Chapter 1 Research Question and Structure of the Study

In the following, the term "the Court of Justice" is used to describe the ECOWAS Court of Justice and "Charta" is used for the African Charta on Human and Peoples' Rights. I would like to mainly discuss in this chapter the historical background of the ECOWAS Court of Justice as an International court (A), the competences of the Court of Justice (B) and in particular its jurisdiction regarding human rights (C). Thereafter, the reason behind this paper is explained (D). The jurisdiction poses complex fundamental questions regarding the binding effect of the decisions taken by the Court of Justice and the consequences regarding the national legal system of the contracted states stemming from them. These complex questions are examined in section (E). Not all forms of jurisdiction of the Court of Justice are discussed in this study. Rather, the relationship between the Court of Justice and the highest court of the Member States (Constitutional Court or Supreme Court) with respect to the binding legal effect form the focus of this dissertation. Therefore, in order to clarify this relationship, the complex questions need to be narrowed down (F).

A. The ECOWAS Court of Justice as an International Court

It should be noted that we assume the association of the African states in the African Union constitutes a continental organisation. Therefore, the term "*regional organisation*" is used for the respective region within the African Union instead of "*sub-regional organisation*". In West Africa, the term „*regional organisation of West African States*" is used at a continental level, as the institutions of the African Union constitute a continental organisation. Effectively, the term *ECOWAS* summarises the Economic Community of West African States.[1]It was founded in Lagos on 28/05/1975 and is an intra-regional organisation of currently 15 countries, since Mauretania's exit in 1999[2]. The starting point for the establishment of an economic

1 In the French version: La communauté des Etats de l'Afrique de L'ouest (CEDEAO).

2 Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice, 6, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah

association in West Africa was the Biafra War in Nigeria. Goals of the regional ECOWAS are stipulated in Art. 3 of the Amendment Agreement of Cotonou. According to this objective, ECOWAS strives to achieve accelerated and sustained economic development in West Africa[3]. According to the original objective of the association, the key-issue was step-by-step economic integration and cooperation of the Member States by forming a customs union, economic union, and currency union.[4] All this will be possible, if there is economic collaboration within the framework of eco-political coordination. For this purpose, the presidents of state may add additional objectives which seem necessary to reach the goals of the association.[5] Therefore the policies of the Member States must be harmonized and coordinated.[6] However, the question may be posed how ECOWAS has evolved from an economic association into a community of values. Before methodically demonstrating how the jurisdiction of the ECOWAS Court of Justice is a *supra-national Court of Justice*, the reasons why the Signatories granted the Court of Justice the authority to decide on questions of human rights will be briefly outlined.

B. The Jurisdiction of the Court of Justice

The assignment of the Court of Justice of responsibilities regarding questions on human rights stems from a curious history in the region. One indeed wonders why a Court of Justice, which was originally meant for economic integration, barely operates in this field.[7] The inactivity of the Court of Justice in the field of economic lawsuits, can be explained by various factors[8].Remarkably, the ECOWAS Court of Justice was turned into a

.pdf (last accessed on 16/05/2015); Hartmann, in: Freistein/Leininger (Publ.), Manual International Organisations, 86.

3 Hartmann, in: Freistein/Leininger (Publ.), Manual International Organisations, 86.

4 Art. 3 of the amendment agreement of Cotonou (23/07/1993).

5 Art. 3 Abs. 2 (0) of the amendment agreement of Cotonou (23/07/1993).

6 Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice, 6, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 16/05/2015).

7 Alter/Helfer/McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (738).

8 Alter/Helfer/R.McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (756).

court for human rights in 2005. How can this shift be explained? The Member States agreed that successful economic development and integration are dependent on political stability, the adherence to human rights and the principles of the rule of law within the Community.[9] Regarding the regional integration in West Africa, politics were at first considered to be a side-issue.[10] The overwhelming attention on political stability and the monitoring of human rights by the ECOWAS Court of Justice essentially has to do with the security policy and the role of the Community as well as the consensus regarding economic integration conditional on human rights[11]. Precisely because of this, the Signatories came to the conclusion in the early stages of integration that the economic purpose can not be attained if the political stability within the Member States and the region cannot be secured. Securing political stability by observing the principles of the rule of law and human rights,is a good prerequisite for the attainment of economic growth.[12] This raises an important question: why does the question of security within the ECOWAS Community play such a significant role? How did ECOWAS become a force for peace in the region[13]? The answer to this question dates back to the exciting and difficult history

9 Saliu, Governance and development questions in West Africa, in: Bamba/Igué/Sylla (Publ.), Sortir du sous-développement, 185 (196); Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 4; Ahadzi-Nonou, Droits de l'Homme et Développement: Théories et Réalités, in: Territoires et Liberté, Mélanges en Hommage au Doyen Yves Madiot, 107 (108); Ndiaye, Les organisations internationa- les Africaines et le maintien de la Paix: L'exemple de la CEDEAO, 37.

10 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 3.

11 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 5; Alter/Helfer/McAlliser, A new international human right court for West Africa: The ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (753); Ebobrah, Human rights developments in sub-regi onal court in Africa during 2008, in: African Human Rights Law Journal (2009), 312 (313).

12 Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice, 7, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 16/05/2015).

13 Van den Boom, Regionale Kooperation in Westafrika, 92; Obi, Economic Community of West African States on the Ground: Comparing Peacekeeping in Liberia, Sierra Leone, Guinea Bissau, and Côte d'Ivoire, in: Söderbaum/Tavares (Publ.), Regional Organizations in African Se- curity, 51 (62); Söderbaum/Tavares, Problematizing Regional Organizations in African Security, in: Söderbaum/Tavares (Publ.), Regional Organizations in African Security, 1 (3); Dampha, Nationalism and Reparation in West Africa, 121; Mair/Peters-Berries,

of the ECOWAS Community. The association was indeed founded with the purpose of ensuring economic collaboration. However, events led to a necessary extension of the Community's objectives, e.g. in the area of security. It all began with the involvement of Nigeria in Liberian conflicts in 1990–1999. The ECOWAS Community has effectively taken on a humanitarian mandate in the region with this intervention.[14] The concern for security and peace in the region has led to a situation where the observation of human rights and the rule of law has become a main priority for the organisation. On the basis of the objectives stipulated by the Community in the Amendment Agreement, further military interventions have taken place in the region, such as in Sierra Leone (1998–2002), Guinea-Bissau (1998–1999), again in Liberia (2003) and in the Ivory Coast (2002–2004).[15] In order to find a legal framework for such interventions, an additional Protocol regarding the creation of a *Mechanisme de prévention, de règlement des conflits, de maintien de la paix et de la sécurité* was adopted in 1999. The regulations stipulated in this additional Protocol are unusual in the light of Art. 2 paragraph 7 of the Charta of the United Nations. This Protocol does not only grant ECOWAS extensive rights of intervention but also mentions extensive reasons and possibilities for the authorisation of an intervention in other Member States.[16] Among these are, besides severe humanitarian emergencies and serious human rights violations, cross-border and internal violent conflict and the prevention of coups against the constitutional order within Member States.[17] Ultimately, an intervention is justified under any circumstances which pose a severe risk to the security

Regional Integration and Cooperation in Africa south of the Sahara: EAC, ECOWAS and SADC in comp., 189.

14 Hartmann, in: Freistein/Leininger (Publ.), Manual International Organisations, 88.

15 Hartmann, in: Freistein/Leininger (Publ.), Manual International Organisations, 88.

16 See inter alia Art. 22, 25 et 26 du Protocol relatif au mécanisme de prévention, des gestions, de règlement des conflits, de maintien de la paix et de la sécurité (10/12/1999); Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 7.

