Chapter 4 The Reception of the Legal Force in theNational Legal System

The exercise of its jurisdiction by the ECOWAS Court of Justice creates a legal force. How does the national constitutional order perceive this binding force of the legal effect? At the same time, this also poses the question of the national status of international law within the national legal systems of the Member States. It will at this stage be shown how the binding effect issued at the level of international law is implemented into the national legal order. The declaratory judgment does not automatically breach the national legal force. However, this declaratory judgment has significant legal consequences for the domestic legal system of the concerned state. The question whether the legal effect is welcome or not welcome within the national legal order must be primarily answered on the basis of national law. This question is of decisive importance because the implementation of judgments by international courts depends on how they are treated at a domestic level. The removal of any obstacles to implementation depends on the national law of signatory states.[1] Therefore, the question of interaction[2] between international law and national law of Member States must be asked. In the same manner, the questions must be asked of, firstly, what provisions are made by the ECOWAS legal regulations regarding the legal effect of its decisions and, secondly, how the domestic legal systems of the Member States regard the guidelines under international law regarding the legal effect from a legal point of view. In order to determine whether the legal effect possesses a national enforcement character, reference must be made to both Community and national legislation. The effectiveness of the binding effect of the declaratory judgment in this specific case depends on the Togolese code of procedure (for example) and the ECOWAS regu-

1 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (113).

2 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004 (2004), in: EuGRZ (2004), 683 (692). [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (692)].

lation.[3] The interaction of the National legal system and theECOWAS Community's legal system creates good conditions for an effective implementation of declaratory judgments by the Community's Court . All this demands, on the one hand, is the interpretation of the pertinent guidelines of the Court of justice and the determination of the binding effect of the decision and on the other hand, the examination of national regulations of constitutional orders by the Member States regarding the reception of the binding effect. This preliminary question is also important because many problems regarding the implementation of international law do not regard the ratification of international law but the national effectiveness of international law. In this respect, African countries do show a presentable history of ratification of international law but, unfortunately, show behaviour that is open to criticism regarding its domestic implementation.[4]

For a better understanding of the reception of the legal force into the national legal system in the signatory states, the importance of the African Charter in the domestic legal system must first of all be demonstrated A) because the national concretisation of the declaratory judgment (B) depends on which rank is assigned to the Member States' constitutional regulations. Nevertheless, the failure to comply with the implementation obligation has consequences under international law to the detriment of the convicted signatory state (C).

A. Preliminary Question: Binding Force of International Law and the ECOWAS Judgments

A preliminary question is defined as a legal question raised before the main question (question préjudicielle) can be discussed. In this case, the preliminary question does not entirely deviate from the sense of law provisions.The special characteristic of the preliminary question raised corresponding with this thought process is differently defined. It concerns the clarification of the question of the status of international law within the

3 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004 (2004), in: EuGRZ (2004), 683 (695).[Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (695)].

4 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (126).

domestic legal systems of the Member States in a normative respect. Contrary to the meaning of the legal provisions, this preliminary question does not require a concrete case before a national court.In order to answer all these questions, the ranking of international law is discussed in francophone (I) as well as Anglophone countries (II). It should not be overlooked that since the Protocol of Good Governance came into force there has been a degree of convergence of constitutional principles within the ECOWAS signatory states (III).

I. Binding Force of the International Law in francophone Member States

Which rank is given to international law in the domestic legal system of Member States (1), is a preliminary question to be resolved before the question regarding the national concretisation of the legal force of the ECOWAS judgment will be discussed. What is more is the consideration of whether the reciprocity principle under International law can be applied in this case (2).

1. Question of rank

It may come as a surprise why, in the context of the investigation into the validity of a constitutional court decision and the institution of an in rem restitution according to International guidelines, a consideration of the domestic status should be necessary. This question, however, should be clarified for two reasons: if International law is ranked below the constitution, the consequence for the implementation of an unconstitutional International rule becomes legally relevant.[5] International law may only be applied when the constitution is changed accordingly. This means that if the decision by the Court of justice , i.e. a judgment in accordance with International law, violates the constitution, it can only be observed if the regulation which is in violation has been changed in advance.

In the initial case, this question of rank was central to the debate regarding the domestic implementation of the declaratory judgment. The government, as well as the Togolese Constitutional Court, refused to implement the judgment of the Court of justice in the initial case. The reasons

5 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (74).

they gave for this were, amongst others, that the decisions by the Constitutional Court were final. There was no further instance above the Constitutional Court.[6]

Such reasoning is understandable from a certain perspective. Fundamentally speaking it is not wrong if the signatory states prevent the implementation of declaratory judgments by the Court of justice . The declaratory judgment basically means that the decision by the Constitutional Court was made in violation of the Convention. The implementation of such a judgment means that the concerned state would accept the violation of the constitutional principle of finality of the decision. This, in turn, would indicate that the International law is ranked above the constitution. At any rate, this constellation equals a displacement of the constitutional principles by the International law. Thus, the judgment under International law that was issued would rank above the constitutional law. This is precisely what the state did not want to accept in the initial case. From the viewpoint of the hierarchy of norms this refusal is justified because, at the level of the domestic legal system, the constitution receives a higher rank. International law is ranked below the constitution. Since the declaratory judgment has International legal content, it would be second in rank in the hierarchy of norms. The legal consequences of the constellation of norms are interesting: A norm under International law that infringes on a constitutional principle (e.g. the finality of legal force) cannot be implemented[7] unless a change to the constitution was made beforehand.

It must, however, be taken into consideration that constitutional norms and International law belong to different legal systems. They take different principles into account. Even in case of a certain relationship between International law and constitutional law, every legal system is independent of the other – as soon as the signatory states have signed and ratified an International treaty. The consequences of this mean that International law demands a domestic implementation, regardless of the constitutional norms that are inconsistent with it. Therefore, the signing parties must, during the conclusion of the agreement, give attention to their constitutional principles before the treaty is signed. Once signed, International law must be easily enforceable and implementable. Therefore, from the point

6 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (74).

7 See criticism of the government in the initial case: Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (74).

of view of International law, a conflicting constitutional principle does not play a role. This is precisely the meaning of the regulation in Art. 26 of the Vienna Convention on the Law of Treaties. The International Court of Justice also confirms this interpretation in its Avena-judgment.[8]

The *question of rank*[9] is therefore important because the National enforceability of human rights instruments depends on the respective National legal system giving these instruments meaning[10] and which rank the International instrument has within the legal system of the Member State. In order to clarify this preliminary question, the constitutional provisions regarding the ranking of International law will be discussed in the following. First of all, Art. 142 of the Togolese constitution must be explained. It states that:

> « Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son appli- cation par l'autre partie ».

After detailed examination of this provision, three basic requirements must be met in order for International law to be valid on a National level: the rule-consistent ratification, the publication in the official state gazette and the application of the reciprocity principle. The domestic question of the rank of International law will be analysed through a systematic examination of all constitutional regulations regarding International law and the constitution. International treaties in general, and the Charter in particular, are directly applicable at a National level as long as they have been properly ratified and published in the government gazette (Art. 142 of the Togolese Constitution)[11]. Ever since the publication of the ECOWAS Amendment Agreement and the associated Additional Protocol, the instruments of International law have a direct National legal force. Therefore, no additional implementation measures are necessary. However, this provision contains a number of uncertainties. Its vague and broad wording

8 CIJ, Demande en interprétation de l'arrêt du 31 mars 2004 en l'Affaire Avena et autres res- sortissants mexicains (Mexique c. Èats-Unis d'Amérique), Arrêt du 19 janvier 2009, par. 8.

9 Mellech, Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung, 19 ff. [The reception of the ECHR and the judgments of the ECtHR in the French and German jurisdiction, 19 ff].

10 Tama, Droit International et africain des droits de l'homme, 131.

11 See: Oumarou, La Cour constitutionnelle du Niger et le contrôle de conformité des traités et accords internationaux à la Constitution: Remarques sur la Jurisprudence CIMA, in: Revue Juridiques et Politiques (2008), 503 (505).

allows for two hypotheses with regards to the interpretation of Art. 142 of the Togolese Constitution, because the regulation does not clarify whether a differentiation based on the content-related rank of the norm is to be done with regards to the question of rank. Fundamentally, the following questions must be asked: what does « *autorité supérieure* à celle des lois » in the regulations of Art. 142 in the Togolese Consituttion mean? Which « loi » is meant in this regulation? The constitutional legislator leaves this question unanswered. Scholarly opinions point to « loi » in the broadest sense. The term « loi » means, according to the understanding of the civil tradition any general and abstract provision inevitably containing a legal command.[12]

> « [Une] autorité supérieure à toute loi, peu importe sa place dans la hiérarchie des normes»[13].

What this means is that after proper ratification and publication of the International law it is directly given a status below that of constitutional law, on national level. Based on the order of validity in Art. 142 of the Togolese Constitution, all International treaties ratified by Togo receive a status above ordinary law.

These agreements are ranked below the constitution. Regarding the African Charter on Human Rights and Peoples' Rights, however, it must be pointed out that the Charter is incorporated into the constitution and is an integral part of the constitution. The principle of reciprocity prevailing in International law, and embedded in Art. 142 of the Togolese Constitution, does not apply here. Due to the special character of the Charter in the Community's Constitution of ECOWAS and in the constitutional system of the Member States, a "constitutional instrument of West African Countries"[14] must be surmised. In any case the Charter enjoys in that regard the status of customary international law. These two conditions were adhered

12 Eissen, Le statut juridique interne de la Convention devant les juridictions répressives, in: Cohen-Jonathan, Droits de l'homme en France, 1 (6); Grewe, The reception of the ECHR in Germany, in: dies./Gusy, Human Rights, 106 (115); Sauve/Pauti, in: Thierry/Decaus, Droit International, 237 (240).

13 Amselek, Une fausse idée claire: la hiérarchie des normes juridiques, in: Renouveau du Droit constitutionnel. Mélanges en l'honneur de Louis Favoreu, 983 (1013).

14 Fall/Sall, Une constitution régionale pour l'espace CEDEAO: le protocole sur la démocratie et la bonne gouvernance, available at: http://la-constitution-en-afrique.org/article-34239380. html (last accessed on 16/05/2015); Adjolohoun, Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois, 95.

to in the African Charter on Human Rights. Now, the question remains whether the other conditions have been met with regards to the unconditional entry into force of the Charter. Regarding liability, it does not make a difference which domestic rank the Charter receives. Ranking by National constitutional law has no consequence for the obligation to comply. The Member State concerned cannot argue that the Charter and the legal regulations of ECOWAS only receive their rank above the ordinary law within the state-internal hierarchy of norms.[15]This transnational constitutional content of the Charter – based on the proclaimed constitutional convergence of West-African states in the Protocol on Good Governance and Democracy from 2001 – confirms a special status of the Charter for all constitutional systems in Member States. Therefore, the principle of reciprocity can also not be applied here.[16]

2. Principle of reciprocity

The principle of reciprocity has its origins in customary International law and establishes a legitimate objection to non-compliance with the obligation under International law.[17] The International treaty is to be applied unconditionally, insofar as the basic principle of reciprocity according to the monistic legal tradition is met. However, this principle cannot be applied to the African Charter on Human Rights for the following reasons:

- objective obligations in the Charter;
- Validity of the principle of reciprocity only for bilateral International treaties;
- Existence of a control organ within the system of the Charter.

The exclusion of the applicability of the principle of reciprocity is based on the objective obligations in the Charter. The obligations ensuing from the

15 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts, in: DÖV (2005), 860 (861). [European human rights under the aegis of the Federal Constitutional Court, in: DOV (2005), 860 (861).].

16 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem, 169. [Protection of constitutional law in the European multi-level system, 169].

17 Simma, Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts, 45.[The element of reciprocity in the inception of customary International law, 45.].

Charter are of an objective nature.[18] This excludes the so-called principle exceptio *non adimpleti contractus*. In concrete terms, it cannot solely depend on the compliance to the human rights laid out in the Charter by the other signatory states. The Togolese state must also meet its obligations. Every signatory state is obligated to unilaterally adhere to recognised human rights and account to International institutions. The goals of the Charter are therefore superordinate in such a way that the signatory states to the Charter must not provide for their own but for a mutual interest in the adherence to the human rights stipulated in the Charter (the guarantees according to the Charter) for all persons in the territory of the signatory states.[19] According to the wording in Art. 142 of the Togolese Constitution it can already be noted that the principle of reciprocity can only be applied to bilateral treaties. This is due to « l'autre partie contractante ». The limitation to the other signatory party and not the other signatory parties confirms the exclusion of the principle of reciprocity regarding multilateral treaties.[20] Therefore, the conduct of the other signatory states is insignificant regarding the adherence to the obligations stipulated in the Charter. After comparing the constitutional system of the ECOWAS Member States, the African Charter on Human Rights and Peoples' Rights receives a special status. This gives the Charter the legal nature of a special International treaty. In confirmation of this special status of the Charter, the adherence to the obligations is transferred from the Charter to the ECOWAS Court of Justice.

Moreover, it must be pointed out that the African Charter belongs to the *bloc de constitutionnalité* of the constitutional system of the Member States. The term *bloc de constitutionnalité* means that all constitutional regulations which the constitutional court refers to in its decision-making process.[21]A number of voices in literature see the *bloc de constitutionnalité* as

18 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 (1128).

19 See also Mellech, Die Rezeption der EMRK sowie der Urteile des EGMR in der französi- schen und deutschen Rechtsordnung, 16. [The reception of the ECHR and the judgments of the ECtHR in the French and German jurisdiction, 16].

20 Mellech, Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsordnung, 16. [The reception of the ECHR and the judgments of the ECtHR in the French and German jurisdiction, 16].

21 Adeloui, L'insertion des engagements internationaux en droit interne des États africains, in: Revue Béninoise des Sciences Juridiques et Administratives (2011), 51 (85).

the standard of review for International treaties and the constitutionality of the laws.[22] This means that the International treaties do not belong to the standard of review of the constitutional conduct of the state organs. However, the Charter and the Universal Declaration of Human Rights of 1948, as well as the two International pacts of 1966, receive a special status in the constitutions of the member states of ECOWAS . Indeed, the mentioned human rights treaties are referred to in the preambles of the constitutions. The Togolese constitutional legislator expressly points out that the Charter is an integral part of the constitution. This particular statute of the Charter needs to be explained further:

– The human rights enshrined in the Charter have constitutional status. The constitutional legislator, as well as all other state powers, must align their actions according to the Charter. In this context, the Charter constitutes a standard of review regarding the actions of state organs.
– The Constitutional Court guarantees the adherence to the human rights enshrined in the Charter in the same manner as those in the constitutional regulations.

