Chapter 3 Supranational Derogation of the Legal Force in Municipal Law

A number of questions should be posed, namely: Is the res judicata decision by the national constitutional court insurmountable? Is the legal force opposed to the review competence of the international court (ECOWAS Court of Justice)? Under which circumstances can the legal force possibly be surmounted? Why should the legal force be surmountable? What should be comprised in the differentiation between conquest and breach? These questions will be discussed in this chapter.

Upfront, the use of the term "derogation" instead of "breach" should be explained. A breach of the legal force is given whenever a decision regarding the object of a res judicata judgment is to be made anew. The admissibility of a resumption of the proceedings and the respective decision triggers an automatic annulment of the judgment already in legal force. However, decisions by constitutional courts in the light of the aforementioned (in chapter 2) regulations, regarding the constitutional process by the ECOWAS Member States is non-appealable and irrevocable. There is no legal remedy available against them. Therefore, the decision of the Constitutional Courts is unchangeable. Subsequently, there is no court instance that can revoke the judgment by a Constitutional Court. Further, the breach can be defined as a legal revocation of a judgment by a higher instance. The legal revocation in a new, complete fact-finding trial by the Constitutional Court itself, does not apply here. The presented legal nature of the decision is opposed to the breach of the legal force. In terms of legal consequences, the breach of the legal force triggers the resumption of the proceedings.[1]

For these reasons, the term "derogation" is used in the present paper. To explain the term, the definition by the Federal Constitutional Court of Germany is referred to. With this in mind, the Federal Constitutional Court of Germany explained:

> „Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, die neue Aspekte für die Auslegung des Grundgesetzes enthalten, ste-

1 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 38, Rn. 1304 f.

> hen rechtserheblichen Änderungengleich, die zu einer *Überwindung der Rechtskraft einer Entscheidung des Bundesverfassungsgerichts* führen können".[2]

The preference of this term can be justified by the fact that the legal force is not breached by the declaratory judgment of the international court of law. It rather remains untouched because the essential nature of Constitutional Court judgments is, as shown, its non-appealability as well as its irrevocability. However, it can be derogated or surmounted based on an international verdict. Indeed, the legal force does not represent an untouchable, dogmatic legal form. The *erga-omnes*-legal effect of constitutional decisions is not opposed to the national effectivity of obligations of the convicted Member State under international law. Consequently, the creators of the constitution restricted the *erga-omnes*-legal effect, for example, in Art. 106 of the Togolese Constitution only to the national rule of law. Subsequently, the legal force does not develop its effect outwardly but only internally.

This chapter contemplates the question whether final judgments by a constitutional court represent an unassailable obstacle which might be standing in the way of the jurisdiction of the ECOWAS Court of Justice under international law. The opening of an international legal process represents the limitation of the objective legal force.[3] A human right dispute before the ECOWAS Court of Justice requires the international unlawfulness or at least the assumption of a violation against human rights by the national constitutional courts. In other words: The decisions by the national Constitutional Court could become the object of an international human rights dispute in the ECOWAS legal system. The assumption is based on the general idea that the necessity of legal control should also include the third force in a constitutional state which aims at the moderation and legal bond of all public exercise of power.[4] Is a new regulation of the relationship between the subregional Court of Law and the national constitutional courts necessary according to the concession of a human rights juris-

2 BVerfGE, 326 (326) (Hervorhebung durch den Verfasser [Emphasis by the author]); Pettiti, Le réexamen d'une déci- sion pénale française après un arrêt de la Cour Européenne des Droits de L'Homme: La loi fran- çaise du 15 juin 2000, in: Revue Trimestrielle des Droits de l'Homme (2001), 3 (12).

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

4 Breuer, Staatshaftung für judikatives Unrecht [Government liability for judicative injustice], 1.

diction to the ECOWAS Court of Justice? The lodging of a human rights complaint at regional level against possible decisions by the constitutional courts has direct procedural effects on the national legal force.

In order to answer these complex questions regarding the relationships between the ECOWAS Court of Justice and the highest courts of the Member States, a precedence-case before the ECOWAS Court of Justice offers a good starting point for the investigation. Following the extensive demonstration of this case (A), the primary features of the ECOWAS Court of Justice as a constitutional court will be discussed (B). Furthermore, the procedure of an individual complaint before the ECOWAS Court of Justice (C) as well as the forms of decision-making by the Court of Law (D) will be given special attention. Subsequent to this, the interpretation of Art. 15 paragr. 4 of the amendment agreement will be explained according to the rules of interpretation in the Vienna Convention on the Law of Treaties (E). For the purpose of a better understanding regarding the forms of decision-making, the expression of the effect of the legal force will be demonstrated (F). Lastly, the understanding of the concept of jurisdiction in the present work requires a justification (G).

A. *The Initial Case before the ECOWAS Court of Justice*

The object of dispute before the ECOWAS Court of Justice is the continuation of the national legal dispute before the Togolese Constitutional Court as demonstrated in chapter 2. For the purpose of assessing the legal dispute before the ECOWAS Court of Justice it is advisable to recall the judgment by the ECOWAS Court of Justice.

The judgment by the ECOWAS Court of Justice was issued on 7 October 2011 in French. The individual complaint N°ECW/APP/12/10 was submitted to the Court of Law on 30 November 2010. The legal dispute was based on an individual complaint N°ECW/APP/12/10 brought by Mrs Ameganvi, among others, against the Republic of Togo. She had been excluded from parliament as a plaintiff based on the decision by the Constitutional Court. This individual complaint by Mrs Ameganvi is thereby directly targeted at the Republic of Togo and indirectly against the decision N° N°E018/10 of 22 November 2010 by the Constitutional Court of Togo. The Togolese state was represented by the government. After an exchange of written pleadings between the individual plaintiff and the government, the ECOWAS Court of Justice considered the legal dispute on 7 October 2011.

It was concluded from the facts that the new parliamentarians in the Togolese Parliament had lost their mandate in parliament based on the decision by the Togolese Constitutional Court.[5] They presented the following facts before the Court of Law: They were members of the Togolese parliament until 22 November 2010, this being the date of their exclusion due to the decision by the Togolese Constitutional Court.[6] They were members of the political party UFC (Union des Forces du Changement). They resigned from this party on 12 August and 12 October 2010 respectively. They added: Before their acceptance as candidates of their party during the electoral campaign for parliamentary elections, they were presented with three documents. Among these was a confidentiality agreement (contrat de confiance de l'UFC) between the candidates and a letter of resignation for their signature. It stated the following declaration of resignation:

> « Je vous informe qu'à compter de ce jour, et pour des raisons de convenance politique, je démissionne de mes fonctions de Député à l'Assemblée Nationale».

However, these letters of resignation were supposedly a blank declaration of renunciation, because the declarations of renunciation were allegedly neither dated nor composed by the concerned candidates themselves.[7] After the elections the UFC party received 27 seats in parliament. All 27 members of parliament joined a parliamentarian faction. However, during the time of their mandate, an irreconcilable disagreement arose within the faction. This led to a resignation of 20 parliamentarians on 20 October 2010. Thereafter, they founded their own party (Alliance Nationale pour le Chan- gement, so-called ANC). The leader of their previous party nominated a new president of the UFC faction in parliament on 27 September 2010. The new president of the faction subsequently requested that the president of the parliament should undertake the substitutions for the resigned parliamentarians. On 18 November 2010, the president of the parliament submitted the list of these members of parliament to the Constitutional Court of Togo with the request to name their successors. However, the concerned parliamentarians had allegedly already announced to the

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

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

7 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/09/11 (07/10/2011), par. 13, available at: www.courtecowas.org (last accessed on 16/07/2015).

Constitutional Court on 17 November 2010 that they did not intend to resign from parliament.[8] Nevertheless, despite this irregularity, the Constitutional Court announced the substitution of the parliamentarians with their decision N° N°E018/10 of 22 November 2010.[9] The decision by the Constitutional Court was based on the parliamentarians' declarations of renunciation. The individual plaintiffs reminded the Court that these declarations of renunciation had been ineffective blank declarations of renunciation. They thereafter emphasised that a declaration of renunciation must be signed by the concerned parliamentarian with the date and specification of his name in order to have any legal effect. This had not been the case. Furthermore, they had not submitted any declarations of renunciation to the new president of the faction. They referred to the declaration of renunciation by Mr Lawson, who had not been elected as a member of parliament, as evidence. He confirmed that the declarations of renunciation in question had been blank declarations.

The government alleged that the dispute involves circumstances under which the plaintiffs were substituted, i.e. that the Constitutional Court of Togo decided on the resignation of the plaintiffs on application by the president of the National Assembly. According to the government, certain internal problems within the UFC party had led to the split of the party and the founding of a new party. Furthermore, it assumed that the individual plaintiffs submitted the declarations of renunciation of their own free will According to regulation in Art. 6 of the rules of procedure of the parliament. Subsequently, the Constitutional Court legally decided in a legally binding manner on the substitution of the concerned parliamentarians According to Art. 192 of the Electoral Act.

The individual plaintiffs alleged: A parliamentarian is a representative of the whole people and not only a representative of his party in parliament. Based on the tension resulting from this dual role, the parliamentarians are representatives of the whole people in parliament and as such are only bound by their own conscience. The constitutional status of the parliamentarian as a representative of the whole people based on a free mandate gives him a number of rights whereby any obligation he has towards his

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

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

party before his election as a parliamentarian is not binding. They base the admissibility of their individual complaint on Art. 9.4 and 10 d of the Protocol A/SP.1/01/05. The wording of both regulations stipulates:

> « La Cour est compétente pour connaitre des cas de violation des droits de l'homme dans tout Etat Membre; peut saisir la Cour […] toute personne victime de violation des droits de l'homme ».

Regarding the merits of the claim the individual plaintiffs argued, in particular, that their right to fair proceedings was violated by the Togolese Parliament as well as the decision N°E018/10 of 22 November 2010 by the Constitutional Court of Togo. It therefore followed that the guaranteed right to fair court proceedings according to Art. 7 Abs. 1; Art. 7 Abs. 1.c and Art. 10 Abs. 2 of the African Charta for Human Rights and Peoples' Rights was violated. Moreover, they alleged that through the actions of the Republic of Togo, the rights guaranteed in Art. 1, Art. 1.a Abs. 2 and 33 of the Protocol for Good Governance were also violated. To further argue the merits of their complaint, they also referred to the relevant national regulations namely Art. 52 of the Constitution of Togo and Art. 6 of the rules of procedure of the Togolese Parliament. They expressly repeated the regulation in Art. 52 of the Constitution of Togo:

> « Chaque député est le représentant de la nation toute entière, tout mandat impératif est nul».

Subsequently, they referred to Art. 10 of the General Declaration of Human Rights of 10 December 1948. The government rejected this view of the plaintiffs and made the following statement: it first rejected the jurisdiction of the Court of justice on the grounds that there was no violation of human rights with regard to the proceedings that had led to the substitution of the concerned parliamentarians. According to the government, the Constitutional Court had observed all constitutional regulations when it decided on the substitution of the parliamentarians. The regulations of the Electoral Act had also been observed during the proceedings. To support their view, the government referred to a judgment by the ECOWAS Court, Decision N°ECW/CCJ/APP/05/06 of 22 May 2007. The government further stated that the declarations of renunciation had been undisputed because each of the concerned parliamentarians had personally declared their resignation before the President of the National Assembly. They were therebyno longer members of the National Assembly. The founding of a new party could not heal the resignation retroactively. In this regard, the

government expressly referred to Art. 6 of the Rules of Procedure of the Parliament:

> « Tout député régulièrement élu peut démettre de ses fonctions. Les démissions sont adres- sées au Président qui en donne connaissance à l'Assemblée Nationale dans la plus prochaine séance et les notifie à La Cour constitutionnelle».

The government further alleged that, according to Art. 6 of the Rules of Procedure of the Parliaments, the president of the National Assembly had been informed of the declarations of renunciation in the course of the third legislative period in 2010 because of this, the President of the National Assembly approached the Constitutional Court in order to carry out the substitution. Subsequently, the entire proceedings regarding the substitution of the parliamentarians had been constitutional and did not represent an infringement of the individual and civil rights of the plaintiffs. Therefore, the legal dispute did not fall in the jurisdiction of the ECOWAS Court of Justice. The government thus referred to Art. 106 of the Constitution of Togo. Art. 106 of the Constitution of Togo states:

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

In this sense, the government referred to a judgment by the ECOWAS Court of Justice, namely the Decision N°ECW/CCJ/APP/02/05 of 7 October 2005, in which the ECOWAS Court of Justice expressly rejected its competence with regards to assessing decisions by national courts of the Member States. Moreover, the government emphasised that the plaintiffs had purposefully signed the declarations of renunciation. The declarations of renunciation give the basis of an obligation of the concerned parliamentarians toward their party which must be fulfilled. The declarations of renunciation were not to be viewed as blank declarations of renunciation as they had been signed.

Regarding the violation of Art. 33 of the Protocol for Good Governance, the government alleged that the decision, with regard to the authenticity of a declaration of renunciation, had to be evaluated at the discretion of the Constitutional Court of Togo.

Regarding the violation of the Fairness Principle, the government disputed that Art. 7 paragr. 1, Art. 7 paragr. 1.c of the African Charta for Human Rights and Peoples' Rights had been violated. According to the government, these regulations refer to court proceedings and not proceedings

within a national assembly. Regarding the violation of Art. 10 of the African Charta for Human Rights and Peoples' Rights, the government highlighted that the individual plaintiffs had made use of their right to freedom of association and thus had founded a new party. Therefore, Art. 10 of the African Charta for Human Rights and Peoples' Rights had been adhered to. Consequently, the government applied before the ECOWAS Court of Justice for the assessment of the lawfulness of the parliamentarian's declarations of renunciation as well as the lawfulness of the decision of the Constitutional Court of Togo The government further asked the Court of Law to reject the application by the plaintiffs. It also asked the Court of Law to order the plaintiffs to pay the legal fees for the proceedings.The Court of justice declared the application by the plaintiffs to be admissible according to Art. 9 Abs. 4 and Art. 10 d of the Additional Protocol A/SP.1/01/05.The Court of Law rejected the plaintiffs' application for urgent proceedings with the reason that there was no requirement for urgency according to Art. 59 of the rule of procedure of the Court of justice .

Primarily, the Court of Law was not convinced that the declarations of renunciation had been lawfully submitted. The Court of justice stated:

> « Toutefois ces documents ne peuvent être considérés comme étant une lettre de démission au sens de l'Article 6 du règlement de l'Assemblée Nationale. En effet, selon cet article une lettre de démission doit être signée par le Député régulièrement élu, statut juridique que les signa- taires n'avaient pas acquis au moment de la signature par eux des dites lettres; ce qui n'est pas contesté par le Défendeur ».[10]

Regarding the alleged violation of Art. 7 of the Charta and Art. 10 of the General Declaration of Human Rights, the Court of Law was confronted by the following legal issue:

> « Les questions soumises à l'appréciation de la Cour, à savoir la transmission par le Président de l'Assemblée Nationale à la Cour Constitutionnelle de lettres de démission attribuées aux requérants et contestées par ceux-ci, et la décision n°E18/10 du 22 novembre 2010 de la Cour constitutionnelle prise à la suite de cette transmission, relèvent-elles de la compétence de la Cour comme étant susceptible de consti-

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

tuer des violations de droits de l'homme des requé- rants comme ils le soutiennent? »[11]

After extensive assessment of the object of dispute, the Court of Law was of the opinion that the provisions of Art. 6 of the rules of procedure of the National Assembly had not been observed. The president of parliament should especially not have submitted an application for substitution of the concerned parliamentarians. This lack of observation of the provisions of Art. 6 of the rules of procedure of Parliament led to the announcement of the substitution of the plaintiffs by the Constitutional Court of Togo without a prior hearing. In the opinion of the Court of Law, such an approach by the Constitutional Court constitutes a violation of Art. 7 paragr. 1 of the African Charta for Human Rights and Peoples' Rights and Art. 10 of the Universal Declaration of Human Rights. The Court of Law further confirmed that, according to provisions of Art. 1(h) of the Protocol for Good Governance, all of these pertinent instruments of human rights are part of the standards of review by the Court of justice .

