

# The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?

Enonchong, Nelson

DOI:

[10.1017/S022185530200189X](https://doi.org/10.1017/S022185530200189X)

*Citation for published version (Harvard):*

Enonchong, N 2002, 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?', *Journal of African Law*, vol. 46, no. 2, pp. 197-215. <https://doi.org/10.1017/S022185530200189X>

[Link to publication on Research at Birmingham portal](#)

## General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

## Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact [UBIRA@lists.bham.ac.uk](mailto:UBIRA@lists.bham.ac.uk) providing details and we will remove access to the work immediately and investigate.

## THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: EFFECTIVE REMEDIES IN DOMESTIC LAW?

NELSON ENONCHONG\*

### INTRODUCTION

The African Charter on Human and Peoples' Rights (the Charter), adopted over two decades ago,<sup>1</sup> entered into force on 21 October 1986. It made provision for the African Commission on Human and Peoples' Rights (the Commission), which was established in 1987. The purpose of the Commission, according to the Charter, is "to protect human and peoples' rights and ensure their protection in Africa".<sup>2</sup> But the Commission has not been able to discharge that office satisfactorily. An important reason for the inability of the Commission to attain its principal objective of protecting human rights in Africa is the fact that it has no power to grant a remedy.<sup>3</sup> It has no jurisdiction to make binding decisions against state parties that have violated the provisions of the Charter. Once the Commission reaches a decision on the merits of a case, its only jurisdiction is to make recommendations to the Assembly of Heads of State and Government (AHSG) of the Organization of African Unity.<sup>4</sup> But the AHSG itself cannot make binding decisions against state parties. It can only decide to permit publication of their violations.<sup>5</sup> Therefore, under the African Charter, there is currently no international institution that can make binding decisions against states that have violated the provisions of the Charter. There is only a power to publicize violations. Yet even this power is conferred not on the Commission but on the AHSG, which is a political body. And that body, as one former member of the Commission has put it, "consists of the very guilty parties".<sup>6</sup> Deprived then of the tools necessary to achieve its purpose of protecting human rights in Africa, the Commission's endeavours have been largely without any real results.<sup>7</sup> The consequence of all this is that under the system of the Charter victims of human rights violations cannot get any adequate remedy (such as monetary compensation) at the international level. This may be contrasted with other regional systems such as the European Convention on Human Rights and

---

\* University of Birmingham.

<sup>1</sup> On 27 June 1981, at the 18th Conference of Heads of State and Government of the Organization of African Unity (OAU).

<sup>2</sup> Art. 30.

<sup>3</sup> Other reasons include the lack of financial resources, lack of independence and the inability of the Commission even to publicize its findings. See R. Murray, "Decisions of the African Commission on individual communications under the African Charter on Human and Peoples' Rights" (1997) 46 *ICLQ* 412, 414.

<sup>4</sup> Art. 58.

<sup>5</sup> Art. 59.

<sup>6</sup> Ex-Commissioner Moleleki Mokama in C. Odinkalu, *Interview with Moleleki Mokama*, Interights, 1993, cited in Murray, *op. cit.*, 414, n. 20.

<sup>7</sup> This is the case in spite of what one writer has perceived as the Commission's "dynamic and courageous" attitude in recent years, given the political pressures under which it operates: Murray, *op. cit.*, 434.

Fundamental Freedoms which has provision for a Human Rights Court with jurisdiction to make binding decisions against contracting states.<sup>8</sup>

It is the Commission's want of a power to give a proper remedy that has been the justification for persistent calls for the establishment of an African Court of Human Rights.<sup>9</sup> Happily the African states have now recognized this serious weakness in the African system and adopted, in 1998, a protocol to the Charter for the establishment of an African Court on Human and Peoples' Rights.<sup>10</sup> However, in the meantime, unable to get any proper remedy at an international level under the African system,<sup>11</sup> victims of human rights violations in African have been compelled to look to their national courts for redress. It is true that in most cases the attempts to get redress in national courts have failed largely because in many, though not all, African countries the judiciary is anything but independent. African judges for the most part tread extremely carefully when invited to grant relief against public authorities or even to hold that there has been a violation of human rights by the administration. Yet once in a while a national judge somewhere will put his or her head above the parapet by condemning violations of human rights by the executive and granting the victim a remedy. Although courageous and bold judges of this kind are in a tiny minority, there is reason for suspecting that this minority is growing gradually.<sup>12</sup> Included in this rising tide of judicial protection of human rights in Africa is the recent decision of a Cameroonian Magistrate in *The People v. Nya Henry & 4 Ors*,<sup>13</sup> a case which concerned the violation of the right to the presumption of innocence by the department in charge of public prosecutions.

This article examines, in the light of the decision in that case, the scope of the right to the presumption of innocence under the African Charter. It also explores the remedies available under national law in Cameroon for the violation of human rights under the Charter.

#### THE RIGHT TO THE PRESUMPTION OF INNOCENCE IN CAMEROON

A person charged with a criminal offence has the right to be presumed innocent until he or she is proved guilty according to law. Widely recognized as a fundamental human right, this right to the presumption of innocence is

<sup>8</sup> Art. 41.

<sup>9</sup> E.g. E. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures*, London, 1996, 75.

<sup>10</sup> Adopted at the 34th Summit of Heads of State and Government of the OAU, soon to become the African Union.

<sup>11</sup> There are of course other avenues of redress at an international level, but these are separate from the regime of the African Charter. For example, individual complaints may be made to the UN Human Rights Committee where a right under the International Covenant on Civil and Political Rights is alleged to have been violated. Individual complaints are allowed under the First Optional Protocol to the Covenant. Indeed in 1994 Albert Mukong, a writer and human rights activist, took his case to the Committee which ruled that his rights to liberty, security of person and freedom of expression had been violated. The Committee recommended that he be compensated. In June 2001 the Cameroon Government reportedly paid Mukong \$137,000 compensation.

<sup>12</sup> A notable example is the decision of Judge Kandji of Senegal (in February 2000) to indict Hissene Habré, the former Head of State of Chad, on charges of accomplice to torture, even though political interference with the judicial process might have resulted in the indictments being subsequently dismissed on appeal on the ground of lack of jurisdiction. See I. Sansani, "The *Pinochet* precedent in Africa: prosecution of Hissene Habré" *Human Rights Brief* (2001), 32.

<sup>13</sup> Suit No. BA/236c/01-02, Court of First Instance, Bamenda (29 October 2001). I am grateful to Professor C.N. Ngwasiri for making a copy of this judgment available to me.

proclaimed in article 11(1) of the Universal Declaration of Human Rights,<sup>14</sup> embedded in article 6(2) of the European Convention of Human Rights<sup>15</sup> and enshrined in article 7(1)(b) of the African Charter on Human and Peoples' Rights.<sup>16</sup> It is beyond doubt that this right is recognized by the Constitution and laws of the Republic of Cameroon. The African Charter on Human and Peoples' Rights, which contains the right to the presumption of innocence, was ratified by Cameroon in 1987,<sup>17</sup> with the result that its provisions, including article 7(1)(b), have the force of law in Cameroon.<sup>18</sup> Indeed, in the preamble of the Cameroon Constitution<sup>19</sup> it is recorded that the people of Cameroon "*Affirm* our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, . . . the African Charter on Human and Peoples' Rights",<sup>20</sup> and, in particular, to a list of principles, one of which is the principle that "every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence".<sup>21</sup> Although there is no doubt that the right to the presumption of innocence is recognized under the Cameroon Constitution there may be some difficulty in identifying the limits of the right and, where there has been an infringement of it, finding an effective and practical remedy.