These annotations speak for the complementarity of the roles between the Constitutional Courts and the ECOWAS Court of Justice. Remarkably, the Constitutional Court of Benin referred to the Judgment DCC 10–049[23] as well as the Protocol on Good Governance and Democracy from 2001 in the ECOWAS Protocol and the African Charter on Human and Peoples' Rights in its reasoning in justifying the control of the constitutionality of an electoral act. The Constitutional Court of Benin explained in this judgment:

> « Ne pas censurer la loi abrogative, c'est autoriser les députés à violer le protocole A/SP1/12/01 de la CEDEAO et par conséquent l'article 147 de la Constitution qui confirme la suprématie de la norme supranationale sur la norme juridique Nationale».[24]

Furthermore, the Constitutional Court reaffirmed the reference to the Charter in another consideration in this judgment:

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22 Chantebout, Droit constitutionnel, 27 éd., 2010, 596; Bernhardt, The Convention and Dome- stic Law, in: Macdonald/Matscher/Petzold (Publ.), The European System for the Protection of Human Rights, 25 (27).

23 Cour constitutionnelle du Bénin, Décision DCC 10–049 (05.04.2010), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

24 Cour constitutionnelle du Bénin, Décision DCC 10–049 (05/04/2010), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

> « [I]l s'ensuit que l'ensemble des dispositions de ces textes internationaux font partie inté-grante de la Constitution béninoise et ont une valeur supérieure à la loi ».[25]

Based on the aforementioned it should be noted, that the ECOWAS signatory states ascribe a special role to the Charter in their respective National constitutional systems. At Community level, this special status is attached to the transfer of the jurisidiction to the ECOWAS Court of Justice to monitor the adherence to the human rights as stipulated in the Charter. Organs have been set up to ensure adherence to the human rights guaranteed in the Charter. These include the African Commission on Human Rights, the African Court on Human and Peoples' Rights and – within the ECOWAS legal system – the newly established ECOWAS Court of Justice. The roles assigned to all mentioned International organs are complementary.

II. Binding Force in Anglophone Member States

It is necessary for the validity of a treaty under International law that the signatory states have signed and ratified the agreement. Furthermore, the effectivity of a treaty depends on how it is integrated into the National legal system and how it is applied.[26] What is important is that the Anglophone Member States, stemming from the legal tradition of Common Law, are not familiar with the concept of a hierarchy of norms.[27] However, with regards to the comprehensive effectivity of International law, this re-

25 Cour constitutionnelle du Bénin, Décision DCC 10–049 (05.04.2010), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

26 Oppong, Legal Aspects of Economic Integration in Africa, 191.

27 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und Europäischem Court of Law für Menschenrechte, in: Der Staat 44 (2005), 403 (405) [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat [The State], 44 (2005), 403 (405)]; Tou- fayan, When British Justice (in African Colonies) Point Two Ways: On Dualism, Hybridity and the Genealogy of Juridical Negritude in Taslim Olawale Elias, in: Leiden Journal of International Law (2008), 377 (396); Landauer, Things Fall Together: The Past and Future Africas of T.O. Elias's Africa and Development of International Law, in: Leiden Journal of International Law (2008), 351 (352).

quires a further legal step at the domestic level of these Member States.[28] The implementation of international law by the national assembly of the respective Member State is indeed necessary for the enforcement of an instrument of International law in all English-speaking ECOWAS Member States. In this regard, the respective provision of Art. 12 par. 1 of the Constitution of Nigeria of 1999 reads as follows:

> "No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."[29]

Such a constitutional requirement is also contained in the constitutions of other Member States that are not Anglophone countries.[30] Art. 11 of the Constitution of the lusophone Republic of Cape Verde is an exception in that regard .[31] Art. 11 (3) of the Constitution of the Republic of Cape Verde reads:

> "The legal acts emanating from the relevant organs of the supranational organisations of which Cape Verde is member, shall enter directly into force in the domestic legal order".[32]

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28 Okene/Eddie-Amadi, Bringing Rights Home: The Status of International Legal Instruments in Nigeria, in: Journal of African and International Law (2010), 409 (410).

29 Ekhator, Improving access to environmental justice under the African Charter on Human and Peoples' Rights: The role of NGOS in Nigeria, in: African Journal of International and com- parative Law (2014), 63 (69).

30 Art. 75 Abs. 2 Verfassung Ghana vom 8. May 1992, geändert durch Verfassungsänderungs- gesetz vom 16. December 1996; Art. 10 d Verfassung Sierra Leone vom 3. September 1991; Art. 79 (c) the Constitution of The Gambia of 16 January 1997; Art. 57 i. conn. with Art. 34 iii. b Constitution of Liberia of 19 October 1983; Art. 56 par. 8 the Constitution of Guinea-Bissau of 16 May 1984, Amendment of 11 May 1991 are considered herein. Available at: http://www.constitutionnet.org/files/Guinea- Bissau%20Constitution.pdf *(last accessed on 14/05/2015).*

31 Ouguergouz, L'application Nationale de la charte africaine des droits de l'homme par les autorités Nationales en Afrique occidentale, in: Flauss/Lambert-Abdelgawad (Publ.), L'application Nationale de la charte africaine des droits de l'homme et des peuples, 163 (166); Enabulele, Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (124).

32 The Constitution of Cap Verde of 05/09/1992, available at: http://www.constitutionnet.org/vl/ item/constitution-republic-cape-verde-1992 (last accessed on 15/05/2015).

According to these constitutional provisions, Parliament has transformed the African Charter e.g. through a so-called „African Charter Act" in Nigeria into National law.[33] This dualism is regrettable in the sense that a ratified but not nationally implemented International law instrument will be declared inapplicable by National courts.[34] More specifically, the legal regulations within ECOWAS as well as the judgments by the Court of justice in this regard, are invalid due to a lack of implementation.[35] The practical legal consequences of comparable regulations are also well-known within the legal system of SADC. This concerned the dispute regarding Art. 231 of the South African Constitution and the effect of the SADC-Treaty on the National legal system.[36] For these reasons, voices in Anglophone literature disputethe direct binding effect of the instruments of the Community within the ECOWAS legal system and therefore the judgments by the ECOWAS Court of Justice with regards to the anglophone Member States. To justify their rejection of the binding effect, they refer to the dualistic legal tradition.[37] Through the ratification of the Amendment Agreement and the Additional Protocols of francophone West African countries, all International law-instruments receive their rank above the law. Therefore, the final decisions by the ECOWAS Court of justice develop the same legal effect as the instruments of the Community that the judgments by the Court of justice refer to.

Voices in literature speak of a direct legal effect of the African Charter based on its special nature.[38] It has already been mentioned above that the judgments by the ECOWAS Court of Justice are final and incontestable

33 Egede, Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria, in: Journal of African Law (2007), 249 (250).

34 Enabulele, Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (125).

35 Ouguergouz, L'application Nationale de la charte africaine des droits de l'homme par les autorités Nationales en Afrique occidentale, in: Flauss/Lambert-Abdelgawad (Publ.), L'application Nationale de la charte africaine des droits de l'homme et des peuples, 163 (166).

36 Oppong/Niro, Enforcing Judgments of International Court in National Court, in: Journal of International Dispute Settlement (2014), 1 (7).

37 ECOWAS Vanguard, „Issues for an ECOWAS of People", Volume 2, Issues 4, Feb. 2013, 7.

38 Ouguergouz, L'application Nationale de la charte africaine des droits de l'homme par les autorités Nationales en Afrique occidentale, in: Flauss/Lambert-Abdelgawad (Publ.), L'application Nationale de la charte africaine des droits de l'homme et des peuples, 163 (167).

and may not be reviewed or changed by any other court. The nature of the respective national legal order of the Member States is, therefore "*self-executing*".[39] According to this, no national implementation measures are required to render the judgments of this Court of Law effective.

Opinion: It makes no difference whether the legal system of the Member State belongs to the dualistic or the monistic system. Moreover, the International law and the decision by the ECOWAS Court of Justice are legally binding. The status assigned to International law within the National law of the signatory states does not play a role.[40] The special character of the Charter within the constitutional order of the Community clarifies that it is a *self-executing* norm and as such does not need a particular implementation measure within the respective constitutional system in order to receive validity at a National level. The Charter even belongs to the *bloc de constitutionnalité* in francophone West African countries, i.e. one of the standards of constitutional interpretation. In Anglophone countries, the Charter is mentioned in the respective preambles. Furthermore, the Member States have waived their sovereignty in this regard by transferring the jurisdiction to the ECOWAS Court of Justice concerning the final authority of the Constitutional Courts or the Supreme Court.[41]

With regards to liability, it does not matter which domestic rank the Charter is given. The determination of the rank by the National Constitutional Court is of no consequence to the obligation of compliance. The concerned Member State cannot submit that the Charter and the ECOWAS legal regulations are only given the rank above basic law within the domestic hierarchy of norms.[42] Therefore, the ECOWAS Court of Justice alone has the right to speak the last word on whether a Member State's

39 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem, 163. [Protection of constitutional law in the European multi-level system, 163].

40 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950, 114. [The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950, 114].

41 Pache, Die Europäische Menschenrechtskonvention und die deutsche Rechtsordnung [The European Convention on Human Rights and the German legal system], in: EuR (2004), 393 (400).

42 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts, in: DÖV (2005), 860 (861). [European human rights under the aegis of the Federal Constitutional Court, in: DOV (2005), 860 (861).].

conduct infringes on human rights or not. The declaratory judgments by the ECOWAS Court of Justice, therefore, do not need a special measure of recognition in order to be executed. Whether monism or dualism, the result remains the same: The Member States are subject to an obligation to comply.[43] In light of the development of human rights case law, the dualistic principle is nowadays to be regarded as antiquated.[44]

III. Principle of the convergence of constitutions

It must be stated in advance that the constitutions of ECOWAS Member States are predominantly influenced by International law.[45] The Protocol on Good Governance from 2001 is denoted as the Constitution of the ECOWAS Community.[46] It expressly orders the Member States to assign the jurisdiction on human rights matters to the ECOWAS Court of Justice.[47] The fact that all signatory states have recognised the Charter and the associated human rights in the preambles of the Constitutions of the Member States, the Charter receives the validity of International customary law

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43 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950, 114. [The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950, 114].

44 Bernhardt, The Convention and Domestic Law, in: Macdonald/Matscher/Petzold (Publ.), The European System for the Protection of Human Rights, 25 (30).

45 Sall, Le Droit International dans les nouvelles constitutions africaines, in: Revue Juridique et Politique (1997), 339 (340).

46 Fall/Sall, Une constitution régionale pour l'espace CEDEAO: le protocole sur la démocratie et la bonne gouvernance, available at: http://la-constitution-en-afrique .org/article-34239380. html (last accessed on 16.05.2015); Alter/Helfer/McAllister, A new International human rights court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013) Vol. 107, 737 (775); Kane, La Cour de justice de la CEDEAO à l'épreuve de la protection des droits de l'homme, Mémoire de Maitrise, Université Gaston Berger (2012- 2013), 14; Cowell, The impact of the protocol on good governance and democracy, in: African Journal of International and Comparative Law (2011), 331 (333).

47 Alter/Helfer/McAllister, A new International human rights court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (757).

within the order of the Community. The obligations in the Protocol of Good Governance are not only directed at the governments of the signatory states. There is more involved: it is not just about actions of the government but also of those of the legislature and the judiciary. Addressees of the responsible governance are, so to speak, all government officials.[48]

Moreover, the Charter belongs to the *bloc de constitutionnalité* of the respective constitutional order of each Member State. Member States have establishhed in their constitutional tradition that it is possible that the human rights guaranteed in the Charter can be violated by organs of the state despite their affiliation to the respective Constitution. In this sense, e.g. the Constitutional Court of Benin expressly refers its jurisdiction to the Protocol:

> « Ces fraudes massives étaient du reste contraire aux principes de la transparence et de la fiabilité garantis les articles 4 et 5 des protocoles de la CEDEAO sur la démocratie et la bonne gouvernance ».[49]

In order to reduce this risk, the Member States have created another way at ECOWAS level to ensure that sufficient attention is paid to the Charter. This task was transferred to the ECOWAS Court of Justice. This means that the Member States are aware that even the Constitutional Courts, who are primarily supposed to guard the rights in the Charter, can fail. Therefore, a possible correction measure at International level was created in the Community. Thus, the Constitutional Courts and the ECOWAS Court of Justice have a common complementary task: to give the African Charter an effective binding force for all persons under the sovereignty of the Community.[50] Notwithstanding the state-internal hierarchy of norms, the norms of International law develop unreserved assertiveness, especially in the area of human rights.[51] It would jeopardise the purpose of the Protocol

48 Dolzer, "Good governance": neues transNationales Leitbild der Staatlichkeit? [a new transNational role model in statehood?], in: ZaöRV (2004), 535 (535).

49 Cour constitutionnelle du Bénin, Décision DCC 10–049 (05.04.2010), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

50 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und Europäischem Gerichtshof für Menschenrechte, in: Der Staat 44 (2005), 403 (431). [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat [The State], 44 (2005), 403 (431)].

51 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts, in: DÖV (2005), 860 (863). [European human rights under the aegis of the Federal Constitutional Court, in: DOV (2005), 860 (863).].

if the obligation under International law, would receive a different meaning depending on the involved Member State.

In the legal matter of Togo vs the Parliamentarians, the government stated that the ECOWAS Court of Justice did not have any competence to order a removal of the consequences of the violation of human rights because such an order would constitute an infringement of Art. 106 of the Togolese Constitution. The ECOWAS Court of Justice did not share this view of the government and therefore rejected the order of a retrial.

Following the entry into force of the Amendment Agreement of 1993 and the associated Additional Protocol, the Member States are prohibited from preventing the application of the obligations under International law which they have adopted from the agreement with reference to their National law. This is because, acc. to Art. 26 of the Vienna Convention (VCLT), International treaties must be adhered to due to the requirement of good faith. Furthermore, the view of both the Togolese government and the concurring opinion of the ECOWAS Court of Justice in the above case , are acc. to Art. 27 VCLT not cogent and therefore dissatisfactory. Art. 27 VCLT reads:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46"

In connection with the competence of the ECOWAS Court of Justice and the obligation of implementation by the Member States, the Togolese government could e.g. refer to Art. 106 of the Togolese Constitution in order to reject the competence to review decisions by the Constitutional Court. This objection is not valid because such a restriction of competence should have been foreseen by the signatory states during the drafting of the agreement. As long as such regulations do not find expression in provisions in the agreement, the recourse to conflicting domestic law must be rejected. They must logically adjust their entire legal system, including the Constitution, to adhere to the guidelines of the obligations of the Community under International law.[52] At this point, a comparison with the competence of the ECtHR is of interest. The Member States indeed have made provision for a certain limitation of the judicial power of the ECtHR in

52 Giegerich, Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten [Effect and rank of the ECHR in the legal systems of Member States], in: Dörr/Grote/Marauhn (Publ.), EMRK/GG, 2. edition, Kap. 2, Rn. 19.