17 Edi, Globalization and Politics in the Economic Community of West African States, 105; Gambari, Political and comparative dimensions of regional integration: the Case of ECOWAS, preface, vii; Mair/Peters-Berries, Regional Integration and Cooperation in Africa south of the Sahara: EAC, ECOWAS and SADC in comp., 233.

and peace in Member States.[18] Voices in literature consider the immediate vicinity of the Signatories to be the main reason for this particular regulation of interventions within ECOWAS, namely the concern for the guarantee of security in the region.[19]

At a universal level and after the horrors of the Second World War, the issue of human rights has moved away from the complete exposure of the fundamental rights of the individual in totalitarian regimes and a purely nationalistic relationship towards an issue of supra-national and international understanding.[20] Thus, citizens are also entitled to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, besides the fundamental freedoms and constitutional individual rights of the Togolese Constitution (to name one example). The Charta is at the centre of the West African Architecture of Human Rights. It was conceived in the instruments of Community not only as a standard of review of national government action but also as the minimal standard of regional protection of human rights – as per the Protocol of Good Governance and Democracy.

This brief historical insight is important because the aforementioned acute crises in the region are the prerequisites for the involvement of the ECOWAS Community in reinforcing human rights protection within the system of the Community. In order to contain a repressive political regime and military coups stemming from it, the Signatories decided to adopt a peoples' rights pact that recognised the principles of human and peoples' rights in the rule of law as standards of the Community. Indeed, an additional Protocol for Good Governance[21] was adopted as a reaction to the instability and the endangerment of the rule of law within the Community. It codifies the significant principles of constitutional convergence, the rule of law and human rights set out in the African Charta. A number of fundamental principles of the rule of law, such as separation of powers, fair elec-

18 Hartmann, in: Freistein/Leininger (Publ.), Manual International Organisations, 88.

19 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (87).

20 Rohleder, Protection of Constitutional Rights in the European Multi-level-System, 29.

21 Protocole A/SP.1/12/.01 sur la Démocratie et la Bonne gouvernance, Additionnel au Protoco le relatif au mécanisme de prévention, de gestion, de règlement des conflits, de maintien de la paix et de la sécurité (21/12/2001).

tions as the only legitimate path to power and the guarantee of political freedoms for the citizens are laid down in this Protocol as basic principles of the Community.[22] Furthermore, inclusive and political participation in political life in the country as well as free activity for political parties is guaranteed. According to the Protocol, the army must, in the secular constitutional system, play a subordinate role to the government (Art. 1 of the Protocol A/SP.1/12/01). As per this Protocol, amendments to the electoral acts without consent by the most important political actors of a Member state in the last six months before new elections are strictly prohibited (Art. 2 of the Protocol A/SP.1/12/01). Moreover, it allows for an intervention in a Member state if it is found that the democratic order of a signatory has been severely breached or the human rights situation is endangered in a fundamental manner (Art. 45 of the Protocol A/SP.1/12/01). Therefore, the defense of democratic rules of governance constitutes, as set out in this Protocol, an indispensable standard within the Community. All of these principles must be adhered to by the Member States. A contravention of the stipulated principles of the rules of law is punished with sanctions. According to a few voices in literature these requirements in the Protocol for good governance establishes a Constitution for West African states.[23] Based on the considerable threat to the constitutional state in West Africa, this opinion is justified. However, it must be stated here that despite the implementation of the Protocol in July 2005 with new instruments of ratification, there have been repeated political upheavals (Burkina Faso, October 2014) and unconstitutional transfers of power as well as military coups in the region, e.g. in Togo (February 2005), Guinea (2008), Niger (2010). This legal situation within the region clearly shows that democracy within the constitutional order of the Member States is still fragile.[24] For this very reason, an impartial and independent organ of jurisdiction at Community-level seems particularly necessary, as the disregard for constitutional principles can directly lead to such constitutional crises and consequently to political instability within the legal order of the Community. The adherence to human rights and the inherent democratic principles will therefore become the current task of the ECOWAS Court of Jus-

22 Likibi, La Charte africaine pour la démocratie, les élections et la gouvernance, 69.

23 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).

24 Hartmann, in: Freistein/Leininger (Publ.), Manual International Organisations, 91.

tice, effectively formalizing the role of human rights in the development process[25].

The legal foundations for the ECOWAS Court of Justice are only laid out in the Founding Treaty. Art. 6 of the amendment agreement (1993) defines the institutions of the Community. The decision-making organs of the Community include the Conference of the Heads of State, the Council of Ministers, the Parliament, the Economic and Social Committee, the executive administration and the ECOWAS Court of Justice.

The ECOWAS Court of Justice can look back on 23 years of history as the judicial pillar of the Community. Effectively, the Protocol A/P1/7/91[26]on the Court of Justice for the Community was adopted on 6 July 1991. This Protocol, however, is a firm component of the Founding Treaty (28/05/1975) and later of the amendment agreement, the so-called Cotonou-Agreement, of 23 July 1993.[27] Therefore, its date of inception was 05/11/1996. According to Art. 6 (e) of the amendment agreement, the ECOWAS Court of Justice embodies the supra-national core of the Community.

Concerning its factual competences, the Court of Justice disposes of a broad competence in comparison to other intra-regional judiciary bodies. According to Art. 9 of the Protocol A/P1/7/91 (1991), the Court of Justice is responsible for the decision on legal disputes regarding the interpretation of the ECOWAS founding Treaty as well as the inherent Protocols and Conventions.[28] Therefore, the Court of Justice may adjudicate on the breaches of the treaty by a Member state and decide on disputes regarding the interpretation and implementation of the treaty. Disagreements between the institutions of the Community and the civil servants also fall within the Court's sphere of responsibility. It is important to point out that there are still many inconsistencies regarding individual complaints against breaches of the Community's economic laws.[29] The ECOWAS Court of Justice should also be called a hybrid court. In fact, the court is *mutatis mutandis* a combination of ECJ (European Court of Justice) and ECtHR (European Court of Human Rights).

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25 Bryde, Überseeische Verfassungsvergleichung nach 30 Jahren [Overseas Comparison of Constitutions after 30 years], in: VRÜ (1997), 452 (460).

26 Protocole A/P1/7/91 (06/07/1991), relatif à la Cour de Justice de la Communauté.

27 Art. 34 Abs. 3, Protocole A/P1/7/91 (06/07/1991), relatif à la Cour de Justice de la Communauté.

28 In addition Art. 15 of the Amendment Agreement.

29 Hartmann, in: Freistein/Leininger (Publ.), Manual on International Organisations, 89.

Indeed, the ECOWAS Court of Justice can in many respects be compared to the ECJ. It is the court in the first and last instance[30] for legal disputes regarding the interpretation and application of the founding Treaty of the Community and the inherent additional protocols.

The factual competences of the Court of Justice are set down in Art. 3 of the additional Protocol.[31] According to Art. 3 of the additional Protocol A/SP.1/01/05 (19/01/2005), the court is responsible for the adjudication of every legal dispute regarding the following areas:

> « 1. La Cour a compétence sur tous les différends qui lui sont soumis et qui ont pour objet:
> a)L'interprétation et l'application du traité, des Conventions et protocoles de la Commu- nauté; b) l'interprétation et l'application du Traité, des règlements, des directives, des déci- sions et de tous autres instruments juridiques subsidiaires adoptés dans le cadre de la CEDEAO; c) l'appréciation de légalité des règlements, des directives, des décisions et de tous autres instruments juridiques subsidiaires adoptés dans le cadre de la CEDEAO; d) l'examen des manquements des Etats membres aux obligations qui leur incombent en vertu du Traité, des Conventions, Protocoles et Règlements, des décisions et directives; e) l'application des dispositions du Traité, Conventions et Protocoles, des règlements, des directives ou décisions de la CEDEAO; f) l'examen des litiges entre la Communauté et ses agents; g) les actions en réparation des dommages causés par une institution de la Communauté ou un agent de celle- ci pour tout acte commis ou toute omission dans l'exercice de ses fonctions. 2. La Cour est compétente pour déclarer engagée la responsabilité non contractuelle et condamne la Com- munauté à la réparation du préjudice causé, soit par des agissements matériels, soit par des actes normatifs des Institutions de la Communauté ou de ses agents dans l'exercice ou à l'occasion de l'exercice de leurs fonctions. 3. L'action en responsabilité contre la Communauté ou celle de la Communauté contre des tiers ou ses agents. Ces actions se prescrivent par trois (3) ans à compter de la réalisation des dommages. 4. *La Cour est compétente pour connaitre des cas de violation des droits de l'Homme dans tout Etat membre*. 5. En attendant la mise en place du Tribunal Arbitral, prévu par l'Article 16 du Traité Révisé, la Cour remplit également

30 Art. 19 Parag. 2 du Protocole A/P1/7/91 (06/07/1991), relatif à la Cour de Justice de la Communauté.

31 Protocole Additionnel A/SP.1/01/05 (19/01/2005) Portant Amendement du Protocole (A/P.1/ 7/91) Relatif à la Cour de Justice de la Communauté.

des fonctions d'arbitre. 6. La Cour peut avoir compétence sur toutes les questions prévues dans tout accord que les Etats membres pourraient conclure entre eux, ou avec la CEDEAO et qui lui donne compétence. 7. La Cour a toutes les compétences que les dispositions du présent Protocole lui confèrent ainsi que toutes autres compétences que pourraient lui confier des Protocoles et Décisions ultérieures de la Communauté. 8. La Conférence des Chefs d'Etat et de Gouvernement a le pouvoir de saisir la Cour pour connaitre des litiges autres que ceux visés dans le présent article ».