These issues presented themselves recently in *The People v. Nya Henry & 4 Ors.*<sup>22</sup> The facts of the case are in a narrow compass. Following some public disturbances,<sup>23</sup> the defendants, together with many others, were arrested on 1 October 2001. By a motion on notice, the defendants with 14 others applied to the court for an order admitting them to bail pending the preferment of any charges against them. In a ruling of 24 October 2001, in *Dr Luma & 18 Ors v. The People*,<sup>24</sup> a magistrate (Kalla Abednego) granted bail to all 19 applicants and

<sup>14</sup> Art. 11(1): "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

<sup>15</sup> Art. 6(2): "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

<sup>16</sup> Art. 7(1) reads "Every individual shall have the right to have his cause heard. This comprises . . . (b) the right to be presumed innocent until proved guilty by a competent court or tribunal."

<sup>17</sup> Decree No. 87-1910 of 29 December 1987, authorized by Law No. 87-29 of 17 December 1987.

<sup>18</sup> Under Art. 45 of the Cameroon Constitution, duly ratified international agreements not only have the force of law but override domestic law.

<sup>19</sup> As amended in 1996 by Law No. 96-06 of January 1996.

<sup>20</sup> Emphasis in the original.

<sup>21</sup> Art. 65 of the Cameroon Constitution makes it clear that the Preamble is "part and parcel" of the Constitution.

<sup>22</sup> See n. 13 above.

<sup>23</sup> These were the result of political agitation, a brief background to which may be helpful. The current Republic of Cameroon is a union of the former UN Trust territory under British administration (commonly known as British Southern Cameroons) and the former UN Trust territory under French administration (at that time known as French Cameroon). French Cameroon gained independence from France in 1960 and became the Republic of Cameroon. On 1 October 1961 British Southern Cameroons also gained independence by joining French Cameroon in a union known as the Federal Republic of Cameroon. Through various developments, the unified country has come to be called the Republic of Cameroon. For some years now, a movement widely known as the Southern Cameroon National Council (SCNC) has been advocating for the independence of Southern Cameroon from the union. On 1 October 2001 the SCNC brought crowds of people out in certain towns within Southern Cameroon to celebrate the "independence" that they desire; 1 October being the day in 1961 when Southern Cameroon gained its independence from the United Kingdom. The SCNC demonstrations went ahead in spite of a prefectorial order banning them. The demonstrators clashed with the police and other armed forces. In the crackdown that followed, a number of persons, including the defendants in the present case, were arrested and detained.

<sup>24</sup> No. BA/13m/01-02, Court of First Instance, Bamenda.

ordered their release from detention. But, in breach of the court order, the five defendants were not released. Instead on 29 October they were brought before the same magistrate charged with two offences: (i) violation of a prefectorial order (a simple offence<sup>25</sup>) and (ii) unlawful assembly<sup>26</sup> (a misdemeanor). The question then arose whether, by their continued detention in breach of the bail order, there had been a violation of the defendants' right to the presumption of innocence. It was found as a fact that the reason why the defendants had not been released as ordered was because the Procureur General of the North West Province,<sup>27</sup> the most senior official in charge of public prosecutions in the province, had given instructions that they should not be released as ordered by the court. That being the case, the remaining question was whether, by preventing the release of the defendants as ordered, the Procureur General had violated their right to the presumption of innocence. The court answered that question in the affirmative. Magistrate Abednego expressed himself in unmistakable terms:

"My answer to that question is that by refusing to carry out the order of the court releasing them [the defendants] on bail, these people [the defendants] have been brought before me as people presumed guilty that I must convict. This makes me conclude that the constitutional right of the defendants of presumption of innocence has been violated."

Was the magistrate correct to hold that there had been a violation of the defendants' right to the presumption of innocence? To answer this question it is necessary to consider the scope of the right to the presumption of innocence under the African Charter.

#### SCOPE OF THE RIGHT TO THE PRESUMPTION OF INNOCENCE

##### **Judicial authorities**

It is commonplace that the right to the presumption of innocence is in essence a procedural safeguard in criminal proceedings and is therefore an element of the right to a fair trial.<sup>28</sup> Hence violations of this right are most likely to occur in criminal proceedings where the judge regards the defendant as guilty before the trial. For example, in a number of cases before the African Commission on Human Rights,<sup>29</sup> it was alleged that the courts in Malawi<sup>30</sup> adopted a theory that "there is no smoke without fire". In other words, the mere fact that a person has been charged is regarded by the court as an indication that the person has done something wrong. This is in effect a presumption of guilt, which is directly contrary to the right to the presumption of innocence. And a judge who adopts

<sup>25</sup> Punishable under section R. 370(12) of the Cameroon Penal Code, with a maximum penalty of CFA 25,000 (roughly £25) and/or 10 days' imprisonment. In the magistrate's ruling the provision of the Penal Code is typed as "section K. 370(11)", but that must be an error.

<sup>26</sup> Punishable under s. 231(1) of the Penal Code with a maximum penalty of six months' imprisonment and a fine of 100,000 CFA (about £100).

<sup>27</sup> Cameroon is divided administratively into ten provinces, each with a Governor (the highest administrative officer), a Court of Appeal (the highest court in a province) and a Procureur General (the highest officer in charge of public prosecutions in a province).

<sup>28</sup> In the European Convention of Human Rights, for example, the right to the presumption of innocence appears in art. 6 dealing with the right to a fair trial. Similarly in the African Charter on Human and Peoples' Rights, the right to the presumption of innocence, is to be found in art. 7 which deals with the right of every individual to have his or her cause heard.

<sup>29</sup> *Chiume and African Watch v. Malawi*, 7th Activity Report, cited in Ankumah, *op. cit.*, 68.

<sup>30</sup> Before the election of a new Government in 1994.

such a theory clearly violates the defendant's right to the presumption of innocence.

Since the right to the presumption of innocence appears to be directed chiefly against judicial authorities, it was at one time assumed that the principle of presumption of innocence imposes obligations only on judicial authorities, and therefore could be shown to have been violated only where, at the conclusion of proceedings ending in a conviction, the court's reasoning is seen to suggest that it regarded the defendant as guilty in advance.<sup>31</sup> But the fallacy of such a restrictive view of the scope of the principle has been exposed in the European Court of Human Rights (the European Court).

The European Court has taken the view that the principle of the presumption of innocence is not limited to cases where the proceedings result in a conviction.<sup>32</sup> Moreover, that court has also made it clear that the right to the presumption of innocence may be violated not only by a judge or court but also by other public authorities, such as the police, the department in charge of public prosecutions and even the Minister of Justice.<sup>33</sup> In *Allenet de Ribemont v. France*,<sup>34</sup> for example, M. Allenet de Ribemont had been arrested as part of an investigation into the murder of a member of parliament. The French Minister of Interior, the police superintendent in charge of the inquiry and the Director of the Criminal Investigation Department all made remarks at a press conference referring to M. de Ribemont as one of the instigators of the murder and thus an accomplice. The European Court held that these remarks were a declaration of M. de Ribemont's guilt before trial and that this was a breach of his right to the presumption of innocence.