Art. 41 ECHR. In light of dynamic interpretation, the ECtHR even deems this limitation partially incompatible with the purpose of the Convention.

In summary, it can be said that: when it comes to the interpretation of the legal regulations within ECOWAS, it does not matter whether these regulations are indeed valid within the domestic legal systems and which National legal status they have been assigned. It is not up to the Court of justice to worry about the question of National validity and state-internal hierarchies of norms when it comes to the legal regulations within ECOWAS.[53]

B. National Articulation of Legal Force

It is irrelevant whether the concerned signatory state has already paid compensation or not. It is the purpose of the declaratory judgment to effect a concrete measure at domestic level. In implementing the decision of the Court of justice, the defendant has a duty to reach a result. The convicted Member State is namely subject to an obligation to succeed or obligation to achieve results. Due to this obligation to achieve results, the convicted signatory state must do everything possible that will lead to a termination or restoration of the original status quo in accordance with the Convention. Even if the judgment by the Court of justice is of a purely declaratory character, the plaintiff must not endure an ongoing violation after the declaratory judgment. Rather, it is the duty of the State to design National procedural regulations in such a manner that the continuation of the violation is terminated or, if necessary, a compensation is paid. The aim of the obligation to achieve results is to enable the declaratory judgment to be enforced or implemented in practice. Based on this obligation to achieve results, the declaratory judgment has a conceptualising effect on domestic law. The design effect is then expressed in the annulment an adaptation of judgment the domestic Constitutional Court ruling. A concrete example can be clearly noted in the aforementioned case. The parliamentarians

53 Egede, Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria, in: Journal of African Law (2007), 249 (278); Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: Internatio nal Community Law Review 12 (2010), 111 (127). Also: Schaffarzik, Europäische Menschen- rechte unter der Ägide des Bundes Constitutional Court, in: DÖV (2005), 860 (861) [European human rights under the aegis of the Federal Constitutional Court, in: DOV (2005), 860 (861)].

who occupy seats in parliament after the judgment in violation of human rights by the Constitutional Court, must, indeed, give up their seats. After a successful human rights complaint, the plaintiffs are entitled to demand their seats back. How this will be taken forward in detail is to be clarified by means of the binding effect of national procedural law (I) and the indirect binding effect of the state organs (II).

I. National procedural binding force

The declaratory judgment has procedural consequences for the domestic legal system of the convicted Member State. The resumption is available to the Member State as an adequate means of reparation of the violation regarding the convention. The domestic concretisation of the compensation takes place by reopening the original proceedings (1). The resumption of the original proceedings is meant to sufficiently effect the change in the the National court's legal opinion (2) in order to reflect the substantive legal effect of the ECOWAS judgment. Moreover, the legal decision by the Court of justice sets the precedent for domestic parallel cases (3). *De lege ferenda,* the declaratory judgment by the Court of justice should be the basis for a *Question Prioritaire de Conformité* (4).

1. Resumption of the initial proceedings

The cause of the declaratory judgment issued against the respondent was the judgment of a violation of human rights by the Constitutional Court. In order to restore the status quo according to the Charter, this cause must be terminated.[54] Several conditions are necessary in order for the resumption of original proceedings. The resumption of the proceedings is not opposed to the institution of legal force.

54 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte, in: Der Staat 44 (2005), 403 (404).
[Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat [The State], 44 (2005), 403 (404)].

a. Prerequisites for a resumption

At this point, it must be differentiated between a completed violation (*violation consommée*) and violations that could be eliminated through future changes. Because, due to the conviction, the Court of justice orders the convicted Member State to terminate the persisting violations, the omission of repeated offences and to take measures to prevent future violations. Therefore, the question arises of what happens should the violation be complete. This means that the legal situation of the plaintiff cannot be restored in hindsight. This addresses the question of the impossibility of performance at International law level. In case of impossibility, the criteria of the obligation of restitution have been stipulated by the Permanent International Court of Justice with the following words:

> « Restitution en nature, ou, si elle n'est pas possible, paiement d'une somme correspondant à la valeur qu'aurait la restitution en nature. »[55]

The restitution has become impossible due to the fact that the violation concerns a completed event.[56]

However, National court decisions contrary to International law are vulnerable due to the obligation of restitution.[57] This addresses the question of the infringing act as the restitution depends on the manner in which the violation came about. There are many such cases in which the possibility

55 Affaire relative à l'usine de CHORZÓW (demande en indemnité) (fond), CPJI, Série A N° 17 (13.09.1928), 47.

56 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004, in: EuGRZ (2004), 683 (691) [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (691)].; Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950, 200. [The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950, 200].

57 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004, in: EuGRZ (2004), 683 (691). [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (691)].

of resumption is excluded due to the nature of the matter[58]. E.g. a responding state is convicted based on the overly long duration of the trial,[59] or the plaintiff was arrested and released without any criminal proceedings. In such cases, the granting of appropriate damages offers a reasonable compensation in order to do justice to the interests of the individual plaintiff. Except from such cases in which the restitution is impossible due to the nature of the infringing act, a resumption of the proceedings in most cases represents the only possibility for *restitutio in integrum*. This is typically the violation of the Right to a fair trial acc. to Art. 7 par. 1 of the Charter.

The legal force of National courts is in no way an insurmountable obstacle to the effectiveness of the judgment under International law. However, the resumption of the trial cannot be carried out ex officio. This results from the fact that the declaratory judgment is not directly binding to the National instance (This is discussed in detail). It is, therefore, recommended to reopen the proceedings of restitution on application by the plaintiff.[60] The concerned signatory state has a duty to act due to the declaratory judgment: the obligation of implementation. The implementation can be made more concrete through the resumption. The content of the obligation is to restore the original status quo. The restoration is made in the form of a reinstatement into the previous state of affairs. Depending on the nature of the violation, the retraction of the violating National legal act or the violating measure must primarily be considered. The legal force cannot be preferred to the duty to implement.[61] In the case of a decision by the Constitutional Court, a resumption of the proceedings in favour of the convicted plaintiff (after his successful complaint by taking action under

58 Polakiewicz, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, 98.[The obligation of countries resulting from the judgments by the European Court of Human Rights, 98.].

59 Ress, Die Europäische Menschenrechtskonvention und die deutsche Rechtsordnung [The European Convention on Human Rights and the German legal system], in: EuGRZ 1996, 337, 351.

60 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950, 108. [The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950, 108].

61 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts, in: DÖV (2005), 860 (867). [European human rights under the aegis of the Federal Constitutional Court, in: DOV (2005), 860 (867)].

International law) must be considered. This is coherent because, according to the principle of *restitutio in integrum*, the convicted signatory state must restore the state of affairs for the plaintiff in such a way as if the Charter had not been violated. Only if a complete reparation turns out to be impossible due to the nature[62] of the matter, is compensation the only other alternative. It must be pointed out that the restoration to the previous status quo does not preclude a just compensation. On the contrary, the restoration in the form of a reinstatement of the previous state of affairs can be done together with an appropriate compensation. It is already accepted in the literature on International law that both obligations, i.e. the natural restitution and the payment of compensation, may go hand in hand.[63]

Furthermore, the legal force is not breached, but rather overcome, by the resumption of the original proceedings on application by the plaintiff, The exceptional overcoming of the legal force based on the jurisdiction by the ECtHR has already been accepted in German constitutional case law. The Federal Constitutional Court has outlined:

> „Entscheidungen des Europäischen Court of Law für Menschenrechte, die neue Aspekte für die Auslegung des Grundgesetzes enthalten, stehen rechtserheblichen Änderungen gleich,die zur Überwindung der Rechtskraft einer Entscheidung des Bundesverfassungsgerichts führen können".[64]

Many legal systems within the European judicial area provide for a resumption of proceedings after a conviction by the ECtHR. E.g. § 359 par. 6 of the German Crimimal Procedure Code. The Swiss Constitutional Process Law makes even more explicit provision for a resumption of the original constitutional complaint, should the ECtHR have determined a violation bySwitzerland. At this point it is advisable to quote the regulation:

> « Art. 122: Violation de la Convention européenne des droits de l'hommeLa révision d'un arrêt du Tribunal fédéral pour violation de la

62 Peukert, in: Frowein/Peukert, Europäische Menschnrechtskonvention. EMRK-Kommentar[European Human Rights Convention. ECHR-commentary], 3. edition, Art. 41, Rn. 3

63 Schilling, Deutscher Grundrechtsschutz zwischen staatlicher Souveränität und menschen- rechtlicher Europäisierung, S. 113; Ipsen, Völkerrecht, § 41, Rn. 66. [Protection of the German constitutional law between state sovereignty and Europeanisation of human rights, p. 113; Ipsen, International law§ 41, Rn. 66].

64 BVerfGE 128, 326 (326).

> Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 (CEDH) peut être demandée aux conditions suivantes : a. la Cour européenne des droits de l'homme a constaté, dans un arrêt définitif, une violation de la CEDH ou de ses protocoles; b. une indemnité n'est pas de nature à remédier aux effets de la violation; c. la révision est nécessaire pour remédier aux effets de la violation ».[65]

The constitutional sovereignty of the signatory state is not opposed to the obligation to restitution.[66] This is coherent as the individual human and fundamental rights recognised in the Charter are not at the disposition of the National constitutional legislator. The conditions of a resumption of the proceedings do not play a significant role in the procedure to implement the judgment.[67] In Austria, for example, in addition to fair compensation, domestic measures are provided for in order to meet the obligation of restitution (§ 33 StPO, renewal of the criminal proceedings acc. to §§ 363a to 363c StPO).[68]

Moreover, the question must be asked which arguments for action the winning individual plaintiff should put forward before the National courts. Following this, one should ask which reasons the judgment of the National court should contain when going over the new facts of the case. For the main proceedings are, as shown, concluded and have therefore entered into legal force. The decision by the ECOWAS Court of Justice serves as a guideline for the constitutional assessment of the case when the National Constitutional Court reconsiders judgment of the case.[69] The fact that a Constitutional Court has to reconsider an individual complaint fol-

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65 La loi fédérale sur le Tribunal fédéral du 17 juin 2005, entrée en vigueur le 1er janvier 2007; siehe dazu: CEDH, Nr. 10577/04, Arrêt (26.07.2007), Affaire Kressler c. Suisse, par. 18.

66 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004, in: EuGRZ (2004), 683 (696). [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (696)].

67 Pettiti, Le réexamen d'une décision pénale française après un arrêt de la Cour Européenne des Droits de L'Homme: La loi française du 15 juin 2000, in: Revue Trimestrielle des Droits de l'Homme (2001), 3 (12).

68 See: Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung, in: EuGRZ 2003, 168 (171). [The implementation of ECtHR judgments and their supervision, in: EuGRZ (2003), 168 (171)].

69 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und Europäischem Gerichtshof für Menschenrechte, in: Der

lowing a declaratory judgment of the ECtHR in favour of the successful human rights complainant despite having previously declared it judgment inadmissable is now well-known in the jurisdiction of the German Constitutional Court ever since the Görgülü case.[70] Therefore, there is no loss of sovereignty should the Constitutional Court render the declaratory judgments by the ECOWAS Court of Justice effective. Based on the exemplary role of the Constitutional Court, the effective implementation of International judgments by the Constitutional Court would be seen as a sign of respect for the rule of law. This is also primarily the demand of the Protocol on Good Governance of 2001. By consulting this Protocol in the judgments of the Constitutional Court of Togo in 2009, the opinion is confirmed that this Protocol represents a supra-National Constitution for the West African Community.[71] The Constitutional Court expressly quotes the Protocol on Good Governance of 2001 in the salient reasons for the decision. However, the Constitutional Court cannot act *ex nihilo*.[72] It requires regulations with regard to the constitutional process to simplify the execution of the resumed proceedings. The court judgments and especially those by the Constitutional Courts must have a legal basis. The Constitution, the acts supplementing the Constitution (the *lois organiques*) and the rules of procedure of the Constitutional Court are the legal bases for the Constitutional Courts. Here, a reason for a resumption should be recorded.

The determination of the violation of human rights by the ECOWAS Court of justice should be recorded in the acts supplementing the Constitution either as "*erreur de droit*"[73] or as a new fact, which represents a rea-

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Staat 44 (2005), 403 (414) [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat [The State], 44 (2005), 403 (414)].

70 The Federal Constitutional Court had at first declared the complaint inadmissible: BVerfG (Chamber), a decision of 31/07/2001. After a successful human rights complaint before the ECtHR, the proceedings is again presented to the Federal Constitutional Court. As a reaction to the declaratory judgment by the ECtHR, the Federal Constitutional Court has accepted the renewed constitutional complaint submitted to it for decision-making and sustained the complaint, comp. BVerfGE 111, 307 – Görgülü.

71 See the judgment by the Constitutional Court of Togo: Décision N°C-003/09 du 09 Juillet 2009.

72 Cremer, Entscheidung und Entscheidungswirkung [Decision and Effect of the Decision], in: Dörr/Grote/Marauhn, EMRK/GG, 2. edition, chapter 32, Rn. 91.

73 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68, 69); DCC 98–098 du 11 décembre 1998; DCC 02–134 du 18 décembre 2002 de la Cour constitutionnelle du Bénin.

son for resumption. This is because the Constitutional Court did not take sufficient account of the aspects relevant to human rights decisions when dealing with the first final decision that violated human rights. In particular, there are already factors in some West African constitutional systems that lead to a relativisation of the legal force of judgments by Constitutional Courts.[74] Under the european jurisdiction the Federal Constitutional Court of the Federal Republic of Germany has rightly pointed out that the regional human right Court has better knowledge regarding the current status and the development of human rights with respect to the current conditions („*à la lumière des conditions d'aujourd'hui*"). Therefore, the jurisdiction of the ECOWAS Court of Justice lends itself as an aid for the interpretation when it comes to the resumption of a trial.

It is recommended that the National Constitutional Court and the courts quote the supporting reasons of the ECOWAS Court of Justice in the declaratory judgment in the resumed trial because the act of violation by the concerned state is to be found in the salient reasons of the judgment. For this reason, the International judgment is also decisive for the domestic Constitutional Court in justifying its own opinion.