The Court of justice had to, in particular, ascertain that the requirement for fair proceedings as per Art. 7 paragr. 1 of the African Charta during the entire national proceedings had been sufficiently observed. In this context, the Court of justice called special attention to the fact that it was its task to ensure that the signatory states complied with their international legal obligations. The Court of Law further pointed out that the judgment by the Constitutional Court also represented a violation of Art. 10 of the Universal Declaration of Human Rights of the United Nations of 1948.

In the tenor, the Court of Law rejected the objection regarding its lack of competence. It declared itself competent. In light of the above explanations, the Court found that the Republic of Togo had violated the individual plaintiffs' right of a Fair Hearing. This violation at the same time represents an infringement of the provisions in Art. 7/1, 7/1c of the African Charta on Human Rights and of Art. 10 of the General Declaration of Human Rights. The Court of justice ordered the Republic of Togo to pay three million (3,000,000) FCFA to the respective individual plaintiffs. The defendant state had to bear the costs and expenses. After the determination of the infringement of pertinent regulations in the Charta (Art. 7 paragr. 1 of the African Charta) as well as the General Declaration of Human Rights

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

(Art. 10), the plaintiffs expected to be automatically reinstated in Parliament. The Togolese state, however, rejected their application for reinstatement.

There is, however, the possibility to initiate review proceedings following a declaratory judgment. This process means that a judgment regarding a certain object of dispute has been rendered. However, several points in the decision are unclear. Therefore, an application before the Court of Law to clarify these yet unanswered questions is admissible.

Subsequently, the plaintiffs in the above presented main proceedings.[12]submitted an application for review to the Court of Law. These proceedings are admissible according to Art. 64 of the Rules of Procedure of the Court of justice . The concerned Togolese parliamentarians therefore re-approached the Court of justice on 16 November 2011 within the framework of these proceedings.

According to the facts, the plaintiffs asked the Court of Law in the review proceedings to take a clear position regarding the consequence of its declaratory judgment, i.e. their reinstatement in the Togolese parliament. According to the reason for the complaint by the plaintiffs in this separate trial, the parliamentarians sought their reinstatement in parliament. This can be justified by the fact that their loss of mandate in parliament was based on the unfair proceedings. These proceedings were qualified by the ECOWAS Court of Justice rightfully as being in violation to human rights.[13] Therefore, they have a claim to re-obtain their seats in parliament.

The individual plaintiffs argued that the Court of justice had rendered the declaratory judgment N°ECW/CCJ/JUD/09 between them and the Republic of Togo on 7 October 2011. The Court of Law had, however, overlooked one of their causes of action. Namely: the Court of Law expressly confirmed in its declaratory judgment that they had not submitted lawful declarations of renunciation.

Object of their application for review was the explicit order of reinstatement by the Court of Law in the Togolese Parliament. In their opinion, this was the logical consequence of the first declaratory judgment. The government alleged that they had fulfilled all obligations arising out of the

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

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

declaratory judgment N°ECW/ CCJ/JUD/09 on 7 October 2011. Further, the government reiterated the fact that, according to the provisions in Art. 106 of the Constitution of Togo, the decisions by the Constitutional Court are final. There is no legal remedy available against the decision of the Constitutional Court. The individual plaintiffs could not be reinstated in Parliament because their resignation occurred by way of the decision N °018/10 of 22 November 2010 by the Constitutional Court of Togo. According to the government, this decision developed an *erga-omnes*-effect and could not be questioned in any way whatsoever.[14]

The Court of justice declared this application admissible.[15]

The question to be answered by the Court of justice was whether the finding of a violation at the same time amounted to an annulment of the decision in violation of human rights by the Togolese Constitutional Court.[16] In the key reasoning of the decision, the Court of justice failed to draw extensive conclusions in the review proceedings.[17]In its key statement, the Court of justice said: despite the Court of Laws finding of in its first decision, it could not order the reinstatement of the parliamentarians. According to settled case law, the ECOWAS Court of Justice was neither a court of appeal nor a court of cassation for judgments in Member States. It did not avail of such a competence. A reinstatement by the Court of justice of the parliamentarians in parliament would equate to an annulment or disregard of the decision by the Togolese Constitutional Court, which does not lie in the competence of the Court of Law.[18]

The Court of justice once again highlighted the fact that the reinstatement of the plaintiffs to their previous position, i.e. the reinstatement in the Togolese parliament, represented a possible consequence of a violation

14 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/06/12 (13/03/2012), par. 8, available at: www.courtecowas.org (last accessed on 16/07/2015).

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

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

17 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/06/12 (13/03/2012), par. 18, available at: www.courtecowas.org (last accessed on 16/07/2015).

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

of human rights by the Republic of Togo.[19] The Court of justice was not authorised to order this reinstatement. Furthermore, it was not the Court of Laws responsibility to determine whether the respondent state had violated the relevant human rights. The Court of Law had thus fully fulfilled its function in its first declaratory judgment.[20] Essentially, the Court of Law stated:

> « La Cour estime que la demande en réintégration s'apparente à un recours contre la Décision N°018/10 du 22 Novembre 2010 de la Cour constitutionnelle de la République du Togo qui est une juridiction nationale d'un Etat Membre, juridiction pour laquelle la Cour, suivant sa ju- risprudence constante, n'est ni une juridiction d'appel, ni de cassation et dont la décision par conséquent ne peut être révoquée par elle. 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.»[21]

The Court of justice declared the formal admissibility of the plaintiff's application for review. The allegation that causes of action had been omitted in the main proceedings was dismissed by the Court of Law.This conjecture is true to a certain extent, because as the Court of justice indicated, it is not a super appellate court. Therefore, it does not have the competence to examine misjudgments of national institutions in a factual or legal respect. However, the determination of a violation represents an exception to the general lack of competence regarding the examination of judgments by national courts at a regional level.[22] Moreover, a number of important principles with regard to the human rights complaint should be mentioned at international law level. It must be pointed out that there are nu-

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19 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/06/12 (13/03/2012), par. 14, available at: www.courtecowas.org (last accessed on 16/07/2015).

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

21 CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N°ECW/CCJ/JUD/06/12 (13/03/2012), par. 17 et suivant, available at: www.courtecowas.org (last accessed on 16/07/2015).

22 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention [European Human Rights Convention]. EMRK-commentary, 3. edition, Art. 6, p. 214, Rdn. 185.

merous differences between the national and the regional legal dispute. The parties, the object of dispute, the applicable legal principles (principles in international law) and the addressee of the decision (the State and the Plaintiff) differ significantly from those of that had been seized in the constitutional procedure on the national level. With regard to the object of dispute, the parties do not seek the derogation of the national judgment. They rather move to determine the violation of the human rights, to which they are entitled.[23]

B. *Role of the ECOWAS Court of Justice as a Constitutional Court*

Which function does the ECOWAS Court of Justice have within the framework of its competences as an international and human rights court? In order to ensure the adherence to the community-specific obligations as well as the obligations deriving from the Charta, the high contracting parties established a Court of Law. The operating principle as well as the statute of this Court of justice resemble, in some respects, those of a Constitutional Court (Art. 15 paragr. 1 of the Amendment Agreement, 9 and 10 d of the Additional Protocol A/SP.1/01/05).[24] Hereby, the elements of the role of the Constitutional Court are discussed (I). It is however questionable whether the sovereignty of the contracting states is opposed to this perception of competence of the Court of Law (II).

I. Articulations of the Constitutional Role of the ECOWAS Court of Justice

Through the jurisdiction regarding the human rights monitoring within the rule of law of the entire Community, the question must be posed whether the Court of Law's jurisdiction extends to that of a supranational

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

24 See also regarding the ECtHR: Cohen-Jonathan, La fonction quasi constitutionnelle de la Cour Européenne des Droits de l'Homme, in: Renouveau du Droit constitutionnel. Mélanges en l'hon- neur de Louis Favoreu, 1127 (1128).

Constitutional Court.[25] In answering this question, the main features of a Constitutional Court are addressed, namely:

- the independence of a Constitutional Court in the constitutional order of the state;
- the adjudication of a last decision-making competence above all state organs;
- the binding effect of the decisions by the Constitutional Court.

The role of a Constitutional Court comprises the monitoring of the entire constitutional order and to enforce the individual and civil rights embedded in the constitution. It examines the constitutionality of the actions of all other state organs according to the constitution. The decisions of a Constitutional Court bind all state organs. Therefore, there are no legal remedies available against these decisions. They are final court orders and therefore unappealable.

Within the framework of the competences assigned to it, the Court of Law exercises its jurisdiction autonomously and independently of the Member states and the institutions of the Community (Art. 15 paragr. 3 of the Amendment Agreement of 1993). Just as a Constitutional Court, the ECOWAS Court of Justice has the function to guarantee the enforcement of human rights of the Community. The Court of Law is, so to speak, the guardian of the human rights embedded in the African Charta in favour of the citizens of the Community. Especially for this reason, the Court of justice can and should, when exercising its function, define the guaranteed human rights in more detail in favour of the individual plaintiff. In order for this goal to be reached, a last decision-making competence is conferred to the Court of Law According to Art. 19 paragr. 2 of the Protocol A/P1/7/91 (2). Before the question of the final decision-making authority of the Court of Law is discussed, the status of the Court of justice should be addressed (1).

1. Status of the ECOWAS Court of Justice, in particular, its independence

The question of the statute refers first of all to the facilities of the Court of justice and its position toward the other organs of the Community. Therefore the status of the judges, on one hand, and the status of the Court of Law, on the other hand, will be addressed. With regards to the judges, the

25 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS (200), 16.

office of the judge will also be addressed. Regarding the Court of Law, the regulations regarding the independence of the Court of Law is addressed.

The status of the judge refers to the requirements for the office, the term of office and the end to a term of office. According to Art. 3 paragr. 1 of Protocol A/P1/7/91 (06/07/1991) signatory states citizens who enjoy a high moral reputation and who avail of the prerequisites necessary to exercise a high judicial office can be elected as judges. Moreover, legal scholars who can prove special knowledge in international law may be appointed as judges. The number of judges at the Court of Law does not correspond to those of the signatories because regarding the composition of the Court of justice, it is comprised of seven judges (Art. 3 paragr. 3 of Protocol A/P1/7/91). A candidate for the judicial office must have completed their fortieth year of age (Art. 3 paragr. 7 of Protocol A/P1/ 7/91). The question regarding the election of the judges is at the discretion of the state presidents of the Community (Art. 3 paragr. 4 of Protocol A/P1/7/91).[26] In Art. 3 paragr. 4 of Protocol A/P1/7/91 it is stated:

> « Les membres de la Cour sont nommés par la Conférence et choisis sur une liste de per- sonnes désignées par les Etats Membres. Aucun Etat Membre ne peut désigner plus de deux personnes ».
>
> "The member of the Court shall be appointed by the authority and selected from a list of persons nominated by Member states. No Member State nominates more than two persons."

After the Member States have drawn up a list of fourteen candidates who meet the requirements of Art. 3 paragr. 1 and 7 of Protocol A/P1/7/91 the decision falls to the Conference of Heads of State, as the judges are appointed by the heads of state during the Conference of Heads of State (Art. 3 paragr. 6 of Protocol A/P1/7/91). It may be concluded from this that, in contrast to the case of the ECtHR (Art. 22 ECHR) where they are voted into their office through an electoral process, the judges are chosen and appointed by the high heads of state. Thereby, a large responsibility by the heads of state of the ECOWAS Community must be noted. During the selectionof the judges, it is especially important to pay attention to their qualifications as the quality of the Court of Law and therefore the protection of human rights within ECOWAS closely corresponds to the quality

26 Tikonimbé, Indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque international de Lomé organisée 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), 5.

of the judges. Furthermore, the candidates are put forward for election by every high signatory party (Art. 3 paragr. 6 of Protocol A/P1/7/91). The election procedure was strongly criticised because the candidates proposed by the signatory state, might be biased in favour of their home country, which could threaten the independence of the judges.[27] There was also no guarantee that the candidates of a signatory party met the necessary requirements, in particular, knowledge of international law.[28] Last but not least, there was no interstate public procedure with regards to the candidates. All of this did not provide good conditions for an independent Court of Law.[29]

The Conference of Heads of State has taken note of this criticism and has reacted positively to it. During the Conference of State Presidents the heads of state passed a resolution on 14 June 2006, regarding the election of judges.[30] In Art. 1 and 2 paragr. 2 of the resolution of the heads of state it is stated:

> « Il est créé un Conseil judiciaire de la Communauté pour gérer le processus de recrutement des juges de la Cour de Justice de la Communauté et les questions disciplinaires. Lorsqu'il gère le recrutement des juges de la Cour de Justice de la Communauté, le Conseil Judiciaire de la Communauté est composé des Président des juridictions suprêmes de l'ordre judiciaire ou de leurs représentants, des Etats auxquels les postes de juges n'ont pas été attribués ».[31]

Through this decision, a Conseil Judiciaire was created by the ECOWAS Community. The Conseil Judiciaire is comprised of the presidents of the

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27 Tikonimbé, Indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque international de Lomé organisée 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), 6.

28 Tikonimbé, Indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque international de Lomé organisée 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), 6.

29 Tikonimbé, Indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque international de Lomé organisée 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), 6.

30 Décision A/DEC.2/6/06 de la Conférence des Chefs d'Etat et de Gouvernement portant créa- tion du Conseil Judiciaire (14 juin 2006).

31 Art. 1 et 2 Al.1 de la Décision A/DEC.2/6/06 de la Conférence des Chefs d'Etat et de Gou- vernement portant création du Conseil Judiciaire (14 juin 2006).

highest courts of the highest signatory parties (Art. 2 paragr. 1 of Resolution A/DEC.2/6/06). Henceforth, the election of candidates into the judicial office is the responsibility of this Conseil Judiciaire (Art. 2 paragr. 1 of the Resolution A/ DEC.2/6/06). Moreover, the judges are elected for a duration of five years.

Their re-election is permitted only once (Art. 4 paragr. 1 of Protocol A/P1/7/91). The judges remain in office until the inauguration of their successors. However, they will continue working on the disputes they were already involved in (Art. 4 paragr. 3 of Protocol A/P1/7/91).

Regarding the independence of the Court of Law, Art. 2 of Protocol A/P1/7/91 shows that the ECOWAS Court of Justice is a permanent and independent court of justice of the Community. The independence of the Court of Law is expressly confirmed in Art. 15 paragr. 3 of the Amendment Agreement. In order to guarantee the independence of the Court of Law towards the signatory states and the other institutions of the Community,[32] the signatories decided, after the Additional Protocol A/SP.1/01/05 (19/01/2005) came into force, to underpin the regulations regarding the independence of the Court of Law. This took place with the creation of the above mentioned Conseil Judiciaire through the decision taken by the heads of state.[33] The fact that the selection of the judges was taken away from the power of the heads of state with the creation of this Conseil Judiciaire shows the first step for independence of the Court of Law.[34] Members of the Conseil Judiciaire may not come from the same signatory state as the judges to be elected (Art. 2 paragr. 2 of Decision A/DEC. 2/6/06). Moreover, Art. 1 and 2 of the Protocol A/P1/7/91 clarify that the judges of the ECOWAS Court of Justice do not belong to the signatory state for which they were elected. The judges rather belong to the ECOWAS Court of Justice in their personal capacity.