It may be asked whether the interpretation of the scope of the right to the presumption of innocence by the European Court is relevant to the interpretation of the equivalent provision of the African Charter. It is submitted that it is. Under article 60 of the Charter, the Commission, the body charged with the responsibility of interpreting the provisions of the Charter,<sup>35</sup> is required to draw inspiration from international law on human rights. There is some evidence that the African Commission "attempts to draw inspiration from the practice of other human rights bodies",<sup>36</sup> including the practice of the European Commission and European Court of Human Rights.<sup>37</sup> It is not too much to say therefore that under the African Charter, and therefore under the law in Cameroon, obligations imposed by the principle of the presumption of innocence extend to public authorities such as the Procureur General, described by the magistrate in the *Nya Henry* case as "the highest officer I know to be in charge of public prosecutions in this province".

<sup>31</sup> This was the argument advanced by the French Government before the European Court of Human Rights in *Allenet de Ribemont v. France* (1995) 20 EHRR 557, para. 32.

<sup>32</sup> The European Court has found violations of the right to a presumption of innocence in cases where the defendant had been acquitted at the end of the proceedings (e.g. *Sekanina v. Austria* (1993) Series A no. 266-A) or where, for some reason, the proceedings were discontinued and the defendant was discharged (e.g. *Minelli v. Switzerland* (1983) 5 EHRR 554, *Allenet de Ribemont v. France*).

<sup>33</sup> *Allenet de Ribemont v. France*.

<sup>34</sup> *Ibid.*

<sup>35</sup> Art. 45(3).

<sup>36</sup> Ankumah, *op. cit.*, 74.

<sup>37</sup> *Cf. Ibid.*, 131.

**Unlawful detention?**

Even if a violation of the right to the presumption of innocence may be committed by a public official such as the Procureur General, the separate question remains of whether the unlawful detention of an accused could amount to such a violation. The answer, it is submitted, must be in the affirmative. If mere words by public authorities could amount to a breach of the right to the presumption of innocence, as in the *Allet de Ribemont* case, then it is not difficult to see how continued detention in defiance of a court order would make a stronger case for finding a violation of the right. After all actions speak louder than words. And in Cameroon in particular it is common knowledge that pre-trial detention is widely used as an instrument of punishment. Thus after his visit to Cameroon in 1999, the UN Special Rapporteur, Sir Nigel Rodley, concluded in his report that “pre-trial detention is used not to attain its primary goal of upholding order and security and facilitating investigations, but rather, *in the perception both of the public and forces of law and order*, as a sanction.”<sup>38</sup> Against that background, it is easy to see how the determination of the prosecuting authorities to keep the defendants in pre-trial detention even against an order of the court amounts to a presumption of guilt.

Yet it should not be supposed that every pre-trial detention which is unlawful will amount to a violation of the right to the presumption of innocence. Thus where the unlawfulness of the detention was unintentional there may be no such breach. This will be the case, for example, where the detention of a person is unlawful because the arrest warrant was defective in that the police mistakenly failed to comply with a certain formality. In such a case, the unlawfulness of the detention is unintentional and may be due either to negligence or to an excess of enthusiasm on the part of an official. The important point is that it is not the result of a conscious intent to treat the accused as guilty. Such a situation is different from a case, such as *Nya Henry*, where the unlawfulness of the detention is the result of a conscious intent to flout an order of the court admitting the defendant to bail. It is this deliberate act, to treat the defendant as a guilty person, in the face of a court decision that he or she should be presumed innocent that amounts to a clear violation of the right to the presumption of innocence. Therefore, it is respectfully suggested that the Cameroonian court was right to find that there had been a violation of the defendants’ right to the presumption of innocence.

Of course it is possible that the unlawful detention may also amount to the violation of a separate right enshrined in the African Charter, such as the right to liberty and the right not to be arbitrarily detained.<sup>39</sup> Few would deny that during the period that the five defendants were detained in violation of a court order for their release, they were deprived of their freedom for no lawful reason. And there is little doubt that their continued detention without lawful reason makes the detention arbitrary, and therefore unlawful under article 6 of the

---

<sup>38</sup> Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to UN Commission on Human Rights resolution 1998/38 (E/CN.4/2000/9/Add.2), para 53. Emphasis added. The problem of pre-trial detention is serious. The same report states (at para. 52) that “80 per cent of the current prison population of Cameroon consists of untried prisoners.”

<sup>39</sup> Under art. 6 of the Charter which reads: “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

African Charter. In most cases an individual's right to liberty is infringed when he or she is detained at a police station beyond the time permitted by law, so that the detention beyond the permitted time becomes unlawful detention. In such cases it is possible to argue that the police or the relevant administrative authority violates the law unintentionally. The Cameroonian case under discussion is spectacular but, sadly, not unique, in that the violation occurs in the face of a court order.<sup>40</sup> In any event, where there is a breach of a Charter right the question will arise whether there is an adequate remedy under national law.

#### IS THERE AN EFFECTIVE REMEDY?

##### Under traditional jurisdiction

The question of a remedy is of course very important because without an effective remedy a right is largely worthless. The African Charter envisages that each State party shall take legislative or other measures to give effect to the rights guaranteed by the Charter.<sup>41</sup> In the case of Cameroon, the principal measure which has been adopted is the establishment of a National Committee of Human Rights and Freedoms.<sup>42</sup> But the Cameroon Committee is no more effective in providing a remedy than the African Commission. It has only a reporting role,<sup>43</sup> it is seriously under-funded, and is not seen to be independent of political influence.<sup>44</sup> The result is that under national law in Cameroon those who allege infringements of their Charter rights have little choice but to turn to the courts for protection. Do the courts in Cameroon have powers to give a remedy for the breach of a Charter right? The first point to note is that the Charter has been ratified by Cameroon. Under the Constitution, the Charter has the force of law in Cameroon by virtue of ratification. Indeed where there is a conflict between a provision of the Charter and national legislation the provision of the Charter prevails.<sup>45</sup> It follows that a breach of a Charter provision is a breach of Cameroonian law and must be treated as such by domestic courts. Consequently, the courts can use their existing powers to give relief where there is a violation of a Charter right in the same way as they can give relief where there is a breach of some other national legislation. Domestic courts in Cameroon need not wait for a special legislative measure giving them additional powers to grant remedies for violations of Charter rights. This, I think, is widely recognized,

<sup>40</sup> This is not the first time that the administrative authorities in Cameroon have blatantly ignored a court order that they do not like. In *Benjamin Itoe v. Joseph Ncho* (No. BCA/1/81), unreported, for example, where the Procureur General had ignored a court order, the Bamenda Court of Appeal, lamented that a tendency on the part of the administrative authorities towards disobedience of court orders was "gaining ground". The pattern continued unabated, especially in high profile cases. Thus the order of the High Court of Bamenda in *Wakai v. The People* (1997) 1 CCLR 127 for the release of the applicants was ignored by the authorities who, after the order, simply removed the applicants from the common law jurisdiction of Bamenda to the civil law jurisdiction in Yaounde where their unlawful detention continued.

<sup>41</sup> See art. 62.

<sup>42</sup> Established by Decree No. 90/1450 of 8 November 1990.

<sup>43</sup> It only receives allegations of human rights violations and reports them to the President of the Republic and to other competent authorities. Its mandate allows it to visit detention units and to propose human rights measures to public authorities and to organize training programmes.

