Chapter 5 Result and Concluding Comment

A. *Criticism of the Self-Restraint of the ECOWAS Court of Justice in the Ameganvi et al vs. Togo Case*

The criticism, directed at the self-limitation of the ECOWAS Court of Justice, can be viewed from three different perspectives: from a procedural perspective (II.), from a legal-substantive perspective (III.) and from the perspective of the basis of authorisation (I.).

I. Criticism of the Self-Restraint

1. Legal basis of the self-restraint

In clause 18 of the legal matter of Ameganvi et al vs Togo, the ECOWAS Court of Justice elaborated:

> « La Cour n'avait donc pas à aller au-delà de sa compétence pour se prononcer sur la demande de réintégration, qui, si elle était ordonnée, équivaudrait à l'annulation de la décision de la Cour Constitutionnelle pour laquelle la Cour de Justice de la Communauté n'a pas de compétence.»[1]

Such an elaboration can be noted several times in the rulings of the Court of justice .[2] The question now arises as to whether the rejection of the reinstatement order and the reasoning of the Court can be justified under International law.

In this clause, the Court of justice makes it expressly known that the authorisation of International courts, such as the ECOWAS Court of Justice,is dependent on the will of the signatory states. International organisa-

1 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, Arrêt N° ECW/CCJ/JUG/06/12, (13.03.2012), par. 18.

2 CCJ ECOWAS, JERRY UGOKWE v. FEDERAL REPUBLIC OF NIGERIA, Judgment N° ECW/CCJ/JUD/03/05 (07/10/2005), par. 32, in: Community Court of Justice, ECOWAS, Law Report (2004–2009), 5; CJ CEDEAO, Affaire Moussa Léo Kéita v. Mali, Arrêt N°ECW/CCJ/ APP/05/06 (22.03.2007), par. 35; Sall, La Justice de l'intégration, 321.

tions, courts in particular, are established by subjects under International law. Their existence and tasks are thus dependent on the will of the subjects under International law. Therefore, they do not enjoy the same freedom as the states as per the principle of sovereignty.[3] Depending on the needs, they have more or fewer tasks. They may not extend their scope and power of action by themselves.[4] Therefore their competence is limited. Acting *ultra vires*[5] is therefore prohibited. In the fulfilment of its task, the ECOWAS Court of Justice may not exceed its competence. This is accurate in this respect, since the principle of limited authorisation is one of the fundamental principles of law of International organisations.[6] Particularly for this reason, the ECOWAS Court of Justice ensures that there is no transgression of its competence in its decision-making process. Because, in principle, it may only exercise its competence within the framework of its founding act.[7]

Furthermore, the signatory states have some discretion when it comes to the National realisation of obligations under International law.

What is disturbing in the legal practice of the Court of justice regarding the rejection of a possible cassation power is that the Court of does not state a reason why it does not consider itself to be authorised to control legally binding judgments of the National courts of the Member States. However, its legal position could derive from two important fundamental principles under International law: the limited authorisation and the margin of discretion by the state. As a result, however, the power of control can be derived from other principles under International law.

2. Implied authority

Indeed, the ECOWAS Court of Justice can refer to other principles of International law regarding the perception of its constitutional function. The International court organs have found possibilities, within the scope of

3 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of ECOWAS, 29.
4 Vitzthum, Völkerrecht, 4. edition, 4. Abschnitt, Rn. 189.
5 Vitzthum, Völkerrecht, 4. edition, 4. Abschnitt, Rn. 192.
6 Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004), 257 (259).
7 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of ECOWAS, 30.

their competence, which primarily serve the realisation of their task and the realisation of the purpose of their organisation.

There is no conditioning in the jurisdiction of the the ECOWAS Court of Justice's legal basis. It concerns the competence given to the Court . The limitation of the competence does not change the fact that the competence of the ECOWAS Court of Justice can be explained otherwise.[8] The theory under International law of limited authorisation does not change the fact that International courts such as the ECOWAS Court of Justice apply the instruments and techniques at their disposal in order to reach the objective and purpose they were established to fulfil. One of these techniques is interpretation. The purpose for the establishment of the Court of justice was to ensure effective legal protection within the entire legal system of the Community. The application of the principle of interpretation, i.e. the *effet utile*[9], serves the teleological interpretation of the Founding Protocol and the African Charter on Human and Peoples' Rights. To realise the goal of the Charter, an *implied power* of the ECOWAS Court of justice is created.[10] The signatory states must accept such an implied legal basis.[11] The safeguarding of the Charter requires a responsible realisation of this authorisation. Especially in the area of human rights, the implied authorisation proves to be logical.[12]

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8 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Recht- sprechung des EGMR für die deutschen Gerichtev[The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 64.

9 Vitzthum, Völkerrecht, 4. edition, 4. Abschnitt, Rn. 190.

10 Katabazi and Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007 (01. November 2007), Ziff. 18, available at: www.eacj.org (last accessed on 08/04/2015); Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of ECOWAS, 30.

11 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtspre chung des EGMR für die deutschen Gerichte [The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 63.

12 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (82); Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of ECOWAS, 30; Ruffert/Walter, Institutionalisiertes Völkerrecht [institutionlised International law], 2. edition, 78; Klabbers, An Introduction to International Organisations Law, 3rd ed., 56.

There are many examples in the jurisprudence of the International Court of Justice in which the ICJ had not been explicitly authorised to order measures, did, however, draw conclusions from the implied power and e.g. ordered the release of US-American diplomats in Teheran.

This application of the implied authorisation may, however, not lead to rendering an explicit limitation provided for by the signatory states to be ineffective[13].But at no point have the ECOWAS Member States expressly excluded a restriction of the Court's review of judgments by a Constitutional Court. It is therefore clear: The restraint expressed by the ECOWAS Court of Justice is, in this context, rather questionable. The Court of justice 's self-conception may lead to a restriction of the authorisation, which is, in turn, incompatible with the will of the signatory states. Because reaching this goal is also one of the primary responsibilities of the Member States. The Member States therefore also carry responsibility, which is why the competence of the Court has been extended. A particular interest of a signatory state must not suppress the general interest of the entire Community. On the contrary, the Court of justice has, within the framework of its authorisation, a duty to interpret the Charter in accordance with international law in the interest of all persons within the sovereign territory of the Community. Especially the wording of the competence to act is formulated so broadly that the Court itself is responsible to derive its implied power from it.[14] It is authorised within the framework of this implied power to do everything possible that complies with the inherent rights in the Founding Treaty and Additional Protocols.[15] Moreover, it would lead to a weakening of the Court if its task was only to issue fixed judgments without there being any hope for the plaintiff.

It is plaintiff's personal interest, that his individual rights be duly respected following the declaration of a violation. The competence to declare a violation of the Charter can go as far as to order concrete measures which are meant to rectify the situation in contravention of the Convention. In the legal matter of Campbell vs Zimbabwe, the same broad inter-

13 Verdross/Simma, Universelles Völkerrecht, 3. edition, § 780, Punkt 2.

14 Vitzthum, Völkerrecht, 4. edition, 4. Abschnitt, Rn. 191.

15 Das ist ein in amerikanischer Gerichtshoheit bekanntes Prinzip der *implied power.* Dazu: Zuleeg, Internationale Organisation, Implied Powers, in: Bernhard (Publ.), EPIL II (1995), 1312 (1313). Vgl. ferner Köck, Die „implied powers" der Europäischen Gemeinschaften als Anwen- dungsfall der „implied powers" Internationaler Organisationen überhaupt, in: FS Seidl-Hohenvel- dern, 1988, 279 ff.

pretation of the Protocol can be noted.[16]The basis of this understanding of competence can be deduced from the ancillary competence developed by the ICJ in the Teheran case.[17] Even if the ECOWAS Court of justice does not have an express competence to order the termination of an act in violation of the Charter, an ancillary competence of the Court of justice can be deduced from the primary obligation of the Member States to order corrective measures. Prior to that, the Court must declare a violation of the primary obligation. Should there be such a violation, the Court of justice should be granted the ancillary competence. The ancillary competence of the Court of justice can be implicitly derived from Art. 1 of the Charter. Otherwise, there would be a prohibition norm derived from the authorisation. It follows that the ECOWAS Court of Justice is authorised to determine a breach of the primary obligation under International law and order its termination in the form of an obligation to terminate.[18] The reference to the ancillary competence giving the Court of justice the power to demand such corrective measures simplifies the implementation of the judgment.[19] The Court of Law should always be given an ancillary competence in case a violation has not yet been completed as in this case, the Member State still has the opportunity to guarantee the adherence to the primary obligation by terminating the violating act in hindsight. Only in the case of a completed event that is entirely in the past does the Court have the authorisation to order reparations on a different legal basis under International law (in detail see chapter 3).[20]

16 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (84).

17 CIJ, Affaire relative au personnel diplomatique et consulaire des États-Unis à Téhéran, (États-Unis D'Amérique c. Iran), Arrêt du 29 Novembre 1979, par. 27; dazu EuGRZ 1980, 394 (403).

18 Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004), 257 (261); 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], 64.

19 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtspre- chung des EGMR für die deutschen Gerichte [The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 64.

20 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtspre- chung des EGMR für die deutschen Gerichte[The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for

In the absence of a prohibition norm,[21] the International court may do whatever it takes to concretise the goal of the agreement. In the legal matter of Katabazi vs the East African Community and Uganda[22], the East African Court of justice recognised its competence to review decisions by the highest courts of Member States. This took place despite a lack of regulations stemming from the basis of authorisation. The East African Court of justice has, namely, approved the access for National persons by interpreting the Founding Agreement, in particular Art. 27. In this case, although the East African Court of justice found that there was no express regulation in the Agreement to declare the complaint admissible, it took the the logical consequenceof the rule of law to affirm its competence:

> "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation."[23]

This statement by the East African Court of justice can be justified with the help of two principles, namely, the ancillary competence and the nonexistence of a prohibition norm.[24]

3. Development of the law by International Courts

The international court organs have their jurisdiction through the will of states. From this, they are able to create the law through the developing case law. It must only be assumed, through the decision-making practice by the Court of Law, that the developed legal practice can be identified as

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German courts], 50; Breuer, Zur Anordnung konkreter Abhilfemaß- nahmen durch den EGMR[Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004), 257 (262).

21 Verdross/Simma, Universelles Völkerrecht [Universal International Law], 3. edition, § 1295.

22 Katabazi and Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007 (01 November 2007), available at: www.eacj.org (last accessed on 08/04/2015).

23 Katabazi and Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007 (01 November 2007), 16, available at: www.eacj.org (last accessed on 08/04/2015).

24 Verdross/Simma, Universelles Völkerrecht [unicersal International law], 3. edition, § 1295.

sufficiently meaningful to the signatory states.[25] The law-generating authority[26] is a logical consequence of the authorisation. Applicable law before international courts includes not only the Convention on international law, but also other legal sources which are listed in Art. 38 of the statute of the ICJ. One of these sources is mainly the jurisprudence of International courts. The development of the law is clearly expressed in the Protocol by the SADC Tribunal. Acc. to Art. 21 par. 2 of the SADC Tribunal-Protocol, the Court of Law should not only consider the Founding Agreement and the associated Protocols in its decision-making but also its own jurisdiction. The East African Court of justice is authorised with the following words in Art. 21 par. 2 of the SADAC Tribunal-Protocol:

> "The Tribunal shall develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public International law and any rules and principles of the law of States."

The National Constitution of the convicted Member States does not represent an "*écran National*", which should be opposed to the principle of effective legal protection of the Charter. Instead, the signatory states took themselves the task to guarantee the rights in the Charter for the subjects of their respective domestic legal system.[27] In this regard, the East African Court of justice states further:

> "It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by".[28]

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25 Grosche, Rechtsfortbildung im Unionsrecht [Law development in Union Legislation], 68.