During their term of office, the judges are not allowed to carry out activities that are incompatible with their independence, their impartiality or

32 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS (200), 4 (16).

33 Décision A/DEC.2/6/06 de la Conférence des Chefs d'Etat et de Gouvernement portant créa- tion du Conseil Judiciaire (14 juin 2006).

34 Sall, La Justice d'Intégration, 53; Tikonimbé, Indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque international de Lomé organisée 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), 7; 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, 36.

with the requirements of a full-time occupation in that position. Art. 4 paragr. 11 of Protocol A/P1/7/91 therefore prohibits the judges to carry out political, administrative or any other professional activities. This regulation takes the fact into account that the ECOWAS Court of Justice is a permanent court of law. Especially for this reason, the judges must guarantee their own independence and impartiality. In particular, the guarantee of independence represents an important element of justice for those seeking justice.[35] In orderto strengthen the independence even further, the judges enjoy the immunities and privileges recognised for diplomatic corps according to Art. 6 of Protocol A/P1/7/91. In this context, the question of independence should be separated from that of impartiality. A removal from the position as a judge during their term of office is not possible. The only possibility for a removal from office is the determination of gross misconduct, inability to carry out one's office or physical or mental inability (Art. 4 paragr. 7 and Art. 6 paragr. 2 of Protocol A/P1/7/91).[36] The competence to decide on the disciplinary question is not that of the heads of state but is allocated to a committee of independent judges.[37]While the independence of the judges concerns an institutional bond of the judges and thus of the Court of Law in relation to other organs within the Community, the impartiality of the judges represents a purely individual, even psychological element. This difference explains why the status of the Court of Law, the electoral process of the judges as well as the privileges and the immunity (Art. 6 of Protocol A/P1/7/91) of the judges are decisive when measuring the independence of the Court of justice .[38] With respect to the impartiality, carrying out political, administrative or professional activities threaten the impartiality of the judges. Due to this, the prohibition of carrying out sideline activities in Art. 4 paragr. 11 of Protocol A/P1/7/91 is justified.

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35 Tikonimbé, Indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque international de Lomé organisée 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), 2; 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, 67.

36 Siehe dazu auch Gans, Die ECOWAS. Wirtschaftsintegration in Westafrika, 70.

37 Art. 2 Abs. 2, Décision A/DEC.2/6/06 de la Conférence des Chefs d'Etat et de Gouvernement portant création du Conseil Judiciaire (14 juin 2006).

38 Tikonimbé, Indépendance de la Cour de Justice de la CEDEAO, Communication donnée au colloque international de Lomé organisée 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), 4.

The Court of justice itself elects its president and vice president (Art. 6 of the rules of procedure of the Court of Law). The internal organisation of the court derives from Protocol A/P1/7/91 and the rules of procedure, in the version of 2 June 2002, the Court of Law set for itself According to Art. 32 of Protocol A/P1/7/91. Regarding the composition of the Court of Law in case of a decision in a legal matter, a quorum of at least two judges and the president of the Court of Law is necessary (Art. 15 paragr. 2 of the Additional Protocol A/SP.1/01/05 and Art. 22 paragr. 2 of the rules of procedure of the Court of Law). Furthermore, According to Art. 15 paragr. 2 of the Additional Protocol A/SP.1/01/05, an uneven number of judges is necessary to make a decision in a legal matter (see also Art. 22 paragr. 3of the rules of procedure of the Court of Law). The Court of Law is based in Abuja (Nigeria). It can, however, also hold external sessions if the circumstances of a case so require (Art. 26 of Protocol A/P1/7/91 and Art. 21 paragr. 2 of the rules of procedure of the Court of Law).

2. Exclusive and ultimate power of decision-making competence

The ECOWAS Court of Justice avails of an exclusive competence regarding the legal instruments of the Community. Art. 23 paragr. 1 and 2 of the Additional Protocol A/SP.1/01/05[39] attribute to the Court of Law an exclusive competence regarding the interpretation and application of the Amendment Agreement and the associated Protocols:

> « Aucun différend relatif à l'interprétation ou à l'application des dispositions du présent Trai- té ne peut être soumis à un autre règlement que celui prévu par le Traité ou le présent Proto- cole. Lorsque la Cour est saisie d'un différent, les Etats Membres ou les Institutions de la Communauté doivent s'abstenir de toute action susceptible de l'aggraver ou d'en entraver le règlement. Les Etats Membres et les Institutions de la Communauté sont tenus de prendre sans délai toutes les mesures nécessaires de nature à assurer l'exécution de la décision. »
>
> "No dispute regarding interpretation or application of Treaty may be referred to any other form of settlement except that which is provided for by the Treaty or this Protocol. When a dispute is brought before the Court, Member States or Institutions of the Community shall re-

39 A.F of Art. 22 of Protocol (A/P1/7/91) regarding the Court of Law of the Community.

frain from any action likely to aggravate or militate against its settlement."

Furthermore, Art. 34 paragr. 3 of Protocol A/P1/7/91 clarifies that Protocol A/P1/7/91 must be seen as a fixed component of the Amendment Agreement. However, the question must be asked, whether the ECOWAS Court of Justice avails itself of an exclusive competence regarding human rights violations. Art. 10 d of Protocol A/SP.1/01/05 namely confers the right to the individual to directly submit an individual complaint to the ECOWAS Court of Justice without prior exhaustion of legal remedies. Can it be deduced from this that the ECOWAS Court of Justice has an exclusive competence regarding the interpretation and application of the African Charta within the ECOWAS Community? Is the competence to decide on human rights an exclusive competence of the ECOWAS Court of Justice? This question is important, because the competence is mainly attributed to the African Court on Human Rights and Peoples' Rights. The Member States know the last word in favour of their own national Constitutional Courts regarding the interpretation and application of their respective constitution (as shown in Chapter 2 of the present examination).

Moreover, the human rights accepted by the African Charta were incorporated in the respective constitutions of the Member States. Because of this, the Constitutional Courts of the Member States have the competence to monitor the rights of the Charta. The jurisdictions and the relationship between the ECOWAS Court of Justice and the national courts is difficult to define r*atione materiae*. Verbatim and following Art. 23 paragr. 1 and 2 of the Additional Protocol A/SP.1/01/05, one must assume an exclusive competence of the Court of Justice regarding the interpretation and application of the African Charta. However, based on the possibility to bring a claim within national law regarding the scope of competence of the Constitutional Courts, one must refer to a teleological interpretation of the regulation in Art. 23 paragr. 1 and 2 of the Additional Protocol A/SP.1/01/05. Therefore, the competence to monitor the rights of the African Charta is attributed primarily to the courts of the Member States and, in particular, the Constitutional jurisdictions . The admissibility of a direct individual complaint before the ECOWAS Court of Justice should not be evaluated as the denial of the primary obligation by the signatory states. To allow direct individual complaints without requiring the prior exhaustion of national legal remedies only corrects a certain deficit in legal protection and problems in some Member States (this will be discussed in detail below in chapter 4).

The regulation in Art. 9 paragr. 4 of the Additional Protocol A/SP.1/01/05 highlights the fact that it is the task of the ECOWAS Court of Justice to guard over the adherence to the obligations by the high contract parties embedded in the African Charta. This means that the Court of Justice neither monitors the adherence to national law nor other international instruments. It decides basically on the obligation of the signatory states regarding the African Charta on Human Rights and Peoples' Rights. In its latest declaratory judgment, the Court of Law has confirmed its rejection in principle of the competence to interpret national law of the signatory states. Here, the Court of Law states:

> « La Cour, en effet, toujours rappelé qu'elle n'était pas une instance chargée de trancher des procès dont l'enjeu est l'interprétation de la Constitution des Etats de la CEDEAO. […] qu'il s'agisse de la Constitution du Burkina Faso, ou de normes infra-constitutionnelles quelles qu'elles soient. Dans leurs écritures, les requérants se sont en effet référés aussi bien à la Constitution nationale, qu'à la Charte de la Transition. La Cour doit considérer de telles réfé- rences comme inappropriées dans son prétoire. Juridiction internationale, elle n'a vocation à sanctionner que la méconnaisse d'obligations résultant de textes internationaux opposables aux Etats ».[40]

In the end, Art. 23 Abs. 1 and 2 of the Additional Protocol A/SP.1/01/05 does not attribute an exclusive competence to the ECOWAS Court of Justice regarding its authority to decide on human rights disputes. The ECOWAS Court of Justice is not to be seen as the only decision-making organ regarding the violation of the human rights embedded in the Charta. The individual complaints are *ratione materiae* directly admissible to the Court of Justice because structural shortcomings in several ECOWAS signatory states were known to the parties to the agreement. Even though the Court of Justice does not avail of an exclusive competence to monitor the Charta, it does have a final decision-making competence. Two elements meet and strengthen this ultimate decision-making competence of the ECOWAS Court of Justice in the area of human rights.

On one hand, the *erga-omnes* binding effect of the national constitutional judgment is restricted to the national rule of law. There is no reference whatsoever in the constitutional regulations of the Member States claim-

40 CJ CEDEAO, Affaire Congrès pour la démocratie et le Progrès (CDP) & Autres c. Etat Bur kina Faso, N°ECW/CCJ/JUD/16/15 (13.07.2015), par. 24 et 26, available at:www.courtecowas.org (last accessed on 16/07/2015).

ing an extension of the *erga-omnes* binding legal effect in an international legal system. On the other hand, the ECOWAS laws acknowledge the last decision-making competence of the Court of Justice in the area of human rights. Another justification for the ECOWAS Court of Justice's competence to review is based on the *erga-omnes* binding effect, intended by the constitutions of Member States to limit such on the national constitutional order. The binding effect of the decisions of the Constitutional Court includes, *erga omnes* effect at a national level. As the creator of the constitution purposefully did not create a binding effect of international court instances, one can draw the conclusion that the creator of the constitution did not exclude the possibility of challenging the legal force of decisions by the Constitutional Court at an international level. The creator of the constitution thus intends for an implicit supremacy of the ECOWAS Court of Justice in terms of the significance of its interpretation and application of the Charta.

On closer inspection of the legal provisions of the ECOWAS Community, a certain implicit relativisation of the final judgment by the Constitutional Court must be noted. According to Art 9.4 and Art 10 d of Protocol A/SP.1/01/05, the ECOWAS Court of Justice is authorised to decide in matters of individual human rights complaints against Member States. Both regulations include references to the possibility of controlling the actions of states by the Court of Justice. According tothis regulation, all actions of governmental authority can be the object of a complaint. In this respect, court decisions are per se actions of state authority. Therefore, it can be deduced that the possibility of relativisation of the legal force of final decisions by the Constitutional Court are also to be included according to Art. 9 paragr. 4 of Protocol A/SP.1/01/05. Consequently, the ECOWAS Court of Justice has the last decision-making competence regarding the interpretation and application of the Charta within the Member States.

Regarding the procedure, the decisions of the Court of Justice take legal effect following their notification (Art. 62 of the Rules of Procedure of the Court of Law). There are namely no legal remedies, such as appeal against or revision of the decisions of the ECOWAS Court of Justice. In this respect, Art. 19 paragr. 2 of Protocol A/P1/7/91 stipulates:

> « Les décisions de la Cour sont lues en séances publiques et doivent être motivées. Elles sont, sous réserve des dispositions du présent protocole relatives à la révision, immédiatement exécutoires et ne sont pas susceptibles d'appel ».

> "Decisions of the Court shall be read in open court and shall state the reasons on which they are based. Subject to the provisions on review contained in this Protocol, such decisions shall be final and immediately enforceable."

The regulation in Art. 19 paragr. 2 of Protocol A/P1/7/91 clearly shows that, in the framework of its jurisdiction, the ultimate decision-making competence lies with the ECOWAS Court of Justice. Furthermore, Art. 15 of the Amendment Agreement confirms that the Member States are bound by the final declaratory judgment by the Court of Justice. There is no exclusive list of actions which may fall within the scope of competence of the Court of Justice. The Member States, therefore, do not provide for an exception concerning which state organ must carry out the state action in violation of human rights in order to establish the legal competence of the Court of Justice. The Member States would have made express provision for this exception if the last and final judgment by the highest state organ, such as the Constitutional Court or the Supreme Court, should be exempted from the scope of competence of the ECOWAS Court of Law. This would, in turn, only cause astonishment. Based on this, the conclusion must be drawn that a decision by the Constitutional Courts or the Supreme Court in violation of human rights falls within the scope of competence of the ECOWAS Court of Justice. There is therefore no exception regarding the scope of application of Art. 9.4 and Art 10 d of Protocol A/SP.1/01/05. Therefore, the Member States have confirmed the supremacy of the jurisdiction with regards to human rights of the ECOWAS Court of Justice in terms of international law.

The Court of Law is supreme in comparison to the other institutions of the community. Even the Conference of Heads of State is subject to the decisions by the Court of Justice. Should it address a decision that at the same time falls within the scope of competence of the Court of Justice, the conference must leave the last decision to the Court of Justice . The competence of the Court of Justice replaces the competence of the conference in all legal matters with regards to the interpretation and application of the Amendment Agreement and the Additional Protocol. After the Court of Justice has decided in a legal matter, all Member States must comply with the decision of the Court of Law. This is not opposed by the sovereignty of the signatory states.

II. Objections with regard to sovereignty

The judiciary represents an essential component of national sovereignty. Therefore, exercising its jurisdiction expresses the sovereignty of the states. One of the basic principles under international law is the principle of sovereign equality. This basic principle of sovereign equality is codified in Art. 2 No. 1 of the Charta of the United Nations. This emphasises that the principle of sovereign equality of states is in closest relationship to the principle of sovereignty.[41] The principle of sovereign equality of all states, in turn, is one of the oldest rights because international law has always been a right among equals even though the states are not, in fact, anything but equal.[42] The sovereignty of a state also means that the state is the highest autonomous entity to its subjects on its territory and that an appeal to a higher instance against its orders and decisions is not possible.[43] To make it even clearer: The sovereignty resembles the independence of a state to issue orders.[44] Consequently, the only law which applies nationally is law which either originates there or was incorporated there by the national constitution.[45] The Constitutional Court of the State monitors the adherence to constitutional regulations. Therefore, sovereignty means „Exclusivity and Imperviousness" of the legal order of the state.[46]The exclusive competence of states can be deduced from Art. 2 clause 7 of the Charta of the United Nations,. This includes the legislative, judiciary and executive sovereignty. Consequently, the state doesn't seem to be subject to any other law but the state law.[47] Therefore, in case of a conflict between international law and national law, legal practitioners tend to prefer the latter.[48]

The judicial prerogative of a sovereign state can be organised in whichever way the state pleases because the state is free to do so.. This requires due consideration of matters that inherently belong to the national

41 Ipsen, Völkerrecht [International Law], 6. edition, § 5, Rn. 254.
42 Ipsen, Völkerrecht [International Law], 6. edition, § 5, Rn. 254.
43 Verdross/Simma, Universelles Völkerrecht [Universal International Law], 3. edition, § 35, 29.
44 Bertele, Souveränität und Verfahrensrecht [Soverignty and Procedural Law], 64.
45 Verdross/Simma, Universelles Völkerrecht [Universal International Law], 3. edition, § 35, 30.
46 Verdross/Simma, Universelles Völkerrecht [Universal International Law], 3. edition, § 35, 30.
47 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS (200), 28.
48 Oppong, Legal Aspects of Economic Integration in Africa, 192.

competence of a state. This, in turn, follows from the principle of equal sovereignty of states.[49]

However, the question must be posed whether human rights issues are „*solely within the domestic jurisdiction*".[50]From this follows that the sovereign authority of a state is in principle indivisible. International law itself guarantees this principle. However, there are possibilities to delegate this exclusive authority of a sovereign state. Indeed, states seem to comply with international law when they observe mutual goals. These can only be reached if states cooperate and thus share their sovereign authority.[51] The delegating signatory state exercises its „freedom of contract" through its delegation.[52]

Therefore, we must differentiate between two questions: whether a factual situation falls within the internal scope of competence or whether a matter shall remain within that national scope of competence. This differentiation is important because the judicial authority belongs to the fundamental rights of a state. However, the state is able to transfer, within the framework of its freedom of contract, this judicial authority to international organisations. This approach is completely comprehensible in the light of Art. 2 clause 7 of the Charta. The signatory states already agreed in the preamble of the Amendment Agreement of 1993 to relinquish their sovereignty of state step by step in favour of the Community in the areas stipulated in theagreement and the associated protocols. The goal of transferring sovereignty is to enable a collectivisation or a common autorisation of sovereign power. The wording of clause 5 in the preamble of the Amendment Agreement provides for the following obligation by the ECOWAS signatory states:

> « Convaincus que l'intégration des Etats Membres en une Communauté régionale viable peut requérir la mise en commun partielle et pro-

49 Kokott, Souveräne Gleichheit und Demokratie im Völkerrecht [Sovereign Equality and Democracy in International Law], in: ZaöRV (2004), 517 (519).