As far as the successful individual plaintiff is concerned, he refers directly to the declaratory judgment of the ECOWAS Court of Justice.[75] These are the substantive consequences of the legal force, as the substantive legal force of the ECOWAS judgment should be decisive in the renewed consideration of the facts by the domestic Constitutional Court.[76] In other words: the cause of the action in the retrial represents the declaratory judgment by the ECOWAS Court of Justice. This opinion also confirms the most recent jurisdiction by the European Court of Human Rights.[77] It

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74 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68, 69).

75 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950, 107. [The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950, 107].

76 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004 [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of 14/10/2004], in: EuGRZ 2004, 683 (698).

77 Maestriv. Italian, Urteil der Großen Kammer vom 17.02.2004, Ziffer 47[Judgment by the Great Chamber of 17/02/2004, Clause 47].

states that the resumption of the violating action or sovereign measure represents an appropriate measure of restitution.[78] Because of this, the reference to the resumption of the trial should be mentioned in the declaratory judgment so that is can be implemented effectively. Without this exceptional overturning of the final decision of the National Constitutional Court, Art. 15 par. 4 of the Amendment Agreement would be null and void which would not correspond with the will of the signatory states.[79]

b. Justification of the obligation to resume

The individual possibility to complain from within the ECOWAS legal circle is to be seen as formal justice. The guarantee in Art. 7 par. 1 of the Charter, together with Art. 9 and 10 of Protocol A/SP./01/05 is a procedural guarantee of effective legal protection because, with the opening up of this possibility to complain, an individual plaintiff is entitled to a procedural guarantee at the international level. This procedural guarantee primarily derives from Art. 1a of the Charter:

> « Toute personne a le droit à ce que sa cause soit entendue. Ce droit comprend : le droit de saisir les juridictions Nationales compétentes de tout acte violant les droits fondamentaux qui lui sont reconnus et garantis par les conventions, les lois, règlements et coutumes en vigueur ».

This guarantee would not be of great importance for the plaintiff if no substantive legal consequences would arise in his individual case. The procedural law is rather meant to concretise the substantive right. What good is a declaratory judgment without revising the National judgment in favour of the plaintiff? The disguise of legal force should not be a justification to uphold Constitutional Court judgments opposed to the Charter.[80] Thus, every signatory state carries the responsibility when a violation is declared

78 Bernhardt, The Convention and Domestic Law, in: Macdonald/Matscher/Petzold (Publ.), The European System for the Protection of Human Rights, 25 (37).

79 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts [European human rights under the aegis of the Federal Constitutional Court], in: DÖV (2005), 860 (867).

80 Breuer, Von Lyons zu Sejdovic: Auf dem Weg zu einer Wiederaufnahme konventionswidrig zustande gekommener Nationaler Urteile? [On the way to a resumption of National judgments that have come about in a manner contrary to the Convention], in: EuGRZ 2004, 782 (786).

to undertake everything to remove any kind of obstacle to the implementation. These measures could be a reopening of a trial despite final judgments or a legislative act.[81]

Thus, the possibility of individual complaints after the granting of a declaratory judgment triggers a substantive change in the legal situation at National level in favour of the plaintiff. The formal justice, i.e. the procedural guarantee at ECOWAS legal level serves substantive justice. The resumption is a realisation of this substantive justice. After the declaratory judgment has been issued, the plaintiff has not yet felt the benefit of the specific change of his rights. This rather happens once a favourable resumption of the original proceedings take place. Only then does the plaintiff experience the effect of the procedural guarantee, as prescribed by Art. 7 par. 1 of the Charter.

The change in legal opinion of a Constitutional Court or Supreme Court is not foreign to constitutional legal systems. For example, § 129 par. 3 of the Constitution of Ghana stipulates:

> "The supreme Court may, while treating its own previous decision as normally binding, de part from a previous decision when it appears to it right to do so, and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

Such constitutional regulations should be welcomed as the interpretation of the Constitution is a dynamic process. The case law of a Constitutional Jurisdictions namely follows societal change and meets its needs. Regarding the judgments of the ECOWAS Court of Justice, the same thought can be applied with regards to the legal consequences of a declaratory judgment. The case of the the Federal Constitutional Court of Germany can repeatedly be recalled when it has revised its legal opinion following a divergence between itself and the ECtHR.[82]

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81 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950, 201. [The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950, 201].

82 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und Europäischem Court of Law für Menschenrechte [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat 44 (2005), 403 (410).

From the above, the regulations demand from the constitutional procedural law of Member States that the jurisdiction must be adjusted to the legal development within the ECOWAS Community. It is in fact conceivable that the declaratory judgment of the ECOWAS Court of Justice should be one of the reasons for a change in legal opinion of Constitutional case law. Consequently, § 129 par. 3 of the Constitution of Ghana needs to be supplemented with respect to the guidelines of ECOWAS instruments.

2. Declaratory judgment by the ECOWAS Court of Justice as a prohibition of enforcement

It is questionable whether the application for the resumption of the original proceedings hinders the execution of the final constitutional judgment. It is important to remember at this point that the judgment by the Constitutional Court that has entered into legal force develops certain effects (this was already addressed to in Chapter 1,). In its core, this application cannot be assigned any restrictive effect as far as the execution is concerned. However, as a result of the renewed consideration of the case after a second final constitutional judgment, the enforcement of the first judgment in violation of human rights is suspended.[83] These legal consequences should be provided for in National procedural law or respectively in court procedure regulations. The domestic measure in violation of the Charter and which has been declared as such by the ECOWAS Court of Justice is no longer enforceable. The convicted Member State must cease the execution of such measures in order to avoid a renewed violation of the Charter. Therefore, the declaratory judgment serves at National level as an interdiction against an execution.[84]

However, the Constitutional Court cannot remove the legal consequences that were set in motion in the past. Rather, the legal force is valid based on the first judgment issued in violation of human rights. The only solution in this constellation is the cessation of the execution in future.

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83 Vgl. Hoffman-Holland, Resumption of a closed trial made final bya judgment], in: Graf (Publ.), Strafprozessordnung [Criminal Procedure Code], § 360, Rn. 1.

84 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Recht- sprechung des EGMR für die deutschen Gerichte [The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 256.

The declaratory judgment by the ECOWAS Court of Justice hence develops an *ex-nunc*-effect at a National level. Even though third parties may have possibly benefitted from the constitutional judgment in violation of human rights, the known principles of unjust enrichment in civil law cannot be applied to their full extent.[85]

3. Effects Transcending the Individual Case

It has been demonstrated above that the declaratory judgment can be extended to the legal systems of other Member States. Now the question must be asked whether the same cross-case effect is imaginable for parallel cases at domestic level. Above all, the ECOWAS legal system does not expressely limit the effect of its decision on the decided legal matter for. However, the system of the ECHR specifies that the signatory states are only obligated in legal matters to which they are a party (Art. 46 par. 1 der ECHR).[86]

Another argument for the legally binding parallel cases on national level is that the declaratory judgment represents a significant legal consequence on national level for the winning individual plaintiff by way of the resumption of the original proceedings. However, the declaratory judgment only develops a direct effect for the parties to the trial before the ECOWAS Court of Justice, and thus only for the individual plaintiff and the responsible Member State. However, the concerned Member State is required to transfer the consequences of the final declaratory judgment by the ECOWAS Court of Justice to comparable domestic cases.[87] The transfer of legal consequences has the advantage for the Member State of avoiding another future conviction.

85 Pestalozza, Verfassungsprozeßrecht [Constitutional Process Law], 3. edition, § 20, Rn. 74 f.

86 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem [Protection of constitutional law in the European multi-level system], 273.

87 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem [Protection of constitutional law in the European multi-level system], 273.

4. ECOWAS Court of Justice Decisions as the basis for QPC

From a comparable point of view, the jurisdiction of the ECOWAS Court of Justice can represent the legal basis of a *Question Prioritaire de Conformité* before the courts of the Member States. The mechanism in constitutional law of the *Question Prioritaire de Constitutionnalité* (QPC) is actually a common institution of procedural law before the French Conseil constitutionnel. The analysis of the QPC requires an account of the relevant French constitutional regulation. Art. 61–1 of the French Constitution reads as follows :

> « Lorsque, à l'occasion d'une instance en cours devant une juridiction, il est soutenu qu'une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d'État ou de la Cour de cassation qui se prononce dans un délai déterminé».[88]

The basic functioning of the system of the QPC is atypical.[89] It is a hybrid system for this mechanism represents a combination of an abstract and concrete judicial review.[90] In principle, the QPC is triggered by the question of a normal party to the process, i.e. a citizen, who disputes the constitutionality of a legal norm applicable to a concrete case.[91] However, the proceedings which ensue do not function like the preliminary ruling procedure within the framework of Art. 267 TFEU before the ECJ. Contrary to the preliminary ruling procedure, here a significant idiosyncrasy arises: Only the highest courts in the various stages of the proceedings are entitled to appeal before the Constitutional Council because the highest domestic courts function as a filter during the assessment of the QPC. This means that the court which is presented with the question, may not decide on the constitutionality of the disputed legal norm. On the contrary, the question is directed to the respective highest court (Cour de Cassation or Conseil d'État). Thus, the pending proceedings must be suspended until the highest court or, where appropriate, the Constitutional Council has reached a decision on the constitutionality of the law. The filtering process

88 Art. 61–1 de la Constitution du 04 octobre 1958 suivant la modification du 23 juillet 2008.
89 Preußler, Question prioritaire de constitutionnalité, 31.
90 Preußler, Question prioritaire de constitutionnalité, 31.
91 Cartier, Le positionnement tactique et stratégique des acteurs du procès face à la QPC, in: ders. (Publ.): La QPC, le procès et ses juges, 53 (53).

takes place at the level of the highest court. Should the question be considered to require presentation, it will be transferred to the Constitutional Council for a decision. This means that only the Constitutional Council is authorised to decide on constitutionality. This shows that the QPC is a legal remedy in the event of a concrete legal dispute. For this reason, the QPC has both the legal nature of a concrete and an abstract judicial review. Nevertheless, this is not a complete abstract control measure.[92] It must be pointed out that when it comes to the admissibility of the trial, it is not necessary that the disputed legal norm is decisive for the outcome of the pending procedures. Rather, it is sufficient that the respective legal norm represents a violation of the human and civil rights guaranteed in the Constitution.

Regarding the signatory states to ECOWAS, it must be pointed out that a comparable mechanism is not entirely unknown to the constitutional systems of the signatory states. Literally all francophone West African states have a comparable procedure referred to as "*Procédure de l'exception d'inconstitutionnalité*". Therefore, Art. 104 par. 6 of the Togolese Constitution stipulates:

> « Au cours d'une instance judiciaire, toute personne physique, ou morale peut, ‹ *in limine li- tis* ›, devant les cours et tribunaux, soulever l'exception d'inconstitutionnalité d'une loi. Dans ce cas, la juridiction sursoit à statuer et saisit la Cour constitutionnelle».[93]

Due to the fact that the object of the dispute is not the legal dispute as such, but rather the constitutionality of the law, this trial is called a *procédure de l'exception d'inconstitutionnalité.* Indeed, every citizen can dispute the constitutionality of a law that has already entered into legal force during the legal dispute. The court before which the proceedings are pending is obliged to submit them. In this case, the legal dispute is suspended and the question of constitutionality of the disputed law is referred to the

92 Preußler, Question prioritaire de constitutionnalité, 37.

93 Art. 104 par. 6 Verfassung von Togo vom 14. Oktober 1992 [Constitution of Togo of 14 October 1992]; Art. 122 Verfassung Benin vom 11. Dezember 1991[Constitution of Benin of 11 December 1991]; Art. 132 par. 1 Verfassung Niger vom 25. November 2010[Constitution of Niger of 25 November 2010]; Art. 96 par. 4 Verfas- sung Guinea vom 07. May 2010 [Constitution of Guinea of 07 May 2010]; Art. 96 Verfassung Elfenbeinküste vom 23. July 2000[Constitution of Ivory Coast of 23 July 2000]; Kanté, Models of Constitutional Jurisdiction in Francophone West Africa, in: The Journal of Comparative Law (2008) Vol. 3, 158 (160).

Constitutional Court.[94] However, there is no possibility in the current legal situation to assess the incompatibility of a legal norm with the African Charter and the respective constitutional case law by the ECOWAS Court of Justice. Therefore, the mechanism of the QPC should contribute to closing loopholes with certain adjustments in this regard.

This mechanism of the QPC can be applied to the domestic orientation effect of the ECOWAS judgment because the jurisprudence of the ECOWAS Court of Justice is part of the meaning and capacity of the African Charter within the constitutional order of the Community. Whenever the conformity to International law of a norm, in light of the African Charter, and with it the jurisprudence of the ECOWAS Court of Justice, is doubted by the disputing parties, there must be domestic mechanisms in place, which enable such questions to be indicatively answered. This would produce a cross-case effect of the decision by the ECOWAS Court of Justice. However, the corresponding adjustment must be pointed out. The description and importance of the QPC should be adjusted because the *Question Prioritaire de Constitutionnalité* is based on the question of compatibility with the French Constitution. At this point, the question should be described as a *Question Prioritaire de Conformité* (in the following referred to as *QPC*) as those seeking justice should ask the question of the compatibility (Conformité) with the African Charter and the case law of the ECOWAS Court of Justice. This reference is important because the African Charter, together with the jurisdiction by the Court of justice , represents an instrument of autonomy. The task of the national Constitutional Courts would therefore, be to assess whether the allegation, primarily made against a legal norm with regards to the African Charter or against the case law of the Court of Law, has any foundation. In this respect, the national

94 Art. 24 LO und Art. 122 Verf B; *Mipamb*, L'exception d'inconstitutionnalité en droit togolais, available at: www.courconstitutionnel.tg (last accessed on 22/06/2015); Bado, Verfassungs- gerichtsbarkeit und Demokratisierung im frankophonen Westafrika, Länderstudie/Togo[Constitutional Jurisdiction and democratisation in Francophone West Africa, country study Togo], 11, ab- rufbar unter [available at]: http://intlaw-sgiessen.de/fileadmin/user_upload/bilder_und_dokumente/forschung/ westafrikaprojekt/workingpapers/Draft_WP_2014_benin.pdf (last accessed on 02/07/2015); Cour constitutionnelle du Bénin, Décision DCC 10–117 (08.09.2010) available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015); Cour constitutionnelle du Bénin, Décision DCC 10–149 (28.12.2010), available at: www.cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

Constitutional Courts would contribute to consolidate the meaning of the African Charter and the case law of the Court of justice at a National level.