"1. The Court has the competence to adjudicate on any dispute relating to the following:
a) the interpretation and application of the Treaty, Conventions and Protocols of the Com- munity; b) the interpretation and application of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; c) the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; d) the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, reg- ulations, directives or decisions of ECOWAS Members States; f) the Community and officials, and g) the actions for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions. 2. The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Com- munity institution or Community officials in the performance of official duties or functions.
3. Any action by or against a Community Institutions or any Member of the Community shall be statute-barred after three (3) years from the date when the right of action arose. 4. The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State. 5. Pending the establishment of Arbitration Tribunal provide for under Article 16 of the Treaty, the Court shall have the power to act as arbitrator for the purpose of Article 16 of the Treaty
6. The Court shall have jurisdiction over any matter provided for in any agreement where the parties provide that the Court shall settle disputes arising from the agreement.
7. The Court shall have all the power conferred upon it by the provisions of the Protocol as well as any other powers that may be conferred by subsequent Protocols and Decisions of the Community. 8. The Authority of Heads of State and Government shall have the power to

grant the Court the power to adjudicate on any specific dispute that it may refer to the Courtother than those specified in this Article".[32]

Except for paragraph 4, the rules of competence for the ECOWAS Court of Justice are *mutatis mutandis* comparable to the ECJ. Essentially, the decision-making competences of both courts extend to safeguarding the laws of the European Union regarding the interpretation and application of the agreements (Art. 19 EUV). It is the task of the Union's jurisdiction to ensure the adherence to the community legislation when it comes to the interpretation and application of the instruments of the Community. This includes compliance control regarding the legal acts of the Executive and the Legislature.[33] The organs of the Union are bound by the lawfulness of their actions. Thereby, the area of competence for both Courts of Justice encompasses the damages caused by the unlawful conduct of organs of the Community and civil servants. Moreover, the ECOWAS Court of Justice and the ECJ deal with official liability claims According to Art. 3 paragr. 1.g of the Additional Protocol A/SP.1/01/05 and Art. 268 TFEU. The permitted official liability claims, According to Art. 3 paragr. 1.g of the Additional Protocol A/SP.1/01/05 and Art. 268 TFEU fall within the exclusive competence of both courts.[34] The extra-contractual liability regulation of the respective area of competence can also be compared (Art. 3 Abs. 2 of the Additional Protocol A/SP.1/01/05 and Art. 340 TFEU). By way of preliminary rulings, collaboration can be noted in the ECOWAS-court system as well as the ECJ. Because for the guarantee of the unified validity of the fundamental norms of the ECOWAS Community and the European Union, national courts are obligated, According to Art. 10.f of the Additional Protocol A/SP.1/01/05 and Art. 267 TFEU, to submit to the respective Court a legally relevant question concerning the interpretation of the agreements or Protocols of the respective community to the respective Court of Justice.

Those entitled to file a suit are also similar at both courts. These include the signatory states, the organs of the respective Union as well as natural and legal persons. In addition, the individual courts ofthe Member States, by way of preliminary ruling, as well as the parties to the disputes are both directly entitled to approach the intra-regional court. As only the courts of

32 Emphasis by the author.

33 Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht[European Union Law], commentary, 1. edition, Art. 19 EUV, Rn. 5.

34 Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht[European Union Law], commentary, 1. edition, Art. 268 TFEU, Rn. 4.

the member states are directly entitled to litigate in this regard, the possibility of the parties to indirectly act by inducing the filing of a suit is of great importance. The parties to the initial proceedings are, however, not entitled to submit.[35] Moreover, there are differences between the system of the ECJ and the ECOWAS Court of Justice regarding the question of submission. Indeed, there is a difference between the entitlement to submit and the duty to submit. Entitled to submit are, according to the stipulations in Art. 267 paragr. 2 TFEU only the courts of the Member States.[36] However, Art. 267 paragr. 3 TFEU prescribes a duty to submit to the court in the last instance for the Member States of the European Union.[37] Obligated to submit are therefore all courts against whose decision, in a particular case, no legal remedies are available. This does not only include court of cassation but also the Constitutional Courts of Member States.[38] This second scenario, the duty to submit, does not exist in the system of the ECOWAS Court of Justice. As in Art. 10 a) of the Additional Protocol A/SP.1/01/05, the ECOWAS Court of Justice, just like ECJ, is responsible for bringing legal action in cases of a breach of the agreement (comparable to Art. 258 and 259 TFEU).[39] With regard to the action of annulment, both systems show similarities regarding the right to bring proceedings. Natural and legal persons actively have *locus standi* before both courts regarding an action of annulment.[40] Subsequently, there are no substantial differences in both systems regarding the object of dispute. Effectively all legally adverse actions caused by an organ of the Community constitute an object of dispute.[41]

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35 Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht [European Union Law], commentary, 1. edition., Art. 267 TFEU, Rn. 22; also see Art. 10 f) Protocole Additionnel A/SP.1/01/05 (19/01/2005) Portant Amendement du Protocole (A/P.1/7/91) Relatif à la Cour de Justice de la Communauté.

36 Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht[European Union Law], commentary, 1. edition, Art. 267 TFEU, Rn. 21.

37 Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht[European Union Law], commentary, 1. edition, Art. 267 TFEU, Rn. 21.

38 Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht[European Union Law], commentary, 1. edition, Art. 267 TFEU, Rn. 28.

39 Tsikrikas, Die Wirkungen der Urteile des Europäischen Gerichtshofs im Vertragsverlet- zungsverfahren. [The Effects of Judgments by the Court of Justice of the European Union in Proceedings due to Breach of Agreement], 82.

40 Art. 10 c) Protocole Additionnel A/SP.1/01/05 (19/01/2005) Portant Amendement du Proto-cole (A/P.1/7/91) Relatif à la Cour de Justice de la Communauté (Comp. with Article. 263 paragr. 4 TFEU).

41 Art. 10 c) Protocole Additionnel A/SP.1/01/05 (19/01/2005) Portant Amendement du Proto- cole (A/P.1/7/91) Relatif à la Cour de Justice de la Communauté

.Furthermore, both courts show similarities when it comes to the monitoring of the lawfulness of the legislative procedure of the Community as well as the actions of organs of the Community (Art. 10 b of the Additional Protocol A/SP.1/01/05 and Art. 263 TFEU).

However, the sequence of competences of the ECOWAS Court of Justice is significantly longer in comparison to the otherwise – as shown – rather similar ECJ. In fact, since 2005 the ECOWAS Court of Justice has been given jurisdiction in questions of human rights. As the Protocol for Good Governance of 2001 clarifies, ECOWAS is not only an economic community but also and particularly so, a community of values. Therefore, principles of the rule of law and human rights are seen as an important pillar of the Community. This particular status of human rights can already be observed in the ratification of the Agreement of Cotonou.[42] The strengthening of the competence of the court was the best solution to enforce these goals. In contrast to other intra-African, intra-regional courts of law, ECOWAS was given jurisdiction with regards to human rights not by its own interpretation of the legal norms of the Community but, and this is significant, by an explicit decision by the Member States.[43] This concession of jurisdiction in human rights questions to the ECOWAS Court of Justice took place by way of the Additional Protocol A/SP.1/01/05, signed in Accra in January 2005. The jurisdiction in human rights questions by the ECOWAS Court of Justice was set out in Art. 4 of this Additional Protocol A/SP.1/01/05. This, on the other hand, shows how highly the Member States rate the compliance with human rights and the rule of law within the territory of the Community.[44]

However, a significant question regarding the liability of the Member States with regard to a breach of the order within the Community has not yet been clarified. The question is whether individuals are entitled to bring proceedings against a Member State for actions which are inconsistent

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und Art. 263 paragr. 4; also Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht [European Union Law], Handkommentar, 1. edition, Art. 263 TFEU, Rn. 32.