50 Ress, Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit [Supranational Protection of Human Rights and the Change in Statehood], in: ZaöRV (2004), 621 (621); Nolte, in:Simma/Khan/Nolte/Paulus, The Charter of the United Nations. A Commentary, 3rd ed., Art. 2 (7), par. 38.

51 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS (200), 29.

52 Kelsen, Die Einheit von Völkerrecht und staatlichem Recht [The Unity of International Law and State Law], in: ZaöRV 19 (1958), 234 (237).

> gressive de leur *souveraineté nationale* au profit de la Communauté dans le cadre d'une volonté politique collective […]».[53]
>
> "Convinced that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of *national sovereignties* to the Community within the context of a collective political will […]"

The political sovereignty of a state can therefore be limited by its integration into an international Community such as the ECOWAS Community. This thought arises from clause 5 of the preamble of the Amendment Agreement. The limitation of the political sovereignty of a state goes hand in hand with the adoption of obligations under international law[54] because the ECOWAS Member States have exercised their sovereignty through the ratification of the African Charta. Moreover, all states of the Community legally confirmed their affiliation to a value system by signing the Protocol of Dakar 2001 and thereby accepted a limitation of their sovereignty.[55] The protection of these rights is guaranteed by the Court of Justice. As a result, the Member States have acknowledged the human rights competence of the ECOWAS Court of Justice and at the same time transferred onto it the corresponding sovereign power. The transfer of sovereignty is expressed through the acknowledgement of the last decision-making competence of the Court of Justice in all its areas of competence. In this regard, the protection of human rights under international law can be reconciled with state sovereignty if there is a provision that an individual complaint may be submitted against an alleged violation before an international organ such as the ECOWAS Court of Justice.[56]

The sovereignty of a state cannot be understood in such a way that an international Court of Law, established by the state within the framework of its freedom of contract, may not exercise its competence.[57]On the contrary, the signatory states are obligated to observe the competences of the

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53 Emphasised by the author.

54 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts [European Human Rights under the Aegis of the Federal Constitutional Court], DÖV (2005), 860 (867).

55 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS (200), 107.

56 Verdross/Simma, Universelles Völkerrecht [Universal International Law], 3. edition, § 36, 31.

57 Hopkins, The effect of an African Court on the domestic legal orders of African states, in: Human Rights Law Journal (2002), 234 (235).

established international court according to the principle of good faith. Thereby, Art. 22 paragr. 2 and 3 of Protocol A/P1/7/91 stipulates:

> « 2. Lorsque la Cour est saisie d'un différend, les Etats Membres ou les Institutions de la Communauté doivent s'abstenir de toute action susceptible d'en aggraver le règlement.
> 3. Les Etats Membres et les Institutions de la Communauté sont tenus de prendre sans délai toutes les mesures nécessaires de nature à assurer l'exécution de la décision de la Cour ».

> "2. When a dispute is brought before the Court, Member States or Institutions of the Commu- nity shall refrain from any action likely to aggravate or militates against its settlement.
> 3. Member States and Institutions of the Community shall take immediately all necessary measure to ensure execution of the decision of the Court".

From the aforementioned, it is certain: There is no conflict between the Constitutional Courts of the Member States and the ECOWAS Court of Justice. Similarly, there is no conflict between international law and state law. The reason for this is clear: The national law as well as the international law are rooted in the will of the same state.[58] As the result of this section it can be summarised:

The question of the transfer of judicial competence to international courts, such as the ECOWAS Court of Justice, does not constitute a violation of the prohibition of intervention in internal affairs of states according to Art. 2 clause 7 of the Charta of the United Nations. It must rather be seen as the state exercising its freedom of contract. The prohibition of intervention therefore depends on the extent of regulation of a factual situation by international or state law. This requires examination in individual cases.[59]

C. *Individual Complaints Procedure before the ECOWAS Court of Justice*

The African Charta and the Additional Protocol A/SP.1/01/05 are agreements under international law that are binding for the signatory states af-

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

59 Simma, Charta der Vereinten Nationen [Charta of the United Nations]. commentary, Art. 2 clause 7, Rn. 37.

ter their ratification. Both agreements directly establish the obligation of persons subject to the jurisdiction of the high parties to the agreement to ensure thehuman rights stipulated in the African Charta. These rights are created directly under international law in such a manner that an individual in the territory of the signatory states is entitled to protection under international law against the signatory states. This right is made more concrete by the possibility of a direct individual complaint before the ECOWAS Court of Justice. Therefore, the admissibility of the individual complaint before the ECOWAS Court of Justice should be addressed at this point (I). Thereafter, the aspects of procedural law, in particular the object of the complaint and those entitled to complain, will be demonstrated (II).

I. Admissibility of the Individual Complaint before the ECOWAS Court of Justice

Since the inception of the Additional Protocol A/SP.1/01/05 regarding the Court of Justice individual complaints became admissible before the Court of Justice . The prerequisites for admissibility of the individual complaint are stipulated in Art. 10. d of Additional Protocol A/ SP.1/01/05. Thereby, the Court of Justice may be approached by any person who is a victim of human rights violations. For this, the application may according to Art. 10 d Additional Protocol A/SP.1/01/05:

> « Peuvent saisis la Cour: […] Toute personne victime de violations des droits de l'homme; la demande soumise à cet effet: i) ne sera pas anonyme; ne sera pas portée devant la Cour de Justice de la Communauté lorsqu'elle a déjà été portée devant une autre Cour internationale compétente ».
>
> „Access to the Court is open to the following: […] Individuals on application for relief for violation of their human rights; the submission of application for which shall: i) not be anon- ymous; nor ii) be made when the same matter has been instituted before another international Court for the adjudication."

Should the application satisfy both requirements, the Court of Justice will declare the application admissible. Apart from these two requirements, the Protocol does not require any more criteria for admissibility. This represents a significant simplification of the legal process at the Court of Justice because in other legal systems, individual complaints before international courts are only admissible if all national legal remedies have been exhaust-

ed.[60] Art. 10 d of Additional Protocol A/SP.1/01/05 does not demand any further admissibility requirements. The abolishment of the prerequisite of a prior exhaustion of legal remedies can be justified in the ECOWAS legal order (this will be address later).

Based on the principle of subsidiarity regarding international courts, the prerequisite of prior exhaustion of the legal process represents a procedural principle generally accepted before international courts. In this context, the IGH has emphasised:

> « La règle selon laquelle les recours internes doivent être épuisés Avant qu'une procédure internationale puisse être engagée est une Règle bien établie du droit international coutumier; elle a été généralement Observée dans les cas où un Etat prend fait et cause pour son ressortissant dont les droits auraient été lésés dans un autre Etat en violation du droit international. Avant de recourir à la juridiction internationale, il a été considéré en pareil cas nécessaire que 1'Etat où la lésion a été commise puisse y remédier par ses propres moyens, dans le cadre de son ordre juridique interne ».[61]

An historical case regarding the admissibility of a complaint without the prerequisite of prior of the national legal process from the jurisdiction of the ECOWAS Court of Justice is reflected in there following:

The factual situation is as follows: In the year 1984, Ms Hadijatou Mani was born as the daughter of a female slave. When she was twelve years old, she was sold by the owner of her mother for 240 000 FCFA[62]. Mr El Hadj Souleymane Naroua, her new master, already had four wives and seven female slaves. According to the tradition of the "Wahiya" in Niger, these seven girls are generally purchased from poor circumstances and are simultaneously servants in the house of the master and fifth wife "sadaka" because the Muslim religion only permits four wives. Therefore, Mr El Hadj Souleymane Naroua raped Ms Hadijatou Mani regularly from the age of thirteen. This resulted in the birth of three children. One of these children died. The master decided in the year 2005 to set her free and therefore gave her an "exemption certificate". After the receipt of the certificate, Hadijatou Mani left the house and rejected the offer of marriage by her former master. Mr El Hadj Souleymane Naroua, however, insisted on marrying her.

60 Art. 1 paragr. 1 EMRK.
61 Art. 1 paragr. 1 EMRK.
62 Converted to Euro = 365 €.

Regarding the legal proceedings: She approached a national court in order to confirm her freedom. The court declared the marriage to be invalid due to her lack of consent.[63] Her former master was angry and took her to court at a higher instance for bigamy. The Tribunal de Grande Instance Konnis rejected the first judgment with the reason that Ms Mani was already married due to her status as a slave. The proceedings continued before the Cour Supreme. The Cour Supreme annulled the judgment of the Tribunal de Grande Instance Konnis. Unfortunately, the judgment was quashed by the Tribunal de Grande Instance Konnis in its verdict, not because of the exercise of slavery, but because of procedural errors.[64] Therefore, the matter was referred back to the Tribunal de Grande Instance Konnis for renewed assessment. In the meantime, Hadijatou Mani had married a man of her own choice. Due to the renewed assessment, the Tribunal de Grande Instance Konnis sentenced Ms Mani and her husband to a six months prison-term for bigamy. She had to serve two months before the proceedings were suspended.[65] With the help of an NGO, Ms Mani submitted an individual complaint to the ECOWAS Court of Justice against the Republic of Niger.

After giving extensive reasoning regarding the factual area of competence, the Court of Justice declared in the tenor of the judgment that there was a violation of the Charta with the following words:

> « que dame Hadijatou Mani Koraou a été victime d'esclavage et que la République du Niger en est responsable par l'inaction de ses autorités administratives et judiciaires ».

The Court of Justice requested the state to act in order to change this legal situation according to the convention. Voices in literature welcomed this order of specific corrective measures in order to stop the violation by Niger.[66] However, the question still remains unanswered whether the ECOWAS Court of Justice now represents a court of law in the first and

63 Arrêt N°06 du 20 mars 2006 du tribunal civil et coutumier de Konni.

64 Cour Suprême de Niamey, Chambre judiciaire, Arrêt N°06/06/du 28 décembre 2006.

65 See for greater detail on the national procedures: Badet, Commentaire de l'arrêt dame Ha- dijatou Mani Korauou contre la République du Niger, in: Revue Béninoise des Sciences Juridiques et Administratives (2010), 153 (157).

66 Hamuli-Kabumba, La répression internationale de l'esclavage. Les leçons de l'arrêt de la cour de justice de la Communauté économique des États de l'Afrique de l'ouest dans l'Affaire Hadijatou Mani Koraou c. Niger, in: Revue québécoise de droit international (2008), 25 (52).

last instance. Whereby the national Constitutional Court and the ECOWAS Court of Justice should simultaneously observe the adherence to the Charta. This possibility of direct submission of a complaint before the ECOWAS Court of Justice without prior exhaustion of legal procedures already causes tension between the national constitutional courts and the ECOWAS Court of Justice.[67] The danger of "*forum shopping*" is certainly unavoidable under such circumstances.[68]

In the proceedings described above, the plaintiff had not exhausted all of the nationally available legal remedies before submitting a human rights complaint with the Court of Justice . The government, as the respondent, was of the opinion that the plaintiff had not make use of all legal remedies available.

Furthermore, the proceedings regarding the factual situation had not been fully clarified by national courts. Based on the non-exhaustion of legal remedies, the government could not be blamed for the violation of Art. 5 of the African Charta as well as other human rights instruments ratified by Niger. Moreover, the government stated that the admissibility of an individual complaint without prior exhaustion of the legal remedies was an error in the protection system of human rights in the Community and the Court of Justice should rectify this error.

The Court of Justice did not follow this argument. The objections made in *limine litis* by the respondent were rejected with the reasoning that no higher prerequisites regarding the legal procedure may be requested than the prerequisites for admissibility provided in Art. 10 d. ii. In the reasoning for this decision, Court of Justice expressly referred to the prior case law by the ECtHR from the year 1971.[69] The Court of Law assumed that the practice of requiring the exhaustion of the legal remedies before submitting a complaint to international courts only had the purpose of avoid-

67 Etim Moses Essien v. Gambia & Anor, Judgment N° ECW/CCJ/JUD/05/07, para 27; dazu: Community Court of Justice, ECOWAS, Law Report (2004–2009), 113 (119).

68 Helfer, Forum Shopping for Human Rights, in: University of Pennsylvania Law Review (1999), 285 (289).

69 Legal matter N° ECW/CCJ/JUD/06/08- Hadijatou Mani Koraou v. Republic of Niger of 27 October 2008, clause 39. Gilles Badet sees this differently to the Court of Law. According to him, the direct accessibility of the Court of Law in terms of individual complaints without prior exhaustion of national legal procedures, may cause certain repressive measures by signatory states. See also Badet, Commentaire de l'arrêt Dame Hadijatou Mani Koraou contre la République du Niger, in: R.B.S.J.A N° 23, Année 2010, p. 153 (191).

ing parallel proceedings at the level of international law. According to the Court of Law, this practice should not jeopardise the effective legal protection of the plaintiffs. Regarding the question of effective legal protection, a recent decision by the ECtHR must be quoted. In the legal matter Sürmeli against the Federal Republic of Germany, the Federal Government raised the objection of inadmissibility due to non-exhaustion of the nationally available legal remedies. This objection was rejected by the ECtHR. In its reasoning, the court was of the opinion that the existence of a constitutional complaint does not necessarily offer effective legal protection against the extensive duration of civil proceedings. Therefore, the individual complaint was admitted for adjudication.[70] After this jurisdiction, the plaintiff is not obliged to make use of the legal remedy if it is in reality ineffective.[71]

By the way, it does not fall within the scope of competence of the Court of Justice to establish additional prerequisites besides the prerequisites given by the signatory states. [72] Therefore, the Court of Justice declared the complaint admissible.

II. Object of the complaint and those entitled to complain

Within this section, the object of the complaint represents the violation of the primary obligation by the signatory states (2). From a procedural point of view, the assessment of the party-respective requirements comes before the decision in the matter. Therefore, the right to complain before the Court of Justice will be addressed first (1).