The mechanism of the QPC should entail many advantages. First of all, the domestic *erga-omnes*-effect of the jurisdiction by the ECOWAS Court of Justice is established by the domestic Constitutional Courts.[95] Indeed, the decision by the domestic Constitutional Courts has an automatic *erga-omnes*-effect. In this sense, regarding the capacity of the *QPC*-judgment in the domestic legal system, the French Constitutional Council emphasises in established case law judgment:

> « Considérant que cette déclaration d'inconstitutionnalité prend effet à compter de la date de publication de la présente décision ; que, d'une part, elle est applicable à toutes les procédures dans lesquelles les réquisitions du procureur de la République ont été adressées postérieurement à la publication de la présente décision ; que, d'autre part, dans les procédures qui n'ont pas été jugées définitivement à cette date, elle ne peut être invoquée que par les parties non représentées par un avocat lors du règlement de l'information dès lors que l'ordonnance de règlement leur a fait grief » [96]

The same tenor can be recommended for the proposed *QPC* in the domestic constitutional order of ECOWAS. By declaring the *QPC*-decision of the Constitutional Court compatible with ECOWAS case law, it also has an *erga-omnes*-effect on the Court of Justice's decision. When accepting the compatibility of a legal norm with the Charter or with the decision by the ECOWAS Court of Justice, it must then be expressly referred to the respective decision by the Court of Law. Accordingly, the domestic acknowledgement of the decision by the ECOWAS Court of Justice by the Constitutional Court of Benin must be welcomed. In fact, regarding the definition of an arbitrary arrest, the Constitutional Court of Benin expressly referred to the relevant judgment by the ECOWAS Court of Justice:

> « Notons que pour déterminer à partir de quand une arrestation et une détention sont jugées arbitraires, la Cour de Justice de la CEDEAO, dans son arrêt N°ECW/CCJ/JUD/05/10 du 08 novembre 2010 prononcé dans l'espèce Mamadou TANDJA contre État du Niger a rappelé

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95 Bernabé/Cartier, L'introduction d'un nouveau gène dans le procès, in: Cartier (Publ.): La QPC, le procès et ses juges, 1 (21).

96 Conseil Constitutionnel, N°2011–160 QPC (09.09.2011), M. Hovanes A.; Conseil Constitu- tionnel, N°2010–15/23 QPC (23.07.2010), Région Languedoc-Roussillon et autres.

> que les conclusions de la « Commission des Droits de l'Homme de l'Organisation des Nations Unies, en déterminant le mandat du groupe de travail sur la détention arbitraire a considéré comme arbitraires les privations de liberté qui, pour une raison ou une autre sont contraires aux normes Internationales pertinentes énoncées dans la Déclaration universelle des droits de l'Homme ou par les instruments internationaux pertinents ratifiés par les États ».[97]

This modus operandi should be applied to the mechanism of the QPC. Even if the French Constitutional Council does not always expressly refer to the jurisdiction by the ECtHR when it comes to the *QPC*, a convergence of legal practices between the two legal systems can be seen in renowned statemtents by the Constitutional Council.[98] Moreover, with the introduction of the *QPC*, the contribution of the litigants to the communitarisation and consolidation of constitutional jurisprudence will be decisively recognisable in the constitutional system of ECOWAS. Furthermore, by introducing the *QP*C the Member States would avoid further convictions because the proposal is based on the assumption that the litigants should have the opportunity within the framework of the *QP*C, by way of a constitutional process, to remove a potential violation of their rights which is embedded in the African Charter. This is consistent: The application of a legal norm contrary to the Convention leads directly to a violation of the Convention and therefore the rights of the citizens. Therefore, the procedure of the *QP*C will contribute to the anticipation of the conviction of Member States. Finally, a unified application of the African Charter and judgments of the Court of justice will be established in Member States by the *QPC*. This consideration takes the idea of precautionary compliance with the obligations resulting from a declaratory judgment into account. Indeed, every Member State has three kinds of obligations in case of a conviction: the obligation to terminate, the obligation of reparation and the

97 Cour constitutionnelle du Bénin, Décision DCC 15–025 (12.02.2015), available at: www. cour-constitutionnelle-benin.org (letzter Zugriff am 27.04.2015).

98 Conseil Constitutionnel, N°2011–113/115 QPC (01.04.2011), M. Xavier P. et autres; Conseil Constitutionnel, N°2010–38 QPC (29.09.2010), M. Jean-Yves G.; Conseil Constitutionnel, N°2011- 147 QPC (08.08.2011), M Tarek J.; Conseil Constitutionnel, N°2011–185 QPC (21.10.2011),
M. Jean-Louis C.; Conseil Constitutionnel N°2011–223 QPC (12.02.2012), Ordre des Avocats au barreau de Bastia; Conseil Constitutionnel, N°2012–243/244/245/246 QPC (14.05.2012), Société Yvonne Républicaine et autre; Conseil Constitutionnel, N°2011–214 QPC (27.01.2012), Société COVED SA.

obligation of prevention. With the introduction of the *QPC,* the obligation of prevention will be met to a large extent.

However, the *QPC* as proposed here could entail a certain risk on both sides: If the highest domestic courts should avail of a monopoly without any control during the filtering process of the question to be referred to the Constitutional Courts, this, on one hand, entails the potential danger of an arbitrary refusal. This risk is already known in the French constitutional process.[99] Therefore, it is recommended that the highest court dealing with the question must be obliged to give reasons for a possible refusal of a submission to the Constitutional Court.[100] This would serve to enable a clean filtering process of the *QPC* at the highest courts. Furthermore, the litigants should have a legal remedy against the refusal of a reference of the *QPC*. On the other hand, the litigants may also misuse the *QPC* by possibly abusing it to delay the pending trial (as a *manoeuvre dilatoire*). It is therefore recommended that the objection of incompatibility with the relevant basis of the Charter or decision by the ECOWAS Court of Justice be clearly stated before the respective court for the admissibility of the *QPC*. The legal basis of the *QPC*-objection should also be clearly distinguished.

Moreover, it must be stated that the national Constitutional Courts could, in certain cases, issue more guarantees than the ECOWAS Court of Justice. This would be admissible since the regional system before the ECOWAS Court of Justice is, after all, a subsidiary protection system according to International practice.[101] Therefore, the domestic Constitutional Court has the primary task to protect the human rights as guaranteed in the African Charter from state interference. In this respect, the ECOWAS protection system represents a lower threshold (*plancher*).[102] The domestic constitutional systems may reach an upper limit with regard to guarantee-

99 Bernabé/Cartier, L'introduction d'un nouveau gène dans le procès, in: Cartier (Publ.): La QPC, le procès et ses juges, 1 (21).

100 Delanlssays, La motivation des décisions juridictionnelles relatives à la QPC au prisme de l'efficience, in: Cartier (Publ.): La QPC, le procès et ses juges, 133 (137).

101 Villiger, The principle of subsidiarity in the European Convention on Human Rights, in: Promoting Justice, Human Rights and Conflict Resolution through International law (2007), 623 (625).

102 In comparison, the ECHR represents the minimum standard in the European Council. Also: Lock, Das Verhältnis zwischen dem ECJ und Internationalen Gerichten [the relationship between the ECJ and International courts], 280; Villiger, The principle of subsidiarity in the European Convention on Human Rights, in: Promoting Justice, Human Rights and Conflict Resolution through International Law (2007), 623 (634).

ing the Charter. Such approaches are known e.g. between the ECtHR and the French Constitutional Council. Indeed, a certain divergence between the Constitutional Council and the ECtHR in favour of more legal protection in the French constitutional system can be noted. This constellation is shown in the decisions Nr. 2011–160 and Nr. 2010–15/23.[103] These two decisions clarify that the regional system represents a minimum standard and the National constitutional system can do even more. All things considered, this approach is to be welcomed, because the understanding of the principle of subsidiarity and the primary obligation of the signatory states are clear.

In the end, the introduction of the *QPC* would enable the litigant to challenge every legal norm, should there be legitimate doubts that it does not comply with the guarantees of the Charter and the established case law of the ECOWAS Court of Justice. Furthermore, the possibility of a *QPC* in the legal system of the Member State would contribute to a certain autonomisation of the African Charter regarding the constitutional jurisprudence of the Member States. This would be guaranteed if the Constitutional Courts would expressly refer to the African Charter and the relevant judgment by the ECOWAS Court of Justice regarding the assessment of the conformity of the *QPC* with National legal norms. The African Charter, within the framework of the *QPC,* would also be seen as a domestic tool of interpretation of the guarantee in the Convention. Furthermore, the relationship of the constitutional guarantee and the guarantee of the Charter would become clearer with the QPC. Regarding the question before domestic courts, the *QPC* would contribute to a differentiation between *Exception d'Inconstitutionnalité* and *Question Prioritaire de Conformité*, because both procedures are similar yet have a different legal basis. The E*xception d'Inconstitutionnalité* refers to the constitutional regulations whilst the *QPC refers* to the guarantees of the African Charter and the corresponding decision by the ECOWAS Court of Justice. After all, with the introduction of the *QPC,* the litigants would become rather familiar with the African Charter and the ECOWAS-case law because such would form the legal basis of their question. All in all, the *QPC* would help in the proposed way the Charter and the case law of the ECOWAS Court of Justice to become a vibrant legal source in the constitutional legal systems the

103 Conseil Constitutionnel, N°2011–160 QPC (09.09.2011), M. Hovanes A.; Conseil Constitu- tionnel, N°2010–15/23 QPC (23.07.2010), Région Languedoc-Roussillon et autres.

Member States (*droit vivant*). Thus, the mechanism contributes to making the guarantee of the Charter also justiciable within domestic law.

II. Effect on all state powers

Although the state is directly convicted, the violating act was not caused by the state itself. Addressee of the declaratory judgment is the concerned state organ, which committed the wrongdoing of the Member State. However, state organs are not party to individual complaint proceedings before the ECOWAS Court of Justice. Precisely because of this, only the involved signatory state is expressly named in the tenor of the declaratory judgment.[104] Nevertheless, the state organs of the sued Member State are indirectly affected by the judgment.[105] This raises the question of the effectiveness and the mode of action of the declaratory judgment on the National legal system of the responsible Member State. On which legal grounds are the state organs obliged to observe International law in general and the decisions by the ECOWAS Court of Justice in particular? This question begs further clarification because Art. 15 par. 4 of the Amendment Agreement does not provide indications of whether the legal decision by the ECOWAS Court of Justice also represents a legal obligation for the National state organs (1). It is, however, certain that the national Constitutional Courts have a special binding commitment (2).

104 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950[The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950], 113.

105 CIJ, Demande en interprétation de l'arrêt du 31. mars 2004 en l'Affaire Avena et autres ressortissants mexicains (Mexique c. États-Unis d'Amérique), Arrêt du 19. janvier 2009, par. 64; Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Menschen- rechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Menschen- rechte und Grundfreiheiten vom 4. November 1950[The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950], 114.

1. Indirect legal force for all state organs

The silence by the signatory states during the adoption of this Amendment Agreement could be justified by assuming that the question of the binding effect for the organs of the convicted Member State was left up to the National law of the concerned signatory state.[106] Which domestic organ is affected depends on the content of the violating act.[107] Although the declaratory judgment only has a declarative character, it directly intervenes in the domestic legal system of the concerned convicted Member State. Thus, all public authorities are bound by the legal binding force.[108] The indirect power of the case law of the ECOWAS Court of Justice to affect all state organs can be derived from the principles of *restitutio in integrum* and effective legal protection.[109] The ICJ thus decided in the legal matter of Avena vs the United States as follows:

> « Le comportement de tout organe de l'État est considéré comme un fait de l'État d'après le droit International, que cet organe exerce des fonctions législatives, exécutives, judiciaires ou autres, quelle que soit la position qu'il occupe dans l'organisation de l'État, et quelle que soit sa nature en tant qu'organe du gouvernement central ou d'une collectivité territoriale de l'État ».[110]

In case of a constitutional judgment which led to a violation, the decision regarding reparations has an indirect effect on the case law of the Constitutional Court. Should it be a law that has been declared to be in violation of human rights by the Court of justice , it must be assumed that the parliament will take this decision into account in the legislative amendment procedure of the sentenced member state. A legal act of the executive

106 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (113).

107 BVerfGE 111, 307 (323 in C I 2 d) – Görgülü.

108 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004, in: EuGRZ 2004, 683 (692). [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (692)].

109 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem [Protection of constitutional law in the European multi-level system], 160.

110 CIJ, Demande en interprétation de l'arrêt du 31 mars 2004 en l'Affaire Avena et autres res- sortissants mexicains (Mexique c. Ètats-Unis d'Amerique), Arrêt du 19 janvier 2009, par. 63.

which leads to the violation of the Charter should be rectified by an appropriate measure.Everything, therefore, depends on the organ which was party to the violation.

It follows that the ECOWAS Court of Justice does not have to expressly name the concerned state organ responsible for the misconduct in the tenor of the judgment. The reason is clear: The specification of competence has already been regulated in domestic law. So to speak: The declaratory judgment is directed together with the to whom it may concern.[111]

The declaratory judgment is addressed to the state organs in their respective area of competence. With regard to the domestic courts, the successful plaintiff receives an enforceable claim to restitution executable under International law through the declaratory judgment. By qualifying the conduct of the state as a violation of human rights and consequently convicting the state, the Court of Justice has indirectly convicted the domestic court concerned. At this stage, it should be pointed out that the Court of justice does not have the power to directly intervene in the domestic legal proceedings. Therefore, its judgments do not have a direct effect.[112] However, on the part of the courts, there is the obligation to give effect to International judgments at a National level. However, the judiciary cannot decide *ex nihilo*.[113] To avoid an *ultra vires,* act the courts need a legal basis. It is therefore recommended to provide for reasons for a resumption through legislation on a National level in order to take the judgments by the ECOWAS Court of Justice into account. This principle of reparation, deduced from common International law, is confirmed for example by § 359 No. 6 of the German Criminal Procedure Code. As a result, provisions should be made for domestic compensation proceedings within the National legal systems in the ECOWAS Community. Failure to comply is a violation of Art. 7 par. 1 of the African Charter.

The task of the legislature concerning compliance with the judgment can be justified on many grounds . As long as there are no new legal or constitutional regulations with regards to the legal effect of the declaratory judgment by the ECOWAS Court of Justice, the National courts in gener-

111 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts [European human rights under the aegis of the Federal Constitutional Court], in: DÖV (2005), 860 (864).

112 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem [Protection of constitutional law in the European multi-level system], 159.