26 Kelsen, Die Einheit von Völkerrecht und staatlichem Recht [The unity of International law and state legislation], in: ZaöRV 19 (1958), 234 (238).

27 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); Somali, L'indépen- dance de la Cour Africaine des droits de l'homme et des peuples, théories et réalités, in: Revue Togolaise des Sciences Juridiques (2013), 51 (58); Badet, Commentaire de l'arrêt dame Hadidjatou Mani Koraou contre la République du Niger, CJ CEDEAO, in: Revue Béninoise des Sciences Juri- diques et Administratives (2010), 153 (178).

28 Katabazi and Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007 (01. November 2007), 20, available at: www.eacj.org (last accessed on 08/04/2015); Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (73).

From this and further statements by the East African Court of justice it can be concluded that the complainant is dependent on the action of the ECOWAS Court of Justice to obtain effective legal protection against interventions by the convicted signatory state. When interpreting and applying Art. 9 par. 4 (together with Art. 10 d) of the Additional Protocol A/SP.1/01/05 (19/01/2005), the ECOWAS Court of justice should take into account the principle that the signatory states, by means of the reform sought by this Additional Protocol, wish to guarantee practical and effective legal protection for the subjects within the territory of the Community.[29] It is therefore clear: A declaration without legal consequence for the convicted Member State is contrary to the goal of the reform carried out in 2005 and constitutes a violation of effective legal protection.

II. Criticism from a Constitutional Perspective

From a procedural perspective, a certain confusion of the cassation authority of a Court of justice and the role of the ECOWAS Court of Justice as a Constitutional Court is regrettable. In order to clarify this, the differentiation between object of dispute and party before National courts and the ECOWAS Court of Justice must, on the one hand, be addressed (1.), and on the other hand, the difference between the cassation authority of a Court of justice and the role as a Constitutional Court of the ECOWAS Court of Justice (2.) must be demonstrated.

1. Object of dispute and party to the dispute before National and the ECOWAS Courts of Justice

The object of dispute refers to the constitutional guarantee before the National Constitutional Court. Regarding the constitutional complaint, an act of state power is facing an individual plaintiff. From a constitutional point of view, the ECOWAS Court of Justice misjudges one of the most important principles of substantive legal force: The legal force is always

29 Meyer-Ladewig, Europäische Menschenrechtskonvention [European Convention on Human Rights]. Hand commentary, 2. edition, Art. 34, Rn. 3a.

tightly bound to the object of the proceedings or the dispute.[30] The ECJ has confirmed this with the following words:

> « Il y a lieu de considérer cependant que la reconnaissance du principe de la responsabilité de l'État du fait de la décision d'une juridiction statuant en dernier ressort n'a pas en soi pour conséquence de remettre en cause l'autorité de la chose définitivement jugée d'une telle décision. Une procédure visant à engager la responsabilité de l'État n'a pas le même objet et n'implique pas nécessairement les mêmes parties que la procédure ayant donné lieu à la dé- cision ayant acquis l'autorité de la chose définitivement jugée. En effet, le requérant dans une action en responsabilité contre l'État obtient, en cas de succès, la condamnation de celui-ci à réparer le dommage subi, mais pas nécessairement la remise en cause de l'autorité de la chose définitivement jugée de la décision juridictionnelle ayant causé le dommage. En tout état de cause, le principe de la responsabilité de l'État inhérent à l'ordre juridique communautaire exige une telle réparation, mais non la révision de la décision juridictionnelle ayant causé le dommage ».[31]

The objections therefore concern interventions by state organs. Thus, the legal force of the decision by the Constitutional Court does not oppose the control competence of the ECOWAS Court of Justice to review as the reasons for litigation before this Court of justice are different compared to those submitted to the National Constitutional Court. Also, the parties to the proceedings before the ECOWAS Court of Justice (signatory state and individual plaintiff) are not the same as those before the National Constitutional Court. Consequently, the legal force of the Constitutional Court and the legal force of the ECOWAS Court of Justice differ considerably from a personal and objective point of view. The East African Court of justice has quite rightly referred to the difference between the reasons for the suit brought before the Constitutional Court of Uganda and the basis of the claim brought before it in the legal matter of Katabazi[32], when reject-

30 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht [The object of Dispute and the Effect of Legal Decisions in Public Law], 33.

31 CJUE, N°C-224/01, Arrêt (20.09.2003), Affaire Köbler c. Republik Österreich [The Republic of Austria], par. 39.

32 Katabazi and Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007 (01. November 2007), available at: www.eacj.org (last accessed on 08/04/2015).

ing the opinion of the Ugandan government. Thus, it dismissed the sanctity of *res judicata* on the part of the Ugandan government.[33]

2. Confusion in the Excercise of Jurisdiction

In the decision-making practice of the ECOWAS Court of Justice, a certain confusion between the possible cassatory authority and its role as a Constitutional Court on human rights disputes can be noted. In order to contain this confusion, an illumination of both authorities is necessary.

Upfront, the term cassation must be addressed. As a matter of fact, cassation means:

> « Annulation par la cour suprême d'une décision passée en force de chose jugée et rendue en violation de la loi ».[34]

From this definition, three attributes of a cassation court can be deduced:
- the cassation court is part of the same instance as the courts below;
- the cassation court has a cancellation competence;
- It is the task of the cassation court to safeguard the unified interpretation and application of state law.

In this definition it can be observed: The procedure before the National courts are part of a completely different sequence of instances in comparison to the proceedings at the level of International law (ECOWAS Court of Justice). However, the procedure for individual complaints before the ECOWAS Court of Justice meets none of the above-mentioned criteria and should therefore not be confused with a cassation court or equated with such. Consequently, this Court of justice does not have a cancellation competence such as the cassation court. Rather, the procedure established in Protocol A/SP.1/01/05 (19/01/2005) is an extraordinary legal measure. This

33 Katabazi and Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007 (01. November 2007), 14, available at: www.eacj.org (last accessed on 08.04.2015); Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (95).

34 Guinchard/Debard (Publ.), Lexiques des Termes Juridiques, 18ème Édition (2011), 121; Crei- felds, Rechtswörterbuch [legal Dictionalry], 19. edition, 650.

is a procedure of an extraordinary nature and therefore fulfils another task[35]. It serves the realisation of the primary obligation of the signatory states.[36]

It is comparable to the National procedure for Constitutional Courts. This procedure arises from the violation of the primary obligation of the signatory states.[37] The individual complaints procedure is an expression of the lack of legal protection in the National legal systems of the Member States. Within the framework of its competence, the Court of justice can only order concrete corrective measures as a consequence of its declaratory judgment. A repeal of the state's objected intervention is irrelevant.

The ECOWAS Court of justice itself has already performed its role as a Constitutional Court in the legal system of the Community by giving two fundamental judgments with constitutional characteristics in 2010. It had namaly convicted the Republic of Senegal in May 2010.[38] It concerned the violation of the non-retroactivity in the constitution-amending Act of 7 August 2008. In the tenor, the Court of Justice of the Republic of Senegal ordered that the principle of non-retroactivity needed to be observed in the amendment of the Constitution.The second decision in this regard concerns the arrest in breach of human rights of the former state president of the Republic of Niger, Mamadou Tandja. In its declaratory judgment, the Court of justice emphasised the need to respect the fundamental freedoms of the state president who had been deposed by a coup. Thus, the Court ordered the release of the former state president Mamadou Tandja.[39]

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35 Katabazi and Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007 (01 November 2007), available at: www.eacj.org (last accessed on 08/04/2015); Ebobrah, Litigating Human Rights before Sub-Re gional Court in Africa: Prospects and challenges, in: African Journal of International and Com- parative Law (2009), 79 (95); Sall, La Justice d'intégration, 294; Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, 2009, Art. 34, Rn. 6.

36 Sall, La Justice d'intégration, 296; Meyer-Ladewig, Europäische Menschenrechtskonven- tion. Handkommentar, 2. edition, Art. 35 ECHR, Rn. 5 f.

37 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 34, Rn. 6.

38 CCJ ECOWAS, Hissein Habre v. Republic of Senegal, Judgment N° ECW/CCJ/JUD/06/10 (18.11.2010), in: Community Court of Justice, ECOWAS, Law Report (2010), 71.

39 CCJ ECOWAS, Mamadou Tandjav. Republic of Niger, Judgment N° ECW/CCJ/JUD/05/10 (08.11.2010), in: Community Court of Justice, ECOWAS, Law Report (2010), 109.

The ECOWAS Court of Justice contributes to the protection of the human rights stipulated in the Charter against infringements by the state. Thereby, it was rightly qualified as a supra-National Constitutional Court.[40]

Prior to these two decisions, the Court of justice had in 2007 already expressly mentioned this aspect of its competence and thus its function as a Constitutional Court in the legal matter of Keita vs the Republic of Mali.[41] Should the order of reparations in case of Constitutional Court judgments inviolation of human rights be removed from the factual area of competence [42], the Additional Protocol would fail to fulfil its purpose. It is even more so astonishing and regrettable that in its first declaratory judgment on the case of dispute the Court of justice judgment extensively described the violating act in the main reasons of its decision.[43] The Court could have drawn this conclusion within the framework of a methodical, acceptable interpretation. This procedural aspect of the constitutional role of the ECOWAS Court of Justice is closely linked to the substantive content of the Charter.

3. Confusion regarding the applicable law

Criticism from a substantive perspective concerns, on the one hand, the applicable law and, on the other hand, the objective nature of the obligations resulting from the judgment.

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40 Bolle, La Cour de Justice de la CEDEAO: une cour (supra)constitutionnelle?, in: La Constitution en Afrique (08.11.2010), available at www.la-constitution-en-afrique.org (last accessed on 08.03.2015); Kpodar, La communauté Internationale et le Togo: éléments de réflexion sur l'ex- tranéité de l'ordre constitutionnel, in: Revue Togolaise des Sciences Juridiques (2011), 38 (39).

41 CJ CEDEAO, Affaire Moussa Léo Kéita c. Mali, Arrêt N°ECW/CCJ/APP/05/06 (22.03.2007), par. 35; Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS-Community Court of Justice, 26, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 01/03/2015).

42 Should the untouchability of the decisions in violation of human rights by the Constitutional Court be part of the *domestic juridiction domaine reservé* of the signatory states, the Member States would have made provision for such during the adoption fo the Founding Protocol and the Additional Protocol. See also: Vitzthum, Völkerrecht [International Law], 4. edition, 4. section, Rn. 195.

43 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, Arrêt N° ECW/CCJ/ JUG/06/12, (13.03.2012), par. 18.

In the case of the National courts, the National law is applied. This means that the final judgments of National courts can be repealed by the National cassation court, should they be contrary to National law. In contrast, in the individual complaints procedure before the ECOWAS Court of Justice, International law is applied. Art. 19 par. 1 of Protocol A/P1/7/91 (19/01/2005) expressly points out that the International regulations are to be applied, i.e. the applicable principles under International law as per Art. 38 of the statute by the ICJ. This means that the declaratory judgment by the ECOWAS Court of Justice has a different function compared to the judgments of National courts of the Member States.

The obligations arising from declaratory judgments are of an objective nature. They have a cross-case effect in the convicted signatory state and a factual *erga-onmes*-effect for the Member States not party to the proceedings (see in more detail chapter 3).