42 Fourth section of the preamble and Art. 4 (g) of the Amendment Agreement of Cotonou (23/07/1993).

43 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (86).

44 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (88).

with Community law. This question can be affirmed in the ECJ-system.[45] It can thus be deduced that the ECOWAS-Community, like the European Union, constitutesa legal order of peoples' rights in whose favour the states have limited their sovereignty on a narrow basis. Legal entities within this new legal order are not only the states but also individuals.[46] However, one can clearly deduct from the wording of Art. 10 c) of the Additional Protocol A/SP.1/01/05 (19/01/2005) that the individual has a legal remedy against unlawful action or inaction by a Member State with the ECOWAS Court of Justice.The Court of Justice saw itself confronted with this question in its first decision in 2004.

I would first like to briefly present the main facts. A Nigerian lodged a complaint with the ECOWAS Court of Justice against the Republic of Nigeria and Benin. The object of the dispute was the fact that the plaintiff was supposed to have had an important appointment in the Republic of Benin regarding his trade activities. Unfortunately, the border between Nigeria and Benin was closed on the said day from the Nigerian side and due to this, the plaintiff suffered considerable economic losses. For this reason, he lodged a complaint against the Republics of Nigeria and Benin. His complaint was dismissed with the reason that the ECOWAS Court of Justice does not have a mandate for individual complaints. Moreover, the court clarified that the only possibility for private persons to bring proceedings was for a Member State to take the reins in the legal matter and bring proceedings on behalf of the private person.[47] The judgment caused enormous attention and triggered a campaign in the region to allow complaints by individuals before the ECOWAS Court of Justice.[48] Even if the question of *locus standi* was eventually clarified after this judgment by the Protocol A/SP.1/01/05, it is still unclear whether the Member States are also liable for their unlawful actions within the Community in favour of natural or legal persons. The question still remains unanswered whether or not natural and legal persons have a declaratory claim regarding the breach of the fundamental rights of free traffic of goods and capital as well as the

45 Pache, in: Vedder/Heintschel von Heinegg (Publ.), Europäisches Unionsrecht [European Union Law], commentary, 1. edition, Art. 340 TFEU, Rn. 16.

46 ECJ, 26/62, Van Gend & Loos (5/02/1963), 25.

47 CCJECOWAS, Afolabi v. Nigeria, N°ECW/CCJ/JUD/01/04 (27/04/2004), in: Community Court of Justice, Law Report (2004–2009), 1 (12); Sall, La Justice d'Intégration, 273 (274).

48 Alter/Helfer/McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (738).

freedom of movement within the territory of the Community. There is also currently no clear answer to the question, whether natural and legal persons are entitled to bring legal proceedings if they lodge a complaint against the breach of their basic rights by organs of the Community. Until 2005, only Signatories were privileged to bring proceedings. Since then. the situation has, however, changed significantly.

C. *In particular: the Jurisdiction of the Court with regards to Human Rights since the Inception of the Additional Protocol of 2005*

The Additional Protocol A/SP.1/01/05 from 2005 brought institutional changes regarding the competences of the Court of Justice. Following the inception of the Additional Protocol A/ SP.1/01/05 of 2005 the Court received jurisdiction over human rights disputes. The turning point in that year can be explained by the objective by the Community discussed above. ECOWAS represents a unique linking of human rights jurisdiction and economic litigation on the African continent.[49] There are many reasons in favour of such an exception and stance with regards to general Peoples' Rights. The changes in the policy of the rule of law and human rights in the Community included the extension of factual responsibilities of the Court of Justice. The court was supposed to make a significant contribution to the implementation of the human rights entrenched in the African Charta for Human Rights and the accepted Principles of Good Governance in the Protocol for Good Governance. The last step toward human rights jurisdiction by ECOWAS was eventually triggered by the case Afolabi which was briefly presented above.[50] Therefore, one can speak of a double face of the ECOWAS Court of Justice since the inception of the Additional Protocol (ratified in Accra on 19 January 2005).

The mentioned Protocol on Good Governance and Democracy was indeed signed in 2001 in the course of regional integration. In order to enforce the requirements of this Protocol on Democratic Principles and Good Governance the court received a special, corresponding, competence. The Signatories also extended the decision-making authority of the

49 CCJECOWAS, Afolabi v. Nigeria, N°ECW/CCJ/JUD/01/04 (27/04/2004), in: Community Court of Justice, Law Report (2004–2009), 1 (12).

50 CCJECOWAS, Afolabi v. Nigeria, N°ECW/CCJ/JUD/01/04 (27/04/2004), in: Community Court of Justice, Law Report (2004–2009).

Court of Justice. According to Art. 10 of the Additional Protocol of 2005[51], the Court of Justice decides on violations of human rights in the territory of the Member States. Consequently, the Protocol on the Court of Justice of 1991 was improved in many places by the Additional Protocol A/SP.1/01/05 on 19/01/2005 in Accra. According to this, individual complaints with regards to human rights violations are permissible before the Court of Justice. This is a judicial guarantee to regard the human rights laid out in the African Charta of Human Rights and Peoples' Rights (Art. 7 of the Charta).

Through its human rights mandate, the ECOWAS Court of Justice resembles the ECtHR in many ways because, just like the ECtHR, the ECOWAS Court of Justice now adjudges on human rights violations in Member States. The protection of human rights by the ECOWAS Court of Justice is therefore equal to the ECtHR in various ways (Art. 10 d of the Additional Protocol A/SP.1/01/05 in comparison to Art. 34 ECHR). However, there is a significant difference between the wording of Art. 10 d of the Additional Protocol (A/SP.1/01/05) and Art. 34 ECHR (this will be enlarged upon in the 2. chapter.)

However, the attribution to the court of special competences regarding human rights and democratic principles entails legal problems. As a result, there is no clearly defined relationship between the Court of Justice and the constitutional organs of the Member States. Indeed, the results of the changes to the Protocol A/P1/7/91 (06/07/1991), concern the admissibility requirements and the entitlement to lodge a complaint. The great difference between the two intra-regional human rights instances lies in the fact that complaints before the ECOWAS Court of Justice are admissible without the prior exhaustion of other legal remedies. Here, the access requirements to the ECOWAS Court of Justice differentiate from those of the ECtHR (Art. 35 paragr. 1 ECHR). Since the recognition of the human rights jurisdiction of the court through the Additional Protocol A/SP.1/01/05 of Accra (2005), the jurisdiction of the ECOWAS Court of Justice is marked by four significant features: it differs from other sub-regional Economic courts of law because of the direct access for individual complaints, there is no requirement of prior exhaustion of legal remedies, it has unlimited factual competence regarding human rights and has a relatively broad adjudication on human rights and barely noticeable jurisdiction regarding com-

51 Protocole Additionnel A/SP.1/01/05 (19/01/2005) Portant Amendement du Protocole (A/P.1/7/91) Relatif à la Cour de Justice de la Communauté.

plaints of a legal economic-integrational nature. [52] Through its jurisdiction and institutional form, the ECOWAS Court of Justice is qualified as being *sui generis*.[53]

However, there is still no clarity which human rights fall within the sphere of the court's responsibility.[54] In fact, the teachings agree that the African Charta for Human Rights and Peoples' Rights of 1981 constitutes the material basis for human rights jurisdiction of the Court of Justice. Nevertheless, the question remains whether, over and above this, the violation of other human rights instruments may function as an object of litigation. However, it is indisputable that the court itself refers to the African Charta for Human Rights and Peoples' Rights as a core element of the community of values of West African states in its judgments.[55] Therefore, we must assume that the ECOWAS Court of Justice is supposed to monitor the adherence to the Charta by the Member States. In order to overcome possible conflicts with the African Court for Human and People's Rights, all complaints that have already been adjudicated by other international court are admissible, According to Art. 4 d) of the Additional Protocol A/SP.1/01/05 (19/01/2005). This finally confirms the status of the ECOWAS Court of Justice as an international court of law. In its latest judgment, the court emphasised its international character with the following words:

> « Dans leurs écritures, les requérants se sont en effet référés aussi bien à la Constitution na tionale […] qu'à la Charte de la Transition […] La Cour doit considérer de telles références comme inappropriées dans son prétoire. Juridiction internationale, elle n'a vocation à sanc-tionner

52 Alter/Helfer/R.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 (753 ff.).

53 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS (200), 10.