<sup>44</sup> The Committee is chaired by a former minister of the present regime, the state prosecutor of the Supreme Court is a member. And the Committee's activities are of a confidential nature and its reports and recommendations are made available only to the relevant public authorities.

<sup>45</sup> Art. 45 of the Constitution.

and it has never seriously been suggested that if one individual commits a breach of another's Charter right the court will refuse to grant a remedy. The problem is that very often the breach which cries out for a remedy is not a breach committed by a private individual against another; in most cases the alleged violation is by a public authority or the administration. The difficulty here is that cases involving the administration do give rise to a question of jurisdiction. This is because in Cameroon there is a divide between administrative courts and ordinary courts, each with its own separate jurisdiction.

### **Administrative courts or ordinary courts?**

Since in most cases complaints of human rights abuse are made against public authorities, it is an important question whether the ordinary courts have jurisdiction to give a remedy against a public authority or the administration. In most common law systems the problem really does not arise because the ordinary courts normally have such jurisdiction. In the case of Cameroon the position is different in that it has adopted the French system of separate administrative courts which exercise judicial control of the administration. According to this divide, ordinary courts do not in general have jurisdiction in administrative disputes. Therefore an individual seeking a remedy for a violation of a Charter right alleged to have been committed by someone who claims to have been acting in his or her administrative capacity will need to consider carefully whether the claim is properly one for the administrative courts or the ordinary courts.

#### *Administrative courts*

In Cameroon, under section 9(1) of a 1972 Ordinance<sup>46</sup> only an administrative court has jurisdiction in cases of administrative disputes against the State, public authorities and public corporations. Administrative disputes in this context include actions for damages for loss caused by an administrative act.<sup>47</sup> Therefore if a complainant suffers loss as a result of an administrative act which is in violation of the Charter, a claim for damages may be commenced in an administrative court. It may be that this approach towards controlling the administration and protecting human rights through special administrative courts is one which is in principle as good as any other. But in practice, in the Cameroonian context, it is less than ideal. This is because there is currently only one administrative court in Cameroon, the Administrative Bench of the Supreme Court,<sup>48</sup> and it is located in the capital city, Yaounde, which is somewhat distant from many parts of the country, especially considering the less than perfect roads and other transport infrastructure. The consequence is that few can afford the expense and trouble necessary to take complaints of human rights violations to

---

<sup>46</sup> S. 9(1) of Ordinance No. 72/6 of 26 August 1972 fixing the Organization of the Supreme Court, as amended.

<sup>47</sup> Ibid. s. 9(2)(b).

<sup>48</sup> Art. 32(3) of the 1972 Constitution. The position will be different when art. 40 of the 1996 Constitution enters into force. Under this article the Administrative Bench of the Supreme Court will have jurisdiction to hear appeals from lower courts in "cases of administrative disputes". This provision envisages that there will be lower courts with jurisdiction over cases of administrative disputes. It is not clear whether it is intended that the lower courts in question should be special administrative courts, as in France, or whether the ordinary courts will simply be given new jurisdiction over administrative disputes.

the Supreme Court.<sup>49</sup> And since that court is the only court with jurisdiction to give a remedy, those who cannot obtain access to the court are left without a remedy. Hence the exclusive jurisdiction of the Supreme Court in such cases is an obstacle to the effective protection of human rights in Cameroon.

#### *Ordinary courts*

As a result of the practical difficulties of accessing the Administrative Bench of the Supreme Court, it is often in the interest of many claimants to seek a remedy from the ordinary courts (Court of First Instance and High Court) which are more readily accessible at a local level. In this respect, the more the ordinary courts can intervene, the more accessible the remedy and the more effective the protection of human rights. However, for the ordinary court to assume jurisdiction, the claimant needs to show that the claim is one within the jurisdiction of the ordinary courts. The key question then is this, to what extent do the ordinary courts have jurisdiction in cases where the alleged violation involved an action by a public authority?

At one time the view gained currency that as the legislative provisions give the Administrative Bench of the Supreme Court jurisdiction in cases of administrative disputes, the ordinary courts in Cameroon therefore lack jurisdiction in any case involving any action taken by the administration. It was assumed that a person who alleges that his or her human rights had been violated by a public authority could not obtain a remedy from the ordinary courts; he or she had to go to the Supreme Court. It is stated in one text,<sup>50</sup> for example, that the Supreme Court has jurisdiction to decide *all* administrative cases. And it is then stated that administrative litigation includes disputes concerning "any arbitrary step by the administration against liberty and property".<sup>51</sup>

Yet it is not correct to say that the ordinary courts do not have jurisdiction in some matters involving action taken by the administration. Section 9(4) of the Ordinance of 1972 clearly specifies such instances. These include cases of (i) trespass and (ii) arbitrary action (or *voies de fait*) by the administration. The same provision even goes on to stipulate that in such cases the ordinary court has jurisdiction to order any measure to put an end to the impugned action by the administration. So, if a public authority trespasses on to a person's private property the ordinary courts have jurisdiction under section 9(4) to grant a remedy. There seems no reason why, if the administrative trespass is such that it violates a right under the Charter (such as the right to property), the victim of that breach of a Charter right should not be able to commence proceedings in the ordinary court for a remedy. And an ordinary court dealing with such a case can grant such remedy as may be necessary to put an end to the violation. Although section 9(4) does not mention damages specifically, there seems no reason why damages should not form part of the measures which may be ordered by the court. Therefore it is submitted that under that section the ordinary courts in Cameroon have jurisdiction to grant a remedy against the administration where there has been a violation of the claimant's Charter right as a result of administrative trespass on the claimant's private property. The problem with

<sup>49</sup> One only needs to think of the expense and practical difficulties faced by a citizen in a small town far removed from Yaounde to see why few bother to pursue such claims.

<sup>50</sup> C. Anyangwe, *The Cameroonian Judicial System*, Yaounde, 1987, 171.

<sup>51</sup> *Ibid.*

this remedy is that it applies only in this limited context and will not be available in the absence of administrative trespass, except where the action in question is so irregular or arbitrary as to bring the doctrine of *voies de fait* into play.

The doctrine of *voies de fait* is borrowed from French administrative law.<sup>52</sup> Basically, it applies where an action by a public authority is so arbitrary or irregular that it loses its character as an administrative act and consequently is treated as if it were the act of a private body, and therefore may be adjudicated upon by the ordinary courts, rather than the administrative courts. In Cameroon the doctrine has been embedded in statute under section 9(4) of the 1972 Ordinance. This enactment of the doctrine is a positive step which clearly gives the ordinary courts jurisdiction to entertain claims in cases involving action by public authorities.<sup>53</sup> Indeed the view that the ordinary courts have jurisdiction in cases of *voies de fait* has been confirmed by the Supreme Court<sup>54</sup> and applied in many cases by the Court of Appeal<sup>55</sup> and High Court.<sup>56</sup> When an ordinary court assumes jurisdiction under the *voies de fait* principle, it can grant any remedy which is normally within its powers. It is submitted that this jurisdiction could, and should, be exercised so as to give remedies, in appropriate cases, where there has been a violation of a claimant's human rights under the Charter.