1. Those entitled to complain

For the purpose of clarifying this difference, it is recommended to reflect on the original version of both texts. Art. 10 d of Additional Protocol A/SP.1/01/05:

70 ECtHR (Great Chamber), judgment of 08/06/2006–75529/01 Sürmeli/Germany.

71 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention [European Human Rights Convention]. EMRK commentary, 3. edition, Art. 35, p. 505, Rdn. 25.

72 Legal matter N° ECW/CCJ/JUD/06/08- Hadijatou Mani Koraou v. Republic of Niger of 27 October 2008, clause 53.

> « Peuvent saisir la Cour: […] toute personne victime des violations de droits de l'homme».
>
> "Access to the Court is open to the following: […] individuals on application for relief for violation of their human rights".

Art. 34 ECHR:

> « La Cour peut être saisie d'une requête par toute personne physique, toute organisation non gouvernementale ou tout groupe de particuliers qui se prétend victime d'une violation par l'une des Hautes Parties contractantes des droits reconnus dans la Convention ou ses protocoles. Les Hautes Parties contractantes s'engagent à n'entraver par aucune mesure l'exercice efficace de ce droit. »
>
> "The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contract- ing Parties undertake not to hinder in any way the effective exercise of this right".

The essential difference between both systems (ECtHR and ECOWAS Court of Justice) consists of the capacity to sue . Not only natural persons have the capacity to sue before the ECtHR according to Art. 34 ECHR, but also associations of persons and non-governmental organisations.[73] This regulation *expressly* specifies the persons who are entitled to appeal as individuals.In contrast, the wording of Art. 10 d of Additional Protocol A/SP.1/01/05 limits the capacity to sue and be sued for human rights complaints directly before the ECOWAS Court of Justice to *every person*. The question must be posed, whether every "Person" also includes groups of persons. Limiting it to natural persons would not be justified as the African Charta guarantees human rights that can also establish claims for legal persons and political parties. Therefore, Art. 10 d of Additional Protocol A/SP.1/01/05 requires further specification through case law. Indeed, the Court of Justice will need to address the objection of the opposing party in the legal matter CDP vs Burkina Faso, regarding the capacity to sue

73 Meyer-Ladewig, Europäische Menschenrechtskonvention [European Human Rights Convention]. Hand commentary, 2. edition, Art. 34, Rn. 7f; Frowein, in: Frowein/Peukert, Europäische Menschenrechtskonvention [European Human Rights Convention]. ECHR commen- tary, 3. edition, Art. 34, Rn. 12 f.

and be sued by the political party before the Court of Justice.[74] The government regards the complaint by the political party (CDP) as inadmissible and states:

> « Au titre de l'irrecevabilité du recours, l'Etat du Burkina Faso estime que le droit en cause, qui est la participation à la gestion des affaires publiques, est un droit individuel et subjectif et non un droit collectif. Devrait alors être déclarée irrecevable au moins la partie de la re quête présentée par des partis politiques ».[75]

The Court of Justice did, however, not follow this opinion by the government. In essence, it explained:

> « La Cour doit d'abord rappeler qu'elle n'est pas saisie que par des partis politiques, elle l'est également par des citoyens. Mais même si elle n'était saisie que par des associations de type politique, la Cour estime que rien ne l'empêcherait d'en connaitre, pour la raison qu'une restriction d'un tel droit peut parfaitement léser une formation politique, structure dont la voca- tion consiste justement à solliciter le suffrage des citoyens et à participer à la gestion des af- faires publiques. Non seulement les textes qui régissent la Cour n'excluent pas que celle-ci puisse être saisie par des *personnes morales*, à la condition qu'elles soient cependant vic- times ».[76]

From this clause, fundamental requirements regarding the party to proceedings before the ECOWAS Court of Justice can be derived. Every person may directly approach the Court of Justice . They must allege that the human and civil rights guaranteed in the African Charta have been violated. "Directly" in this sense means that the person concerned must personally be affected.

Through this requirement, the Court of Justice can prevent a collective action. Besides the right to complain of natural persons, such a right also exists for legal persons. In particular because of the specific nature of politi-

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74 CJ CEDEAO, Affaire Congrès pour la démocratie et le Progrès (CDP) & Autres c. Etat Bur- kina Faso, N°ECW/CCJ/JUD/16/15 (13/07/2015), par. 31, available at: www.courtecowas.org (last accessed on 16/07/2015).

75 CJ CEDEAO, Affaire Congrès pour la démocratie et le Progrès (CDP) & Autres c. Etat Bur- kina Faso, N°ECW/CCJ/JUD/16/15 (13/07/2015), par. 11, available at: www.courtecowas.org (last accessed on 16/07/2015).

76 CJ CEDEAO, Affaire Congrès pour la démocratie et le Progrès (CDP) & Autres c. Etat Bur- kina Faso, N°ECW/CCJ/JUD/16/15 (13/07/2015), par. 20, available at: www.courtecowas.org (last accessed on 16/07/2015). emphasis by the author.

cal rights, natural as well as legal persons can complain. It is therefore sufficient that the individual plaintiff claims that the infringement of the party's rights will likely lead to a measure that will affect him personally.[77] It can be further derived from this judgment that the ECOWAS Court of Justice would now declare individual complaints by associations of persons but not state organisations as entitled to appeal. This is because associations of persons especially include political parties. Therefore, the Court of Justice clearly states that nothing opposes the admissibility of an appeal of an individual complaint by a political party. At any rate, the respective association of persons must claim to be impaired in their own rights by an action or omission of the signatory state.

2. Object of the complaint (breach of primary duty, compare Art. 1 ECHR)

A reason for exclusion must first be mentioned. In Art. 10. d. ii of Additional Protocol A/SP.1/01/05 a complaint is inadmissible if the legal dispute is already the object of proceedings before other international courts. The reference to "other international competent courts" is legally relevant because the individual complaint may be declared inadmissible if an international court has already decided on the matter. It would be a different constellation if the same individual complaint was the object of a *listispendens* at another international court. Otherwise, the complaint is admissible without further requirements. The consequences of this are as follows:

- The reprimanded violation may be an action of the executive power;
- or the complaint may be based on the action of the judiciary in a broader sense;
- The individual complaint may reprimand the judicial act.

In conclusion, complaints are admissible if the violation is caused by the actions of sovereign organs. This means that all actions in violation of human rights by state powers are appealable before the Court of Law. This, in turn, means that the courts decisions in violation of human rights can represent the object of anindividual complaint in terms of Art. 10. d. ii i. V. m. Art. 9 paragr. 4 of Additional Protocol regarding the Court of Law. It is irrelevant, whether the court, whose decision is reprimanded, is a Consti-

77 Meyer-Ladewig, Europäische Menschenrechtskonvention [European Human Rights Convention]. Hand commentary, 2. edition, Art. 34, Rn. 11a.

tutional Court or a specialised court. Moreover, an individual complaint can be directed at legislative acts as well as administrative measures in terms of this regulation.

The proceedings before the ECOWAS Court of Justice consider other legal questions and is not to be regarded as an extension of the national proceedings.[78] Should the Court of Justice not have competence to assess a final judgment by Constitutional Courts of Member States, this would have been included as an impediment to an appeal in the admissibility requirements under Art. 10 d ii. of the Additional Protocol. As long as the signatory states did not provide for this obstacle to proceedings, it can be assumed that the Court of Justice has the competence to review final decisions by Constitutional Courts. It is questionable, which consequences are drawn from this authority to review. In other words: Which decisions can the Court of Justice make when it declares a complaint against a final judgment by Constitutional Courts of Member States as admissible?

D. Types of Judgments by the ECOWAS Court of Justice

An overview of the extent of the binding effect requires a demonstration of the different types of decisions by the ECOWAS Court of Justice. This primarily means that the decisions that concern only the organisation of the Court of Law[79] will not be analysed in this section. Rather, the decision on merits by the Court of Law regarding the binding effect is mainly taken into account. The decision on merits by the ECOWAS Court of Justice generally includes the declaratory judgment (I) and the sentence regarding compensation in terms of remuneration (II). There is also a special form of decision by the Court of Law regarding the interpretation of its declaratory judgment: the interpretative judgment (III). According to case law, it is certain that the decisions of the Court of Law do not have an effect of cassation. This aspect must therefore be addressed (IV). According to the current legal situation, the possibility of an appeal decision already exists, which should be expanded on *de lege ferenda* (V).

78 Sall, La Justice de l'intégration, 322.

79 .That internal judicial decision concerns, in principle, the election of the President of the Court of Justice, the composition of the Court of Law and the power to establish the Rules of Procedure of the Court of Justice.

I. Declaratory Judgment

Within the framework of its judicial power, the Court of Justice must render a judgment after receiving an admissible individual complaint. The nature of the judgment is not expressly regulated in the text of the Convention. According to the preamble of the Additional Protocol the Court of Justice has the task to ensure that the signatory states fulfill their obligations. Moreover,the extension of competence of the Court of Justice regarding human rights aims at controlling sovereign actions by the Member States in accordance with the accepted human rights. As the previous practice by the Court of Justice shows, it will render a declaratory judgment in the case of an individual complaint. The declaratory judgment can be defined as a judgment which possesses a declaratory content. When submitting an individual complaint, the plaintiff desires the declaration of a violation of human rights. Therefore, the Court of Justice must render a declaratory judgment. This means that the plaintiff asks the Court of Justice to give a legally binding statement regarding a violation of his guaranteed human rights by a signatory state. The legal action by the plaintiff can, in this respect, be called a declaratory legal action against the respondent Member State. Whether the plaintiff seeks an annulment of the act of law causing the violation is unclear at this point. The declaratory judgment is not generally enforceable. The judgment can therefore not be enforced because it is in the prerogative of the sentenced Member State to choose the remedies by which the violation will be removed.

The big difference between the declaratory judgment and the design judgment is that, in the case of a declaratory judgment, the decision by the Court of Justice only indirectly influences the rectification of the national judgment which violates human rights. The design judgment would enable the Court of Justice to directly annul the action in violation of human rights. Whether the Court of Law has this authority will be addressed at a later stage. However, all of this is irrelevant for the sentenced Member State because sentenced state is bound by the declaratory judgment by the Court of Justice in any case. It carries the obligation under international law to implement the decision by the Court of Justice.

II. Judgment granting Reparation (Compensation)

Before a decision can become res judicata, a court must be approached. The court must, in turn, justify its decision based on legal principles.

Therefore, the legal standards of the declaratory judgment will be demonstrated first (1). Subsequently, the enforcement procedure of the judgment regarding the compensation will be addressed (2).

1. Standards of a Judgment granting Reparation

The judgment granting satisfaction in a broader sense is based on a law suit aimed at receiving future satisfaction together with the sentencing of the respondent (to do, omit or tolerate something).[80] In this context, such a law suit, if successful, will lead to a corresponding judgment granting satisfaction. Here, the judgment granting satisfaction can be understood in its own terms. This involves a demand of the Court of Law, in the tenor of the judgment, of payment of a sum of money to the individual plaintiffs.[81] After an individual complaint has been granted, the Court of Law may, indeed, sentence the respondent to pay justified damages alongside the declaration of an infringement.[82] When calculating the damages as a sum of money to be paid to the plaintiff, the Court of Law bases its decision on equity. This is due to the fact that neither the protocol regarding the Court of Law nor the rules of procedure include an established basis to calculate the incurred damage. It cannot be determined from the Amendment Agreement nor the Additional Protocol which legal basis the Court of Justice must apply regarding the question of compensation. This is because, according to Art. 9.4, the Court of Justice decides on human rights violations. It is, however, not mentioned whether the Court of Law may order compensations based on violations of human rights. Therefore, the general principles of international law regarding monetary compensation following a violation of international law must be used. Indeed, the Court of Justice may apply the principles based on international law as per Art. 38 of the IGH statute.[83] In practice, the Court of Justice's application of the *ubi jus ibi remedium* principle can be ascertained, because in almost all deci-

80 Creifelds, Rechtswörterbuch, 19. edition, 741.

81 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 (116).

82 Arangio-Ruiz, Second Report on State Responsibility, UN Doc.A/CN.4/425 (09.06.1989),
§ 137.

83 Art. 19. Abs. 1 des Protocol (A/P1/7/91) über den Court of Law von 1991.

sions in which the Court of Justice determined a violation of human rights, it simultaneously ordered compensation in the form of a monetary sum in favour of the plaintiff.[84] This is consequential because, in any case, the violation of the convention represents a *conditio sine qua non* of the damages. As such, the compensation requires a certain causal link.[85] It is therefore surprising why the Court of Justice , in some cases, also grants compensation regarding the contravention of the African Charta. In any case, a contravention of the African Charta itself represents the basis of a claim for compensation for immaterial damages, at least in a symbolic amount.[86]

Subsequently, the declaratory judgment and the decision regarding the compensation usually go hand in hand with the judgment on merits. It is established that the determination of the compensation is at the reasonable discretion of the Court of Justice in respect of the special circumstances in each respective case. A sufficient satisfaction is thus granted to the plaintiff. In every trial based on an individual complaint, material as well as immaterial damages which were caused by a violation of human rights are considered.

The requirements regarding the costs of the proceedings are stipulated in Art. 66 to Art. 71 in the rules of procedure of the Court of Justice. A refund of incurred expenses during the complaints procedure is granted to the successful plaintiff according to Art. 66 paragr. 2. It is questionable whether, when calculating the incurred expenses during the procedure, the Court of Justice also considers the expenses incurred before national instances. This should be conceivable[87] because these expenses would not

84 CJ CEDEAO, Koraou c. Republique du Niger, N°ECW/CCJ/JUD/06/08 (27/10/2010), available at: www.courtecowas.org (last accessed on 24/07/2015); CC CEDEAO, Manneh c. Répu- blique de la Gambie, Arrêt, N°ECW/CCJ/JUD/3/08 (05/06/2008), available at: www.courteco- was.org (last accessed on 16/07/2015); CJ CEDEAO, Affaire Ameganvi et al. c. Etat du Togo, N °ECW/CCJ/JUD/09/11 (07/10/2011), available at: www.courtecowas.org (last accessed on 16/07/2015).

85 Dannemann, Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention [Compensation in Case of a Violation of the European Convention on Human Rights], 115.

86 Dannemann, Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention [Compensation in Case of a Violation of the European Convention on Human Rights], 362.

87 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention [European Convention on Human Rights]. ECHR commentary, 3. edition, Art. 41, Rn. 4.

have been incurred had it not been for the violation of human rights. Because of this, the inclusion of the incurred expenses during the procedure in the end calculation would be consequential.

2. Enforcement Procedure

Now the question must be asked of how the final decision of the Court of Law is enforced. At the same time, the question of the execution of the decisions by the ECOWAS Court arises. There are two regulations in this respect. The rules regarding the judgments of the Court of Justice which impose a payment obligation on the sentenced Member State are stipulated in Art. 24 of the Protocol (A/SP.1/01/05) in conjunction with Art. 15 of the Amendment Agreement. In Art. 24 of the Protocol (A/SP.1/01/05) it states:

> « Les arrêts de la Cour qui comportent à la charge des personnes ou des Etats, une obligation pécuniaire, constituent un titre exécutoire. L'exécution forcée, qui sera soumise par le Gref- fier du Tribunal de l'Etat membre concerné, est régie par les règles de procédure civile en vigueur dans ledit Etat membre. La formule exécutoire est apposée, sans autre contrôle que celui de la vérification de l'authenticité du titre, par l'autorité nationale que le Gouvernement de chacun des Etats membres désignera à cet effet. Les Etats membres désigneront l'autorité nationale compétente pour recevoir ou exécuter la décision de la Cour et notifieront cette désignation à la Cour. L'exécution forcée ne peut être suspendue qu'en vertu d'une décision de la Cour de Justice de la Communauté».
>
> "Judgments of the Court that have financial implications for nationals of Member States are binding. Execution of any decision of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for exe- cution according to rules of civil procedure of that Member State. Upon the verification by appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced. All Member States shall determine the competent national authority for the purpose of receipt and processing of execution and notify the Court accordingly. The writ of execution issued by the Community Court may be suspended only by a decision of the Com- munity Court of Justice."