It is the task of the ECOWAS Court of Justice, just as it is with a National Constitutional Court, to guarantee the safeguarding of certain fundamental freedoms and rights stipulated in the African Charter.[44]Especially for this reason, the individual complaint fulfils an objective function of legal protection that exceeds the mere declaratory judgment in a specific case. In the Marckx case, the ECtHR already expressly clarified the aspect of the cross-case effects of its declaratory judgment.[45] Therefore, the case law to be developed by the ECOWAS Court of Justice is in the general interest of the legal order of the Community.[46]

Comment: This case law by the Court of justice is dangerous in many aspects:

The constant rejection of the review of court judgments creates an obstacle for the signatory states with regards to the human rights competence of the ECOWAS Court of Justice. Indeed, it is in the hands of the Member States to create an obstacle by prematurely rendering judgments in violation of human rights by domestic courts, in order to seemingly fulfil the

44 Vgl. Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Hand- kommentar[European Human Rights Convention. ECHR-commentary], 3. edition, 2009, Art. 34, Rn. 6.

45 ECtHR (GK), case No. 6833/74, Marckx v. Belgium (13/06/1979), clause 58 = EuGRZ 1979, 454 (460).

46 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommen- tar [European Human Rights Convention. ECHR-commentary], 3. edition, 2009, Art. 34, Rn. 9; Meyer-Ladewig, Europäische Menschenrechtskonvention, Hand- kommentar [European Human Rights Convention. ECHR-commentary], 2. edition, Art. 34, Rn. 3b.

legal bases against the review competence of the ECOWAS Court of Justice.[47] Bolle correctly viewed this narrow interpretation in an interpretative judgment as questionable self-limitation.[48]

From the above, it can be recommended that the Court of justice should amend its case law in this regard by differentiating between a possible cassation-competence and its function as a Constitutional Court within the legal system of the Community. The African Charter on Human and Peoples' Rights is an International treaty with objective obligations. It is necessary, particularly for this reason, to choose the interpretation that comes closest to the purpose of the treaty. In this context, the ECtHR clarified in the case Wemhoff vs Germany:

> « [S']agissant d'un traité normatif, il y a lieu d'autre part de rechercher l'interprétation la plus propre à atteindre le but et à réaliser l'objet de ce traité et non celle qui donnerait l'étendue la plus limitée aux engagements des Parties ».[49]

It is particularly regrettable that the ECOWAS Court of Justice includes the purpose of the later Additional Protocols in its interpretation only to a minimal extent. It thereby overlooks the fact that "the individual norms and parts of a system are to be seen rather as purposely linked to each other. A treaty with all its annexes, Additional Protocols, explanations etc. now represents – in its area a self-contained system as well as a National law".[50]

Through the previous case law, the Court of justice has given itself a self-limitation, thereby endangering the Charter. The Court may and should review final judgments by the Constitutional Courts if human rights are at stake. It is not a cassation if the Court of justice finds a violation in a domestic Constitutional Court´s judgment and demands that the signatory state draw the possible consequences from it. For these reasons and in light

47 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (100).

48 Bolle, Quand la Cour de Justice de la CEDEAO s'autolimite, in: La Constitution en Afrique (08.04.2012), available at: www.la-constitution-en-afrique.org (last accessed on 08/03/2015).

49 Case Wemhoff v. Deutschland, ECtHR No. 2122/64, (27/06/1968), 20.

50 Matscher, Die Methoden der Auslegung der EMRK in der Rechtsprechung ihrer Organe [Methods of interpretation by the ECHR in the jurisdiction of its organs], in: Schwind (Publ.), Aktuelle Fragen zum Europarecht aus der Sicht in- und ausländischer Gelehrter [Current questions regarding the European Law from the viewpoint of domestic and foreign scholars], 103 (114).

of its previous case law, the ECOWAS Court of Justice has ridden itself of its task in this respect. It is not a cassation court according to domestic hierarchical understanding but the interpretation of its human rights competence should be undertaken in the future with particular care.

In conclusion: Should the International court have no competence to demand the application of the Charter under International law, the following dangers are to be feared:

- The signatory states are encouraged to continue to commit the same violations because they do not have to fear major repercussions apart from paying compensation to the victims of an established violation;
- The plaintiffs must endure a legal relationship contrary to human rights determined by the ECOWAS Court of Justice, despite the fact that their legal situation is in need of improvement;by refusing to review final National judgments, the signatory states enjoy an easy way out of avoiding the control competence by the ECOWAS Court of Justice.

III. *Marge Nationale d'appréciation* as a possible Limit to the Empowerment Authority?

The big problem international human rights organs are confronted with is the boundary between the guarantee under International law and the competence of the respective signatory state.[51]

1. The term *marge Nationale d'appréciation*

The National margin of discretion is to be seen as a source of tension between the requirement of effective protection of human rights and the granted autonomy of the signatory states.[52] The term *marge Nationale d'appreciation* invented by the European Commission on Human Rights ad-

51 Bernhardt, Internationaler Menschenrechtsschutz und Nationaler Gestaltungsspielraum, in: Völkerrecht als Rechtsordnung [International protection of human rights and National margin of discretion, in International Law as the rule of law], FS Mosler, 75 (75).

52 Bernhardt, Internationaler Menschenrechtsschutz und Nationaler Gestaltungsspielraum, in: Völkerrecht als Rechtsordnung[International protection of human rights and National margin of discretion, in International Law as the rule of law], FS Mosler, 75 (78).

dresses the question of how much leeway the Convention bodies of a signatory state share should be granted in the realisation of human rights. For the first time in the case Greece vs the United Kingdom[53], the term has been applied in more than 700 cases in the case law of the ECtHR.[54]

The characteristics of the term were demonstrated in the case Ireland vs the United Kingdom as follows:

> « Les limites du pouvoir de contrôle de la Cour […] se manifestent avec clarté particulière dans le domaine de l'article 15. Il incombe d'abord à chaque État contractant, responsable de la vie de sa nation, de déterminer si un danger public la menace et, dans l'affirmative, jusqu'où il faut aller pour essayer de le dissiper. En contact direct et constant avec les réalités pres- santes du moment, les autorités Nationales se trouvent en principe mieux placées que le juge International pour se prononcer sur la présence de pareil danger comme sur la nature et l'étendue de dérogations nécessaires pour le conjurer. L'article 15 § 1 laisse en la matière une marge d'appréciation ».[55]

In the case Marckx[56], ECtHR already introduced the term *marge d'appreciation* when rejecting the order of concrete corrective measures. But this can be justified by the fact that, by the nature of the violation, the sued Member State had many possibilities to remove the violation.[57]

In this case, the discretion of the convicted member State is reduced to "zero". This should often be the case if the contravention against the guarantee of the Convention lies in a legislative act.[58] In this regard, Maurice Kamto, adds that the realisation of the African Charter is dependent on the margin of discretion in the decision-making by the signatory states.[59]

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53 Affaire Hellénique contre Royaume-Uni, Annuaire de la Convention Européenne des Droits de l'Homme (1958–59) 2, 172 (177).

54 Greer, The margin of appreciation: interpretation and discretion under the European Con- vention on Human Rights, in: Human rights files No. 17, Council of Europe, 2000, 5.

55 CEDH (plénière), Affaire Irlande v. Royaume-Uni N°5310/71, (18.01.1978); par. 207.

56 ECtHR (GK), Marckx v. Belgium (13/06/1979), Ziff. 58 = EuGRZ 1979, 454.

57 ECtHR (GK), Marckx v. Belgien (13.06.1979), clause 58 = EuGRZ 1979, 454 (460).

58 Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004),268 (268).

59 Kamto, Charte africaine, instruments internationaux de protection des droits de l'homme, Constitutions Nationales: Articulation respectives, in: Flauss/Lambert-

2. Appreciation of reverting to the discretion of the state

The state's margin of discretion, however, is not unlimited.[60] It should be emphasised that the principle of effective legal protection is superior to the National margin of discretion.[61] Generally, the term of the state's margin of discretion is limited where the ECtHR has determined that the conduct of a Member State is not tolerable in a democratic society.[62] In the case of Ireland vs the United Kingdom, the ECtHR gave the concerned signatory state a certain prerogative with respect to its factual assessments but clearly stated its boundary:

> « Les États ne jouissent pas pour autant d'un pouvoir illimité en ce domaine. Chargée, avec la Commission, d'assurer le respect de leurs engagements (Art. 19), la Cour à compétence pour en décider s'ils ont excédé la stricte mesure des exigences de la crise […]. La marge Nationale d'appréciation s'accompagne donc d'un contrôle européen ».[63]

In case of a violation of Art. 7 of the Charter, the ECOWAS Court of Justice should set clear boundaries where the discretion of the concerned Member State must be reduced to "zero". Consequently, the signatory state must draw the necessary consequences if the ECOWAS Court of Justice declared a judgment by the National Constitutional Court to be in violation of human rights.[64] The ECtHR already declared in many cases that the resumption of such judgments in violation of human rights is the suitable and appropriate way to remedy the violation.[65]

Abdelgawad (Publ.), L'ap- plication Nationale de la Charte africaine des droits de l'homme et des peuples, 11 (31).

60 Bernhardt, Internationaler Menschenrechtsschutz und Nationaler Gestaltungsspielraum, in: Völkerrecht als Rechtsordnung [International protection of human rights and National margin of discretion, in International Law as the rule of law], FS Mosler, 75 (82).

61 Greer, The margin of appreciation: interpretation and discretion under the European Con- vention on Human Rights, in: Human rights files No. 17, Council of Europe, 2000, 26.

62 Bernhardt, Internationaler Menschenrechtsschutz und Nationaler Gestaltungsspielraum, in: Völkerrecht als Rechtsordnung [International protection of human rights and National margin of discretion, in International Law as the rule of law], FS Mosler, 75 (84).

63 CEDH (plénière), Affaire Irlande v. Royaume-Uni N°5310/71, (18.01.1978); par. 207 (in fine).

64 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N°ECW/CCJ/APP/12/10 (07.10.2011), par. 66.

65 CEDH, Affaire Somogyi v. Italie, N°67972/01, (10.11.2004), par. 86.

Even if it is regrettable that the ECtHR orders such measures only in the main reasons for its decision[66] and not in the tenor of a judgment, in the case Assanidze vs Georgia the plaintiff was immediately released, one day after issuing the judgment.[67] In particular, the discretion of the signatory states does not intervene in the procedural guarantee because this, in particular, is one of the core areas, in which state and subjective interests collide. The demand for impartial justice however has more weight than the margin of discretion (a)[68] as there is no conflict when it comes to the guarantees of justice between state interests and International law (b). Subsequently, the procedural guarantees represent an obligation to show result at the expense of the convicted signatory state.

a. Procedural guarantees as a basis for other human rights

In its judgment Assanidze vs Georgia, the ECtHR stipulates:

> « La Cour rappelle que ses arrêts ont u caractère déclaratoire pour l'essentiel et qu'en général il appartient au premier chef à l'État en cause de choisir les moyens à utiliser dans son ordre juridique interne pour s'acquitter de son obligation au regard de l'article 46 de la Convention, pour autant que ces moyens soient compatibles avec les conclusions contenues dans l'arrêt de la Cour […] Toutefois, en l'espèce, la nature même de la violation constatée n'offre pas réel- lement de choix parmi différentes sortes de mesures susceptibles d'y remédier».[69]

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66 Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004),257 (263).

67 Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004),257 (262).

68 Greer, The margin of appreciation: interpretation and discretion under the European Con- vention on Human Rights, in: Human rights files No. 17, Council of Europe, 2000, 28 f.

69 CEDH, N°71503/01, Arrêt (08.04.2004), Affaire Assanidzé c. Géorgie, par. 202; Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Handkommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 140, 185; Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR[Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004), 257 (263); CEDH, N°15869/02, Arrêt (23.03.2010), Affaire Cudac c. Lituanie, par. 79; CEDH, N°1620/03, Arrêt (28.06.2012), Affaire Schütz c. Allemagne, par. 17.