54 Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice, 8, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 16/05/2015).

55 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/06/12 (13.03.2012), par. 11, available at: www.courtecowas.org (last accessed on 16/07/2015); CJ CEDEAO, Af- faire Congrès pour la démocratie et le Progrès (CDP) & Autres c. Etat Burkina, N°ECW/CCJ/ JUD/16/15 (13/07/2015).

> que la méconnaissance d'obligations résultant de textes internationaux opposables aux Etats ».[56]

The system does, however, show weaknesses resulting in the emergence of an extensive range of topics which definitely require clarification. Since the concession of the jurisdiction on human rights to the ECOWAS Court of Justice. One of the main problems in the ECOWAS system of protection is that there are no set of rules concerning the implementation of declaratory judgments under international law. There is a lack of regulation on Member State level for the reception and intra-national effectiveness of ECOWAS declaratory judgments. Especially the question of implementation requires clarification, because the effective legal protection in favour of the individual plaintiff logically assumes that the elimination of breaches of the convention, as ascertained by the ECOWAS Court of Justice, can also be implemented at intra-national level. In this respect, the awarding of damages does currently not constitute full compensation.[57]

D. Reason for the Study: The Case of Ameganvi et al vs. Togo

The ECOWAS Court of Justice has in the past already reached four significant verdicts[58] which are especially important for the present paper. Addi-

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56 CJ CEDEAO, Affaire Congrès pour la démocratie et le Progrès (CDP) & Autres c. Etat Bur- kina, N°ECW/CCJ/JUD/16/15 (13/07/2015), par. 26.

57 Polakiewicz, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte (2012), 4.[The Obligation of States resulting from Judgments by the European Court of Human Rights (2012), 4.].

58 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques 54 (74); Olinga, Les Droits de l'Homme peuvent-ils sous- traire un ex-dictateur à la justice? L'affaire Hissène Habré devant la Cour de justice de la CEDEAO, in: Revue Trimestrielle des Droits de l'Homme (2011), 735 (736); Sall, L'affaire Hissène Habré, Aspects judiciaires nationaux et internationaux, 16; CC CEDEAO, Mamadou Tandja c. République du Niger, Arrêt, N°ECW/CCJ/JUD/05/10 (08/11/2010), available at: www.courtecowas.org (last accessed on 16/07/2015); CC CEDEAO, Hissein Habré c. République du Sénégal, Arrêt, N°ECW/CCJ/JUD/06/10 (18/11/2010), available at: www.courtecowas.org (last accessed on 16/07/2015); CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/09/11 (07/10/2011), par. 66, available at: www.courtecowas.org (last accessed on 16/07/2015); CJ CEDEAO, Affaire Gbagbo c. République de la Côte d'Ivoire, N°ECW/CCJ/JUD/03/13 (22/02/2013), accesible at: www.courtecowas.org (last accessed on 16/07/2015); Ebobrah, Human rights development in African sub-regional econo-

tionally, the latest decision by the ECOWAS Court of Justice against the Republic of Burkina Faso, in which the court considered an electoral act as a breach of the principles of the rule of law anchored in the Protocol on Good Governance of 2001 in Art. 1.g) and 2.3, is of great importance.[59] With regard to these judgments, the question is justified, whether the ECOWAS Court of Justice can be considered to be a supra-national Constitutional Court[60] as the ECOWAS Court of Justice hereby demonstrates that the last word no longer belongs to the Constitutional Court or Supreme Court of the Member States.[61] Due to their constitutional references these Court of Justice judgments trigger a tense relationship between the Court of Justice and the Constitutional jurisdictions of the Member States.

The present study concerns itself primarily with the question of the relationship between constitutional jurisdiction of Member States and the ECOWAS-jurisdiction on human rights. In this respect, the case of Ameganvi against the State of Togo is a prime example where the Court of Justice arrived at a groundbreaking judgment following the examination of a decision by the Togolese Constitutional Court. The Togolese Constitutional Court decision and the resulting declaratory judgment by the ECOWAS Court of Justice represent the main subject matter of the present study.

I. Decision by the Togolese Constitutional Court

Nine parliamentarians of the opposition party UFC left the party and founded a new party, the ANC. On 18 November 2010, the President of the Parliament submitted a list of these parliamentarians to the Constitutional Court with the request to find successors for them. With the decision N° N°E018/10 of 22 November 2010, the Togolese Constitutional Court gave notification of substitutes for these parliamentarians in court.

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mic communities during 2010, in: African Human Rights Law Journal (2011), 216 (236).

59 CJ CEDEAO, Affaire Congrès pour la démocratie et le Progrès (CDP) & Autres c. Etat Bur- kina, N°ECW/CCJ/JUD/16/15 (13/07/2015), par. 31.

60 Bolle, La Cour de Justice de la CEDEAO: une cour (supra)constitutionnelle?, available at: http://la-constitution-en-afrique.org/article-la-cour-de-justice-cedeao-une-cour-supra-constitutionnelle-87092524.html (last accessed on 09/07/2015).

61 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (75).

This happened without consulting the concerned parliamentarians (detailed presentation of the facts in chapter 1).

II. Declaratory Judgment by the ECOWAS Court of Justice

The nine parliamentarians lodged an individual complaint with the ECOWAS Court of Justice against this decision by the Togolese Constitutional Court. The Court of Justice was thus confronted with two questions. The first is of a procedural nature and the second represents a material legal question. The ECOWAS Court of Justice summarises these two questions in the following words:

> « Les questions soumises à l'appréciation de la Cour, à savoir la transmission par le Président de l'Assemblée Nationale à la Cour Constitutionnelle de lettres de démission attribuées aux requérants et contestées par ceux-ci, et la décision n°E18/10 du 22 novembre 2010 de la Cour constitutionnelle prise à la suite de cette transmission, relèvent-elles de la compétence de laCour comme étant susceptible de constituer des violations de droits de l'homme des requé rants comme ils le soutiennent? »[62]

In its decision of 07 October 2011, the ECOWAS Court of Justice found an obvious breach of Art. 1 and 33 of the Protocol on Democracy and Good Governance, ratified by Togo in 2001, and of Art. 7/1, 7/1c and 10 of the African Charta for Human Rights. According to Art. 7 paragr. 1 of the Charta, everybody is entitled to a legal hearing. This includes the right to legal protection before the responsible national court against all actions that violate ones fundamental rights under agreements, laws, regulations and customary law. Furthermore, everybody is entitled to be considered innocent until ones guilt has been proven by a responsible court. This procedural guarantee also entails the right of defense. This includes the right to be defended by a defense attorney of one's choice. Lastly, this guarantee gives the individual the right to a judgment within an appropriate period of time and by an impartial court.

62 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/09/11 (07/10/2011), par. 53, available at: www.courtecowas.org (last accessed on 16/07/2015).

The Court of Justice further pointed out that the constitutional judgment also represents a breach of Art. 10 of the United Nations Universal Declaration of Human Rights of 1948.

After the declaration of the breach of the relevant regulations in the Charta (Art. 7 paragr. 1 of the African Charta) as well as the United Nations Universal Declaration of Human Rights (Art. 10), the plaintiffs expected to be automatically reinstated in parliament but the Togolese state rejected their application of reinstatement.

A detailed presentation of the facts until the judgment was rendered by the ECOWAS Court of Justice on 7 October 2011 and can be found in chapter 2 of the present paper.