Five important consequences can be deduced from this regulation:

- First of all, the judgment by the Court of Justice is per se an enforcement instrument according to paragraph 1 of this regulation (section 1).
- The enforcement is carried out according to the enforcement rule of the sued state (section 2).
- The sued state may not give a separate writ of execution, before the settlement verdict can be executed at national level (section 3).
- It is the responsibility of the Member State to decide which national instance of execution should monitor the implementation of the payment obligations (section 4).
- All measures regarding the potential suspension of the enforcement procedure are directly decided on and are possibly ordered by the ECOWAS Court of Justice itself.Art. 24 of the Protocol (A/SP.1/01/05) can be compared with Art. 244 EG (today Art. 267 TFEU) in many respects. On the one hand, both regulations enable international law to have a direct effect on the legal order in the Member States. The direct national enforceability of the obligation to pay confirms the direct legal effect of the final decision by the ECOWAS Court of Justice. In Art. 24 of the Protocol (A/ SP.1/01/05), the Member States have regulated the priority of judgments ordering payment by the Court of Justice under international law. By granting the direct national enforceability of the judgments ordering payment, the plaintiff has an enforceable claim under international law [88]which must be implemented according to the Protocol at national level.

Now the question arises of who should guarantee the implementation of the judgment. It is regrettable that no specific organ in the Community is responsible for following up on the implementation of the judgments and for informing the Court of Justice on how the sentenced state attends to its obligations as per the judgment. Only a general responsibility of all Member States and institutions of the Member State, regarding the implementation of the judgments by the Court of Justice can be deduced from Art. 22 paragr. 3 of the Protocol (A/P1/7/91). According to Art. 22 paragr. 3:

> « Les Etats membres et les Institutions de la Communauté sont tenus de prendre sans délai toutes les mesures nécessaires de nature à assurer les décisions de la Cour ».

88 Vgl. Rohleder, Grundrechtsschutz im europäischen Mehrebenen-System, 156.

> "Member States and Institutions of the Community shall take immediately all necessary measures to ensure execution of the decision of the Court".

From this, a collective responsibility regarding the monitoring of the judgments by the Court of Justice is established. Unfortunately, a regulation, such as Art. 46 paragr. 2 ECHR does not exist. With regard to judgments that grant a just compensation to the plaintiff, it is the responsibility of the plaintiff himself to inform the institutions of the Community that the sentenced state did not meet its payment obligation. Moreover, it is hard to imagine, how the Court of Justice should ensure that individual measures arising from its judgments are implemented. Here, a loophole in the execution procedure regarding the judgments by the Court of Justice can be found which can lead to a delay of the actual implementation of final decisions. Furthermore, it must be noted that the signatory states have no choice regarding the implementation of the obligation of payment. They must take measures to enable the enforcement of the claim of compensation under international law. The signatory states want to prevent manoeuvers which delay implementation (*manœuvre dilatoire*) by a sentence Member State. The regulation is to be welcomed insofar as it may occur that a possible reference regarding national law, with respect to the enforceability of the judgment, would delay the implementation of the obligation of payment. In this context, one can only recall the opinion of the Gambian government in the Manneh case. In this case, the government tried, with reference to national law, to delay their obligation of payment. However, it is regrettable that there is no monitoring body, such as the Committee of Ministers in the ECtHR protection system, within the Community which regularly informs the Court of Law on the execution of the implementation because the plaintiff is equal to the sued Member State before the ECOWAS Court of Justice during the complaint proceedings. However, the situation changes after the sentencing of the state. After the declaratory judgment, the plaintiff stands alone against the sentenced state and its enforcement organs, whereby the international attention in national law is not nearly as much as it is in cases before the ECOWAS Court of Justice. This can lead to a delayed implementation of the judgment. In order to improve the mechanisms of implementation of the judgments by the Court of Justice, the establishment of a monitoring body or transfer of such monitoring roles to already existing organs is desirable.

III. Interpretative Judgments

Art. 23 of the Protocol (A/P1/7/91) prescribes a procedure of interpreting a judgment. It is questionable, whether the interpretative judgment may affect the irrevocability of a decision. In other words: May the Court of Justice change its own decision on application by the parties to the dispute without the presentation of new facts?

The interpretation of a judgment has two fundamental requirements. Firstly, the application for interpretation of the judgment is open to every party to the dispute and the institutions of the Community. A particular interest in legal protection is required. Regarding the effect of this procedure, it should be pointed out that the admissibility of the application does not suspend the already rendered judgment in the main proceedings. Therefore, the interpretative proceedings do not represent an obstacle to its enforcement.

IV. Not a Court of Cassation

The question posed here is whether the ECOWAS Court of Justice avails of a possible direct cassatory decision-making authority. In other words: it is questionable whether the Court of Law, like the Federal Constitutional Court of Germany, may set aside the unconstitutional decisions of specialised courts within the framework of a constitutional complaint (§ 95 section 2 and 3 BVerfGG) or declare parliamentary acts null and void.[89] The cassatory authority of a court resembles the possibility for the Court of Justice to directly set aside decisions made by courts of prior instances. In the legal matter Ameganvi et. al. vs. Togo, the ECOWAS Court of Justice stated:

> « la Cour estime que la demande de réintégration s'apparente à un recours contre la Décision n° E018/10 du 22 novembre 2010 de la Cour Constitutionnelle de la République Togolaise qui est une juridiction nationale d'un Etat Membre, juridiction pour laquelle la Cour, suivant sa jurisprudence constante, n'est ni une juridiction d'appel, ni de cassa-

89 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und europäischem Court of Law für Menschenrechte, in: Der Staat 44 (2005), 403 (414) [Cooperation or Confrontation? – The Relationship between the Federal Constitutional Court and the European Court of Law for Human Rights, in: The State 44 (2005), 403 (414)].

> tion et dont la décision par conséquent ne peut être révoquée par elle ».[90]

This reasoning is partially correct as the Court of Justice does not avail of a cassatory authority for two reasons. Firstly, the signatory states did not provide for this possibility when they expanded the decision-making authority although all international courts generally move within the framework provided for by the state parties. Secondly, a cassatory authority touches on the principle of observance of the sovereignty of the state. However, in contrast to satellites which only move within their orbit, international courts can move out of their orbit if it serves the concretisation of their tasks. This occurs by way of appropriate interpretation of international law. After an appropriate interpretation the Court of Justice must be regarded as a indirect cassatory court because the Court of Justice does not have the authority to set aside court decisions by Member States that are in violation of human rights and to refer the matter back to another national court. The same goal is however reached by the obligation of the sentenced state to comply.

There is in fact no breach of state sovereignty when a Member State Constitutional Court in a legal dispute negates a human rights violation, as in the present case of the Togolese parliamentarians, and the ECOWAS Court of Justice affirms this in the same matter. There are reasons that justify the different legal opinions by both courts. These reasons are of a procedural and substantive nature. Regarding the procedural reason the object of the dispute, the cause of action and the claim differ at national, constitutional-procedural and at regional level. Moreover, the parties to the dispute are not always the same depending on the type of procedure. The ECJ has confirmed this point of view 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

90 CJ CEDEAO, Affaire Mme Isabelle Ameganvi et al. c. l'Etat Togolais, Arrêt N° ECW/CCJ/ JUG/06/12, du 13 mars 2012.

> 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 ».[91]

The statement by the ECJ is completely correct regarding the formal legal force because the decision by the ECOWAS Court of Justice does not demand the reversal of the decision by the court giving rise to the damage.[92] The formal legal force of the national court therefore remains untouched.[93] Regarding the substantive reason, the applicable law at national level is the national constitutional law and at regional level (ECOWAS), the international law. The ECOWAS Court of Justice therefore monitors the adherence to the African Charta and the principles of international law (Art. 38 of the Amendment Agreement). The plaintiffs in fact desire the compliance to national constitutional law and the fundamental freedoms guaranteed in the constitution by the respective state organ before the Constitutional Court. The applicants or plaintiffs additionally desire the declaration of a violation by the signatory state at international level through the ECOWAS Court of Justice.

This preliminary remark means that both instances decide according to different standards and apply relatively different legal regulations. In this regard, it is not surprising if a regional Court of Justice, established by the Member States in order to monitor the Charta, reaches a wholly different conclusion than the national Constitutional Court of a Member State.

It is the task of the international court to close possible loopholes that may arise when national courts misinterpret and incorrectly apply the human rights found in the national constitutional order. In this respect, international law has a different function compared to national law of the signatory states.[94] The task of the ECOWAS Court of Justice to close such

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91 CJUE, N°C-224/01, Arrêt (20/09/2003), Affaire Köbler v. Republik Österreich [Republic of Austria], par. 39.

92 Breuer, Staatshaftung für judikatives Unrecht [State liability in case of judicial injustice], 400.

93 Breuer, Staatshaftung für judikatives Unrecht [State liability in case of judicial injustice], 401.

94 Kamto, Charte africaine, instruments internationaux de protection des droits de l'homme, Constitutions nationales: Articulation respectives, in: Flauss/Lambert-Abdelgawad (Publ.), L'application nationale de la Charte africaine des droits de l'homme et des peuples, 11 (31).

loopholes can be justified by an interpretation of the African Charta according to international law (further explanations regarding this point in "Justification of the Derogation of the Legal Force" in chapter 4). The Court of Justice rightly decided in its decision of 22 November 2010 regarding the case of Togo that the Togolese Constitutional Court did not adhere to the standards of Art. 7 in the Charta and Art. 10 of the Universal Declaration of Human Rights.

This occurs based on the national and law-shaping effects of declaratory judgments by the Court of Justice. In conclusion, the ECOWAS Court of Justice is not a court of cassation. As a result, its declaratory judgment does not invalidate the formal legal force of national judgments. The decision of how the declaratory judgment should be implemented without derogating from the legal force remains with the sentenced Member State. However, its verdict has a cassatory effect on national level resulting from international responsibility of the sentenced state

V. Appeal proceedings (de lege ferenda)

Art. 25 paragr. 1 of the Protocol (A/P1/7/91) states:

> « La demande en révision d'une décision n'est ouverte devant la Cour que lorsqu'elle est fon- dée sur la découverte d'un fait de nature à exercer une influence décisive et qui, au moment du prononcé de la décision, était inconnu de la Cour et du demandeur, à condition toutefois qu'une telle ignorance ne soit pas le fait d'une négligence».
>
> "An application for revision for a decision may be made only when it is based upon the dis- covery of some fact of such a nature as to be a decision factor, which fact was, when the de- cision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence".

Furthermore, the application to resume must contain prescribed reference points. For example, Art. 93 paragr. 2 of the rules of procedure of the Court of Justice stipulates that the application to resume must meet the following requirements:

> « *La demande* doit en outre:
> a) spécifier l'arrêt attaqué;
> b) indiquer les points sur lesquels la demande est basée;

c) indiquer les moyens de preuve tendant à démontrer qu'il existe des faits justifiant la révision et à établir que le délai prévu à l'article précédent a été respecté;
d) indiquer les moyens de preuve tendant à démontrer qu'il existe des faits justifiant la ré vision et à établir que le délai prévu à l'article précédent a été respecté».

"In addition such *application* shall:
a) specify the judgment consteded;
b) indicate the points on which the judgment is contested;
c) set out the fact on which the application is based;
d) indicate the nature of evidence to show that there are facts justifying revision of the judgment, and that the time limit laid down in Art. 92 has been observed".

The judgment actually develops legal force in a formal and substantive regard after official notification of the ruling. However, if a decisive fact is discovered in hindsight which was neither known to the Court of Justice nor to the parties to the dispute an application to resume may be submitted to the Court of Justice. The conditions for the resumption of the proceedings are provided in Art. 25 paragr. 1 of the Protocol (A/P1/7/91) and Art. 93 paragr. 2 of the rules of procedure of the Court of Justice . Thus, the application to resume is admissible if it is submitted within a period of three months after gaining knowledge of the facts that were not taken into account by the Court of Justice during its decision-making process.

Regarding the procedure, one must differentiate between the decision regarding the admissibility of the application and the substantive decision of appeal. In the admissibility phase, the Court of Justice must first determine whether the application to resume is, indeed, introducing new points that were not taken into account in the decision following the main proceedings (Art. 25 paragr. 2. of Protocol A/P1/7/91). If the application is admissible a special meeting of the Court of Justice ensues during which it decides on the points that are still open after hearing the parties to the dispute in a private session. The admissibility of the review application does not postpone the execution of the main decision according to Art. 27 Protocol (A/SP.1/01.05) (alter Art. 25 of Protocol A/P1/7/91) and Art. 94 of the rules of procedure of the Court of Law.

The resumption contemplated so far only refers to facts that were not taken into account in the decision by the Court of Law (Art. 25 paragr. 2. of Protocol A/P1/7/91). However, the regulation in Art. 25 paragr. 2. of the Protocol (A/P1/7/91) does not provide for a possibility to resume based

on gross injustice by the ECOWAS Court of Justice. This legal situation may in future jeopardise the system for the protection of human rights because, unlike in the ECtHR system there are no legal remedies against the declaratory judgment by the ECOWAS Court of Justice available to the plaintiff. Moreover, there is no commission, according to the current provisions of the Court of Justice, which would be responsible for reviewing the decision in the first instance. It is recommended to provide a possibility *de lege ferenda* for the resumption of the proceedings due to gross procedural errors. This, however, should be limited to especially difficult and exceptional cases. The possibility should serve to remove gross procedural injustice in the declaratory decision. Furthermore, the possibility to resume the proceedings should be admissible if the legal matter concerns a serious question with respect to the interpretation or application of the Charta. The system of the ECtHR already offers some criteria according to Art. 43 in conjunction with Art. 44 ECHR.