Fundamental principles can be derived from this statement by the ECtHR. Regarding the procedural guarantees, the discretion of the signatory states has been reduced to "zero".[70] The reason is clear: The procedural guarantees are the basis for the realisation of other human rights. Therefore, the meaning of procedural guarantees should be clarified in relation to the paper at hand.How can the procedural guarantee be defined in terms of the present study? In order to answer this question, it is recommended to reflect on the (French and English) wording in Art. 7 par. 1 of the African Charter:

> « Toute personne a droit à ce que sa cause soit entendue. Ce droit comprend: a). 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; b). le droit à la présomption d'innocence, jusqu'à ce que sa culpabilité soit établie par une juridiction compétente; c). le droit à la défense, y compris celui de se faire assister par un défenseur de son choix; d). le droit d'être jugé dans un délai raisonnable par une juridiction impartiale ».
>
> "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent National organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proven guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal".

The regulation in Art. 7 par. 1 of the Charter is to be divided into an organisational and a functional guarantee. Furthermore, the content of the regulation in Art. 7 par. 1 of the Charter encompasses the procedural guarantee regarding the principle of fairness.[71] The right to a fair procedure comprises, amongst others, the claim to impartiality and independence of

70 Rohleder, Grundrechtsschutz im europäischen Mehrlevelssystem [Protection of constitutional law in the European multi-level system], 76; Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004), 257 (263).

71 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 26.

the presiding court.[72] A certain equity consideration can be noted behind Art. 7 of the Charter.[73] Thus, the principle of the requirement of fairness with respect to the structural and organisational elements of the procedural guarantee can be applied.[74] The independence and impartiality with regard to the organisational guarantee concern the decision-making body because, unlike the guarantee of independence, impartiality and the requirement of fairness, the claim to access to the court is not guaranteed absolutely.[75] Rather, the right to access to the court may be subject to limitations.[76] Even here, the principle of proportionality takes effect.[77]

Consequently, limitations are permissible as long as they serve a legitimate goal and there is a reasonable relationship between the applied means and the goals pursued.[78]

It is questionable, what the two organisational guarantees should be benchmarked against. For a lack of firm criteria to measure independence and impartiality of the court, the case law of International courts, as well as the doctrine, must be referred to.[79] According to ECtHR case law e.g. the independence of a court can be determined by the following features: the manner of the nomination of members of the court, the judges' term of offices, the existence of guarantees against external influences (protection against external influence) and finally the external appearance of the

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72 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 1.

73 Djogbènou, Procès équitable, in: Annuaire Béninoise de Justice constitutionnelle (2013), 587 (613); Velu, Considérations sur les arrêts de la Cour européenne des droits de l'homme relatifs au droit à un procès équitable dans les affaires mettant en cause la Belgique, 17.

74 Matscher, Der Gerichtsbegriff der EMRK [The concept of court by the ECHR], in: Prütting (Publ.), FS Baumgärtel, 363 (366).

75 Szymczak, La Convention européenne des droits de l'homme et le juge constitutionnel national, 414.

76 Szymczak, La Convention européenne des droits de l'homme et le juge constitutionnel nati- onal, 415.

77 Delmas-Marty/Izorche, Marge Nationale d'appréciation et Internationalisation du droit: réflexions sur la validité formelle d'un droit commun pluraliste, in: McGill Law Journal (2000- 2001), 923 (954).

78 Grabenwarter, Europäische Menschenrechtskonvention[European Human Rights Convention], 4. edition, § 24, Rn. 49.

79 Tonnang/Fandjip, La Cour de Justice de la CEMAC et les règles du Procès équitable, in: Recueil Penant (2010) N°872, 329 (332); Dupuy, Les juridictions Internationales face au procès équitable. Le point de vue de la Cour Internationale, in: Delmas-Marty u. a. (Publ.), Variations autour d'un droit commun, 239 (244).

court. The ECtHR has expressed these criteria even more clearly in the legal matter of Bryan vs the United Kingdom:

> "In order to establish whether a body can be considered *independent* regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an ap- pearance of independence".[80]

With regards to the outer appearance, the maxim "justice must not only be done it must also be seen to be done" must be adhered to.[81] The criteria of independence mainly include the relationship of a court to the parties to the proceedings as well as to the executive. Here, it must be assessed whether the court as a whole and the individual judges entertain any relationship with the party and the executive.[82] What is more are the tenure of the judges and the freedom from instructions from other state powers. The freedom from instructions for the judges means that they may not be subject to any form of justification obligation.[83]

In total, independence means a formal freedom from instructions. Furthermore, the independence of the court and its members means the freedom from exterior coercion, pressure or influence; it is, so to speak, a state which puts the judge in a position that allows him to make his decisions solely on the basis of law and conscience.[84] Regarding tenure, the irremov-

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80 ECtHR, No. 19178/91, Judgment (22.11.1995), Case of Bryan v. The United Kingdom, par. 37 (emphasis by the author); CEDH, N°22107/93, Arrêt (25.02.1995), Affaire Findlay c. Royaume-Uni, par. 73; CEDH, N°4/1998/907/1119, Arrêt (02.09.1998), Affaire Lauko c. Slovaquie, par. 63; CEDH, N°6878/75, 7238/75 Arrêt (23.06.1981), Affaire Le Compte c. Belgique, par. 57; Peukert, in: Frowein/Peukert, EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 205.

81 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 205; CEDH, N°22107/93, Arrêt (25.02.1995), Affaire Findlay c. Royaume- Uni, par. 73.

82 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 32; Matscher, Der Gerichtsbegriff der EMRK [The concept of court by the ECHR], in: Prütting (Publ.), FS Baumgärtel, 363 (370).

83 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 35.

84 Matscher, Der Gerichtsbegriff der EMRK [The concept of court by the ECHR], in: Prütting (Publ.), FS Baumgärtel, 363 (369).

ability of the judges plays an important role.[85] Should there be a removal, its criteria must be objectively defined in detail. This may only be possible under special circumstances.[86] The ECtHR rightly decided in a particular case that a court had not been independent due to the fact that the respective decision-makers were too controlled by the government. The dependence of the court was, in particular, confirmed by the ECtHR because the nomination of the judges was subject to the assessment of the executive. Through the broad control authority by the executive, the judges received, from a legal point of view, the status of employees and it was therefore affirmed that they had been exposed to undue exterior coercion.[87]

One of the organisational guarantees, named in Art. 7 par. 1 of the Charter, describes impartiality.[88] It must be pointed out that impartiality and independence are closely connected. The reason is clear: The objectivity of a trial and the judicial decision depends on the impartiality and the independence of the decision-making body.[89] Nevertheless, these two procedural guarantees are not interchangeable because independence is a fundamental prerequisite for impartiality.[90] This basically refers to the subjective attitude of the judges. They should be above the parties and make their decisions properly and to their best knowledge and conscience, regardless of the person involved.[91] Thus, the impartiality is an independent criterion to be judged on by the ECOWAS Court of Justice.[92] In order to assess the impartiality, the actual and procedural circumstances of the indi-

85 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 34.
86 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 34.
87 CEDH, N°4/1998/907/1119, Arrêt (02.09.1998), Affaire Lauko c. Slovaquie, par. 64.
88 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 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 39.
90 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 213.
91 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 213.
92 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 40.

vidual case must be taken into account. In this sense, one must differentiate between subjective and objective impartiality.[93]

Subjective impartiality is to be understood as the relationship between the members of a decision-making body and the parties to the proceedings. The close relationship between independence and impartiality is expressed through objective impartiality.[94] Because objective impartiality poses the question of whether the position held by a judge within the internal organisation of the court can cast doubts on his independence. If this question is answered in the affirmative, the judge would be biased.[95] Furthermore, a judges' objective partiality is given, if a judge holds different positions as "*juge d'instruction*" and as "*juge d'assise*" in the same proceedings.[96] A criminal judge who was actually involved in the early stages of the trial as a member of the prosecuting authorities is affected by the appearance of objective impartiality. Thus, it does not suffice that the concerned judge showed himself to be impartial during the public trial.[97] Furthermore, the danger of objective impartiality is given, if one and the same judge is involved in the civil or criminal jurisdiction with the same matter at different instances.[98]

Moreover, the core of the procedural guarantee is the requirement of fairness.[99] This includes many partial guarantees,[100] namely the require-

93 Decaux/Imbert/Pettiti, La convention Européenne des Droits de l'Homme, Commentaire article par article, Art. 6, 260; CEDH, N°22107/93, Arrêt (25.02.1995), Affaire Findlay c. Royaume-Uni, par. 73.; Gundel, Verfahrensrechte [procedural rights], in: Bernhardt/Merten (Publ.), Handbuch der Grundrechte in Deutschland und Europa, Band [Handbook on fundamental rights in Germany and Europe, volume] VI, § 146, Rn. 90.

94 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 Faculté de Droit de L'Université de Gand (02.03.2012), Lomé, 4.

95 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 45.

96 Decaux/Imbert/Pettiti, La convention Européenne des Droits de l'Homme, Commentaire article par article, Art. 6, 261.

97 Matscher, Der Gerichtsbegriff der EMRK [The concept of court by the ECHR], in: Prütting (Publ.), FS Baumgärtel, 363 (376).

98 Matscher, Der Gerichtsbegriff der EMRK [The concept of court by the ECHR], in: Prütting (Publ.), FS Baumgärtel, 363 (376).

99 Bertele, Souveränität und Verfahrensrecht [Sovereignty and procedural law], 180.

100 Mole/Harby, Le droit à un procès équitable, un guide sur la mise de l'article 6 de la Conven- tion européenne des droits de l'homme, 11.

ment of equality of arms, the right to view the case files, the right to a fair hearing (the right to a fair hearing as per Art. 7 par. 1 of the African Charter) and lastly the right to know the reasons for the decision.[101] For the parties to the dispute, the right to a fair hearing includes the right to receive the opportunity to make a statement regarding the facts of the case and the legal aspects during the entirety of the proceedings.[102]

Accordingly, the court must acknowledge the statements of the parties as well as the submitted evidence according to the requirement of fairness.[103] Furthermore, Art. 7 par. 1 of the African Charter includes the requirement of an even playing field. An even playing field as a procedural guarantee should be understood as the adherence to a certain equality of the parties during court proceedings. The requirement of an even playing field represents a core element of the right to a fair trial. It requires that each party to the proceedings, regardless of which court proceedings, receives an appropriate opportunity to present the facts during the proceedings.[104] Moreover, the principle of even playing field stipulates that the court proceedings must be conducted under conditions which exclude any disadvantage of one party to the proceedings in relation to the other parties to the proceedings. With regards to this, the ECtHR stated:

> « La Cour rappelle que le principe de l'égalité des armes – l'un des éléments de la notion plus large de procès équitable – requiert que chaque partie se voie offrir une possibilité raison- nable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de désavantage par rapport à son adversaire ».[105]

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101 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 60.

102 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommen- tar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 142; Renoux, Le Conseil Constitutionnel et l'autorité judiciaire, l'élabora- tion d'un droit constitutionnel juridictionnel, 364.

103 Renoux, Le Conseil Constitutionnel et l'autorité judiciaire, l'élaboration d'un droit constitutionnel juridictionnel, 382.

104 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommen tar[European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 147; Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 60.

105 CEDH, Nr. 39594/98, Arrêt (07.06.2001), Affaire Kress c. France, par. 72; CEDH, N°32367/96, Arrêt (05.10.2000), Affaire Apeh Üldözöteinek c. Hongrie, par. 39; Szymczak, La Convention européenne des droits de l'homme et le juge constitutionnel National, 122.