113 Bernhardt, The Convention and Domestic Law, in: Macdonald/Matscher/Petzold (Publ.), The European System for the Protection of Human Rights, 25 (38).

al, and the Constitutional Courts in particular, are in a dilemma. Compliance with the ECOWAS judgment means an infringement of theconstitutional requirement of the finality of Art. 106 of the Constitution (of Togo). Should the Constitutional Court however remain unimpressed by the declaratory judgment, there would also be an infringement of International law because of the violation of the obligation of compliance of an International judgment.[114] An easing of the legal effect in Art. 106 of the Togolese Constitution is the only way to resolve this dilemma. Thus, it is necessary that the National constitution-amending legislator or the simple legislator take action.[115] A law in violation of human rights per se already creates a normative basis for a permanent violation of the declaratory judgment because those enforcing the law are bound by the legislation. Specialised courts are bound by the legal authorisations of the legislator and the Constitutional Courts to the decision-making authority of the constitutional legislator (or the constitution-amending legislator). They align their actions to the guidelines given by the legislator. This was recently confirmed by the French State Council when it rejected the resumption of a decision by the administrative court in violation of human rights from 1999.[116] By the executive and the judiciary acting according to the guideline of the law, a law in violation of human rights would be per se the strongest form of a breach of a declaratory judgment by the ECOWAS Court of Justice. This makes the task of the legislature of implementing the declaratory judgment even more urgent.

Many Member States of the European Council have recognised the danger of a violation of the Convention based on non-action of the legislature. In order to prevent recurring violations, Germany and France, e.g. have

114 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und Europäischem Court of Law für Menschenrechte [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat, 44 (2005), 403 (422).

115 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950[The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950], 201.

116 Mellech, Die Rezeption der EMRK sowie der Urteile des ECtHR in der französischen und deutschen Rechtsprechung, 84. [The reception of the ECHR and the judgments of the ECtHR in the French and German jurisdiction, 84].

made statutory provisions for the resumption of proceedings. In Germany, it can be found in § 580 No. 8 of the Civil Procedure Act and in § 359 No. 6 of the German Criminal Procedure Act. In France, a retrial was introduced into the French Criminal Procedure Act with the announcement of the Act No. 2000–516 of 15 June 2000.[117] Such measures are to be welcomed in the states of the European Council because the continued validity of a law in violation of human rights and declared as such by the ECOWAS Court of Justice is a continuous criminal offence by the convicted Member State.[118] Therefore, the theoretical continued validity of the law is, after the conviction and its practical application, a permanent criminal offence of the Member State under International law. It is therefore necessary that the constitution-amending legislator creates conditions for a resumption of a trial after sentencing the state on the basis of Constitutional Court judgments in violation of human rights. Here, it must also be pointed out, taking into account the perspective of comparative law, that an amendment to the Constitution following an International judgment is nothing new. This is e.g. the case in some European countries which amended their constitutions as a consequence of and in accordance with judgments by the ECtHR.[119] In this context, Ress rightfully considers the

117 See also Art. 626–1 to 626–7 of Act No. 2000–516 of 15/06/2000. Acc. to Art. 626–1 CPP: « [Le réexamen d'une décision pénale définitive peut être demandé au bénéfice de toute personne reconnue coupable d'une infraction lorsqu'il résulte d'un arrêt rendu par la Cour européenne des droits de l'homme que la condamnation a été prononcé en violation des disposi- tions de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ou de ses protocoles additionnels, dès lors que, par sa nature et sa gravité, la violation cons- tatée entraîne pour le condamné des conséquences dommageables auxquelles ‹ la satisfaction équi- table › allouée sur le fondement de l'article 41 de la convention ne pourrait mettre un terme.»

118 Bernhardt, The Convention and Domestic Law, in: Macdonald/Matscher/Petzold (Publ.), The European System for the Protection of Human Rights, 25 (39); Ress, Die Europäische Men- schenrechtskonvention und die deutsche Rechtsordnung [The European Human Rights Convention and the German Legal System], in: EuGRZ 1996, 337 (252).

119 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem [Protection of constitutional law in the European multi-level system], 175; such, Turkey has changed its Constitution on 03/10/2001 and on 31/12/2002 with reg. to Art. 13, 26 and 76 (see: Conseil de L'Europe, Comité des Ministres, Résolution intérimaire ResDH 2004, 38 du 02.06.2004.); also as a consequence of the judgment Incal vs. Turkey, judgment of 09/06/1998 Turkey has made changes to its Constitution, see Ress, Aspekte der Entfaltung des europäischen Menschenrechtss-

resumption as the only possibility to remedy a violation of the Convention.[120]

In some cases, the executive represents the state before International courts. Indeed, the Member State is represented by the respective government as the respondent in individual complaints proceedings before the ECOWAS Court of Justice. However, this does not mean that the government is to be regarded as a party before the regional human rights protection instance. It only acts as a representative of foreign affairs before the Court of justice .[121] Every Member State namely regulates the question of who is authorised to represent the state before International instances. As a result, it may occur that the reprimanded conduct of the state is an action by a state authority or the administration. The action of the signatory state that led to the conviction concerns all decisions in violation of human rights. In this sense, decision means all sovereignactions by the concerned Member States. Thus, it is clear that acts by the executive which are attributed to the signatory state should be repealed.[122] When determining a violation of the Charter, the executive's leeway for consideration to retract is reduced to nil because of the principle *restitutio in integrum*. The administration must comply with the declaratory judgment.[123] Due to the obligation to comply with the judgment, the declaratory judgment indirectly

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chutzes, in: Jahrbuch der Juristischen Gesellschaft Bremen [Aspects of the development of the European protection of human rights] (2003), 17 (20); Sweden has also changed its Constitution after the case Sporrong a. Lönnroth vs Schweden of 23/09/1982 in accordance with the jurisdiction by the ECtHR, see also Rinsche, Die Welt nach Caroline – Rechtliche und faktische Umsetzung des EGMR-Urteils im Fall Hannover [The World after Caroline – legal and factual implementation of the ECtHR judgment in the case of Hanover], in: Mann/Smid (Publ.), FS Damm (2005), 156 (159).

120 Ress, Die Europäische Menschenrechtskonvention und die deutsche Rechtsordnung [The European Human Rights Convention and the German Legal System], in: Eu- GRZ 1996, 337 (251).

121 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem [Protection of constitutional law in the European multi-level system], 168.

122 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950 [The Binding Effect of decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950], 203.

123 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und Europäischem Court of Law für Menschenrechte [Cooper-

binds the executive, in a broad sense. The conduct that led to the violation must be removed or terminated. Precautions must be put in place in order to prevent future violations. Thereby, the obligation to compensate can be enforced. The domestic Constitutional Courts are subject to a separate binding effect based on their position in the respective constitutional system of the Member States.

2. Special binding effect of the Constitutional Court

At this stage, the question must be asked: on which grounds may the ECOWAS Court of Justice assess constitutional courts judgments? For the status of a constitutional court expresses the sovereignty of the signatory state.[124] In order to guarantee the last decision-making competence of the Constitutional Court or Supreme Court, constitutional regulations are expressly provided for.[125] However, the degree of the binding effect of the ECOWAS Court of Justice is unrestricted. It does not depend on the position of the responsible state organ. Rather, as a state organ, the Constitutional Court (a) is just as liable toward the Member State as all other state organs. Moreover, Constitutional Courts or Supreme Courts play such an important role at a National level that they function as a role model (b).

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ation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat, 44 (2005), 403 (414).

124 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950 [The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950], 114.

125 See also: § 129 par. 2 Constitution of Ghana of 16 December 1996; Art. 106 Constitution of Togo of 14 October 1992; Art. 124 Constitution of Benin of 11 December 1991; Art. 94 Constitution of Mali of 25 February 1992; Art. 134 Constitution of Niger of 25 November 2010; Art. 99 Constitution of Guinea of 07 May 2010; Art. 98 Constitution of Ivory Coast of 23 July 2000; Art. 159 Constitution of Burkina Faso of 02 June 1991; Art. 92 par. 2 Constitution of Senegal of 22 January 2001; Sect. 230, 232, 233, 235 Constitution of Nigeria of 29 May 1999; Art. 65 Constitution of Liberia of 06 January 1984; Art. 92 Constitution of Guinea Bissau of 16 January 1984; Sect. 126, 127 Constitution of The Gambia of 16 January 1997; Art. 229 par. 1 Constitution of Cape Verde of 23 November 1999; Art. 122 par. 1 Constitution of Sierra Leone of 03 September 1991.

Furthermore, even Constitutional Courts can infringe on the human rights guidelines through the execution of judicial powers (c).

a. The Constitutional Court as a state organ

The Constitutional Court is part of the National judiciary and as such carries the responsibility for and against the state. Every state is sovereign. The Constitution contains regulations that correspond with the attribution of sovereignty. However, unlike natural persons, the state itself cannot act. It needs organs that carry out certain National tasks on its behalf through natural persons referred to as organ administrators.[126] For this reason, the "actions of the organ administrators are attributed to the respective organ and via this to the state. The action of the organ administrator is, therefore, a direct action of the state".[127] In this sense, the attribution of the actions of the constitutional bodies to the state is therefore especially applicable at the International law level. Functionally, the Constitutional Court is to be regarded as both a court and also as the highest constitutional body of the state.[128] At the level of International law, the term state organ has an even broader meaning. Every official is included. The ICJ has defined the term with regards to the liability of the state based on actions in violation of International law as follows:

> « L'expression ‹ organe de l'État › utilisée […] doit s'entendre dans son acception la plus large. Elle ne se limite pas aux organes du gouvernement central, aux hauts responsables ou aux personnes chargées des relations extérieures de l'État. Elle recouvre les organes publics de quelque nature et de quelque catégorie que ce soit, remplissant

126 Maurer, Staatsrecht I. Grundlagen, Verfassungsorgane, Staatsfunktionen [State Law I. Basics, Organs of the Constitution, Functions of the State], 4. edition, 391, Rn. 22.

127 Maurer, Staatsrecht I. Grundlagen, Verfassungsorgane, Staatsfunktionen [State Law I. Basics, Organs of the Constitution, Functions of the State], 4. edition, 391, Rn. 22.

128 See also Art. 114 Constitution of Benin of 11 December 1991; Art. 99 Constitution of Togo of 14 October 1992; Art. 152 Constitution of Burkina Faso of 02 June 1991; Art. 88 Constitution of Ivory Coast of 23 July 2000; Art. 94 Constitution of Guinea of 07 May 2010; Art. 120 Constitution of Niger of 25 November 2010; Art. 85 Constitution of Mali of 25. February 1992.

> quelque fonction que ce soit et à quelque niveau que ce soit, y compris au niveau régional au local».[129]

As a court, the Constitutional Court carries out judicial power and is therefore part of the judiciary in the separation of powers.[130] As a general rule, it may only act as public authority of the Third Power[131] on application. In a numbe of ways, the Constitutional Court is a court and therefore a state organ. As a Court of Law, the decisions by the Constitutional Court develop final legal force in a substantive and formal regard. It is the very top of the judiciary in guarding the fundamental freedoms and human rights entrenched in the Constitution.As the highest constitutional organ, the Constitutional Court is subordinate to no other constitutional organ. Rather, it controls the actions of all other constitutional organs, in particular of the parliament and the president of the state according to the Constitution. If they exceed their competences, the Constitutional Court shall refer the other Constitutional organs to their respective areas of competence. At state level, its decisions develop the strongest effects on all state organs, including the legislature and everyone.[132]

b. Role Model Function of the National Constitutional Court

The special position of a Constitutional Court finds expression in the legal systems of the francophone West African states. That is to say, that they are not connected to the regular instance procedure.[133] In fact, the regulations

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129 CIJ, Demande en interprétation de l'arrêt du 31. mars 2004 en l'Affaire Avena et autres ressortissants mexicains (Mexique c. États-Unis d'Amérique), Arrêt du 19. janvier 2009, par. 64.

130 Art. 88 Constitution of Senegal of 22. January 2001; see also Sodan/Ziekow, Grundkurs Öffentliches Recht [Basic Course Public Law], 5. edition, 130, Rn. 1; Benda/Klein, Verfassungsprozeßrecht [constitutional process law], 2. edition, § 4, Rn. 99.

131 Stern, Das Staatsrecht der Bundesrepublik Deutschland, Band [State Law of the Federal Republic of Germany, Volume] II, § 32 I 2, 335.

132 Maurer, Staatsrecht I. Grundlagen. Verfassungsorgane, Staatsfunktionen[State Law I. Basics, Organs of the Constitution, Functions of the State], 4. edition, 667, Rn. 9.

133 Art. 124 Constitution of Burkina Faso of 02 June 1991; Art. 113 Constitution of Togo of 14 October 1992; Art. 125 Constitution of Benin of 11 December 1991; Art. 102 Constitution of Ivory Coast of 23 July 2000; Art. 108 Constitution of Guinea of 07 May 2010; Art. 136 Constitution of Niger of 25 November 2010; Art. 81 Constitution of Mali of 25 February 1992.

of the Constitutional Court are stipulated in their own chapter.[134] As a result, it exercises its competence as the highest guardian of the Constitution independently and autonomously. Because the existence, the statute and the regulations regarding the competence of the Constitutional Court are provided for in the Constitution itself, the Constitutional Court has an important position within the constitutional framework.[135]The safeguarding of the human rights guaranteed by the Constitutional Court is first and foremost the task of the National Constitutional Court. In order to remove a certain discrepancy between the International jurisdiction on human rights and the decisions by National state organs of Member States, the Constitutional Court plays a model role. The Constitutional Court has, in this regard, a levelling task.[136] In otherwords, the Constitutional Court is a guide within the structure of a state. The domestic Constitutional Court is, so to say, *the highest* guardian[137] of the Charter within the National legal system. Moreover, the Constitutional Court plays a key role within the structure of the state.[138] It has the responsibility to make landmark judgments to consolidate the rule of law. The case law of the Constitutional Court has consequences for the entire domestic constitutional order. The Constitutional Court gives other state authorities the incentive to comply with International law at National level because the other state organs, such as the highest specialised courts and the legislature, base their actions on the control standards of the Constitutional Court.

Subsequently, it is clear that the respective Constitutional Court of the ECOWAS signatory states has the highest responsibility within the state structure, in particular with regards to the adherence to the judicial guarantee acc. to Art. 7 par. 1 of the Charter. Their role as "Co-Con-

134 Art. 152 Constitution of Burkina Faso of 02 June 1991; Art. 99 Constitution of Togo of 14 October 1992; Art. 114 Constitution of Benin of 11 December 1991; Art. 88 Constitution of Ivory Coast of 23 July 2000; Art. 93 Constitution of Guinea of 07 May 2010; Art. 120 Constitution of Niger of 25 November 2010; Art. 85 Constitution of Mali of 25 February 1992.