The modification of a final decision is not unknown in the legal system of the Member States.§ 133 section 1 of the Constitution of Ghana allows for this possibility. Thus, Art. 54 of the Rules of Procedure of the Supreme Court in Ghana defines the reason for a resumption more precisely as follows:

> "The Court may review any decision made or given by it on the following grounds –
> (a) exceptional circumstances which have resulted in miscarriage of justice;
> (b) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given."[95]

As impermeable as the final decision by the Court of Justice may be, it is quite imaginable to make provision for an appeal mechanism before the ECOWAS Court of Justice. This would be an instrument which the Court of Justice as well as the parties to the dispute can take advantage of in order to allow for a subsequent correction of gross procedural injustice. The ECOWAS Court of Justice is not only a human rights court.[96] Especially for this reason review procedures should be provided for. With the possi-

95 Ghana's Supreme Court Rules, 1996 (C. I 16), Art. 54.

96 Extensive presentation regarding the original jurisdictions of the Court of Law can be found in the introduction of the present paper.

bility of a resumption of the proceedings due to gross procedural errors the basic problem of judicial injustice[97] will also be removed at the level of international law. Like national legal systems, the regional legal order should also consider the possibility of resuming proceedings in case of judicial injustice. The proposition is based on the assumption that international courts also represent bearers of sovereign power. They therefore exercise a sovereign power of jurisdiction. Logically, the injustices caused by their actions should be removed by recourse to legal action.[98]

Moreover, it is advisable to establish a chamber, similar to the one at the ECtHR, which has the competence to adjudicate on a complaint against a judgment of the first formation of the Court of justice, if it is determined that legally significant questions which are of crucial importance for the entire legal system arise in a dispute. The establishment of such a chamber logically requires judges with sufficient knowledge in human rights litigation. Judgments made by this chamber should be seen as guiding judgments for the entire legal order. They should, therefore, be considered to be leading or pilot decisions (see also the section regarding leading decisions or pilot decisions). Therefore, the material prerequisites with respect to monitoring should be strictly regulated in the Grand Chamber. The renewed assessment is granted by the Grand Chamber if the legal matter causes a serious question of interpretation or application of the African Charta or the respective Protocols or a serious question of general significance.[99] It is also recommended that in legal matters including questions of general significance the ECOWAS Court of Justice should be composed differently with regard to the number of judges. Indeed, the number of judges at the ECtHR regarding the composition of the Grand Chamber is increased to 17 judges According to Art. 24 paragr. 1 of the Rules of Procedure of the ECtHR.

E. Legal Force According to Art. 15 of the Amendment Agreement

Upfront, one question must be asked: Why should the interpretation of Art. 15 paragr. 4 of the amendment agreement be presented in a separate

97 Breuer, Staatshaftung für judikatives Unrecht [State liability in case of judicial injustice], 1.
98 Breuer, Staatshaftung für judikatives Unrecht [State liability in case of judicial injustice], 3.
99 Schaffrin, in: Karpenstein/Mayer, ECHR-commentary, 2. edition, Art. 44, Rn. 6.

section? This can be justified on the grounds that interpretation belongs to the most difficult tasks of a judge at international law level. Especially because of the sovereignty of the signatory states the will of the state parties must always be determined.[100] Furthermore, the question of res judicata as the decisive element regarding the finality of a judgment. Consequently, research of the interpretation in terms of Art. 15 paragr. 4 of the Amendment Agreement is required because the aim of the interpretation is to establish the true intention of the signatory states with regard to every term that is used.[101]

Regarding the interpretation of Art. 15 of the Amendment Agreement, the Vienna Convention on the Law of Treaties (in the following referred to as VCLT) is quoted. One must note the rules of interpretation in Art. 31 and 32 of the VCLT in the interpretation of international treaties. Regarding the point in time, there is a prohibition of retroactivity according to Art. 4 VCLT. In this context, the VCLT applies in ECOWAS Community instruments because the ECOWAS Founding Treaty of 1975 represents a concluded agreement under international law, after the VCLT. Moreover, the ECOWAS Amendment Agreement of 1993 falls within the material scope of application of the VCLT since it represents an intergovernmental agreement (Art. 1 VCLT). It is questionable whether all ECOWAS Member States ratified the VCLT. This question remains unimportant for the prohibition of non-retroactivity in Art. 4, because the rules stipulated in Art. 31 and 32 embody the general rules under customary international law. Therefore, both regulations regarding the interpretation of the ECOWAS-judicial instruments are applicable under customary international law.

After this preliminary observation, we will now examine the meaning of Art. 15 paragr. 4 of the Amendment Agreement regarding the requirements as per Art. 31 and 32 VCLT. This is because in the legal matter Ameganvi vs the Republic of Togo[102] the question arose whether and to what extent the signatory states are bound by the declaratory judgment of the ECOWAS Court of Justice. The signatory states made no respective changes with regard to the binding effect of the decision by the Court of

100 McNair, The Law of Treaties, 364, 366.

101 De Visscher, Problèmes d'interprétation des judicaires en Droit International Public, 50; McNair, The Law of Treaties, 366.

102 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/06/12 (13/03/2012), available at: www.courtecowas.org (last accessed on 20/04/2015).

justice in the reform of 2005 which enabled the access to the Court through direct individual complaints. Hence, the interpretation of Art. 15. paragr. 4 of the Amendment Agreement of 1993 must be referred to. In the following, the rule of interpretation in Art. 31 and 32 VCLT will be discussed.

I. Rule of Interpretation of Art. 31 VCLT

The rules of interpretation regarding an agreement under international law are laid out in Art. 31 VCLT. According to this, a convention should first be interpreted according to its usual wording (1). Should there still be uncertainties after this step, a systematic (2), historical (3) and teleological (4) interpretation of the agreement come alternatively into effect. Insofar as the international law is perceived as non-static law, an effective approach to interpreting the convention is needed. The agreement should thus be interpreted in an evolutionary and dynamic manner (5).

1. Literal Interpretation

The interpretation of Art. 15 of the Amendment Agreement should first be done according to the wording. The first general rule of interpretation of Art. 31 VCLT is the literal interpretation. In this respect, Art. 31 paragr. 1 stipulates:

> « Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte ».
>
> "A treaty shall be interpreted in good fair in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The fundamental rule of interpretation is mainly the adherence to the requirement of good faith (*pacta sunt servanda*) which concerns a moral obligation of the parties to the agreement.[103] Moreover, the literal interpretation of the wording of the agreement under international law has the function to maintain the rule of law by protecting the true will of the signatory

103 De Visscher, Problèmes d'interprétation des judicaires en Droit International Public, 50.

states. However, it must be pointed out that the VCLT has opted for the objective interpretation of agreements under international law.[104] Literal interpretation means: the interpretation of the original text of the agreement. In order to better understand the meaning of binding force, it is recommended to quote the original text of Art. 15 paragr. 4 of the Amendment Agreement. The original version in French of Art. 15 paragr. 4 of the Amendment Agreement read as follows:

> « Les arrêts de la Cour de Justice ont force obligatoire à l'égard des Etats Membres, des Institutions de la Communauté, et des personnes physiques et morales. »

In the original English version:

> "Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individual and corporate bodies".

The meaning of the text seems to immediately be comprehensible. It says that the decisions of the Court of Law are legally binding to the Member States, the institutions of the Member States and to natural and legal persons. However, legal regulations are often not as easy to comprehend as they seem at first. A peculiar example can be seen in the first judgment by the ECOWAS Court of Justice in 2004.[105]

Thereby, the Court of justice focused extensively on the word "peut" or "may", which is to be found in Art. 9 paragr. 3 of Protocol A/P1/7/91 (06/07/1991).[106] As McNair discussed, it can happen that the word "Mutter" for the purpose of a testator has a completely different meaning than the meaning a judge would attribute to it according to habitual linguistic usage.[107] Therefore, all possible interpretations regarding the binding forces provided in this provision, must be analysed, because after closer inspection of this regulation, only a paraphrase of the binding effect can be

104 Bleckmann, Völkerrecht [International Law], Rn. 367.

105 CCJ ECOWAS, Afolabi v. FEDERAL REPUBLIC OF NIGERIA, Judgment N° ECW/CCJ/ JUD/01/04/04 (27/04/2004), in: Community Court of Justice, ECOWAS, Law Report (2004–2009), 1 ff.

106 CCJ ECOWAS, Afolabi v. FEDERAL REPUBLIC OF NIGERIA, Judgment N° ECW/CCJ/ JUD/01/04/04 (27/04/2004), par. 18, in: Community Court of Justice, ECOWAS, Law Report (2004–2009), 1 ff.

107 McNair, The Law of Treaties, 367.

determined.[108] However, this regulation does not inform on which concrete consequences follow from a declaratory judgment for the sentenced Member State. What is to be understood needs to be interpreted and explained by those applying the law.

On closer inspection of the provision, one may assume that the signatory states wish to establish an abstract and general regulation regarding the legal effect for this provision. When stated in such general terms, it must then be further clarified by the judges of the Court of justice. The process of specifying such abstract-general norms in turn requires constant creativity by those applying the law.[109] The advantage in this case is that the judge receives further scope for interpretation.[110] When determining the meaning of this provision, one can assume that an obligation is created following a judgment by the Court of justice for the Member States and the Institutions of the Community as well as natural and legal persons to adhere to the final decision by the Court of justice. It is questionable, whether a positive obligation can be deduced from the provision because, as already mentioned, one can see at first glance that the addressees of the decision are subject to a negative obligation to comply.

Furthermore, many questions with respect to Art. 15 paragr. 4 of the Amendment Agreement remain unanswered. E.g. the question whether the signatory states not participating in the individual complaints' procedure should also be bound by the declaratory judgment. Unlike Art. 32 paragr. 3 of the SADC-Tribunal Protocol, the provision in Art. 15 paragr. 4 of the ECOWAS Amendment Agreement does not give any information regarding who exactly and to which extent is bound by the legal decision of the ECOWAS Court of Justice. There is a certain danger that the limitation to the wording could lead to completely different results than originally intended and that are undesirable for the parties (compared to Art. 31 paragr. 2 VCLT).[111] Since an interpretation of the wording cannot help us here any further, it must also be referred to the other rules of interpretation according to Art. 31 VCLT because, despite the top position of

108 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtspre- chung des EGMR für die deutschen Gerichte [The importance of the European Convention for Human Rights and the jurisdiction of the ECtHR for the German courts], 45.

109 Cremer, Entscheidung und Entscheidungswirkung [Decision and the Effect of the Decision], in: Grote/Marauhn, ECHR/GG, consociational commentary, chapter 4, Rn. 118.

110 Bleckmann, Völkerrecht [International Law], Rn. 370.

111 McNair, The Law of Treaties, 367.

the literal interpretation in Art. 31 paragr. 1, it should not be deduced that this method of interpretation (literal) is superordinate compared to other rules of interpretation.[112] Quite the opposite: the equality of the rules stipulated in Art. 31 VCLT is expressed in the heading of this article. This point of view was confirmed by the International Law Commission when it did not provide a hierarchy between the rules of interpretation. The commission rather stated:

> « En mettant le titre de l'article (règle générale d'interprétation) au singulier, et en soulignant la relation, d'une part, entre les paragraphes 1 et 2 et, d'autre part, entre le paragraphe 3 et les deux paragraphes qui le précèdent, la Commission a voulu indiquer que l'application des moyens d'interprétation prévus dans l'article constituait une seule opération complexe. »[113]

Therefore, the other methods of interpretation will be discussed in the following sections.

2. Systematic Interpretation

In the term "systematic interpretation" the word "system" is of decisive importance. Therefore, the basis that every rule of law represents a system is addressed. According to the rule of interpretation stipulated in Art. 31 paragr. 2 VCLT, there is inter alia the reference to a systematic interpretation in the following words:

> « Aux fins de l'interprétation d'un traité, le contexte comprend, outre le texte, préambule et annexes inclus:
> a) Tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occa- sion de la conclusion du traité;
> b) Tout instrument établi par une ou plusieurs parties à l'occasion de la conclusion du trai- té et accepté par les autres parties en tant qu'instrument ayant rapport au traité ».

112 Ipsen, Völkerrecht [International law], 6. edition, § 12, Rn. 12.

113 Annuaire de la Commission du Droit international (1966), Volume II, 245; and also De Visscher, Problèmes d'interprétation des judicaires en Droit International Public, 51.

This fundamental rule of systematic interpretation has been confirmed by the International Court of Justice in its well-known opinion regarding the case of Namibia:

> « De plus, tout instrument international doit être interprété et appliqué dans le cadre de l'ensemble du système juridique en vigueur au moment où l'interprétation a lieu».[114]

The ECOWAS Amendment Agreement of 24 July 1993 and the associated Additional Protocol form a system.[115] When interpreting individual regulations, the interpreter should not lose sight of the entire system. The individual term must rather be interpreted in conjunction with the entire text of the evolved system. In graphical terms: The entire rule of law is like a chain. Every single norm represents a link in this closed chain. As soon as one of the links in this chain fails, the entire system collapses. It is therefore recommended to carefully interpret the meaning of each individual norm.

It follows from the aforementioned that the interpretation of an agreement under international law requires the adherence to the principle of unity and to avoid contradictions.[116] The regulations in the entire legal system are coordinated in such a way that the meaning of one of the regulations can only be recognised by taking the meaning of the others into consideration. More specifically, the judges of the ECOWAS Court of Justice must pay attention that contradictions between Art. 15 paragr. 4 of the Amendment Agreement and the legal consequences desired in Art. 9.4 (in conjunction with Art. 10 d) of Additional Protocol A/SP.1/01/05 (19/01/2005) are avoided when interpreting: This is the purpose of the systematic interpretation. One must differentiate in this respect between logical contradictions and discrepancies in the assessment.[117] Logical contradictions occur whenever certain behaviour is allowed by norm A in the jurisdiction and is prohibited by norm B in the same jurisdiction. Discrepancies in the assessment, however, concern the question of a different assessment of the legal consequences of norm A and those of norm B. Therefore,

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114 Conséquences Juridiques pour les Etats de la présence continue de l'Afrique du Sud en Na- mibie nonobstant la Résolution 276 (1970) du Conseil de Sécurité, Avis Consultatif, CIJ, Recueil des Arrêts (1971), 16 (35), par. 53.

115 Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice, 12, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (letzter Zu- griff am 16.05.2015).

116 Bleckmann, Völkerrecht, Rn. 354.

117 Bleckmann, Völkerrecht, Rn. 354.

those applying the law must always take care to assess the legal consequences of different norms in the same way.[118] All this requires the interpreter to sufficiently acknowledge the inner connection between the individual legal principles of the rule of law.

3. Historical Interpretation

It should be pointed out that there is no mention of human rights in the original founding agreement of 1975. The original goals of the Community were of a commercial nature. Especially for this reason, the Court of justice was in 1991 intended to settle disputes of a commercial nature. Only in the Amendment Agreement of 1993 did the signatory states decide that they had to employ the adherence to human rights as a fundamental prerequisite in order to reach their economic goals. This is taken into account in the preamble of the Amendment Agreement.[119] Despite this reference, there was no possibility to submit individual complaints before the ECOWAS Court of Justice. Only after the complaint of Afolabi vs Nigeria was declared admissible in 2004 [120] did the signatory states decide to amend the Protocol of 1991 of the Court of justice by introducing the Protocol of 2005. The Court of Law should include this development as a basis for the historical interpretation of the agreement.[121]

However, it must be stated that the interpretative task regarding the human rights disputes is not all that easy. The difficulties are such that the Court of justice had been originally established to settle disputes of an economic nature. Therefore, the personal as well as factual areas of responsibility of the Court of justice were only meant to settle disputes of an economic nature and only for the signatory states (Art. 9 of Protocol A/P.I/7/91). The rules of procedure were issued with this in mind in 2002. When the signatory states decided to confer a human rights competence to the

118 Bleckmann, Völkerrecht, Rn. 354.

119 Clause 4 of the preamble of the Amendment Agreement (of 24/07/1993 in Cotonou).

120 Afolabi v. Nigeria, Case N°ECW/CCJ/APP/01/03 (27/04/2004), in: Community Court of Jus- tice, ECOWAS, Law Report (2004–2009), 1 ff.

121 Ebobrah, A critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice, 13, available at: http://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (last accessed on 16/05/2015).

Court with the Additional Protocol A/SP.1/01/05[122], they did not sufficiently consider all legal consequences. There is in particular the question of obligations on the side of the signatory states after a declaratory judgment by the Court of justice with regards to a human rights violation. Neither the Additional Protocol A/SP.1/01/05 (2005) nor the rules of procedure of the Court of justice (2002) define the scope of the decision-making competence of the Court and subsequently the obligation of the signatory parties. Therefore, the historical interpretation is especially important. It must be referred to the historical events in the region – such as described in the introduction of the present study.