The procedural guarantee demands further, regarding the right to view case files, that each participant of the trial will be notified of all evidence and statements submitted to the court.[106] Here, the goal is them give him the opportunity to comment on such. It, therefore, does not matter whether the material is relevant to the issue or not. In this context, the ECtHR said in the legal matter of Kressler vs Switzerland:

> « Dans sa jurisprudence constante, la Cour a notamment affirmé que l'effet réel des observa- tions d'une autorité importe peu, mais que les parties à un litige doivent avoir la possibilité d'indiquer si elles estiment qu'un document appelle des commentaires de leur part». [107]

This opinion by the ECtHR is justified because it does not matter whether the opposing party to the proceedings has actually made use of the advantage of having viewed the case files or not. Rather, it is important to assess whether such an advantage is an abstract existence and whether the opposing party to the proceedings could use this advantage should the need arise.[108]If one party has a knowledge advantage over the other participants to the proceedings and is able to draw procedural advantages from such, this would constitute a violation of the principle of fairness corresponding with Art. 7 par. 1 of the Charter (Art. 6 ECHR).[109] Moreover, it is irrelevant whether the determination of a violation has any substantial effect on the decision-making process.[110]

The procedural guarantees are the basis and prerequisite for the implementation of substantive human rights at domestic level. This view can be justified by the fact that most of the complaints concern the reprimand of procedural guarantees before domestic courts as well as before International courts.[111]

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106 Germelmann, Das rechtliche Gehör vor Gericht im europäischen Recht [The legal hearing before a court in the European Law], 144; Bimpong- Buta, The role of the Supreme Court in the development of constitutional Law in Ghana, 377.

107 CEDH, N°10577/04, Arrêt (26.07.2007), Affaire Kressler c. Suisse, par. 30.

108 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 61.

109 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 64.

110 CEDH, N°32367/96, Arrêt (05.10.2000), Affaire Apeh Üldözöteinek c. Hongrie, par. 42.

111 Cohen-Jonathan, Quelques considérations sur la réparation accordée aux victimes d'une violation de la Convention Européenne des Droits de l'Homme, in: Les Droits de l'Homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert, 109 (109).

Thus, the differentiation between the "*obligations actives procédurales*" and „*droits substantiels*"[112] are of greatest importance for understanding of the following statement.

First of all, the question must be clarified to which area of expertise the regulation in Art. 7 par. 1 of the African Charter can be applied. The question can be asked because, contrary to Art. 6 ECHR, there is no differentiation in the type of procedure. Therefore, it can be presumed that Art. 7 par. 1 of the Charter finds application for all court procedures. Thus, the quality of the decision-making body does not play an important role. Furthermore, the applicable procedural law is irrelevant for the material scope of the regulation in Art. 7 par. 1 of the Charter. Subsequently, Art. 7 par. 1 of the Charter can be applied to civil, criminal as well as administrative court procedures.[113] However, the question must be asked of whether the adherence to the procedural guarantee, in particular, the principle of fairness in the Constitutional Court proceedings, is necessary. This question is justified because the constitutional procedural law is a special procedure. Thus, in the Kraska case the Swiss government was of the opinion that the adherence to the constitutional guarantee in Art. 6 ECHR should not be applied to the constitutional complaint.[114]

The ECtHR did not follow this interpretation in its judgment in the Kraska case.[115] Now, after the development of the jurisdiction of the ECtHR, it is confirmed that the procedural guarantees should also apply to proceedings before the Constitutional Court.[116] In this regard, the ECtHR expressly pointed out that it is irrelevant whether the proceedings before the Constitutional Court is a referral for a preliminary ruling or a constitu-

112 Cohen-Jonathan, Quelques considérations sur la réparation accordée aux victimes d'une violation de la Convention Européenne des Droits de l'Homme, in: Les Droits de l'Homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert, 109 (110).

113 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 15.

114 CEDH, N°13942/88, Arrêt (19.04.1993), Affaire Kraska c. Suisse, par. 23.

115 CEDH, N°13942/88, Arrêt (19.04.1993), Affaire Kraska c. Suisse, par. 23.

116 EGMR, Nr. 47169/99, Urteil [judgment] (08/01/2004), legal matter of Voggenreiter vs Germany, clause 32; CEDH, N°20024/92, Arrêt (16.09.1996), Affaire Süssman c. Allemagne, par. 40; Graben warter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 15; Ndiaye, La protection des droits de l'homme par la Cour de justice de la CEDEAO, Mémoire de Master II, Université Mon- tesquieux Bordeaux IV, 72.

tional complaint against a court decision.[117] In the case Süssman vs Germany, the ECtHR emphasised that the plaintiffs wanted to enforce their substantive claim by questioning constitutional law. Thus, the ECtHR explained:

> « [E]lle estima que, si elle n'avait pas à se prononcer dans l'abstrait sur l'applicabilité de l'ar- ticle 6 par. 1 aux Cours constitutionnelles en général, il lui fallait néanmoins rechercher si des droits garantis aux requérants par ce texte avaient été touchés en l'espèce. Elle rappela aussi qu'en suscitant des questions de constitutionnalité, les intéressés utilisaient l'unique moyen-indirect- dont ils disposaient pour se plaindre d'une atteinte à leur droit de propriété ».[118]

The ECOWAS Court of Justice later confirmed this opinion in its jurisdiction.[119] The procedural guarantees are the prerequisite and basis for the realisation of the substantive human rights in Charter, such as the freedom of speech, the right to life.[120] There are two reasons which justify the view held in here. On one hand, the task of the adherence to human rights is first and foremost that of the signatory state. On the other hand, there is generally a principle of subsidiarity before International courts. Both reasons can be substantiated by the primary obligation and the exhaustion of the National legal remedies as a prerequisite for individual complaints before International instances.

The term 'primary obligation' and the principle of subsidiarity go hand in hand. The principle of subsidiarity is based on the assumption that it is primarily the task of the domestic bodies, the courts in particular, to en-

117 EGMR, Nr. 47169/99, Urteil (08.01.2004), legal matter of Voggenreiter vs Germany, clause 32.

118 CEDH, N°20024/92, Arrêt (16.09.1996), Affaire Süssman c. Allemagne, par. 39; Velu/Er- gec, La Convention Européenne des Droits de l'Homme, Art. 6, par. 425.

119 CJ CEDEAO, Affaire Ameganvi et al. c. État du Togo, N°ECW/CCJ/JUD/09/11 (07.10.2011), par. 66, available at: www.courtecowas.org (last accessed on 16.07.2015); Koupokpa, L'indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque interna- tional de Lomé, organisé par le Centre de Droit Public de Lomé et le département de Droit administratif de la Faculté de Droit de L'Université de Gand (02.03.2012), Lomé, 20.

120 Dröge, Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonven- tion [Positive obligations of the states within the European Human Rights Convention], 61.

sure the effective protection of human rights.[121] For the guarantee of substantive human rights, the respective domestic rules of law of the signatory states of the African Charter must, therefore, ensure such effective procedural guarantees. It follows that the effectiveness of the substantive rights depends on the adherence to procedural guarantees by the parties to the treaty. The closest connection between the substantive complaint and the procedural guarantee is clearly demonstrated in the Selmouni vs France case:

> « Cette règle se fonde sur l'hypothèse, objet de l'article 13 de la Convention – et avec lequel elle présente d'étroites affinités – que l'ordre interne offre un recours effectif quant à la vio- lation alléguée. De la sorte, elle constitue un aspect important du principe voulant que le mécanisme de sauvegarde instauré par la Convention revête un caractère subsidiaire par rap- port aux systèmes nationaux de garantie des droits de l'homme. Ainsi, le grief dont on entend saisir la Cour doit d'abord être soulevé, au moins en substance, dans les formes et délais prescrits par le droit interne, devant les juridictions Nationales appropriées ».[122]

Furthermore, from the violation of the procedural guarantee, the ECtHR drew the conclusion that Ireland had violated the substantive guarantee under Art. 3 ECHR in the O'Keeffe case.[123] This ECtHR's argument is logical because the procedural guarantees are the fundamental prerequisite for the realisation of the substantive rights entrenched in the Convention. The domestic courts have the primary task to protect these rights from unlawful interference. Therefore, the signatory states are required to establish effective legal remedies.[124] The ECOWAS Court of Justice proceeded in the same manner in the case of Koraou vs the Republic of Niger. Indeed, the Court of Law deduced a violation of the prohibition of slavery from the violation of the procedural guarantee. It can be seen from this that the ECOWAS Court of Justice demands from the Member States to establish procedural regulations which enable everybody who feels that his rights

121 Twinomugisha, The role of the judiciary in the promotion of democracy in Uganda, in: Af- rican Human Rights Law Journal (2009), 1 (8); Meyer-Ladewig, Europäische Menschenrechtskon- vention. Handkommentar [European Human Rights Convention. Commentary], 2. edition, Art. 35, Rn. 5.

122 CEDH, N°25803/94, Arrêt (28.07.1999), Affaire Selmouni c. France, par. 74.

123 CEDH, N°35810/09, Arrêt (28.01.2014), Affaire O'Keeffe c. Irlande, par. 187.

124 Villiger, Handbuch der Europäischen Menschenrechtskonvention [Handbook on the European Human Rights Convention], 2. edition, § 7, Rn. 112.

under the Charter have been violated to assert his rights before an independent and impartial court.[125]

In this context, the decision by the ECOWAS Court of Justice in the Ugokwe vs the Republic of Nigeria case is questionable in many respects. On the one hand, the election disputes fall within the area of factual competence of the Court of Law. In that respect, the opinion by the Court is unacceptable.[126] On the other hand, however, the Court had to assess whether the signatory state had ensured the procedural guarantees before the National courts of Nigeria with regards to the electoral disputes. This would have justified the connection of the procedural guarantees to the competence of the Court of Law. However, the ECOWAS Court of Justice, unfortunately, did not take this approach.[127] Thus, the violation of the plaintiff's right to a fair trial by Nigeria's Court of Appeal remained without legal protection at ECOWAS level.[128]

The particularity of the procedural guarantee can be determined, strictly speaking, with the comparison to the right to an effective complaint.[129] While the right to an effective complaint (Art. 13 ECHR, Art. 7 Abs. 1a of the Charter) leaves a certain margin of discretion for the signatory states,[130] there are particularities with respect to the procedural guarantee (Art. 7

125 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); Badet, Commentaire de l'arrêt dame Hadidjatou Mani Koraou contre la République du Niger, in: Revue Béninoise des Sciences Juridiques et Administrative (2010), 153 (170).

126 CCJ ECOWAS, Ugokwe v. The Federal Federal Republic of Nigeria, Judgment, N°ECW/ CCJ/JUD/02/05 (07.10.2005), par. 26, 33, available at: www.courtecowas.org (last accessed on 16/07/2015).

127 CCJ ECOWAS, Ugokwe v. The Federal Federal Republic of Nigeria, Judgment, N°ECW/ CCJ/JUD/02/05 (07.10.2005), par. 33, available at: www.courtecowas.org (last accessed on 16/07/2015).

128 CCJ ECOWAS, Ugokwe v. The Federal Federal Republic of Nigeria, Judgment, N°ECW/ CCJ/JUD/02/05 (07.10.2005), par. 19, 27, available at: www.courtecowas.org (last accessed on 16/07/2015); see also criticism 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 Faculté de Droit de L'Université de Gand (02.03.2012), Lomé, 17.

129 It must be pointed out that within the system of the African Charter, the regulations in Art. 6 and Art. 13 ECHR are integrated in Art. 7 of the African Charter *mutatis mutandis*.