If a court has jurisdiction to deal with a breach of the Charter, whether the jurisdiction is under the doctrine of *voies de fait* or not, the question will arise: what is the practical and effective remedy for the breach? In the case of the right to the presumption of innocence, the effectiveness of the remedies within the existing powers of the domestic courts will depend on whether the violation is established before, during or after the criminal trial.

### Where the breach is established before a trial

There are certain situations in which an individual's right under the Charter may be infringed by the action of a person or authority that is not related to any prospective prosecution at all. In such cases the complainant is entitled to seek immediate relief from the High Court. The relief may take the form of an injunction or an award of damages. If, for example, there is a breach of article 6 of the Charter in that a person is detained or imprisoned without lawful excuse, the High Court in Cameroon has jurisdiction<sup>57</sup> to grant an order for the immediate release of the individual. In *Richard Tikum v. Ngwan Mbanyamsick*,<sup>58</sup> for example, the High Court granted injunctive relief against a traditional ruler whose actions were found to be in breach of the applicant's fundamental human

<sup>52</sup> For a good discussion of the doctrine in English, see, L. Neville Brown and John Bell, *French Administrative Law*, 5th ed., Oxford, 1998, 139–140.

<sup>53</sup> It has been held (*Wakai v. The People* (1997) 1 CCLR 127) that the fact that the impugned action was purportedly taken under emergency laws does not exclude the jurisdiction of the ordinary courts based on the doctrine of *voie de fait*.

<sup>54</sup> E.g. *John Enoch v. Zachary Abe Tatah*: No. 26/78/79/cc, especially the report of the conseiller/rapporteur. Even before the 1972 Ordinance, the doctrine of *voies de fait* had been recognized in Cameroon by the decision of the Full Bench of the Federal Supreme Court, as it then was, in *Nje Ndongo's* case: No. 10 of 17 October 1968.

<sup>55</sup> E.g. the Bamenda Court of Appeal in *Joseph Ncho v. Benjamin Itoe*: No. BCA/1/81 (judgment 13 July 1981 unreported).

<sup>56</sup> Most notably in the celebrated case of *Wakai v. The People* (1997) 1 CCLR 127.

<sup>57</sup> S. 16 of Law No. 72/4 of 26 August 1972 as amended by Law No. 89/019 of 29 December 1989.

<sup>58</sup> High Court of Mbengui, Suit No. MBHC/17M/2000, unreported, but noted (2001) *Juridis Périodique* 31, by Simon Tabe Tabe.

rights of freedom of association<sup>59</sup> and the right to property.<sup>60</sup> In that case the action which was found to be in breach of the Charter was completely unrelated to any criminal investigations or trial. But in other, perhaps most, cases, the conduct in breach of the Charter would be conduct on the part of the police or other prosecuting authority in connection with a criminal investigation or trial.

In such a case the complainant can also commence proceedings in the High Court even before he or she is charged with any offence at all. If, in such proceedings, the court finds that there has been a breach of the Charter, it can give a remedy even before the complainant has been charged with any offence. The case of *Wakai & 172 Ors v. The People*<sup>61</sup> is an example of how such a remedy is possible under existing law in Cameroon. Following the proclamation of the results of Presidential elections of 11 October 1992 there was widespread unrest involving the destruction of property and loss of lives in the North West Province and in Bamenda in particular.<sup>62</sup> To impose calm and order, a state of emergency was declared in Bamenda and a number of people were arrested and detained under emergency legislation.<sup>63</sup> The applicants (173 in number) were amongst those arrested and detained. Even before they were charged with any offence, the applicants applied to the High Court for bail and for *any other order* which the court deemed fit to make. Under the relevant legislation, the detention could only be effected on the order of specified administrative officials.<sup>64</sup> However, the names of 38 of the applicants did not even appear on any of the detention orders. The High Court of Bamenda held that the continued detention of these 38 applicants was unlawful. By way of remedy the court ordered their immediate release, not on bail, but “as of right”.<sup>65</sup>

Another remedy which may be granted by the ordinary courts is an award of damages. In cases where the ordinary court assumes jurisdiction under the doctrine of *voies de fait* the damages may be awarded against the public official in his personal capacity, since the action in question is *ex hypothesi* not an administrative act. In *John Enoh v. Zachary Abe Tatah*<sup>66</sup> the learned Conseiller/Rapporteur of the Supreme Court made it clear that in cases where the action of a public official was so irregular as to attract the doctrine of *voies de fait*, the public official “becomes personally liable if his illegal acts cause damage to an individual who should file his action *not* in the Administrative Bench of the Supreme Court but in the ordinary civil courts”.<sup>67</sup>

This principle was applied in *Benjamin Itoe v. Joseph Ncho*.<sup>68</sup> The two defendants held public offices. The first defendant was the Procureur General of the North

<sup>59</sup> Art. 10(1) of the Charter.

<sup>60</sup> Art. 14 of the Charter.

<sup>61</sup> (1997) 1 CCLR 127.

<sup>62</sup> Bamenda is the capital town of the North West Province and the residence of John Fru Ndi, the main opposition candidate for the post of President of the Republic. Hence the serious nature of the disturbances in the town when it was announced on state media that the incumbent, Paul Biya, was the winner of the presidential elections.

<sup>63</sup> Law No. 90/47 of 19 December 1990.

<sup>64</sup> That is to say, in ascending order of rank, the Prefect of an Administrative Division, the Governor of a Province, or the Minister of Territorial Administration.

<sup>65</sup> The rest of the defendants were released on bail. But the administration, in characteristic fashion, defied the court order and transferred the defendants from the North West Province in Anglophone (common law) Cameroon to a prison in the Centre Province in Francophone (civil law) Cameroon.

<sup>66</sup> No. 26/78/79/cc, cited in *Benjamin Itoe v. Joseph Ncho*: No. BCA/1/81, unreported.

<sup>67</sup> Emphasis in the original.

<sup>68</sup> No. BCA/1/81 (judgment 13 July 1981, unreported).

West Province and the second defendant was the Commissioner of Police in Bamenda, the capital town of the province. The defendants, purporting to be acting in their official capacities, trespassed on to the claimant's premises, ransacked his home and took away property. They detained the claimant's property, including a commercial vehicle (a petrol tanker) for months. The High Court granted an order for the release of the vehicle. But the defendants contemptuously ignored the court order. The claimant then commenced proceedings before the High Court claiming damages against the defendants in their personal capacities. The High Court awarded substantial damages against the defendants personally. The defendants' argument that their acts, which constituted the claimant's cause of action, were administrative and therefore the proper court was the Administrative Bench of the Supreme Court and not the ordinary courts, was rejected by the High Court and the Bamenda Court of Appeal. The Court of Appeal examined the actions of the defendants and held that they "were unambiguously arbitrary steps against the liberty and property" of the claimant, so that the ordinary courts had jurisdiction under the doctrine of *voies de fait* as enshrined in section 9(4) of the 1972 Ordinance.

The court went on to say that even if the defendants' original acts were not arbitrary, their continued acts in defiance of a court order were clearly illegal and arbitrary and therefore attracted the jurisdiction of the ordinary courts. It is difficult to disagree with this view. Action by a public official which blatantly disregards a court order is an action which certainly involves flagrant irregularity. But the situation is worse where the action in contemptuous disregard of a court order is that of public officials whose duty it is to enforce the observance of the law. In such a case it is clear that the irregularity is both flagrant and gross and is therefore bound to attract the doctrine of *voies de fait*. It is not difficult to see how the remedy granted in this case (damages) could be awarded in cases where the arbitrary or illegal act is one which violates a claimant's fundamental right under the Charter.