III. Interpretation of the Declaratory Judgment by the ECOWAS Court of Justice

There is a possibility to initiate interpretation proceedings after a declaratory judgment. Such a process means that a judgment has been rendered on a particular object of dispute. However, various points of the decision are obviously unclear. Therefore, an application for clarification of the open points is admissible before the Court of Justice. Consequently, the plaintiffs initiated such interpretative proceedings with the Court of Justice. These proceedings are admissible According to Art. 64 of the rules of procedure of the Court of Justice. Therefore, the Togolese relevant parliamentarians again turned to the Court of Justice on 16 November 2011 within the framework of this process. The Court of Justice declared this application admissible.[63]

The question the Court of Justice had to answer was whether the declaration of this breach also constituted an annulment of the decision by the Togolese Constitutional Court[64], which would constitute a violation of human rights.

After extensive examination, the ECOWAS Court of Justice was however not in favour of this. The purpose of the first decision, According to

63 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/06/12 (13/03/2012), par. 11, available at: www.courtecowas.org (last accessed on 16/07/2015).

64 Cour constitutionnelle du Togo, Entscheidung N°E-018/2010 vom 22. November 2010, available at : http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

the Court of Justice, was to declare a breach of Art. 7 of the Charta. The Court of Justice however does not have the power to go over and above that and order a reinstatement of the plaintiffs. This would constitute an underestimation or annulment of the decision by the Togolese Constitutional Court. The ECOWAS Court of Justice does not possess such a competence. This decision is to be criticised in many respects (for this purpose, a detailed criticism in chapter 5).

Indeed, it is understandable when the Court of Justice states that it does not have the competence to set aside a binding constitutional decision. However, the opinion of the Court of Justice regarding the legal consequences of the declaration of the breach is to be criticised.

With its findings of 7 October 2011, the ECOWAS Court of Justice declared that the decision by the Togolese Constitutional Court, which led to the loss of mandate by the parliamentarians in the Togolese parliament, constitutes a breach of Art. 7 paragr. 1 of the African Charta for Human Rights and Peoples' Rights.[65] This declaratory judgment by the ECOWAS Court of Justice entails a number of consequences. Insofar as the Court of Justice qualified the proceedings that led to the loss of mandate in parliament by the plaintiffs, as being in violation of human rights, the logical consequence would have been to reinstate the status prior to that. This is the application of the principle *Restitutio in Integro. Restitutio in Integro* is a legal principle recognised in international law and by international courts. According to this principle, countries are bound to meet their obligations stemming from judgments by international courts. Therefore, the countries are obligated to withdraw the legal action that caused the breach once it has been declared to be a violation of human rights by the international court.

Based on the principle of *Restitutio in Integro*, countries are also obligated to grant the victim of the violation appropriate damages.The reference to the principle of *Restitutio in Integro* is important because the ECOWAS Court of Justice neglected significant aspects of this principle in its interpretation judgment of 13 March 2012.[66]

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65 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/09/11 (07/10/2011), par. 66, available at: www.courtecowas.org (last accessed on 16/07/2015).

66 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/06/12 (13/03/2012), available at: www.courtecowas.org (last accessed on 16/07/2015).

This declaratory judgment of 7 October 2011 by the ECOWAS Court of Justice, should invoke a number of consequences regarding the national judgment (this will be discussed in more detail in chapter 3).

Until the Case Ameganvi was submitted to the ECOWAS Court of Justice, the relationship between the ECOWAS Court of Justice and national constitutional courts was not viewed as a possible institutional source of conflict within the ECOWAS Community. However, a scientific study of this relationship seems obligatory after the judgment by the ECOWAS Court of Justice and the hesitation of the national court in this conflict scenario.

E. Binding Force of the Decision by the ECOWAS Court of Justice

The system introduced in Protocol A/SP.1/01/05 (19/01/2005) can be compared to constitutional complaints in Benin because the system allows for an individual complaint to be submitted directly to the ECOWAS Court of Justice. Moreover, attention must be drawn to the fact that the protection system allows for ECOWAS to be more lenient with admissibility requirements. In fact, an individual complaint before the Court of Justice is permissible without the prior exhaustion of legal remedies. This special feature is protected by many reasons (this will be discussed in more detail in chapter 3). However, the protection system, provided by the Protocol, presents a certain predictable danger. Due to the existence of the protection of human rights on several levels with different effects, one must reckon with different, even contradictory judgments.[67] How to resolve this actual and potential problem is the object of the present study.

In contrast to Benin, a direct complaint by an individual against the state is foreign to the Togolese constitutional process. For this very reason, the admissibility of individual complaints causes difficulties regarding the constitutional process for many of the Member States from a constitutional point of view. Therefore, they are struggling to give the judgment of the ECOWAS Court of Justice national validity.

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67 Lindner, Grundrechtschutz in Europa – System einer Kollisionsdogmatik [Protection of Constitutional Rights in Europe – a System of Collision-Dogmatism], in: EuR (2007), 160 (161); Rohleder, Grundrechtsschutz im europäischen Mehrebenensystem [Protection of Constitutional Rights in the European Multilevel System], 30.

This Protocol A/SP.1/01/05 (19/01/2005) enhances the territorial scope of application of the Charta by supporting the effectiveness of the Charta in the Community system by allowing individual complaints before the ECOWAS Court of Justice.

I. Contractual Foundations

According to Art. 15 paragr. 4 of the Amendment Agreement:

> « Les arrèts de la Cour de Justice ont force obligatoire à l'égard des Etats Membres, des Institutions de la Communauté, et des personnes physiques et morales ».
>
> "Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies".

Due to the lack of a precise definition of the scope of the legal force of this regulation, the development of the law through case law is particularly called upon. In this sense, the famous quote by a British Tribunal is particularly relevant:

> "International law, as well as domestic law, may not contain, and generally does not contain express rules decisive of particular cases but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles and so to find – exactly as in the mathematical science – the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well as between States as between private individuals".[68]

II. Teleological Interpretation

The wording of the text of the agreement clearly does not allow for an easy understanding of the binding effect of the decisions within the national legal systems of the Signatories. Without determining the scope of the bind-

68 Cassesse, International Law, 2nd éd, 188.

ing effect, the national implementation of the declaratory judgments by the Court of Justice is difficult. It is therefore necessary to interpret the agreement by the ratio of the norms.According to this method of interpretation, the terms in an international treaty are to be interpreted in regard to their object and purpose, thereby giving the agreement the greatest possible effectiveness. However, with the proviso that the object and purpose can be deduced from the treaty text itself.[69]

III. The Problem of National Implementation

Which role does the ECOWAS Court of Justice play according to the two Additional Protocols?[70] In the reticence of the texts, the rules of interpretation of the Vienna Convention on the Law of Treaties is methodically pointed out. This question will find particular attention in the present study. It is necessary to clarify this question because the consequences are legally relevant to the implementation of the declaratory judgments of the ECOWAS Court of Justice. Even if the ECOWAS Court of Justice were to receive the authority to decide on individual human rights complaints through Protocol A/SP.1/01/05, it is still dependent on the national court regarding the implementation of its decision. Precisely because of this there should be a dual relationship, namely, in a legally institutional respect, regarding a hierarchical relationship in favour of the ECOWAS Court of Justice and, in a legally material respect, regarding a cooperative relationship. In view of this, the question of enforceability of the African Charta as well as the decisions by the ECOWAS Court of Justice within the order of the Community must be posed.[71] It may be true that a separate meaning is reserved in the constitutional orders of the Member States

69 Ipsen, Völkerrecht [International Law], 6. edition., § 12, Rn. 10.

70 Protocole A/P1/7/91 (06/07/1991), relatif à la Cour de Justice de la Communauté; Protocole Additionnel A/SP.1/01/05 (19/01/2005) Portant Amendement du Protocole (A/P.1/7/91) Relatif à la Cour de Justice de la Communauté.

71 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, 68. [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, 68].

for the African Charta for Human Rights and Peoples' Rights.[72] However, various court instances are assigned to the Constitutions at national, transnational and international level, so that scholars in Europe tend to speak of a constitutional "Multi-level System" in Europe.[73] This reality is transferable to the African continent and in particular to ECOWAS Community.

