was suffered.

92 Sec I(b) provides that '[s]tates shall ensure that lawyers ... 3. are not subject to, nor threatened with, prosecution or economic or other sanctions for any action taken in accordance with their professional obligations, recognised professional standards and ethics'.

93 *Black's law dictionary* (n 8) 1361.

94 *Cheusi* (n 87) para 154.

In so ruling, the Court made the assessment of non-pecuniary damage conditional on an amount backed by the local currency. Moreover, in the same case it concluded by exercising its discretionary power and awarded 5 725 000 Tanzanian shillings in reparation.[95] This approach by the Court is consistent with the case of *Abubakari v Tanzania*, where the claimant made his application in US dollars but the Court determined the quantum of damages in Tanzanian shillings. From the foregoing, it may be thought that the Court's reasoning is intended to protect the applicant in its *pro victima* approach. However, this approach raises two major concerns.

On the one hand, the Court lacks guidance on the application of the principle of fairness. In the Court's case law, the assessment of amounts is granted without distinction where the infringement has vitiated all or part of the proceedings before the courts. In addition, the findings used by the Court are imprecise. Finally, there is a lack of reasoning by the Court in its rulings on reparation, which leads to controversial judgments. This can be seen in the Court's various findings. For example, in the *Onyango Nganyi* case the criteria used to award reparation to indirect victims were different from those used in the *Alex Thomas* case, yet the same amounts were awarded.[96]

On the other hand, the Court's practice in matters of fairness raises real questions that need to be examined here. In the course of its judgments, the Court has shown itself to be inconsistent in its application of fairness in assessing non-pecuniary damage. A case in point is *Ingabiré Victoire Umuhoza,* in which the Court awarded 55 000 000 Rwandan francs (US $45 323) to the applicant and members of her family in reparation for non-pecuniary damage, while considering that the presidential pardon had led to the applicant's freedom, without, however, determining the reasons for the pardon and its consequences for the violations found.[97] Similarly, in the *Onyango Nganyi* case the claimants were awarded US $3 000 for arbitrary prosecution and $4 000 dollars for four years of abnormally long proceedings,[98] unlike the applicant in the *Guéhi* case, who was awarded US $2 000 even though the proceedings had been unreasonably prolonged by a year and ten months.[99] Moreover, as regards other costs, in particular procedural costs, the Court is once again adopting an inconsistent approach in its case law. In *Guéhi* the Court rejected the applicant's claim on the grounds that he had benefited free of charge from a legal aid programme.[100] In similar circumstances, it rejected the claimant's application on the grounds that he had been represented free of charge by the legal aid programme.[101] However, in the *Mugesera* case the Court adopted a

95 *Cheusi* (n 87) para 155.
96 See *Onyango Nganyi* (n 39) para 97; *Thomas* (n 56) paras 55-60.
97 See *Ingabiré Victoire Umuhoza* (n 41) para 72.
98 *Onyango Nganyi* (n 39) para 97.
99 See *Guéhi* (n 53) para 205.
100 *Guéhi* (n 53) para 200.
101 See *Abubakari* (n 33) para 86.

surprising line of reasoning. It stated that the applicant had not submitted any legal aid agreement or receipts for the payments they had received.[102] Given that three lawyers represented the applicant before the Court, the Court assumes that the applicant must pay the lawyers' fees.[103] It therefore awarded the sum of 10 million Rwandan francs as a lump sum on the basis of fairness, without specifying the criteria on which this amount is based.[104] In light of the foregoing, the Court's jurisprudence shows a lack of a quantification mechanism that alters the principle of fairness dear to the Court.

6 COMPARATIVE ANALYSIS BETWEEN THE AFRICAN COURT AND ITS COUNTERPARTS ON THE APPLICATION OF THE NOTION OF FAIRNESS

The application of the notion of fairness differs from one regional system to another. The Inter-American Court and the European Court on Human Rights are relevant to our study. In its approach, the African Court faithfully reflects the requirements of fairness. In other words, fairness is a prerequisite for the proper conduct of the trial, and this is a particular attitude of the Court. It proceeds by examining the evidence and is very particular about the documents produced by the parties. In contrast, its European counterpart is not very favourable to evidence adduced fraudulently or illegally. In its reasoning, the European Court states the following: 'The Court cannot therefore exclude as a matter of principle and *in abstracto* the admissibility of evidence gathered illegally, of the kind in question. It is only for the Court to determine whether the trial ... was on the whole fair.'[105]

In addition, the Inter-American Court adopts a flexibility approach in regard to the proof required to support awards of damages.[106] In adopting this approach, the Inter-American Court relies on the heinous nature of violence and presumes that the victims have suffered serious physical and mental violence.[107] This is what the Court did in the *Velasquez* case, in which it awarded 750 000 Honduran lempiras to the victims without taking into account the devaluation of the Honduran currency, which was unable to compensate the victims for their prejudice.[108] Second, the Court examines the procedural and substantive nature of fairness. In its approach, it differs from its European and American counterparts. In the case of the European

102 See *Mugesera* (n 64) para 175.

103 As above.

104 *Mugesera* (n 64) para 176.

105 ECHR *Schenk v Suisse* (1988) para 46.

106 See D Cassel 'The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights' in M Bossuyt and others (eds) *Out of the ashes: reparations for gross violations of human rights* (2006) 94.

107 See IACHR *Aloeboetoe v Suriname* (1993) paras 52-54.

108 See IACHR *Velasquez v Honduras* (n 31) para 60(1).

courts, for example, the requirement of procedural fairness, and more specifically the obligation to give reasons for judicial decisions, was emphasised by the Court: 'Article 6(1) obliges courts to give reasons for their decisions, but it cannot be understood as requiring a detailed response to every argument. Similarly, the European Court is not called upon to determine whether the arguments have been adequately dealt with.'[109]

In its jurisprudence the African Court sometimes refers to the European and Inter-American human rights bodies and uses them as an *a contrario* argument to assert the originality of its interpretation with regard to the use of fairness in reparation.[110] However, the development of the Court's case law shows that the African courts are tending to move implicitly towards article 41 of the doctrine of their European counterparts.[111] For African human rights law, fairness therefore reveals both its strength and its weakness. It is strong because it attests to the vitality of the Court and the ongoing development of this law. It is weak because, in order to be accepted by all and apply to all cases, the rules must be formulated in general terms, but in order to be applied, they depend on the wisdom of the African Court, even if he or she has to draw on the depths of his or her being, given that no provision in the African Charter or the African Court Protocol expressly defines what is meant by fairness.

7 CONCLUSION

The purpose of this article is to analyse the notion of fairness in the dispute over compensation before the African Court. An examination of the case law shows that the Court systematically incorporates the notion of fairness into reparation proceedings. In so doing, the African Court demonstrates that it is fastidious in its examination of the evidentiary documents submitted to it. Second, in its reasoning, the Court relies on its discretionary power to correct excessive requests by the parties. However, the Court's approach shows shortcomings stemming from the economic situation that prevent it from judging fairly. Be that as it may, the African Court stands out from other human rights courts because of the rigour of its approach to applying the notion of fairness. What is regrettable is that the notion of fairness is not expressly mentioned in the African Charter, still less in the African Court Protocol. Amendments are therefore urgently needed, given that the Court's interpretation of the concept of fairness may have consequences for all reparation litigation.

109 ECHR *Van de Hurk v Pays-Bas* (1994) para 61.

110 See *Guéhi* (n 53) para 164; see *Mtikila* (n 84) paras 49-50.

111 See art 41 of the European Convention on Human Rights.