In cases where the right infringed is the right to the presumption of innocence, it is a difficult question what the just and appropriate remedy should be where a court determines that there has been a violation before any criminal trial. Injunctive relief will only stop the breach from continuing. It will not compensate for the wrong already done. Damages may provide some compensation but how, it may be asked, can damages adequately compensate for any violation to the complainant's right to a fair trial which the breach of the right to the presumption of innocence might have occasioned?<sup>69</sup> This problem was highlighted in the opinion of the dissenting judge in the *Alenet de Ribemont* case. He considered that if the violation of the right to the presumption of innocence by a public authority is established before the trial of the complainant, no practical and effective remedy can be afforded for the violation. It is true that there is a problem in such a case, but the problem of lack of effective remedy for a violation established before trial can be over-estimated. In the context of the European Convention, if the violation (under article 6(2)) is not so serious that it is bound to involve a breach of the right to a fair trial (under article 6(1)) then damages may be an adequate remedy. In other words, the breach of the right to the presumption of innocence does not necessarily involve a breach of the right to a fair trial. But under the African Charter a similar distinction is not made. The fair trial right

---

<sup>69</sup> Assuming of course that the complainant will subsequently be tried.

in article 7(1) for an individual to have his or her cause heard comprises, *inter alia*, the right to the presumption of innocence (article 7(1)(b)). Therefore, it is submitted, any violation of the right to the presumption of innocence under subparagraph (b) of article 7(1) is a violation of the right to have one's cause heard under article 7(1). If this is right, then in the context of Cameroon, the difficulties involved in allowing a trial subsequently to proceed are greater. It may be that in such a case the High Court hearing the complaint of violation of the right to the presumption of innocence can, in exercise of its existing powers,<sup>70</sup> issue an order restraining the department of public prosecutions from proceeding with the particular prosecution connected with the established violations.<sup>71</sup> Even if it is doubtful whether the existing jurisdiction of the High Court to grant an order of prohibition under section 16 of the Law of 1972<sup>72</sup> extends to such a case, it is submitted that the High Court has jurisdiction under section 9(4) of the 1972 Ordinance to grant such an order as a necessary measure to put an end to the violation.

### Where the violation is found during a criminal trial

In certain cases, as indeed in *Nye Henry*, claims of human rights violations will be raised in connection with criminal proceedings. In such cases the appropriate remedy may be obtained from the criminal court or through separate proceedings before some other court.

#### *Remedies which may be granted by the criminal court*

In Cameroon it is generally accepted that persons who claim that a public authority has violated their human rights under the African Charter may rely on the infringement in any criminal proceedings against them. The only real question is as to the remedies which a criminal court is able to grant in such cases. There appears to be no specific statutory provision which sets out the relief which may be granted by a criminal court for breach of the Charter. But it is not too much to say that the court should be able to grant such remedy as it considers just and appropriate, provided that the remedy or relief is *within its powers*.<sup>73</sup> It is commonplace that in criminal proceedings the courts in Cameroon (Court of First Instance and High Court)<sup>74</sup> have the power (i) to dismiss a complaint "on the merits", which has the effect of an acquittal,<sup>75</sup> (ii) to dismiss a complaint "not on the merits" or "without prejudice", which does not have the effect of an acquittal,<sup>76</sup> (iii) to discharge the accused on the ground that there

<sup>70</sup> S. 16(g) of Law No. 72/4 of 26 August 1972, as amended by Law No. 89/019 of 29 December 1989.

<sup>71</sup> Whether every breach of the right under art. 7(1) of the Charter should give rise to the right to have the trial discontinued is another matter. Even if one takes the view that there are degrees of breaches of art. 7(1) so that the remedy being discussed in the text should be available only in cases of a serious breach, the question remains whether the High Court has powers to issue an order restraining the department in charge of public prosecutions from instituting a prosecution before the defendant is charged.

<sup>72</sup> *Ibid.*

<sup>73</sup> In the UK s. 8(1) of the Human Rights Act 1998 is to the same effect.

<sup>74</sup> Ss. 13 and 15 of Law No. 72/4 of 26 August 1972 as amended by Law No. 89/019 of 29 December 1989.

<sup>75</sup> Criminal Procedure Ordinance, s. 301(1).

<sup>76</sup> *Ibid.* s. 301(2).

is no case to answer,<sup>77</sup> (iv) to exclude evidence,<sup>78</sup> or even (v) to reflect the breach in the sentence which is imposed.

In *The People v. Nye Henry* the magistrate decided that the appropriate remedy was to dismiss the complaint on the merits. The words of the magistrate merit quotation in full:

“[T]he principle of law which I now adumbrate is that—and who says African Magistrates cannot do this—where a court of competent jurisdiction in a criminal matter orders the release of a defendant on bail and the department in charge of public prosecutions—in our case the Legal Department—refuses to carry out that order, the obvious conclusion is that the defendant has been denied the right of presumption of innocence and the proper course for that court is to set the defendant free.”

Is this remedy the most appropriate one in the circumstances of this case? It is submitted that the answer to that question is in the affirmative. All the other remedies are either unsuitable or ineffective in the circumstances of the case. First, there is no question of the exclusion of evidence. It simply does not arise in this case. Secondly, there is also no question of discharging the defendants on the ground that there is no case to answer. That remedy applies only on the basis of the case presented by the prosecution. And the violation of human rights in this case does not affect the ability of the prosecution to put their case on the charges laid against the defendants. Thirdly, it is true that a possible remedy would have been to proceed with the trial and to reflect the violation of human rights in the sentence which is imposed. But, in the light of the particular violation in this case, namely, a breach of the right to the presumption of innocence, to have proceeded with the trial on this basis would have left the court open to the charge that it too was presuming the defendants guilty, thereby committing another breach of the very right to the presumption of innocence, since the remedy (reducing sentence) is only available if the defendants are convicted. Therefore this was not a suitable remedy in this case. Finally, the only other alternative remedy available, to dismiss the complaint “not on the merits” or “without prejudice”, so that it does not have the effect of an acquittal, would have been a feeble response to what is a serious violation.

It is the gravity of the misconduct, in that it was a blatant and defiant violation of human rights, that justifies the stronger remedy of, in effect, an acquittal. Not only was the violation in this case committed by the Procureur General, the highest law enforcement official in the relevant province, it was an infringement of human rights which took place in defiance of a court order, that is to say, under the “very nose” of the court, as the magistrate himself described it. By his conduct, the Procureur General, the official whose duty it is to enforce the law, at once (a) disobeyed a court order, (b) deprived the defendants of their liberty without lawful excuse, and (c) infringed their right to the presumption of innocence. This is executive lawlessness of a most despicable kind. This point did not escape the learned magistrate who observed that by their lawlessness, the department of public prosecutions, headed by the Procureur General, had turned themselves into “persecutors and not prosecutors”. It is clear that the conduct of the Procureur General in this case directly threatened the very idea

<sup>77</sup> Ibid. s.286. See also *The People v. Lekunze* (2000) 1 CCLR 74; *Injoku v. The People* (1998) 1 CCLR 118; *The People v. Pius Fusi* (1968) WCLR 30.

