# Introduction

This paper is concerned with the conflict of jurisdiction within the ECOWAS Community and the function of the ECOWAS Court of Justice resulting from it's nature as a supranational Constitutional Court.[1] In order to explain the term "conflict of jurisdiction", it is necessary to define the term "jurisdiction" in greater detail. Jurisdiction can be understood in a formal and material sense.[2] In a formal sense, jurisdiction means the competence of a court to decide on a legal dispute.[3] In this sense, the term "jurisdiction" is understood as the competence of the court in a judicial instance. In contrast, jurisdiction in a material sense describes the material manifestations of these responsibilities, i.e. the contents of the decision.[4]Since the conflict relates to the term "jurisdiction", the term of "conflict" is also to be understood from both points of view.[5] Formal conflicts arise when two or more courts claim jurisdiction as only one claim can be fulfilled at a time.[6]A divergence in the content of decisions taken by different courts on the other hand refers to a conflict in a material sense.[7]

Finally, regarding the conflict of laws, the term of conflict of jurisdiction has another, very different meaning. It insofar concerns the conflict of competence between courts of different countries as these have not necessarily signed an international treaty. This conflict of jurisdiction is two-dimensional. A positive conflict arises in cases where multiple courts, according to the relevant collisionregulations, claim their power to adjudicate in a particular case so that, in theory, this case could be brought before numerous courts. In contrast, a negative conflict of jurisdiction arises, when

1 Cohen-Jonathan, La fonction quasi constitutionnelle de la Cour Européenne des Droits de l'Homme, in: Renouveau du Droit constitutionnel. Mélanges en l'honneur de Louis Favoreu, 1127 (1028); Wildhaber, Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshofs für Menschenrechte?, in: EuGRZ (2002), 569 (569) [A constitutional future for the European Court of Justice for Human Rights].

2 Klatt, Die praktische Konkordanz von Kompetenzen, 34. [The practical concordance of competences].

3 Klatt, Die praktische Konkordanz von Kompetenzen, 34.

4 Klatt, Die praktische Konkordanz von Kompetenzen, 58.

5 Klatt, Die praktische Konkordanz von Kompetenzen, 60.

6 Klatt, Die praktische Konkordanz von Kompetenzen, 60.

7 Klatt, Die praktische Konkordanz von Kompetenzen, 60.

none of the courts may be approached due to a conflict of law regarding the rules of competence or all approached forums reject responsibility due to the aforementioned rules. As a result, none of the courts may adjudicate.

For the purpose of this paper, the term "conflict of jurisdiction" has a more specific meaning. Whilst not necessarily, conflicts of jurisdiction are often conflicts of competence.[8] The examination presented here looks at the competing or contradictory conflicts of competence of different organs of jurisdiction in multi-level-governance systems.[9] To be specific, it is about the theoretical possibility of conflicts of jurisdiction between national Constitutional Courts or Supreme Courts of West African countries and the ECOWAS Court of Justice. In general, national constitutional courts have the competence to issue legally binding and final judgments which develop an *erga-omnes* effect on national level. The conflict and its effects[10] can, for example, be found in Art. 46 (3) of the Nigerian Constitution or in Art. 106 of the Togolese Constitution. Therefore, the conflict of jurisdiction has its origin in the juxtaposition of the finality of decisions of national courts and the possibility of legal action at the court of justice on the ECOWAS-level.[11] By challenging the final binding decisions of national Constitutional Courts[12], these conflicts of jurisdiction not only represent a theoretical paradox but are also the basis for a substantial and real risk potential, because they challenge the final binding decision of domestic constitutional courts.[13] This risk potential comes to show in such cases where courts on different levels reach contradicting verdicts.[14] It is then no

8 Sauer, Jurisdiktionskonflikte in Mehrebenensystemen, 59. [Conflicts of jurisdiction in multi-level-governance systems].

9 Linder, Grundrechtsschutz in Europa – System einer Kollisionsdogmatik, in: EuR (2007), 160 (161); Schilling, Deutscher Grundrechtsschutz zwischen staatlicher Souveränität und men- schenrechtlicher Europäisierung, 10. [Protection of fundamental law between state sovereignity and Europeanisation in terms of Human Rights].

10 Enabulele, International Community Law Review (2010), 111 (119); Ebobrah, A critical Ana- lysis of the human rights mandate of the ECOWAS Community Court of Justice, 14, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 16/05/2015); Knop, Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze, 57. [Openness toward International and European Law].

11 Enabulele, International Community Law Review (2010), 111 (132).

12 Sauer, Jurisdiktionskonflikte in Mehrebenensystemen, 60. [Conflicts of jurisdiction in multi-level-governance systems].

13 Sauer, Jurisdiktionskonflikte in Mehrebenensystemen, 60.

14 Sauer, Jurisdiktionskonflikte in Mehrebenensystemen, 60.

longer comprehensible for the parties to the dispute which judgment is binding.[15] This state situation could lead to a loss of confidence in the validity of the law. Because of this, the risk of a conflict of jurisdiction was removed at a continental level by Art. 10 of the Protocol (2005).[16]Theoretically, the conflict arises out of the fact that the protection of human rights does not fall exclusively in the competence of national Constitutional Courts but also in the jurisdiction of the ECOWAS Court of Justice.[17] Just as in the European judicial area, the possibility of such conflicts of jurisdiction is not impossible. The conflict also arises at a European level when the European jurisdiction contradicts that of the constitutional courts of the Member States.[18] Within ECOWAS, the conflict is revived especially, if the ultimately binding decision by the national Constitutional Court is declared to be in violation of human rights by the ECOWAS Court of Justice. How can this conflict be resolved? How can a harmonious functioning between the ECOWAS Court of Justice and national constitutional courts of Member States be created? These questions form the fundamental object of this paper.

From a procedural point of view, the conflict arises when two different legal systems with contradictory judgments that are difficult to overcome in their respective procedural principles, collide. These quasi insurmountable differences concern, on one hand, the legal force and the binding effect of constitutional court-decisions (Chapter 2), and on the other hand, the possibility to the ECOWAS Court of Justice to supersede the decisions of national courts (Chapter 3).

15 Sauer, Jurisdiktionskonflikte in Mehrebenensystemen, 60.

16 Ebobrah, A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice, 15, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 16/05/2015).

17 Alter/Helfer/McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (759).

18 Benda/Klein, Verfassungsprozeßrecht, 2. edition, erstes Kap., Rn. 63 [Benda/Klein, Constitutional Process Law, 2. edition, first chapter., see recital 63].