135 Stern, Das Staatsrecht der Bundesrepublik Deutschland, Band [State Law of the Federal Republic of Germany, Volume] II, § 32 II 2, 344.

136 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts [European human rights under the aegis of the Federal Constitutional Court], in: DÖV (2005), 860 (860).

137 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts, in: DÖV (2005), 860 (866). [European human rights under the aegis of the Federal Constitutional Court].

138 Sodan/Ziekow, Grundkurs Öffentliches Recht [Basic Course Public Law], 5. edition, § 16, Rn. 6.

troller" next to the ECOWAS Court of Justice, entails significant consequences regarding the implementation of the human rights entrenched in the Charter. However, it is clear that these conditions for appealing to the national Constitutional Courts do not make it easier to consolidate the legal principles. Especially the Constitutional Courts have the responsibility of entrenching the rule of law.[139] Should this primary responsibility fail, the violation must be removed at National level in hindsight. Consequently, this violation is the responsibility of the state under International law. The National Constitutional Court must then remedy this error retrospectively by reopening the original proceedings.[140]

In the following, the adherence to the legal decision by the ECOWAS Court of Justice will be briefly discussed. The declaratory judgment of the ECOWAS Court of Justice only has declarative character. In its role as the highest guardian of the Charter, the Constitutional Court should establish an *erga-omnes* binding effect for the Charter and the associated judgments by the ECOWAS Court of Justice at National level. Art. 106 of the Togolese Constitution and Art. 23 of the LO[141] read as follows:

> « Les décisions de la Cour Constitutionnelle ne sont susceptibles d'aucun recours. Elles s'im- posent aux pouvoirs publics et à toutes les autorités civiles, militaires et juridictionnelles. »

Especially because these two regulations ascribe the strongest effect to the decisions of the Constitutional Court, all other state powers should follow the understanding of the International law and the associated judgments by the ECOWAS Court of Justice before that of the Constitutional Court. Should the Constitutional Court reject the binding effect of the declaratory judgment by the ECOWAS Court of Justice, the other state powers would not have any reason to pay attention to the declaratory judgment by the Court of Law. They follow the opinion of the Constitutional Court and are closer and more open to the Constitutional Court than they are to

139 Diop, La justice constitutionnelle au Sénégal. Éssai sur l'évolution, les enjeux et les réfor- mes d'un contre-pouvoir juridictionnel, 268.

140 Also Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü- Beschluß des BVerfG vom 14.10.2004, in: EuGRZ 2004, 683 (698). [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (698)].

141 Loi Organique N°2004–004 (01.03.2004).

the ECOWAS Court of Justice.[142] The reason is obvious: The Constitutional Court is perceived as the highest court within the state structure and also as the "*pouvoir neutre*".[143]

c. The possibility of a judgment in violation of human rights

We will discuss the question, why the Constitutional Court of a Member State should be bound by the decision by the ECOWAS Court of Justice. At first glance, this binding effect is opposed to regulations, e.g. § 129 par. 2 of the Ghanaian Constitution. Nevertheless, the obligation of the Constitutional Court of the Member State can be justified. The constitutional regulations have a certain *kinship* with the human rights that are guaranteed in the Charter.[144]

However, assessment benchmarks by the Constitutional Court at their core are not to be confused with those of the ECOWAS Court of justice . The control measures of the Constitutional Court are different compared to those of the ECOWAS Court of Justice. Although the relevant human rights instruments and the Charter are applicable in the ECOWAS signatory states, the respective Constitutional Court assesses the constitutional complaint against the benchmark of the domestic constitutional law. For the suitability of these International obligations as a direct standard of examination in a Constitutional Court procedure is, according to the opinion of the majority in literature, rather limited.[145] Consequently, the Constitutional Court is in the service of the respective National Constitution. In contrast, the terms of the Human Rights Convention are to be interpreted autonomously by the ECOWAS Court of Justice.[146] Therefore, at

142 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Recht- sprechung des EGMR für die deutschen Gerichte [The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 139.

143 Herdegen, Constitutional Court als pouvoir neutre, in: ZaöRV (2009), 257 (258).

144 Benda/Klein, Verfassungsprozeßrecht[Constitutional Process Law], 2. edition, § 3, Rn. 71.

145 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law], 2. edition, § 3, Rn. 64.

146 Bernhardt, The Convention and Domestic Law, in: Macdonald/Matscher/ Petzold (Publ.), The European System for the Protection of Human Rights, 25 (34); Benda/Klein, Verfassungspro- zeßrecht [Constitutional Process Law], 2. edition, § 3, Rn. 66.

the level of International law, the African Charter, i.e. International law, represents the subject of assessment of the individual complaint against actions of the state. In this sense, the ECOWAS Court of Justice is directly at the service of the Charter. Actions by the state are directly assessed according to the guidelines of the Charter. There are, in fact, precedence cases in which some of the principles in the Constitutions do not comply with the human rights guidelines.[147] At European level, some Member States have changed their Constitutions because of the ECHR in order to reconcile them with the guidelines of the ECHR and ECtHR case law. All this confirms the autonomy of human rights despite the theoretical acknowledgement of their principles in the legal systems of Member States.[148] As far as the case law of the Constitutional Court is concerned, there are concrete examples in the West African judicial area, where sovereign acts of National Constitutional Courts have caused justified fears regarding the rule of law and the consolidation of democracy. The Togolese Constitutional Court must be quoted in this respect. In 2005, the Constitutional Court confirmed the unconstitutional transfer of power after the death of the former state president. This measure taken by the Togolese Constitutional Court has attracted particular attention within the International Community in general and the ECOWAS Community in particular.[149] Moreover, it is recognised within the West African Community that there is a convergence of constitutional principles. This convergence is reflected in the incorporation of the African Charter on Human and Peoples' Rights into the constitutional systems of the Member States. The ECOWAS Court of Justice is to be regarded as the authentic interpreter for the unification of the interpretation of these constitutional principles formed by the African Charter.[150] The ECOWAS Court of Justice alone has more knowledge regarding the current state of development of the Charter. It is therefore log-

147 CJ CEDEAO, Affaire Hissen Habré v. République du Sénégal, N °ECW/CCJ/JUD/06/10 (18/11/2010), available at: www.courtecowas.org (last accessed on 20/04/2015).

148 Bernhardt, The Convention and Domestic Law, in: Macdonald/Matscher/Petzold (Publ.), The European System for the Protection of Human Rights, 25 (34).

149 Regarding the failure of the Togolese Constitutional Court, see Kessougbo, La Cour constituti- onnelle togolaise et la régulation de la démocratie au Togo, in: Revue Béninoise des Sciences Juri- diques et Administrative (2005), 61 (97); Cowell, The impact of the protocol on good governance and democracy, in: African Journal of International and Comparative Law (2011), 331 (339).

150 Kilian, Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Men- schenrechte auf die Nationalen Gerichte der Mitgliedstaaten der

ical that the Constitutional Courts of Member States are subordinate to the jurisdiction of this ECOWAS Court of justice .[151]

In summary: An overview of the constitutional regulations of Member States clearly shows that obstacles still remain on national level of the ECOWAS Member States which could block the implementation of the judgments by the Court of justice . The majority of the opinions in literature argue for the precedence of the ECOWAS-instrument and therefore in favour of the precedence of the judgments by the Court of justice above National constitutional regulations.[152] Member States cannot refer to the inaction of their organs in order to justify the lack of effectiveness of their obligations towards the ECOWAS Community.[153]

The ECOWAS Court of Justice has expressly deduced from Art. 15 par. 4 of the Amendment Agreement that it has no authority to order a direct revocation of measures in violation of human rights, as a command to state organs, in the tenor of a declaratory judgment. For this reason, the declaratory judgment does not develop a direct legal binding effect with regards to the state bodies of the responding Member State. Therefore, they are only indirectly affected by the obligation to comply with the judgment. Nevertheless, the declaratory judgment possesses a factual legal force towards the state organs because of the right to effective legal protection

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Konvention zum Schutze der Men- schenrechte und Grundfreiheiten vom 4. November 1950[The Binding Effect of Decisions taken by the European Court of Law for Human Rights with regards to the National Court of the Member States regarding the Convention on the Protection of Human Rights and Constitutional Freedoms of 4 November 1950], 195.

151 BVerfGE, 74, 358 (370).

152 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (135 und 136); Egede, Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria, in: Journal of African Law (2007), 249 (253 und 284); Oppong/Niro, Enforcing Judg- ments of International Court in National Court, in: Journal of International Dispute Settlement (2014), 1 (21).

153 Egede, Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria, in: Journal of African Law (2007), 249 (253 und 253); the SADAC-Tribunal has accurately rejected the opinion of the Zimbabwean government: Oppong/Niro, Enforcing Judgments of International Court in National Court, in: Journal of International Dispute Settle- ment (2014), 1 (7).

(Art. 7 of the Charter). Thus, the duty to remedy applies to all state.[154] The actual, indirect commitment of the state organs is based on an International legal obligation of the convicted Member State. The state organs are not a party before the ECOWAS Court of Justice, therefore this Court of justice cannot directly convict them. On the basis of the right to effective legal protection the Court should be able to give directives in the tenor of a declaratory judgment, on how this goal could be achieved at a domestic level. Such references have no direct effect on the domestic legal system of the convicted state. The signatory state alone is bound by them. It is helpful for the convicted state to understand which route the Court of justice expects. The guidelines in the tenor of the declaratory judgment create a sound basis for the immediate national implementation of the judgment. Moreover, the ECOWAS Court of Justice saves itself a renewed assessment of the same case by way of an interpretative judgment because with the clear statement in the tenor of the Court of justice s decision regarding the resumption of the domestic proceedings it can hardly be presumed that the parties will submit another application for the interpretation of the declaratory judgment. This is because an interpretation procedure is based on the ambiguity of the tenor which entails the expectation of the Court of justice towards the result of the reparations. With respect to the effective legal protection and an acceleration of the compliance with the judgment, it is necessary to point out to the affected state organs in the main reasons of the decision that they are to act in accordance with the Convention. The Court of Law can make use of the method to aid the effectiveness of the declaratory judgment. No exception can be deducted from the legal basis for the transfer of human rights competences to the ECOWAS Court of Justice as to which state action may be objected to before the Court of justice . Therefore, judgments by the Constitutional Court in violation of human rights are to be assessed by the ECOWAS Court of justice . With the declaration of a violation of human rights by these judgments, the resumption of the trial offers an appropriate solution to effectively grant the plaintiff their legal right. Based on the principle of non-appealability of final constitutional decisions, the National Constitutional Courts should be authorised to take sufficient account of the legal consequences of the declara-

154 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat 44 (2005), 403 (417).

tory judgment by reopening the initial trial. In order to reach a compromise between justice in the individual case and legal certainty, National Constitutional Courts should order the cession of the enforcement for the future (*ex-nunc*-Wirkung) in the resumed trial. In this way the resumption of the proceedings serves the removal of the consequences of the legal force on a National level.

C. Consequences of Contempt of Judgments of the ECOWAS Court of Justice

The implementation of decisions by the ECOWAS Court of Justice represents an obvious, decisive step toward a better functionality of the mechanism instituted by Additional Protocol A/SP.1/01/05 for the direct individual complaint before the Court of justice . This goal can only be achieved if the Member States feel bound by the decision of the Court of Law and actually implement the latter in their domestic legal order. In this way, a functional legal system on Community level can slowly develop.[155] It is not a valid argument that the domestic law of the signatory states opposes the implementation of obligations under International law. This view is reiterated by the ICJ in its consistent case law, in particular in its latest judgmentinterpretation judgment in the case Avenas vs the United States. The ICJ namely states that:

> « La Cour n'a cessé de réaffirmer dans sa jurisprudence qu'un État ne saurait invoquer son droit interne pour justifier de ne pas avoir exécuté une obligation Internationale. Ainsi, en prenant les mesures qui leur incombent en vertu de l'arrêt Avena, les États-Unis ne sauraient invoquer vis-à-vis d'un autre État leur propre Constitution pour se soustraire aux obligations que leur imposent le droit International ou les traités en vigueur».[156]

Consequently, the question of sanction mechanisms in case of a violation of the obligation to implement arises (II). Is there a legal basis for an alternative solution in case of a violation of the obligation to implement (I)?

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155 Gans, Die ECOWAS. Wirtschaftsintegration in Westafrika [ECOWAS. Economic Integration in West Africa], 71.

156 CIJ, Demande en interprétation de l'arrêt du 31 mars 2004 en l'Affaire Avena et autres res- sortissants mexicains (Mexique c. États-Unis d'Amérique), Arrêt du 19. janvier 2009, par. 8.

I. State liability due to a breach of the obligation to implement

Acc. to Art. 15 par. 4 of the Amendment Agreement, the signatory states are obliged to acknowledge the declaratory judgment by the Court of justice as legally binding. In case of a conviction to pay compensation, the content of the obligation to implement is obvious. In some cases, however, the obligation to implement is based on the withdrawal of the disputed legal act by the state in violation of the Convention – regardless of whether it was an act of the administration, a court judgment, a legal norm that directly affects the individual or any other conduct by the state.[157] It has been shown, that the obligations derived from the African Charter represent objective obligations for the signatory states. For this reason, the violation of the obligation is established under International law by the convicted Member State towards the individual plaintiff. Furthermore, the other signatory states also have a legitimate interest in the implementation of the declaratory judgment. This can be specified through the enforcement of the General State Liability Act under International law.[158] From the aforementioned, it can be said: With regards to the object of the dispute, i.e. the substantive legal force, the legal proceedings of State liability inevitably neither have the same parties nor the same object of the dispute as the final national decision establishing liability.[159] Thus, the difference of the object of the dispute with regard to the substantive legal force represents a significant advantage in avoiding pendency when a new possibility of appeal is opened (1).[160] Regarding the accountability of the signatory states because of a violation of the obligation to implement, it should be referred to the general rule of state responsibility as well as the sanction mechanisms within the ECOWAS Community (2).