<sup>78</sup> *Kusiduba v. The People* (1998) 2 CCLR 234.

of the rule of law and the whole concept of freedom in society. That is why the magistrate took pains to emphasize the point “that this nation of Cameroon is a state of law where the decision of a competent court, until reversed by a superior court, stands and has the force of law”. It is submitted that the court must take a firm stance against flagrant executive malpractice of this kind which so directly threatens the rule of law. A criminal court can only do so by dismissing the complaint on the merits.

A criminal court is not just concerned with the question whether or not the defendant is guilty of the offence charged. The judiciary, including a magistrate in a criminal court, has a responsibility to maintain the rule of law and to refuse to countenance executive malpractice and abuse of power which threatens basic human rights or the rule of law.<sup>79</sup> Therefore if it comes to the attention of the court that there has been serious abuse of power by the department in charge of public prosecutions, the court should express its strong disapproval by dismissing the complaint on the merits. Two advantages may be gained from the use of this remedy: (i) it should have the effect of discouraging the department in charge of public prosecutions and the police from engaging in similar misconduct in the future and (ii) it would safeguard the moral integrity of the criminal process. It is for this latter reason that the criminal court cannot simply turn a blind eye to the violation of human rights by the department in charge of public prosecutions, proceed with the trial, and leave the defendants to seek in the civil courts such remedy against the department as may be available. The criminal process ought not to proceed on the basis of such gross misconduct by those in charge of public prosecutions.

Another reason which argues in favour of the remedy granted by the magistrate is that, quite apart from the policy of deterrence or safeguarding the integrity of the criminal process, where the violation amounts to a breach of the defendant's right to a fair trial, the proper remedy is to discontinue the proceedings. It appears that in the context of the Charter a breach of the right to the presumption of innocence necessarily involves a breach of the right to a fair trial under article 7(1). This seems to be the view taken by the magistrate in *The People v. Nya Henry*. Hence once he found that there had been a violation of the right to the presumption of innocence, he concluded that the trial could not continue. He made it clear that “I will be doing no justice in this matter to call upon these people to take a plea before me with the gross violation of their constitutional and Human Rights”.

#### *Damages in separate proceedings*

Apart from or in addition to any remedy which the criminal court may grant, an individual whose right under the Charter has been infringed may pursue a free-standing claim in separate proceedings for damages against the public authority alleged to have committed the violation. At this point it should be recalled that the general rule in Cameroon is that only the administrative court has jurisdiction in respect of claims for damages against public authorities. Generally, the ordinary courts do not have jurisdiction to award damages against public authorities. The position is of course different in other systems of law. In England, for example, by section 7(1)(a) of the Human Rights Act 1998, a person

<sup>79</sup> A similar approach has been adopted under English law in cases of pre-trial misconduct by the police: *R. v. Horseferry Road Magistrates' Court, ex parte Bennett* [1993] 3 WLR 90.

who claims that a public authority has violated his or her human rights<sup>80</sup> may bring proceedings against that authority in the appropriate court or tribunal.<sup>81</sup> The expression “appropriate court or tribunal” means ordinary courts, so that a claim under section 7(1)(a) may be brought either in the County Court or the High Court,<sup>82</sup> depending on the usual jurisdictional limit. So, where a criminal court (Magistrates Court or Crown Court) has found that a public authority acted in violation of the defendant’s human rights, a claim for damages could be brought in separate civil proceedings before the ordinary civil courts (County Court or High Court). In Cameroon, as in England, where a criminal court finds that a public authority has acted in violation of the complainant’s human rights, and the complainant seeks damages for that violation, he or she would need to pursue separate civil proceedings for damages against the public authority. But in Cameroon, the civil proceedings against a public authority may only be brought in an administrative court, subject to the exception in section 9(4) of the 1972 Ordinance which allows claims to be brought before the ordinary courts in cases of administrative trespass and arbitrary action or *voies de fait*.

Therefore the defendants in the case of *Nya Henry* could have maintained a separate civil claim for damages against the department of public prosecutions in the Administrative Bench of the Supreme Court if the action of the Procureur General was deemed to be an administrative act. But if, as is here submitted, the illegality of the action in question is so flagrant and gross that it ceases to be an administrative act, then the claim for damages should be against the person acting as the Procureur General in his personal capacity. The action may be brought in the ordinary civil court (Court of First Instance or High Court) under the doctrine of *voies de fait*. In either case the court (whether the administrative court or the ordinary civil court) would have to assess the amount of damages recoverable. That will depend of course on the Charter right infringed and the degree of the infringement.

In the case of the right to the presumption of innocence, the damages recoverable should include (i) pecuniary loss suffered as a result of the violation, (ii) non-pecuniary loss caused by the violation, and (iii) legal costs and expenses incurred in attempting to secure redress for the violation. Pecuniary loss includes the amount of fine by way of penalty imposed by the court as a result of the conviction.<sup>83</sup> It also includes loss of earnings, especially where, as in the case of *Nya Henry*, the complainant was physically prevented from working by the detention. But pecuniary loss is not limited to cases of physical detention. Loss of earnings as a result of damage to business opportunities is also loss for which compensation should be recoverable. In *Allenet de Ribemont v. France*<sup>84</sup> the complainant was awarded compensation for damage to his business opportunities

<sup>80</sup> That is to say, the public authority has acted in a way which is made unlawful by s. 6 of the Act.

<sup>81</sup> In England it is said that this procedure is there to ensure that an individual can bring a claim for the violation of human rights under the European Convention in instances where there is no existing remedy available under domestic law which is capable of adaptation: B. Emmerson and A. Ashworth, *Human Rights and Criminal Justice*, London, 2001, paras. 3–41.

<sup>82</sup> Civil Procedure Rules, Rule 7.11.

<sup>83</sup> Cf. *Lingens v. Austria* (1986) 8 EHRR 407, where the European Court awarded a sum equivalent to the fine and costs which had been awarded against the complainant in the criminal proceedings against him.

<sup>84</sup> (1996) 20 EHRR 557.

as a result of statements which infringed his right to the presumption of innocence.<sup>85</sup>

Non-pecuniary loss includes pain and suffering arising from unlawful detention.<sup>86</sup> The assessment of damages for non-pecuniary loss is of course more difficult. It is by no means clear how much should be awarded, for example, for a day or week spent in unlawful detention. But the difficulty in the assessment of these damages should not deter national judges who are accustomed to making such assessments in common law cases of false imprisonment by the police.<sup>87</sup> Thus a person who has been unlawfully detained by the police or the department of public prosecutions so that his or her right under article 6 of the Charter has been violated may be awarded non-pecuniary damages under national law.<sup>88</sup> If the claim is brought under the common law of false imprisonment then the court should not award any additional sum by way of "human rights" or "Charter" damages. The reason is because the right under article 6 of the Charter appears to be co-extensive with the common law of false imprisonment. Therefore the ordinary award for false imprisonment should provide an adequate sum for the breach of article 6 of the Charter where the breach arises out of the same circumstances.

### Where the violation is established after the trial

In cases where the violation is established only after the trial, the options open to the court are in practice limited, and they depend on whether the complainant was convicted or not. Where the complainant was not convicted the only practical remedy will be monetary compensation by way of damages.