130 CEDH, N°22414/93, Arrêt (15.11.1996), Affaire Chahal c. Royaume-Uni, par. 145.

par. 7 par. 1d. and Art. 6 ECHR). This can be justified by the fact that the right to an effective complaint must continue to be linked to other regulations of the respective Convention. Thus, the right to an effective complaint is an accessory right to other substantive pleas. However, the prerequisites in of the guarantees are, strictly speaking, stricter than the right to an effective domestic complaint.[131] The ECtHR even recognised the fact that procedural guarantees absorb the right to an effective domestic complaint. In this regard, the ECtHR explained:

> « Bref, il n'y a eu violation ni de l'article 13 (art. 13) ni, à cet égard, de l'article 6 par. 1 (art. 6–1), les exigences du premier (art. 13) étant d'ailleurs moins strictes que celles du second (art. 6–1) et entièrement absorbées par elles en l'espèce».[132]

Moreover, the procedural guarantees play an important role in a democratic state and are an external sign of the adherence to the principles of the rule of law.[133] Based on the role of the procedural guarantees for the enforcement of the principles of the rule of law, the International courts leave hardly any margin of discretion for the signatory states.[134] Furthermore, the ECOWAS Court of Justice demands, based on its importance for the enforcement of the principles of the rule of law, that the principle of fairness must also be adhered to in the constitutional procedural law because the rule of law requires the adherence to the procedural guarantees.[135] By referring to the Protocol on Good Governance from 2001 in connection with the procedural guarantees, the ECOWAS Court of Justice

131 Villiger, Handbuch der Europäischen Menschenrechtskonvention [Handbook on the European Human Rights Convention], 2. edition, § 19, Rn. 648; De Bruyn, Le Droit à un recours effectif, in: Les Droits de l'Homme au seuil du troisième millénaire, Mélanges en hommage à Pierre Lambert, 185 (191).

132 CEDH, N°15777/89, Arrêt (16.09.1996), Affaire Matos E Silva et al. c. Portugal, par. 64.

133 CEDH, N°4/1998/907/1119, Arrêt (02.09.1998), Affaire Lauko c. Slovaquie, par. 63; CEDH, Nr. 34869/05, Arrêt (29.06.2011), Affaire Sabeh El Leil c. France, par. 46; Bertele, Souveränität und Verfahrensrecht [Sovereignty and procedural law], 195.

134 CEDH, N°9024/80, Arrêt (12.02.1985), Affaire Colozza c. Italie, par. 32; CJ CEDEAO, Af- faire Ameganvi et al. c. État du Togo, N°ECW/CCJ/JUD/09/11 (07.10.2011), par. 67, available at: www.courtecowas.org (last accessed on 16/07/2015).

135 CJ CEDEAO, Affaire Ameganvi et al. c. État du Togo, N°ECW/CCJ/JUD/09/11 (07.10.2011), par. 66, available at: www.courtecowas.org (last accessed on 16/07/2015).

made it clear that the judicial protection prescribed by Art. y referring to the Protocol on Good Governance from 2001 in connection with the procedural guarantees, the ECOWAS Court of Justice made it clear that the judicial protection prescribed by Art. constitutional procedural law because [136]

b. Non-existence of a collision with National interests

For the assessment of the adherence to the rights in the Convention that contain procedural guarantees, several particularities apply. The assessment of the procedural guarantees, namely, follows a different pattern from the other rights of defense.[137] The usual assessment scheme is not applied. Rather, the monitoring body assesses whether the conduct of the state organsis reconcilable with the procedural guarantee in question. The reason is clear: The procedural guarantees are defined more concretely than the comparable rights of defense.[138] Furthermore, it is hardly imaginable that a conflict exists between the fairness principle and a National interest. Thus, discretion by the signatory states is, strictly speaking, excluded with respect to the procedural guarantees.[139] Public interests, such as National security or the protection of third parties, cannot justify a restriction of the right to an independent, impartial court and a fair trial. There are also no special circumstances in the interest of national security that could justify the limitation of the principle of fairness. The procedural guarantees are therefore to be viewed as universally implementable human rights.

136 CJ CEDEAO, Affaire Ameganvi et al. c. État du Togo, N°ECW/CCJ/JUD/09/11 (07.10.2011), par. 67, available at: www.courtecowas.org (last accessed on 16/07/2015).

137 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 18, Rn. 29.

138 Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 18, Rn. 29.

139 Greer, The margin of appreciation: interpretation and discretion under the European Convention on Human Rights, in: Human rights files No. 17, Council of Europe, 2000, 28.

c. Procedural Guarantees as the resulting obligation

As discussed above, the right to access to courts is not an absolute right.[140] The substance of this right depends on the domestic reality in signatory states. Therefore, when it comes to the right to access to courts, a certain "*marge Nationale d'appreciation*" by the High Contracting Parties[141] applies and there is, therefore, no absolute obligation to create domestic courts.[142] However, the legal situation presents itself in a different light than the procedural guarantee of the principle of fairness. On the one hand, there is an obligation to achieve results and, on the other hand, a positive obligation.[143] The positive obligation is to be understood in the sense that the respective signatory state must provide for regulations through legislation that ensure the independence, impartiality and the principle of fairness.

Because as long as the courts exist, the signatory states must adhere to the procedural guarantees of Art. 7 par. 1 of the Charter.[144] Thus, the High Contracting States carry an "*obligation de résultat*" *when* it comes to procedural guarantees.[145] In this sense, the procedural guarantee receives more attention than the substantive human rights.[146] National discretion cannot interfere with the procedural guarantee. In principle, the right to a fair trial can only be adhered to if the signatory state can guarantee the impartiality and independence of the judiciary. In this context, the ECtHR expressly emphasises the absolute character of the impartiality and independence of the judiciary in the case Micallef vs Malta.[147] Absolute rights are first and

140 Decaux/Imbert/Pettiti, La convention Européenne des Droits de l'Homme, Commentaire article par article, Art. 6, 259.
141 CEDH, N°38695/97, Arrêt (15.02.2000), Affaire Garcìa Manibardo c. Espagne, par. 36; CEDH, N°9024/80, Arrêt (12.02.1985), Affaire Colozza c. Italie, par. 30; CEDH, N°24488/04, Arrêt (15.04.2009), Affaire Guillard c. France, par. 33; CEDH, N°34869/05, Arrêt (29.06.2011), Affaire Sabeh El Leil c. France, par. 47.
142 CEDH, N°38695/97, Arrêt (15.02.2000), Affaire Garcìa Manibardo c. Espagne, par. 39.
143 Decaux/Imbert/Pettiti, La convention Européenne des Droits de l'Homme, Commentaire article par article, Art. 6, 245.
144 CEDH, N°38695/97, Arrêt (15.02.2000), Affaire Garcìa Manibardo c. Espagne, par. 39.
145 Decaux/Imbert/Pettiti, La convention Européenne des Droits de l'Homme, Commentaire article par article, Art. 6, 245.
146 Marauhn/Merhof, Grundrechtseingriff und -schranken [interference in fundamental rights and their limitations], in: Grote/Marauhn (Publ.), EMRK/GG, 2. edition, Kap. 7, Rn. 6.
147 CEDH, N°17056/06, Arrêt (17.10.2009), Affaire Micallef c. Malte, par. 86.

foremost based on the fundamental guarantees in Art. 3 of the ECHR, namely the prohibition of torture and the prohibition of inhuman or degrading treatment and the guarantee in Art. 4 of the ECHR.[148] However, the procedural guarantee could be seen as an absolute right due to its particular role when it comes to the enforcement of the rule of law. Moreover, because of the obligation to adhere to the procedural guarantee in Art. 7 of the Charter, it is a dual obligation.

In the end, discretion is exercised when it comes to the right of access to courts or the right to an effective complaint. This is justified by considering the circumstances of the individual case. Contrary to this, the state's margin of discretion does not apply to procedural guarantees when it comes to the principle of fairness. During the assessment of the conduct of Member States regarding the procedural guarantee, the discretion, which normally relates to other substantive reprimands, does not apply in practice because the procedural guarantees can not be illusory and theoretical. Rather, procedural guarantees are effective and concrete guarantees.[149] Consequently, the signatory states must do everything in their power to meet the requirements of a fair trial as demanded by the Charter. When it comes to the procedural guarantee, the signatory states carry an obligation to achieve results. This is understandable when taking the special nature of the principle of fairness in a democratic state into account.[150] There is no pretence of a possible conflict with National interests. Therefore, the principle of fairness is a universally enforceable guarantee. A violation of the procedural guaranteesis, at the same time, an interference with the underlying human rights.[151] This demonstrates why, in case of a violation of the procedural guarantees, the signatory states should not be allowed to exercise discretion.

148 Marauhn/Merhof, in: Grundrechtseingriff und -schranken [interference in fundamental rights and their limitations], in: Grote/Marauhn (Publ.), EMRK/GG, 2. edition, Kap 7, Rn. 3; Greer, The margin of appreciation: interpretation and discretion under the European Convention on Human Rights, in: Human rights files No. 17, Council of Europe, 2000, 27.

149 CEDH, N°38695/97, Arrêt (15.02.2000), Affaire Garcìa Manibardo c. Espagne, par. 43.

150 CEDH, N°9024/80, Arrêt (12.02.1985), Affaire Colozza c. Italie, par. 32.

151 Dannemann, Haftung für die Verletzung von Verfahrensgarantien nach Art. 41 EMRK [Liability in case of a violation of procedural guarantees acc. to Art. 41 ECHR], in: Rabels Zeitschrift für ausländisches und Internationales Privatrecht [magazine for foreign and International civil law](1999), 452 (465).

B. Concluding Comment

Based on a judgment of the Togolese Constitutional Court contrary to international law and the resulting declaratory judgment of the ECOWAS Court of Justice, the present paper must answer several questions of both constitutional and international law. The examination primarily identifies a conflict of jurisdiction within the ECOWAS legal system. The source of the conflict of jurisdiction is the constitutional principles of procedure by the constitutional systems of the Member States and the introduction of an individual complaints procedure before the ECOWAS Court of Justice. At the centre is the core question of the position of the ECOWAS Court of Justice as a Constitutional Court in the West African constitutional order. Which obligations arise from its characterisation as a Constitutional Court, based on its judgments for the courts of the Member States and, in particular, for the Constitutional Courts?

It has been demonstrated in the first chapter that the ECOWAS Court of Justice, which primarily monitored the interpretation and application of the ECOWAS Community law, has developed into a Court of justice for Human Rights. The reason for this is an interaction of the security policy, the human rights situation and the awareness of the High ECOWAS States, which maintain a close relationship between the economic growth and the respect for principles of the rule of law in the West African countries.

The second chapter analysed the internal procedural binding force of constitutional decisions from a domestic and constitutional point of view. The consequences for the domestic Constitutional Courts and the parties to the proceedings stemming from this were shown. The principles of irrevocability and non-appealability must thereby be taken into consideration when it comes to Constitutional Court decisions that have acquired the status of res judicata. Following this, the fundamental *erga-omnes* binding effect is demonstrated based on the constitutional traditions of the Member States in the ECOWAS Community. *De lege lata*, *the* decisions by the Constitutional Courts of Member States develop an *erga-omnes* binding effect. Moreover, they are irrevocable and non-appealable. Therefore, there is no legal remedy available.[152] Subsequently, the decision of the decision by

152 See also: § 129 par. 2 Constitution of Ghana of 1992; 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;

the Togolese Constitutional Court in the initial case was evaluated from a procedural point of view.

In the third chapter, the supra-National overcoming of the National legal force, as analysed in the second chapter, is shown. It should be emphasised that the operating principle of the ECOWAS Court of Justice resembles that of a Constitutional Court in many aspects. First of all, the questions the ECOWAS Court of Justice has to deal with in its human rights mandate are of a Constitutional litigation nature. There are, namely, the fundamental freedoms and individual human rights. Moreover, the decisions of this Court of Law are final judicial judgments. They are final and therefore non-appealable. Furthermore, the supra-National Court of justice has an exclusive competence regarding the interpretation and application of the African Charter on Human Rights at ECOWAS level.