In order to realise the African Charta on a national level, ECOWAS Member States have formally acknowledged the Charta as a binding legal instrument in their respective constitutional systems. Apart from this theoretical incorporation of the Charta into the national constitutional system of the respective Member State, the question may be posed whether and to what extent the judicial institutions of Member States view the ECOWAS Court of Justice as the authentic interpreter of the Charta, based on its human rights mandate. The national constitutional courts primarily watch over the compliance with the human rights set out in the Charta. Knowing that the state governed by the rule of law through the actions of state organs can be questioned by the judiciary[74] the signatories have provided ECOWAS legal remedies at a regional level. This primarily involves the guarantee for citizens in the region of an impartial and independent instance at international level.[75] The regulation of the relationship between the regional organ of ECOWAS and the national constitutional courts must still be clarified.

Hence, the task of the ECOWAS Court of Justice is particularly important for the full compliance with the guarantees of the Charta. Especially with regards to its task, the question arises of how the enforceability of the Charta and the corresponding declaratory judgments by the Court of Justice can be guaranteed. Once the ECOWAS Court of Justice has adjudicated in a concrete case, how should the decision be implemented in the national legal system of the concerned Member State? In order to effectively implement the declaratory judgment in the national legal system, the issued declaratory judgment would have to activate a standard of implemen-

72 Kamto, Charte africaine, instruments internationaux de protection des droits de l'homme, constitutions nationales: Articulation respectives, in: Flauss/Lambert-Abdelgawad (Publ.), L'application nationale de la Charte africaine des droits de l'homme et des peuples, 11 (30).

73 Rohleder, Grundrechtsschutz im europäischen Mehrebenensystem, 30. [Protection of Constitutional Rights in the European Multi-level System, 30].

74 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (73).

75 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (73).

tation for the individual plaintiff. This primarily means that a conflicting judgment by the national constitutional court or another exercise of public power would have to be set aside. The question which constitutional principles would allow for an action of annulment to be lodged thus arises here. These are all questions that concern the enforceability of the declaratory judgment in the national legal system of the convicted Member State. In this respect, the question concerning which legal action should be taken must also be posed in order to effectively enforce the declaratory judgment. Are legal remedies against the concerned Member State available in the case that it fails to implement?

These problems of the "Multi-level human rights protection"[76] entail dogmatic questions.[77] Following a precise examination of the regulations as well as the Amendment Agreement and the Additional Protocols, a need for regulation regarding these questions becomes apparent. To date, clear rules concerning the implementation of declaratory judgments neither exist at Community-level nor at national level of the Member States.

F. Limitation of Question and Structure

The Protocol on Good Governance, contains substantive and procedural constitutional elements. The countries do not disagree on the substantive constitutional elements, i.e. the factual competence of the Court of justice with regards to interpreting the Charta which establishes and justifies the basis of the decision-making authority of the court. However, they are divided when it comes to the resulting consequences for the national constitutional courts. The human rights mandate of the ECOWAS Court of Justice relates explicitly to the African Charta for Human Rights and Peoples' Rights. Therefore, the present study mainly concerns itself with the scope of the judgments by the Court of justice in relation to the interpretation of the Charta. This excludes the reference to the Protocol on Good Governance as a supra-national Constitution, even if the Court of justice usually refers to this Protocol. The observations in this paper focus fundamentally

76 Lindner, Grundrechtsschutz in Europa – System einer Kollisionsdogmatik [Protection of Constitutional Rights in Europe System of Collision Dogmatics...], in: EuR (2007), 160, (161).

77 Lindner, Grundrechtsschutz in Europa – System einer Kollisionsdogmatik [Protection of Constitutional Rights in Europe System of Collision Dogmatics...], in: EuR (2007), 160, (160).

on the human rights mandate of the Court of justice . This work limits itself primarily to the relationship between the jurisdiction of a constitutional court in the signatory states and the human rights jurisdiction of the ECOWAS Court of Justice. This is basically about the task of the Court of justice with regards to the upholding of the joint constitutional system and the resulting possible conflicts of jurisdiction with the constitutional courts of Member States.

In order to avoid the risk of confusions in this thesis a further differentiation is necessary. The jurisdiction of the Court of justice regarding proceedings following after a breach of contract[78] and the annulment proceedings[79] brought by a Member State, the Council or an executive secretary, are not dealt with here. The jurisdiction regarding the preliminary ruling procedure is also not taken into consideration.[80] The excluded areas of competence may be referred to insofar as the jurisdiction on such serves the purpose of this paper.

The following problems represent the main questions in the present study: based on its characterisation as a Constitutional Court: what is the binding force that decisions by the ECOWAS Court of Justice unfold in the Member States and, in particular, for the constitutional courts of the Member States? Which consequences arise from differing verdicts of the national constitutionals court and the ECOWAS Court of Justice concerning, from a substantive law viewpoint, the concurrent human rights? What are the obligations of the signatories derive out of the judgments by the Court of Justice? In particular, the question whether the Court of justice represents a supra-national constitutional court will be dealt with.[81]

In addition to these main questions, accessory, yet no less significant questions will also be covered. How far should the obligation of a convicted Member State extend to a payment of damages or how can it be justified with regards to international law? This will be discussed with respective arguments. With the ratification of Protocol A/SP.1/01/05, the ECOWAS Member States, and therefore their sovereign acts, have unconditionally submitted themselves to the jurisdiction of the ECOWAS Court of Justice for review of the conformity of the exercising of state authority in con-

78 Art. 10 a) in c. w. Art. 9 d) of the Protocol.
79 Art. 9 c) in c. w. Art. 10 b) of the Protocol.
80 Art. 10 f) of the Protocol.
81 Vgl. Wildhaber, Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte? [A constitutional future for the European Court of Law for Human Rights?...], in: EuGRZ (2002), 569 (570).

formity with the Charta. Can an individual deduce a claim from a declaratory judgment to recognize a ECOWAS Court of Justice judgment in the national legal system? The present paper concerns itself moreover with the question, whether and to what extent, the decisions by the ECOWAS Court of Justice should be legally binding especially for the constitutional courts in the area of their human rights jurisdiction. Should there a legal obligation arise for the constitutional courts? If yes, what does this obligation entail? In other words: which substantive and procedural obligations arise for the constitutional courts regarding the implementation of the decisions by the ECOWAS.Court of Justice?[82] Furthermore, the question must be answered, whether the individual plaintiff is entitled to legal remedy in case such an obligation to implement, deriving from the declaratory judgment by ECOWAS, is breached. Finally, the question on how the various competences of the ECOWAS Court of Justice and the constitutional jurisdictions of the Member States can be meaningfully coordinated so that they can be made fruitful for one another, must be answered.[83] It can be particularly noted that the network of relationships of national, regional and continental human rights jurisdiction is barely regulated. Due to the admissibility of the individual complaints' procedure without prior exhaustion of other legal remedies the further question of whether the Member States want to withdraw the primary competence of the application and interpretation of the Charta from the national constitutional courts, arises.

It is thus clear that there is a need for regulation within the ECOWAS system of justice. Scholars have unanimously recognized and agreed to the need for such regulation.[84] Yet, nobody has shown the way on how to close this gap within the legal order of the Community.

The aim of the present study is to draw attention to the problem area of actual and potential tension within the ECOWAS legal order regarding the human rights mandate of the ECOWAS Court of Justice. The African Charta for Human Rights and Peoples' Rights is part of the constitutions of the Member States and the national constitutional courts must guarantee the human rights set out in the Charta to the persons subject to the re-

82 Oppong/Niro, Enforcing Judgment of International Court in National Court, in: Journal of International Dispute Settlement (2014), 1 (4).

83 Rohleder, Grundrechtsschutz im europäischen Mehrebenensystem[Protection of Constitutional Rights in the European Multi-level System], 31.