Where the complainant was convicted, the conviction should be quashed if the violation of the right to the presumption of innocence resulted in the violation of the defendant's right to a fair trial. It has been seen that under the European Convention of Human Rights the breach of the right to the presumption of innocence under article 6(2) will not necessarily result in an infringement of the right to a fair trial under article 6(1). But, as has been suggested above, the position is different under the African Charter. Breach of the right to the presumption of innocence under the Charter will always involve breach of the right to a fair trial. If this view is correct, then if it is found that the complainant's right to the presumption of innocence was violated in proceedings in which he or she was convicted, the conviction should be quashed, if the court has the power to do so. In the *Nya Henry* case, where the breach of the right to the presumption of innocence was found during a trial, the court held that the trial could not in justice continue. If a trial ought not to continue because of a

<sup>85</sup> In *Bagetta v. Italy* (1998) 10 EHRR 325 the European Court awarded compensation for the financial loss suffered as a result of criminal proceedings which failed to be concluded within a reasonable time.

<sup>86</sup> Cf. in England, *R. v. Governor of Brockhill Prison, ex p. Evans (No. 2)* [1998] 4 All ER 993, damages awarded to individuals whose release from prison was delayed beyond the lawful date.

<sup>87</sup> In England, the Court of Appeal in *Thompson v. Commissioner of Police* [1997] 2 All ER 762 laid down specific guidelines as to the levels of award which were appropriate for false imprisonment or malicious prosecution to the extent of suggesting figures for each day of detention.

<sup>88</sup> Art. 6 of the African Charter seeks to protect the same right which is protected under art. 5 of the European Convention. One difference between the two provisions is that the remedy of monetary compensation is expressly provided for in art. 5(5) of the European Convention for a violation of the right in art. 5.

particular violation, then it is not too much to say that if the same violation is found after trial the conviction should be quashed.

If the breach of the Charter is established at the level of a national court, then if that court has power to quash the conviction it may do so. In Cameroon the Court of Appeal has power to quash a conviction. It is submitted that the same power can, and should, be used to quash a conviction where there has been a breach of the right to a fair trial under article 7(1) of the African Charter.<sup>89</sup> Where the case goes beyond the national courts and the violation is only established at the level of the African Commission then the only practical and effective remedy may be damages in a free-standing action in a domestic court. The African Commission, as has been seen, has no power to make any award of damages against a State. It certainly has no power to make an order for a conviction to be quashed. Even the European Court which has jurisdiction to award monetary compensation under article 41 of the European Convention, has no jurisdiction<sup>90</sup> to quash a criminal conviction.<sup>91</sup> The question is whether, if a violation is established at the level of the African Commission, the complainant could take that finding to a national court to have his conviction quashed. This is a moot point which has not yet been tested in the Cameroonian courts. But it is not immediately clear why this should be impossible. Even if it is beyond the power of national courts to quash a conviction on the findings of the Commission, the complainant should be able to use the findings to maintain a civil claim for monetary compensation in the domestic courts as explained above.

#### CONCLUSION

The African Commission was established to protect human rights and ensure their protection in Africa. But it is now widely acknowledged that the system of redress through the Commission has failed to achieve that purpose. The inability of the Commission to give an effective remedy has meant that victims of human rights abuse in Africa have for the most part looked no further than their national courts for a remedy. Yet national judges have largely been unequal to the challenge of providing a remedy where the alleged violation is by the administration. But the disappointment which this occasions should not cause us to give up hope altogether. There are a few but encouraging instances where national judges have not been prepared to turn a blind eye to flagrant and serious human rights violations by the administration.

This article has endeavoured to show, using the example of Cameroon, that national courts sometimes have the formal power to provide redress where there has been a breach of the African Charter. That for the most part they have not done so is something which must be attributable to other reasons. Of these the lack of judicial independence surely takes a prominent place.<sup>92</sup> In some countries

<sup>89</sup> In England, for example, the Court of Appeal (Criminal Division) has power to quash a conviction where there has been a breach of the right to a fair trial under art. 6 of the European Convention.

<sup>90</sup> Art. 41 is in terms that if the Court finds that there has been a violation of the Convention, "and the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

<sup>91</sup> *Schmautzer v. Austria* (1996) 21 EHRR 511, paras. 43–44.

<sup>92</sup> The problem of lack of independence of the judiciary is one which can only be dealt with at a wider political level as part of any constitutional arrangement for the separation of power between the different branches of state power.

a judge who ventures to grant a remedy for human rights violations against the administration in a politically sensitive case will be risking his or her career and sometimes more. That is why it is worthwhile to record and celebrate the courage of those few judges, like the magistrate in the *Nya Henry* case, who, in the face of intimidation from the executive, are prepared to stand up for the rule of law and the protection of human rights in Africa. It is to be hoped that the proposed African Court of Human Rights will go much further than the Commission and national courts in the protection of human rights in Africa through the provision of an effective remedy, such as monetary compensation. If that dream should come true then at least some claimants who cannot obtain a remedy before national judges who are under political influence will have somewhere else to take their prayer for redress.

#### POSTSCRIPT

The problem of lack of independence of the judiciary in Cameroon is serious. In his report on Cameroon, the UN Special Rapporteur identified this as one of the factors which contribute to the poor state of human rights protection in Cameroon.<sup>93</sup> In the *Nya Henry* case the magistrate could not conceal the fact that he was under pressure from the executive. He could see that at least his career could be adversely affected if he decided the case in a way which went against the wishes of the executive.<sup>94</sup> Thus he observed in his ruling that “those who cherish the status of this country as a state of law should keenly follow up the outcome of this case before the superior courts and, why not, any developments in the career of this magistrate after this case”. On the first point, it can be reported that the case has gone to the Court of Appeal.<sup>95</sup> On the second point, within months of the decision in *Nya Henry* the magistrate was removed from his post and transferred to serve in the office of the Procureur General of the South West Province.<sup>96</sup> Magistrate Abednego observed in his ruling that “a Magistrate in this our state of law is free to render . . . justice without fear or favour”. Whether the development in his career after he rendered justice without fear or favour confirms his view that in Cameroon a magistrate “is free” to do so is perhaps a question on which views may differ. But few would disagree with the proposition that judicial independence is an essential requirement if the rights enshrined in the Charter are to be enforced fully in domestic courts.

<sup>93</sup> Report of Special Rapporteur (E/CN.4/2000/9/add.2), para. 71, where he recorded the “general perception that judges and prosecutors were and considered themselves as officials of the Ministry of Justice, and thus subject to the authority of the executive power.”

<sup>94</sup> That perhaps explains why he went out of his way to bring his decision to the attention of the international community by ordering that the ruling be served, for their information, on (i) the French Ambassador in Cameroon, (ii) the British High Commissioner in Cameroon, (iii) the Ambassador of the United States of America in Cameroon, (iv) the UN Commission for Human Rights, (v) Amnesty International and (vi) Transparency International.

<sup>95</sup> A few days after the complaint was dismissed, the defendants were in fact released.

<sup>96</sup> This kind of sanction is apparently not uncommon in Francophone states. In Senegal, for example, Judge Kandji, the judge who took the courageous decision to indict Hissene Habré, the former Head of State of Chad in a landmark case, was quickly transferred from his post as chief investigating judge of the Dakar Regional Court to become assistant state prosecutor at the Dakar Court of Appeals. This transfer happened after Habré’s lawyer in the case became Senegal’s Minister of Justice. See I. Sansani op. cit. n. 12 at 34.