From a possible viewpoint as a Constitutional Court of the Member States, the declaratory judgments of the ECOWAS Court of Justice trigger considerable consequences for the constitutional procedural principles of the Member States.[153] The extension of the ECOWAS Court of Justice's jurisdiction aims at securing the steering power and the effectiveness of regional human rights law. Declaratory judgments in principle do not develop a constitutive but rather a declarative effect. More precisely: the declaratory judgment of the Court of justice has no direct domestic force of application. However, the organisational structure, the position and the functioning of the Court of justice within the institutional framework of the Community shows all the features of a Constitutional Court. In addition, the scope of the decisions by this Court of justice has a constitutional function. The African Charter on Human Rights and Peoples' Rights are not at the National legal systems by the Member States' disposition. They must take the Charter into account.

Neither the domestic legislator nor the *Constitutional Courts* of the Member States may dispose of the Charter. The interpretation of the African

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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.].

153 Szymczak, La Convention européenne des droits de l'homme et le juge constitutionnel national, 266.

Charter by the ECOWAS Court of Justice is an integral component of the Charter within the ECOWAS legal system.[154]

Although *res judicata* constitutes a procedural guarantee, it is nevertheless necessary to justify an exceptional relativisation of this procedural principle, because the legal force ensures the irrevocability of a judgment that has been issued on a fair basis. As soon as the conditions under which a judgment by a Member State has been issued represents an infringement of the principle of fairness, there is no longer a valid reason to protect the legal force against a challenge. It is well-known that a legal right must be protected as long as it requires protection. An unfair judgment does not constitute a legal right worthy of protection. As a result: the principle of fairness replaces the legal force. The thesis presented here, is based on the fundamental conflict between legal certainty (secured by the institution of legal force) and substantive justice (supported by the institution of the restitution in kind under International law). In case of a conflict between the jurisdiction of the ECOWAS Court of Justice and the domestic Constitutional Court, the answer is clearly that the ECOWAS Court of Justice has the last word. Otherwise there would not have been an individual human rights complaint at the ECOWAS level. Thus, the institution of the *restitutio in integrum* has more weight than that of *res judicata.* The result of the declaratory judgment is the obligation of reparation. The appropriate means of reparation is known to be the rescission of the judgment by the Constitutional Court causing the violation. Should the Court of justice order concrete corrective measures in the tenor of the judgment, such an order is legally binding for the convicted signatory state. Thus, there is no leeway left for the concerned signatory state. In such a case, the declaratory judgment constitutes de facto a judgment granting reparation.

Regarding the procedural guarantee, the declaratory judgment is purely a judgment granting reparation. In this regard, two fundamental problems of a procedural nature present themselves. On the one hand, the relationships between the Court of justice and the National courts with respect to areas of competence. Therefore, the question must be asked: would it be compatible with general International law if the Court of justice were allowed to overrule the decisions of National courts? This question would be answered in the affirmative if the ECOWAS Court of Justice had the competence of a "cassation court" under customary International law.Such a

154 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'Amérique), Arrêt du 19 janvier 2009, par. 8.

competence cannot be derived from the basis of the Court's jurisdiction.[155] However, this is followed by a substantive question, namely whether the Court of justice may, despite this, order the resumption of a judgment contrary to International law – irrespective of its legal force. With this question, the distinction between the formal legal force and the substantive legal force is legally relevant, because the ECOWAS Court of Justice cannot itself issue cassation judgments against National courts on the basis of its jurisdictional norms. However, in terms of legal consequence, a necessary material result is to be expected from the convicted state. This results is an implicit authorisation to reopen the initial domestic proceedings. Therefore, a power of the Court to annul the substantive legal force can be deduced from the substantive-legal perspective. In other words: the judgments by the ECOWAS Court of Justice do not have direct domestic force, however, there is an obligation by national courts including the National Constitutional Courts under International law to reopen the case and to take the jurisdiction of the ECOWAS Court of Justice into account. Thereby, the National courts are largely bound by the interpretation of the ECOWAS Court of Justice. Therefore, the judgments of the ECOWAS Court of Justice are, in fact, binding in substance. The view taken here is based on the basic idea that in the event of a Member States' court judgment being contrary to International law, responsibility under International law must necessarily lead to a rectification of the situation giving rise to the liability. This aspect has been discussed argumentatively through the material-legal relationship between the two legal systems as discussed in the fourth chapter. Moreover, the procedural guarantee is the basis to achieve this result for the signatory states. Subsequently, the consideration of the National-specific reality does not apply to a procedural guarantee. This is mainly the case if a violation of Art. 7 par. 1 of the African Charter is established. After all, the violation of the procedural guarantee creates a permanent situation contrary to International law in the National law of the convicted signatory state. The intervention of the Court of justice is therefore required to its greatest extent. The adoption of obligations under International law by the ECOWAS Member States resembles the limitation of sovereign state power in the area of human rights jurisdiction. Together with this, the signatory states have accepted a limitation of the legal force of their Constitutional Courts and equivalent judicial instances.

155 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.

The prevailing regulation regarding the *erga-omnes* binding effect does not represent an insurmountable obstacle within the National law of the ECOWAS signatory states. In the area of human rights, this binding effect is to be viewed as provisional since the possibility of bringing a claim before the ECOWAS Court of Justice, based on the legally binding national constitutional judgment already triggers the relativisation of the binding effect. In case of a sustained declaratory judgment by the ECOWAS Court of Justice, the provisional character of the judgment by the National Constitutional Court is manifested. To express this metaphorically: the legal force of National Constitutional Court judgments is untouchable insofar as these judgments have been passed without errors. Should a misdirection be detected at the level of International law, an actual breach of the legal force is to be allowed. The corrective measure is the resumption of the initial domestic proceedings. Thus, the declaratory judgment by the ECOWAS Court of Justice develops a final judicial legal force under International law and the decision by the domestic Constitutional Courts a provisional National legal force. The resumption of the initial proceedings in terms of human rights alone confirms the last decision-making competence of the International Court of justice .

This results in the competence of the Court to order concrete corrective measures. The approach of ordering corrective measures does not violate the principle of the limited abatement of International courts. It is true that the International organisation in general and International courts, in particular, are only allowed to act within their assigned authority. Otherwise, there would be the risk of a transgression of competence. However, this principle is not contrary to the corresponding interpretation of International law. The development of the law through case law is needed especially in cases where the text in International law is unclear with regards to certain questions concerning the review competence regarding decisions by Constitutional Courts. The opinion of the ECOWAS Court of Justice, moreover, is not to be assumed since there are no norms of prohibition in the legal basis of the Court of justice with respect to the assessment of legally binding compensation by Constitutional Courts of Member States. Furthermore, there is the possibility of ordering concrete corrective measures in close connection with the area of competence of the Court of justice . This is, namely, a logical consequence of the power to establish a violation of human rights entrenched in the Charter. This results in an ancillary competence of the ECOWAS Court of Justice. This ancillary competence has been argumentatively justified in connection with the primary obligation of the signatory states to the African Charter on Human and

Peoples' Rights according to Art. 1 of the Charter. Due to the absence of a prohibition norm, the ECOWAS Court of Justice is ultimately entitled to draw the necessary consequences from its declaratory judgment, namely to order corrective measures in the concerned signatory state. The resumption by a Constitutional Court of a judgment, infringing International law shall not preclude that interpretation.[156] The Court of justice should accordingly refer to the standards of the International Court of Justice[157] In this context, Cohen-Jonathan detailed:

> « [E]n tant que juridiction Internationale des droits de l'homme, la Cour européenne pourrait atténuer ici la règle qu'elle s'est imposée de ne pas signaler aux États les conséquences de leur infraction à la Convention. Il nous semble que la cessation d'un acte illicite continu est une conséquence implicite mais inévitable du constat effectué par la Cour».[158]

The proposed solutions in the present study contribute to the prevention of a danger in the current protection system of the ECOWAS Court of Justice. The danger of creating a de facto obstacle at state level which opposes the obligation of implementation by the convicted signatory states. Therefore, it has been shown that judgments with National legal force are not an insurmountable obstacle regarding the review competence of the ECOWAS Court of Justice. If this were the case, Member States would be more likely to evade their obligations under International law (from the Charter, the Amendment Agreement and the associated Protocols). They would then have a legally binding judgment prematurely issued by their National Constitutional Courts in order to create the prerequisites for an inability to review such by International judicial bodies. This easy circumvention neither takes account of the purpose of the Charter nor that of the Additional Protocol of 2005.

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156 Verdross/Simma, Universelles Völkerrecht [Universal International law], 3. edition, § 1295.

157 CIJ, Affaire relative au personnel diplomatique et consulaire des États-Unis à Téhéran (24.05.1980), États-Unis d'Amérique c. Téhéran, par. 3. Vgl. Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR[Regarding the order of concrete corrective measures by the ECtHR], in: EuGRZ (2004), 268 (261).

158 Cohen-Jonathan, Quelques considerations sur la réparation accordée aux victimes d'une violation de la Convention Européenne des Droits de l'Homme, in: Les Droits de l'homme au seuil du troisiéme millénaire. Mélanges en hommage à Pierre Lambert, 109 (120).

Regarding the extent of the legal force of the declaratory judgment, the following has been shown: the elements of the tenor are significant. Nevertheless, the main reasons for the decision assist with the interpretation of the judgment. The relevant reasons for the decision by the ECOWAS Court of Justice are all those determining the facts from which the Court of justice gleans, by way of a necessary conclusion, the answer to the individual plaintiff's complaintsubmission.

Thus, the main reasons for the decision are closely linked to the scope of the procedural claim defining the object of dispute.

If ECOWAS case law is disregarded or not complied with, the concerned Member State must guarantee that a new complaint can be submitted to the ECOWAS Court of Justice against itself because the disregard of a declaratory judgment constitutes a permanent situation contrary to International law within the convicted signatory state. This state of offence constitutes an attack on International law in general and affects state responsibility.

The current loopholes within the ECOWAS Community can only be closed if procedural reforms are initiated on both sides: The reforms should be carried out in the Member States' constitutional procedure regulations and at the ECOWAS level.

At ECOWAS level: the Protocol as well as the procedural system of the ECOWAS Court of Justice should include the party-relatedness of the legal force, the extent of the binding force of the ECOWAS judgment in the decided case, the effectiveness of the judgments in the parallel-proceedings of those Member States not party to the proceedings, the authority of the Court of justice to order concrete corrective measures and, as a consequence, an obligation of implementation. As soon as the adherence to human rights and principles of the rule of law has become a legal tradition for the signatory states, the necessity of exhausting all National legal remedies as a prerequisite for the admissibility before the ECOWAS Court of Justice would become understandable.

Regarding the reforms at National level of the signatory states, an obligation to implement should be included in the constitutional procedure regulations of the Member Staes. It has been shown, with regard to the partiality, that the current content of Art. 15 par. 4 of the Amendment Agreement has a general binding effect of the decision of the ECOWAS Court of Justice. Based on the development of the law within the legal system of the Community and, in particular, the admissibility of an individual complaint before the Court of justice , an amendment of the regulation in Art. 15 par. 4 of the Amendment Agreement becomes necessary. *De lege*

ferenda presumes a direct legal effect on the signatory state that is party to the proceedings. This does not mean that the declaratory judgments have no consequences for the signatory states not party to the proceedings. Rather, the decisions of the Court of justice constitute a normative basis for all Member States regarding their future behaviour, in order to prevent possible own convictions. Thus, the decisions by the Court of justice develop an orientation effect and have a guiding function atNational level. This means that the effects of the ECOWAS declaratory judgments can be observed in parallel proceedings by not directly involved Member States. Regarding the exceptional admissibility of individual complaints without prior exhaustion of all National legal remedies, a step by step solution within the ECOWAS Community should be found. Through the review of decisions of National Constitutional Courts, a culture of impartiality in the region can slowly be established because the independence of the justice system is confirmed on paper but the impartiality based on their subjective imprints can only be guaranteed through a culture of rule of law and responsibility. As the consolidation of the rule of law principles and the adherence to ECOWAS-standards within the signatory states is gradually completed, the requirement to exhaust all National legal remedies as a prerequisite for the proceedings before the ECOWAS Court of Justice should be required. This takes the notion of the need for legal protection and the subsidiary system of International law into account.