157 Frowein, in: ders./Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 46, Rn. 2.

158 Combacau/Sur, Droit International Public, 7. éd., 520.

159 CJUE, N°C-224/01, Arrêt (20.09.2003), Affaire Köbler v. Republik Österreich, par. 39.

160 Breuer, Staatshaftung für judikatives Unrecht [State liability in case of judicial injustice], 402.

1. Introduction of a new complaint procedure due to a breach of the obligation to implement

Commonly, the injustice under International law only arises against the violated subjects under International law[161], which represent states or International organisations. Through the declaratory judgment, the convicted signatory state carries an obligation to implement. This implementation preferably takes the shape of compensation in case of an established violation or the termination obligation in case of of still continuing infringements. If this obligation to implement is violated, this results in new rights in favour of the individual plaintiff. Therefore, the individual plaintiff can first claim the obligation to implement at a state level. Should a violation of the obligation to implement be established, a second individual complaint is set in motion before the ECOWAS Court of Justice based on the violation of the obligation to implement.

The failure to comply with the judgment opens the opportunity to submit a new complaint to the Court of justice . The plea of non-compliance has a different legal basis than the plea for the violation of human rights. The possibility to submit a further individual complaint if a breach of the obligation to comply is determined would contribute to the effective legal protection. Indeed, such a possibility can be dogmatically justified: on one hand, there is no need to fear the breach of legal force by a renewed complaint against the convicted Member State because the fundamental elements of this complaint are different to those in the initial proceedings before this Court of justice . Here, the plaintiff submits the application based on a violation of a general objective violation of an obligation, namely, the obligation to observe the International commitment of the Member State (Art. 15 par. 4 of the Amendment Agreement). In contrast to the initial trial where the plaintiff asserts the violation of the individual and civil rights acknowledged in the Charter, the application in a resumption of the domestic proceedings refers to the declaratory judgment. In this respect, it is recommended to create an appellate court at Community level, which should not only be able to decide on a remedy against judgments in the first instance but also on the complaint of a violation of the obligation to implement.[162] In this sense, the declaratory judgment gives the claimant a

161 Schröder, in: Vitzthum/Proelß (Publ.), Völkerrecht [International Law], 6. edition, 7. section, Rn. 8.

162 Thus was the recommendation of the experts during the meeting in Guinea-Bissau, "Legal and Human Rights Experts Propose Measures for Improving the Ef-

subjective legal claim to the implementation of the judgment. For, the declaratory judgment, with all due caution, gives rise to a subjective obligation to perform in favour of the applicant.

From the above, the status of the individual as a subject of under International law can be perceived. In principle, International law establishes rights and duties between subjects under International law.[163] Therefore, the right of state responsibility forms a second corrective level[164] in case of unlawful conduct. Subsequently, the rules of state liability come into effect if and only when, should a subject under International law has infringed on its primary obligation through attributable action.[165] The fact that the individual may claim the imputability of an infringement of International law means that he is awarded the status of a subject under International law. While the individual was purely perceived as an object under International law, this opinion has increasingly been criticised in the second half of the twentieth century.[166] The situation has definitely changed with the regulation in Art. 34 ECHR and Art. 10 d in the Additional Protocol A/SP.1/01/05 (19/01/2005). Both regulations grant the individual a right to judicial legal protection under International law. Thereby, access to an International court and the introduction of court proceedings have been made possible. The question with regard to the legal order of ECOWAS remains, whether the individual has the same claim regarding the violation of the implementation of the judgment because the regulation in Art. 10 d A/SP.1/01/05 (19/01/2005) only allows for the complaint against the violation of the primary obligation by the signatory state, but not on the second corrective level.

2. Enforcement of general state liability law

Here, the function and purpose of state liability law at the International law level can be perceived. With regard to the violation of the obligation

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ficiency of the ECOWAS Court in Imple- menting Human Rights Mandate", available at: www.courtecowas.org (last accessed on 18/04/2015).

163 Doehring, Völkerrecht [International Law], § 1, Rn. 17; Kau, Der Staat und der Einzelne als Völkerrechtssub- jekte [The State and the individual as subjects under International law], in: Vitzthum/Proelß (Publ.), Völkerrecht [International Law], 6. edition, 131 (140).

164 Ipsen, Völkerrecht International Law], 6. edition, § 28, Rn. 6.

165 Ipsen, Völkerrecht [International Law], 6. edition, § 28, Rn. 6.

166 Ipsen, Völkerrecht [International Law], 6. edition, § 7, Rn. 1.

to implement a declaratory judgment by the Court of justice , the general rule of customary International law is applicable (a). In addition, there are regional mechanisms of sanctions at ECOWAS-level (b).

a. Applicability of the general rules of customary International law

The states are responsible for attributable violations of International legal obligations according to International law. In the customary practice between states, the case law of International courts and the jurisprudence of International law, there is a consensus that the violation of International law by a state establishes its responsibility.[167]

The International law perceives the state as a unit. It does therefore not matter which state organ is responsible for the actual offence. What is important is the determination of the infringement of International law. The state cannot escape its obligation by attributing the action in violation of International law to another domestic organ.[168] In this respect, the legal actions of the legislature, the executive as well as the judiciary are attributable to the state. The independence of National courts cannot be an argument against the attribution of a violation of International law. Subsequently, the International Justice Commission stipulates in Art. 4 of the draft for state responsibility:

> "The conduct of any State organ shall be considered an act of that State under International law, whether the organ exercises legislative, executive, judicial or any other functions, what- ever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[169]

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167 Ipsen, Völkerrecht [International Law], 6. edition, § 28, Rn. 1; Schröder, in: Vitzthum/Proelß (Publ.), Völkerrecht [International Law], 6. edition, 7. section, Rn. 6.

168 Breuer, Staatshaftung für judikatives Unrecht [State liability in case of judicial injustice], 592; Van Genugten, Avena ou le system ju- ridique fédéral américain à l'épreuve, in: Hague Justice Journal (2008), 53 (58).

169 UN Doc. A/56/10, Chapter 2 (attribution of conduct to a state), Art. 4, 44; CIJ, Demande en interprétation de l'arrêt du 31 mars 2004 en l'Affaire Avena et autres ressortissants mexicains (Mexique c. États-Unis d'Amérique), Arrêt du 19 janvier 2009, par. 65; Koupokpa, L'indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque International de Lomé, organisé par le Centre de Droit Public de Lomé et le département de Droit administratif de la Fa- culté de Droit de L'Université de Gand (02.03.2012), Lomé, 18.

From this, we should remember that the states are accountable for the injustice under International law that was caused by their courts. According to common International law, states are responsible for disregarding their obligations under International treaty law. As far as the system of protection within the ECOWAS Community is concerned, in the absence of a provision such as Art. 41 and 46 ECHR, the common principles of state responsibility under international law applies to the obligations of Member States arising from judgments by the Court of Law.[170] Should a sued Member State refuse to implement the binding final decision by the ECOWAS Court of justice , the general rules under International law regarding state liability are set in motion. The refusal of the obligation to comply represents a violation of the execution of the declaratory judgment.

Furthermore, the disregard or non-compliance with a declaratory judgment is a violation of the principle of supremacy of the rule of law. This basic principle in the Protocol on Good Governance from 2001 is a milestone in the framework of fundamental rights in the ECOWAS Community. This disregard is even classified in the system of the ECtHR as a serious infringement of the Convention and triggers a multitude of sanctions: the right of representation of the concerned Member State is withdrawn. In the case of Loisidou, the Ministerial Committee expressly referred to the serious nature of the violation in disregarding the declaratory judgment.[171] In the event of acquiescence, the sued Member State will be forced to declare its withdrawal.[172] Only once – in the years 1969 and 1970 – has this procedure been employed against Greece.[173]

b. Sanction mechanisms in the ECOWAS legal order

Apart from the general State Liability law described, ECOWAS makes provision for further sanctions based on the violation of an International obli-

170 Doehring, Völkerrecht [International Law], 2. edition, Rn. 838; Schilling, Deutscher Grundrechtsschutz zwischen staatlicher Souveränität und menschenrechtlicher Europäisierung [Protection of the German constitutional law between state sovereignty and Europeanisation of human rights], 113.

171 Interim Resolution of 24 July 2000 DH (2000) 105, HRLJ 000, 272.

172 See: Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung []. [The implementation of ECtHR judgments and their supervision], in: EuGRZ (2003), 168 (172).

173 Compare the Resolution fo the Ministerial Committee Res. DH (70)1 (15/04/1970).

gation by the member States. Regarding the sanctions in case of a violation of the obligation to implement, the Community provides for many step by step possibilities. The sanctions are stipulated in Art. 77 of the Amendment Agreement. According to Art. 77:

> « 1. Sans préjudice des dispositions du présent Traité et des protocoles y afférents, lorsqu'un État membre n'honore pas ses obligations vis-à-vis de la Communauté, la Conférence peut adopter des sanctions à l'encontre de cet Etat. 2. Ses sanctions peuvent comprendre: (i) lasuspension de l'octroi de nouveau prêt ou de toute nouvelle assistance par la Communauté;
> (ii) la suspension de décaissement pour les prêts, pour tous les projets ou des programmes d'assistance communautaires en cours; (iii) le rejet de la présentation de candidature aux postes statutaires professionnels; (iv) la suspension du droit de vote; et (v) la suspension de la participation aux activités de la Communauté ».

> "Where a Member State fails to fulfil its obligations to the Community, the Authority may decide to impose sanctions on that Member State. These sanctions may include: (i) suspen- sion of new Community loans or assistance; (ii) suspension of disbursement on on-going Community projects or assistance programmes; (iii) exclusion from presenting candidates for statutory and professional posts; (iv) suspension of voting rights; and (v) suspension from participating in the activity of the Community."

With this regulation, it is clear: The other signatory states also have a direct interest in implementation. It is questionable, however, who should be responsible for employing the procedure against the failing Member State? The legal quality of the public International legal system and in particular based on the character of the African Charter as an instrument of human rights means that its violation is of greater importance for the other Member States. This thought is expressed in Art. 15 of the Supplementary Act A/SA.13/02/12 of 17 February 2012. To this end, acc. to Art. 15 par. 1 of the Supplementary Act A/SA.13/02/12 of 17 February 2012 gives the other Member States the primary right to submit an application for the declaration of non-compliance with the judgments by the Court of justice . Apart from the signatory states, also natural or legal persons may report a violation of the obligations under International law by the signatory states (Art. 15 par. 1 of the Supplementary Act). Finally, the institutions of the Community, as well as the Ministerial Committee and the Conference of

the Heads of State, have the right to report (Art. 15 par. 1 of the Supplementary l Act A/SA.13/02/12).

However, the procedure of reporting the violation of an obligation differs depending on the plaintiff. Notfication of a violation of the obligation by natural as well as by legal persons, must be lodged with the ECOWAS Community representative in the concerned Member State acc. to Art. 15 par. 2 of Supplementary Act A/SA.13/02/12 . This means that an individual complaint before the ECOWAS Court of Justice in this regard is not provided for within the framework of Art. 15 par. 2 of the Supplementary Act A/SA.13/02/12 . Thus, the Court of justice has declared an individual complaint in this regard to be inadmissible with the argument that this legal recourse is only open to Member States.[174]

II. Monitoring and Implementation of the Decisions by the ECOWAS Court of Justice

The organs of the Community should ensure the execution of the declaratory judgment. The President of the European Court of Justice has quite rightly reprimanded the Federal Republic of Germany based on the delay of the implementation of judgments by the European Court of Human Rights.[175] The question must be asked, whether the ECOWAS legal system makes provision for an implementation mechanism (1). Due to a lack of implementation mechanisms, it is not surprising that some of the Member States do not implement the judgments into the domestic legal system (2).

1. Monitoring of the implementation

The execution of the implementation measures of the declaratory judgment is left to the sued Member State. According to the implementation practice of the ECOWAS judgments, it is regrettable that there is no institution within the Community that can directly monitor the implementa-

174 CJ CEDEAO, Affaire Hissein Habré v. République du Senegal, arrêt N° ECW/CCJ/ RUL/05/13 (05.11.2013), available at: www.courtecowas.org (last accessed on 18/04/2015).

175 See Der Tagesspiegel of 08/12/2006, Meldung im Internet [Report on the Internet] available at: http://www. tagesspiegel.de/politik/International/europaeischer-menschenrechtshof-praesident-ermahnt- deutschland/784798.html (last accessed on 05/02/2015).

tion of the judgments by the Court of justice .[176] Moreover, there is no official procedure to inform the public on how the decisions by the Court of justice are implemented. It is therefore recommended to establish a body, which must follow up on the implementation as well as of implementation measures of the judgments by the Community's Court of justice . This was a demand by experts during a meeting in Guinea-Bissau. They demanded, among other things, the creation of an executive organ which must monitor the implementation of the judgments by the Court of justice .[177] Furthermore, this organ could compile an annual list which shows the status of implementation of the Court of justice judgments and which must be made public. In this context, it is currently difficult to monitor which member States have and have not implemented the judgments by the ECOWAS Court of Justice. The practice at the point in time of my conversation at the Court of justice in Abuja (Nigeria) was as follows: If there is no complaint regarding the non-implementation of a judgment, the Court assumes that the judgment has been implemented. Such a legal situation is not favourable for the plaintiff who is ultimately powerless towards the convicted Member State.

2. Status of the implementation according to previous practice by the ECOWAS Court of Justice

The consequences of the lack of a Community organ for the monitoring of the implementation measures are clearly noticeable. After an exchange with the Court Registrar, it can be concluded that the decisions by the Court of justice are not implemented equally by all Member States. To be even more concrete, the status of implementation (stand until July, 10th 2015) is as follows: Niger, Senegal, Liberia and the ECOWAS Commission have all implemented the decision of the Court of justice . Member States such as Gambia, Nigeria, Togo, Burkina Faso and Ghana have unfortunately *not* implemented the decision by the Court of justice . Moreover, it must be pointed out that, after several decisions against the Nigerian State, only

176 Lambert-Abdelgawad, L'exécution des arrêts de la Cour européenne des Droits de l'Homme, in: Revue Trimestrielle des Droits de l'Homme (2011), 939 (941).

177 "Legal and human rights experts propose measures for improving the efficiency of the ECOWAS court in implementing human rights mandate", available at: www.courtecowas.org (last accessed on 18/04/2015).

one decision has been implemented. Even the ECOWAS Commission has not yet implemented several decisions by the Court of Law.

In conclusion, it can be recommended that the ECOWAS-System provides provision for the possibility of monitoring the implementation of the declaratory judgments for the future and that the Court of justice itself will enforce the demand for implementation in the tenor of the judgment.[178]

178 Hamuli-Kabumba, La répression Internationale de l'esclavage. Les leçons de l'arrêt de la cour de justice de la Communauté économique des États de l'Afrique de l'ouest dans l'Affaire Hadijatou Mani Koraou c. Niger (27 octobre 2008), in: Revue québécoise de droit International (2008), 25 (56).