84 Oppong/Niro, Enforcing Judgment of International Court in National Court, in: Journal of International Dispute Settlement (2014), 1 (5).

spective sovereign power. From a constitutional law point of view, there is a mixture of normative frames of reference for the constitutional review of sovereign acts in the light of the Charta. This is due to the fact that from the perspective of the national constitutional law, the constitutional courts act under the constitution and, at the same time, under the Charta (international law). As a servant of two masters, the constitutional court must always take care to protect the individual human rights and constitutional freedoms according to the standards of the Charta in its decisions. From an international point of reference, the competence of the ECOWAS Court of Justice includes the review of the compatibility of sovereign acts by the Member States with the Charta through the means of individual claims. Hence, there are two levels of judicial guarantees of human rights: the national level and the ECOWAS-level. This results in a tense relationship between the two, due to a divergence in the jurisdiction.[85] After closer inspection, it is a confrontation of *res iudicata* and *restitutio in integrum*. It is the goal of this study, to find internationally acceptable possibilities which can close a gap within the joint protective system of the ECOWAS legal system. The current reticence of the texts does not offer a good basis for effective legal protection for the individual plaintiff. It is in fact a matter of the actual and the potential conflict of jurisdiction between the ECOWAS Court of Justice and the constitutional courts and Supreme Courts as well as the constitutional regulations of the Member States. It is regrettable that the ECOWAS Court of Justice currently contents itself solely with the payment of damages after a violation has been determined. The restrictive interpretation of its judicial authority should be overhauled with acceptable arguments under international law.

There may be voices that do not necessarily agree with these proposed solutions or who remain skeptical about them. Perhaps the proposed solutions seem unenforceable in the region or unrealistic, especially since there is already, according to the current legal situation, resistance against the implementation of the declaratory ECOWAS-judgments.[86] This possible objection would be understandable: however, one should not forget that it

85 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und europäischem Gerichtshof für Menschenrechte, in: Der Staat 44 (2005), 403 (405). [Cooperation or Confrontation? – The Relationship between the Federal Constitutional Court and the Court of Law for Human Rights, in: The State 44...].

86 Alter/Helfer/McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (739); nach Austausch mit den Justizbeamten des Gericht-

is the task of scientific consideration to identify problems and to raise questions. Therefore, solutions should be proposed. Whether these will be successful in reality is then a question of practice. The proposed solutions in the present study may appear unrealistic in the near future but theory and practice may meet at a future point in time.

There are two theoretical contributions in this study: for one thing, this work does not aspire to resolve all problems regarding the relationship between the ECOWAS Court of Justice and Constitutional Courts of Member States. It only has the goal of comprehensibly examining the divergence of jurisdiction on both levels, i.e. national and ECOWAS-level. This thesis should contribute tothe resolution of this conflict by means of international legal requirements and the practice by a comparable regional court, such as the ECtHR. Therefore, it will be referred to the decision-taking practice by the ECtHR and the legal practice of European Member States regarding the resumption as a source of inspiration in order to close the regulations-gap in the ECOWAS Community. Moreover, further remedies will be shown, which are supposed to simplify the execution of the judgment by the ECOWAS Court of Justice at a national level. However, the proposed solutions are based on agreements within the ECOWAS Community. On the other hand, the study serves to remove a supposed collision[87] between the national legal systems of the signatory states and that of the ECOWAS at community level.According to Art. 15 paragr. 4 of the Amendment Agreement, the Member States are bound by the decisions of the ECOWAS Court of Justice and due to the fact that constitutional courts represent the organs of the Member States, they too are bound by the judgments of the ECOWAS Court of Justice. Therefore, the question whether and to what extent the national organs and, in particular, the Constitutional Courts are bound by decisions of the ECOWAS Court of Justice will be answered in the present study. According to

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shofs, lässt sich folgender Umsetzungs- stand feststellen: Niger, Senegal und Liberia haben die gegen sie ergangenen Urteile umgesetzt. Dagegen haben die Republik Togo, Burkina Faso, Gambia, Nigeria und Ghana ihre Urteile immer noch nicht vollumfangreich umgesetzt. [After the exchange with the Judicial Officers of the Court of Law, the follwing Status of Implementation may be noted: Niger, Senegal and Liberia have implemented the judgments against them. On the other hand, The Republic of Togo, Burkina Faso, Gambia, Nigeria and Ghana still have not implemented their Judgments to their full Extent.].

87 Lindner, Grundrechtsschutz in Europa – System einer Kollisionsdogmatik, EuR (2007), 160 (160). [Protection of Constitutional Rights in Europe – a System of Collision-Dogmatism...]

Art. 19 paragr. 1 of the Protocol A/P1/7/91, the general principles of law recognized by civilized nations, as stipulated in Art. 38 of the IGH-statute can be applied to the modus operandi of the ECOWAS Court of Justice. Based on this reference, the present paper expressly refers to the general rules of International Law and jurisdiction of the IGH.

Moreover, in order to justify some of the following opinions, reference will be made to the jurisdiction of the ECtHR. There is a reason for this: The ECOWAS Court of Justice itself often refers to the jurisdiction of the ECtHR.[88] This approach by the ECOWAS Court of Justice is justified because most human rights as inherent to the African Charta are essentially the same as those of the ECHR. The Inter-American Court of Law also mainly refers to thejurisdiction of the ECtHR because of the long-time experience of the ECtHR.[89]

The present study is the result of a comparative analysis. Regarding the methodology, the study primarily uses the regulations of the Founding Treaty and the Additional Protocols pertaining to it. Furthermore, the analysis of the jurisdiction of the ECOWAS Court of Law, the IGH, the ECtHR and other comparable regional courts of law plays a significant role. Thereby, the study often refers to the current practice of the EACJ and SADC Tribunal in the area of human rights jurisdiction. Not least, the constitutional regulations of the ECOWAS Member States are used from a comparative legal perspective. Furthermore, the study uses official legal determinations of ECOWAS-institutions. Finally, a personal visit to the ECOWAS Court of Justice, informal discussions with staff members as well as judges at the Court of Law was very useful. This involved inter-

88 CJ CEDEAO, Koraou c. Republique du Niger, N°ECW/CCJ/JUD/06/08 (27/10/2010), par. 85, available at: www.courtecowas.org (last accessed on 24/07/2015); CC CEDEAO, Mamadou Tandja c. République du Niger, Arrêt, N °ECW/CCJ/JUD/05/10 (08.11.2010), available at: www. courtecowas.org (last accessed on 16/07/2015); CC CEDEAO, Hissein Habré c. République du Sénégal, Arrêt, N°ECW/CCJ/JUD/06/10 (18/11/2010), available at: www.courtecowas.org (last accessed on 16/07/2015); CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/ JUD/09/11 (07/10/2011), par. 66, available at: www.courtecowa s.org (last accessed on 16/07/2015); CJ CEDEAO, Affaire Gbagbo c. République de la Côte d'Ivoire, N°ECW/CCJ/ JUD/03/13 (22/02/2013), available at: www.cou rtecowas.org (last accessed on 16/07/2015); CC CEDEAO, Manneh c. République de la Gambie, Arrêt, N°ECW/CCJ/JUD/3/08 (05/06/2008), par. 21, available at: www.courtecowas.org (last accessed on 16/07/2015).

89 Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, in: European Journal of International Law (2008), 101 (104, 111, 114 und 116).

views being conducted in the form of questionnaires. Further meetings with representatives of the Member States during regional conferences represented a considerable contribution as the present study orientates itself on the actual implementation problems and the mentality of the highest instance of the signatories regarding the jurisdiction of the Court of justice . With regards to the ECtHR, a personal visit to the Court of Justice and an informal discussion with staff members and a judge was a noteworthy contribution.

Further justification for the reference to the ECtHR case law lies in the jurisdiction of the ECtHR and the practice of implementation by the Member States of the European Council that serves as a model for deeper analysis and resolution of the tension between *res judicata* and *restitutio in integrum*. Because of the significant influence the judicature of the ECtHR has on the jurisdiction of the ECOWAS Court of Justice, the jurisdiction of the ECtHR is referred to for the purpose of supporting the arguments of this examination.

In the second chapter of the present study, the impact of rulings by the national Constitutional Court will be demonstrated. In the third chapter of the study, the supra-national overcoming of national legal force will also be addressed. This is followed by the reception of the legal force through the national rule of law in the fourth chapter. Finally, the result of the study will be presented in chapter five.