With regards to the Protocol, it must be clearly added that the interpretation of the Charter and the declaratory judgment by the ECOWAS Court of Justice have priority before those of the Constitutional Courts of Member States. In order to apply and implement the judgments by the regional Court uniformly, the Member States should amend their procedural law according to the ECOWAS-Protocol. A change in case law for these reasons seems necessary because the ambiguous wording that the Court of justice is not a cassation court further encourages the Member States to use the doctrine of res judicata to undermine the competence of the Court of justice .

In the fourth chapter, certain deficiencies regarding the reception of the legal force in the domestic legal system of the signatory states were identified. Even if a judgment of the ECOWAS Court of Justice is of a declarative character, it does not automatically have legal consequences for the convicted Member State. There is, namely, the obligation to comply with the judgment in the domestic legal system. There are, however, problems regarding the status of International law within the National law of the Member States, the strict *erga-omnes* effect of the judgments of domestic

Constitutional Courts and the question of implementation of ECOWAS declaratory judgments at National level. Subsequent to this, the question of the addressees of obligations of implementation under International law has been discussed. The position of International law in the hierarchy of norms within the National legal system of the signatory state does not play a role in terms of legal consequences. Should the ECOWAS Court of Justice establish a violation of the obligations adopted into the instruments of the Community, the concerned Member State is liable to enforcement, regardless of the position of International law within the domestic legal system.[159] When comparing the legal force of National judgments and that of the institution of restitution in kind, the latter has more weight. An order of restitution regarding the situation that is contrary to International law does not equal the direct annulment of the judgment by the Constitutional Court. How the state is to achieve the result of the declaratory judgment in conformity with International law judgment is left to its discretion. The annulment is not absolutely essential. The signatory state could take another domestic route in order to restore the legal status quo before the violation. From a comparative legal perspective, however, the resumption of the original initial proceedings should be considered as an appropriate means to restore a situation in accordance with International law. This can be derived from the practice of ECtHR case law and the Member States of the European Council. In this context, many Member States of the European Council have introduced the declaratory judgment of the ECtHR as a reason for a resumption in their respective domestic legal systems (Germany and France should be named here as examples).[160]

From a procedural perspective, all ECOWAS Member States should provide for the possibility of overcoming the legal force by way of exception in their rules of procedure. The declaratory judgment should be established as the constituent element of the resumption of the initial trial in

159 Comp.: ECJ, 26/62, Van Gend & Loos (05.02.1963), 25; ECJ, 6/64, Costa ENEL (15.07.1964).

160 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 (13); Hoffmann-Holland, Wiederaufnahme eines durch rechtskräftiges Urteil abgeschlossenen Verfahrens [resumption of a trial completed by a final judgment], in: Graf, Strafprozessordnung [Criminal Procedure Code], commentary, § 359, Rn. 35; Hart- mann, Die Restitutionsklage [restitution action], in: Baumbach/Lauterbach/Hartmann (Publ.), Zivilprozessordnung [Civil procedure Code, 71. edition, (2013), § 580, Rn. 27.

the rules of procedure of the Member States. For the parallel domestic proceedings the declaratory judgment should be applied as part of the facts of the case of a *question prio ritaire de conformité* corresponding with the prevailing *exception d'inconstituti onnalité*. For this purpose, the term *conformité* statt *constitutionnalité* is preferred because state acts are not examined in the light of the constitution but the African Charter and the associated case law of the ECOWAS Court of Justice. According to the current legal situation, the regulations of the legal force in National legal system are opposed to the obligation to comply with ECOWAS judgments because the implementation of declaratory judgments clearly constitute an infringement of opposing constitutional law of Member States.[161]Herewith, the respective regulations of the rules of procedure in the constitution of Member States should thus be adjusted. A fundamental non-appealability of constitutional court decisions should be maintained, but an exceptional deviation from the non-appealability based on ECOWAS-declaratory judgments should be provided for.[162]

The state powers of the Member States involved in the proceedings are not party to the trial before the ECOWAS Court of Justice. For this very reason, the signatory state alone is directly bound by the declaratory judg-

161 See also: § 129 par. 2 Constitution of Ghana of 1992; 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.

162 Thus, the adjustment of the respective regulations seems advisable, namely: § 129 par. 2 Constitution of Ghana of 1992; 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.

ment. However, the conviction of the Member State indirectly addresses the concerned National bodies.[163] Since domestic Constitutional Courts are state organs, they are indirectly bound by the declaratory judgment of the ECOWAS Court of Justice. The reason for this is: the signatory states cannot act by themselves as they are, without exception, bound by their organs. However, the actions of the state organs are ascribed to the signatory state. Every signatory state is liable for the misconduct of one of its organs and this is now an established rule of international state responsibility. The best way to correct misconduct is: to reverse the National misconduct which is in violation of human rights. Thus, the restitution in kind is to be deduced as a direct consequence from the declaratory judgment. In the case of a Constitutional Court decision, the resumption of a trial constitutes an appropriate means of reparation. This is logical. In their role as the highest guardians of the Charter, the Constitutional Courts and Supreme Courts of Member States and the associated judgments of the ECOWAS Court of Justice shall transfer an *erga-omnes*-commitment to the entire National legal system. The reason for this is that the other organs of the state are more open-minded towards the National Constitutional Court than towards the ECOWAS Court of Justice. For this reason, the national Constitutional Courts should play a jointly-responsible role for the implementation of the Charter at a National level. These proposed constitutional reforms are based on the fundamental finding of the contractual commitments in accordance with state responsibility under International law, as the ICJ has quite rightly explained.[164]

Both reforms should be able to contribute to the realisation of the purpose of the Additional Protocol A/SP.1/01/05. The signatory states have committed themselves to undertake such reforms. This is consistent: countries that commit themselves to International law, do not have any better means available to meet their obligation than to adjust their National legal systems to that of International law.[165] The current state of procedural rules oin the constitutions of Member States is an insurmountable obstacle

163 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'Amerique), Arrêt du 19 janvier 2009, par. 61.

164 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'Amerique), Arrêt du 19 janvier 2009, par. 8.

165 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (135).

for the implementation of ECOWAS-Court decisions. Reforming the procedural rules in the constitutions would be a preventive measure to prevent blocking the implementation of ECOWAS-Court decisions. This view is confirmed by the ICJ in its interpretation judgment regarding the Avena vs the United States case:

> « Un État qui a valablement contracté des obligations Internationales est tenu d'apporter à sa législation *les modifications nécessaires* pour assurer l'exécution des engagements pris ».[166]

The establishment of procedural regulations at domestic level would mean that the African Charter and the decisions of the Court of justice would always be present in the National organs of the Member States as a set of rules for the implementation of the ECOWAS rulings. Subsequently, the state organs would attribute great value to the judgments by the ECOWAS Court of Justice.[167] This is because the conviction of a Member State based on an infringement of the human rights guaranteed in the Charter has no effect if the *judgment* of the protective instance at regional level is seen by the National organs as non-binding. A reform of the National legal systems of Member States is necessary, in order to expressly clarify the question whether and to what extent the decisions by the ECOWAS Court of Justice develop their effects.[168] Such reforms are the only way to confirm Protocol A/SP.1/01/05 (19/01/2005) as an effective instrument of International law.[169] Without such reforms, plaintiffs must rely on the goodwill of the convicted signatory state after having endured long-winded proceedings before the ECOWAS Court of Justice.[170] The cooperation between both levels of law alone could guarantee the effective protection of

166 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 (Her- vorhebung durch den Verfasser).

167 Mellech, Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung, 2. [The reception of the ECHR and the judgments of the ECtHR in the French and German jurisdiction, 2].

168 Oppong/Niro, Enforcing Judgments of International Court in National Court, in: Journal of International Dispute Settlement (2014), 1 (21); Enabulele, Reflections on the ECOWAS-Com- munity Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (137).

169 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (137).

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

human rights.[171] In this context, the domestic procedural principles in the constitution should be amended in accordance with the guiding principles of regional International law. In established case law, the ICJ has, in this regard, emphasised that the argument of the obstacle to implementation must not be allowed to take effect in the light of the development of the state liability law. With this in mind, the ICJ recently stated in its interpretative judgment in the Avena case:

> « 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».[172]

Two constellations have been analysed for parallel *National* proceedings. On the one hand, the transfer of an automatic *erga-omnes*-binding effect for parallel National proceedings, and on the other hand, the procedure of the *Exception d'Inconstitutionnalité* and the *Question Prioritiare de Conformité* (QPC) were referred to. The automatic erga-omnes-binding effect for parallel National proceedings means that in the case where a signatory state is concerned, the signatory state is obliged to make amends or terminate its obligation. However, this obligation should also apply for parallel proceedings at *National* level. Due to the generalisation of the binding effect, the convicted signatory state must prevent a new conviction. Thus, the declaratory judgment by the ECOWAS Court of Justice constitutes a de facto direct *erga-omnes* binding effect for *parallel* domestic *cases*. Furthermore, there would be doubts in parallel National proceedings regarding a legal question that is of substantial importance to the human rights jurisdiction before domestic Constitutional Courts. In this case, they are (as in case Art. 276 par. 3 TFEU) obliged to make a submission. The party to the dispute should also have the right to ask this legal question, to raise the question as a *Question Prioritaire de Conformité* before National courts as

171 Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice, 25, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 16/05/2015).

172 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.

well as the Constitutional Courts. This means the suspension of the main proceedings either on the initiative of the referring Constitutional Courts or by the concerned party to the dispute. The decision by the ECOWAS Court of Justice on this would then constitute a landmark decision for the entire legal system of the Community.

The study at hand should, after all, serve as a small contribution to the development of the National implementation of the judgments by the ECOWAS Court of Justice and the effective legal protection within the ECOWAS legal order. This can only be achieved if there is an improved interlocking of regional International law and national constitutional law. It is, therefore, necessary to maintain a constructive dialogue between both legal systems, which can lead to effective and operative legal protection. The joint participation of the National law of the Member States and the ECOWAS legal instruments create good conditions for implementation and at the same time lead to an optimal effectiveness of the African Charter within the legal order of the Community.[173] The reforms would help to eliminate the incompatibility of the National law and the Protocol.[174] Access to the International ECOWAS Court of Justice is illusory if the execution of final, legally-binding declaratory judgments is refused on National level. This would run counter to the idea behind Art. 7 par. 1 of the African Charter.

Moreover, the establishment of a monitoring body which is responsible for controlling the implementation of declaratory judgments by the Court of justice is necessary. In this regard, the creation of an independent executive body would assist in expediting the implementation of the judgments. Furthermore, the official status of implementation of the judgments by the ECOWAS Court of justice should be published at regular intervals in order to increase the attention of the public regarding the implementation of judgments. The current sanction mechanisms could do with some improvements.

173 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts [European human rights under the aegis of the Federal Constitutional Court], in: DÖV (2005), 860 (865).

174 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review 12 (2010), 111 (133).

Let us hope that the reform proposals will be heard so that Abuja, because of the ECOWAS Court of Justice stands for the West African constitutional order as "The Capital of Human Rights Protection".[175]

175 Kane, La Cour de justice de la CEDEAO à l'épreuve de la protection des droits de l'homme, Université Gaston Berger, Maitrise en Sciences Juridiques 2012, 50; Adjolohoun, The ECOWAS Court as a Human Rights Promoter? Assessing Five Years' Impact of Koraou Slavery Judgment, in: Netherlands Quarterly of Human Rights (2013), 342 (368).