In 2001, with the Protocol on Good Governance, human rights and the adherence to the rule of law finally take centre stage in the legal order of the Community and were set as a benchmark for the assessment by the signatory states of their will to integrate. As a central actor regarding the enforcement of human rights as stipulated in the Charta, the role of the Court of justice is very much in demand. The historical background of this development must therefore be paid more attention when interpreting a norm. Step by step, the Court should steer the actions of the signatory states according to this interpretation technique because the West African states have given the Court of justice the responsibility to decide in human rights disputes, in order to accompany the process of democratisation in the region by a court.[123] The ECOWAS Court of Justice rightly referred to the historical context in the legal matter Afolabi vs Nigeria[124] as an interpretation aid by stating:

> "The court is to collect from the nature of subject, from the words and from the context of the protocol, the true intent of the contracting parties, when the provisions of a statute are apt and clear."[125]

With the reference to "context of the protocol" the historical aspect of the interpretation is referred to in this passage of the judgment. Granting the ECOWAS Court of Justice with the competence to adjudicate in human

122 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.

123 Alter/Helfer/McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (777).

124 Afolabi v. Nigeria, case N°ECW/CCJ/APP/01/03 (27/04/2004), in: Community Court of Jus- tice, ECOWAS, Law Report (2004–2009), 1 ff.

125 Afolabi v. Nigeria, case N°ECW/CCJ/APP/01/03 (27/04/2004), par. 52, in: Community Court of Justice, ECOWAS, Law Report (2004–2009), 1 ff.

rights disputes is in fact based on a deficit of legal protection at national and continental level. Indeed, it can be determined that, despite the establishment of constitutional courts since the third wave of democratisation, there has been no tangible development in the human rights situation in the signatory states. At continental level, the individual complaint before the African Court for Human Rights remains conditional.[126] It follows from these historical events that the regional courts of justice on the continent fulfill a particular task with regards to the protection of human rights.[127]

All this speaks for a constructive interpretation of the enabling provision of the ECOWAS Court of Justice, in order to reach the goal set out in Additional Protocol A/SP.1/01/05 (19/01/2005).

4. Teleological Interpretation

Every agreement represents an answer to a certain problem.[128] Teleological interpretation means that every term of the agreement must be interpreted with regards to its object and purpose. Regarding the teleological interpretation, the question arises of how Art. 15 paragr. 4 of the Amendment Agreement is to be interpreted in order to take account of the object and purpose of Protocol A/SP.1/01/05 (19/01/2005). According to Art. 31 paragr. 1 VCLT, object and purpose of the agreement has a special meaning besides the wording of the agreement:

> « Un traité doit être interprété de bonne foi suivant […] et à la lumière de son objet et de son but ».

In order to determine object and purpose of the agreement the operative text of the agreement, the preamble as well possible addenda are available. Therefore, it must be stated that the teleological interpretation only refers to the written norm and follows the objective approach of interpreting a contract.[129] This view is correct because the purpose alone gives informa-

126 Viljoen, International Human Rights Law in Africa, 2nd éd, 487.
127 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009) 17, 79 (86).
128 Bleckmann, Völkerrecht [International Law], Rn. 362; Cross/Bell, Statutory Interpretation, 22.
129 Ipsen, Völkerrecht [International Law], 6. edition, § 12, Rn. 15.

tion regarding the more specific meaning which can be assigned to every term or article in the agreement.[130]

It is regrettable in this regard that the ECOWAS Court of Justice oriented itself according to the rules of interpretation of Sir Gerald Fitzmaurice in the key reasoning of the decision.[131] According to a study carried out by Sir Gerald Fitzmaurice regarding the decisions of the International Court of Justice, there are five rule of interpretation:

> "I. Actuality (or textual interpretation);
> II.Natural or Ordinary Meaning;
> III.Integration (or interpretation of the treaty as whole);
> IV.Effectiveness (ut res magis valeat quam pereat);
> a. Subsequent Practice; Contemporaneity (interpretation of texts and terms in the light of their normal meaning at the date of the conclusion)".[132]

However, there were problems with this rule of interpretation during the preparatory work at the Vienna Convention on the Law of Treaties. Indeed, the International Legal Commission highlighted the fact that, due to the divergence at the forum, these rules by Sir Fitzmaurice could not be codified.[133]133 Voices in literature as well as the practice of international courts show that the rules of interpretation as stipulated in Art. 31 VCLT have reached a character of customary international law. According to McNair, the parties to disputes may advocate different opinions regarding the rule of interpretation. One of the parties might demand a liberal interpretation while the other party might demand a more restrictive interpretation.[134] In order to avoid such disputes, it is necessary to orient oneself to the rules of interpretation in Art. 31 VCLT as these rules have an undisputed statute under international customary law.

It is therefore regrettable that the ECOWAS Court of Justice limits the question of legal force and its competence solely to Art. 15 paragr. 4 of the Amendment Agreement. The Amendment Agreement only contains general rules and principles. These rules were concretised by the subsequent protocols to the Amendment Agreement. The subsequent protocols de-

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130 De Visscher, Problèmes d'interprétation des judicaires en Droit International Public, 62.

131 CCJ ECOWAS, Afolabi v. FEDERAL REPUBLIC OF NIGERIA, Judgment N° ECW/CCJ/ JUD/01/04/04 (27/04/2004), par. 35.

132 McNair, The Law of Treaties, 364; Sall, La Justice de l'intégration, 276.

133 Annuaire de la Commission du Droit international (1966), Volume II, 244.

134 McNair, The Law of Treaties, 365.

scribe the competence of the Court of justice clearer and more extensively than the Amendment Agreement.[135] The teleological interpretation aims to give the agreement an effective impact.

5. Principle of effectiveness and evolutive/dynamic interpretation

With regards to the interpretation of an agreement under international law, Art. 31 paragr. 3.c VCLT also refers to generally accepted principles in international law. Indeed, Art. 31 paragr. 3.c VCLT stipulates:

> « Il sera tenu compte, en même temps que du contexte: […] c) De toute règle pertinente de droit international applicable dans les relations entre les parties ».
>
> "There shall be taken into account, together with the context […] c) any relevant rules of international law applicable in the relations between the parties".

By interpreting according to object and purpose, other principles of interpretation have taken shape at an international law level and have become general rules of interpretation.[136] In this regard, the principles of effectivity and dynamic interpretation as in Art. 15 paragr. 4 of the Amendment Agreement (1993) must be taken into consideration. With reference to the Principle of Effectivity, the ECtHR insists that the rights guaranteed by the Convention are not illusory and theoretical, but that it is the object and purpose of the convention to protect rights that are practical and effective.[137]

The judgment by the ECOWAS Court of Justice develops a binding effect towards the Member States according to Art. 15 Abs. 4 of the Amendment Agreement. In the case of an individual complaint procedure, an *inter-parte* binding effect can be deduced from this. This means that the sen-

135 Sall, La Justice de l'intégration, 282.

136 Ipsen, Völkerrecht [International Law], 6. edition, § 12, Rn. 16.

137 Frowein, in: Frowein/Peukert, Europäische Menschenrechtskonvention [European Human Rights Convention]. EMRK commentary, 3. edition, introduction, Rn. 8; Meyer-Ladewig, Europäische Menschenrechtskonvention[European Human Rights Convention], hand commentary, 2. edition, Note, Rn. 36; Alter/Helfer/McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: The American Journal of International Law (2013), 737 (750).

tenced state and the plaintiff must acknowledge the final judgment. As already explained,[138] the participating parties to the procedure are bound by the formal legal force of the declaratory judgment. Here, the question must be asked what is included in the binding effect for the sentenced state as well as what should be understood regarding the scope of the binding effect provided for in Art. 15 of the Amendment Agreement. Thus, an interpretation of the legal force regulation, which takes the principle of effectivity into account, is needed. According to the effective interpretation requirement under international law, an agreement under international law is to be interpreted in such a way that the goal as well as the purpose of regulation is reached as best as possible. This includes that the intended efficiency is achieved[139]. The intention of the signatory states can be deduced from the special meaning they attribute to a term. To this effect, Art. 31 paragr. 4 VCLT states:

> « Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties. »
>
> "special meaning shall be given to a term if it is established that the parties so intended"

Moreover, the principle of „necessary implication" should be considered during interpretation because with the adoption of an Additional Protocol and the concomitant admissibility of individual human rights complaints before the Court of justice, all Member States must reckon with the fact that the legal effect must go over and above what the signatory states had originally intended. Subsequently, one should also anticipate an extended authority of the Court of justice . With the adoption of Protocol A/SP.1/01/05 of 2005 the necessary implications for the interpretation of Art. 15 of the Amendment Agreement are to be included.[140] This means that in order to explore the meaning of thisregulation, it should not be referred only to this regulation but to all contractual agreements between the parties to the agreement, which are referred to at the time of the interpretation and which best serve the desired purpose of the regulation. Subsequent changes of the legal opinion regarding the legal system are to be considered by way of evolutionary interpretation.

138 See also the section regarding formal legal force (s. p. 38).
139 Ipsen, Völkerrecht [International Law], 6. edition, § 12, Rn. 16.
140 Ipsen, Völkerrecht [International Law], 6. edition, § 12, Rn. 16.

Moreover, it must be noted that the dispute between "dynamic interpretation" and "evolutionary interpretation" will not be discussed. The reason being that a Court of justice does not have the authority to modify the content of the norm. The interpreter, i.e. the judge, rather takes changes in societal opinions into account through evolutionary interpretation of the norm.[141] Therefore, the term "evolutionary interpretation" is preferable. The question concerning evolutionary interpretation is whether the original understanding of the term under international law is to be taken into account or whether one should rather orient oneself more closely to the changed legal opinion of the signatory states.[142] In Art. 31 paragr. 3 the time factor in the rule of interpretation has already been discussed:

> « Il sera tenu compte, en même temps que du contexte:
> a) De tout accord ultérieur intervenu entre les parties au sujet de l'interprétation du traitéou de l'application de ses dispositions;
> b) De toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité ».
>
> "There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation

In order to fully understand the contemporary meaning of Art. 15 paragr. 4, the internal context of the Amendment Agreement together with Protocol A/SP.1/01.05 of 2005 must be consulted. The reference to this Protocol is significant for the interpretation of the binding effect because the regulation in Art. 15 paragr. 4 was provided for at a point in time when individual complaints were not admissible before the Court of justice . Furthermore, many regulations in Protocol A/P1/7/91 of 1991 were amended by the Protocol A/ SP.1/01.05 of 2005. However, the content of Art. 15

141 Matscher, Die Methoden der Auslegung der EMRK in der Rechtsprechung ihrer Organe, in: Schwind (Publ.), Aktuelle Fragen zum Europarecht aus der Sicht in- und ausländischer Gelehrter, 102 (108). [The methods of interpretation by the ECHR in the jurisdiction of its organs,..., Current questions regarding the European law from the viewpoint of domestic and foreign scholars.].

142 Wildhaber, De l'évolution des idées sur les missions de la Cour Européenne des Droits de l'Homme, in: Promoting Justice, Human Rights and Conflict Resolution through International Law (2007), 639 (645).

paragr. 4 of the Amendment Agreement has remained untouched. This status quo represents an inevitable source of conflict because the binding effect of a decision regarding an individual complaint is not necessarily the same as in a decision by the states regarding a complaint. It must be noted that the Member States have not ignored a limitation of the binding effect in a personal respect when working on Protocol (A/ P1/7/91) in 1991. A limitation of the legal effect on the parties and on the object of dispute was not entirely unknown to the Member States at this point in time. Quite the opposite, they made express provision for this regarding the review procedure according to Art. 27 paragr. 5 A/SP.1/01.05 (old Art. 25 paragr. 5 of Protocol A/P1/7/91). Even according to the current status of the development in international law regarding human rights disputes within the rule of law of the Community, many questions remain unanswered with regard to the interpretation of Art. 15 paragr. 4 of the Amendment Agreement. The question is therefore whether all Member States are concerned bound by the legal force of a declaratory judgment finding a violation of human rights between a signatory state and an individual plaintiff. This is a question of the subjective and objective limits of the legal effect (this aspect is extensively discussed in chapter 2). The subjective limit concerns the parties to the dispute and the objective limit concerns the scope of the legal effect over and above the case that was decided on. This is the question of the cross-case legal force. The legal question that the individual plaintiff raises in a human rights dispute is the question of his personal situation in regards to the respondent (the concerned Member State). Therefore, the legal effect concerns both parties to the procedure. However, the answer by the Court of justice regarding the raised legal question has an effect over and above the case, which must be taken into account in the entire legal order in the Community.[143]

Moreover, the rules of procedure of the ECOWAS Court of Justice were determined in 2002. Despite the fact that Protocol A/SP.1/01.05 of 2005 approved the admissibility of the individual complaint three years later, the rules of procedure (2002) of the Court of justice has not been amended. There is no answer to the question of why there is no respective regulation neither in Art. 15 paragr. 4 of the Amendment Agreement (1993) nor in the Additional Protocol A/SP.1/01.05 (2005). Therefore, the application of evolutionary interpretation is very helpful in this respect. As the International Court of justice said in its statement regarding the case of

143 Klein, Should the binding effect of the judgments of the European Court of Human Rights be extended?, in: Mahoney/Matscher/Petzold/Wildhaber, 705 (706).

Namibia, regulations in agreements under international law and the development of legal opinions play an important role in the interpretation of the terminology. The IGH stated in this regard:

> « [L]a Cour doit prendre en considération les transformations survenues dans le demi-siècle qui a suivi et son interprétation ne peut manquer de tenir compte de *l'évolution que le droit a ultérieurement* connue grâce à la Charte des Nations Unies et à la coutume ».[144]

The temporal element in interpretation has been acknowledged for a long time by the International Court of Justice (ICJ) as a rule of interpretation. Following the evolutionary interpretation invented by the ICJ, these regulations concerning agreements under international law are to be interpreted together with the international law in force at the time of the interpretation and their respective understanding.[145] Therefore, the time factor plays an important role regarding the scope of the binding effect of Art. 15 paragr. 4, regarding individual complaints. In the legal matter of Costa Rica vs Nicaragua, the ICJ has confirmed its case law regarding the interpretation with the following words:

> « Cela ne signifie pas qu'il ne faille jamais tenir compte du sens que possède un terme au moment où le traité doit être interprété en vue d'être appliqué, lorsque ce sens n'est plus le même que celui qu'il possédait à la date de la conclusion. D'une part, la prise en compte de la pratique ultérieure des parties, au sens de l'article 31 3-*b)* de la convention de Vienne, peut conduire à s'écarter de l'intention originaire sur la base d'un accord tacite entre les parties. D'autre part, il existe des cas où l'intention des parties au moment même de la conclusion du traité a été, ou peut être présumée avoir été, de conférer aux termes employés – ou à certains d'entre eux – un sens ou un contenu évolutif et non pas intangible, pour tenir compte notam- ment de l'évolution du droit international. En pareil cas, c'est précisément pour se conformer à la commune intention des parties lors de la conclusion du traité, et non pas pour s'en écarter, qu'il conviendra de tenir compte du sens que les

144 Conséquences Juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie nonobstant la Résolution 276 (1970) du Conseil de Sécurité, Avis Consultatif, CIJ, Recu- eil des Arrêts (1971), 16 (35), par. 53 (emphasis by the Author).

145 Ipsen, Völkerrecht, 6. edition, § 12, Rn. 21.

termes en question ont pu acquérir à chacun des moments où l'application du traité doit avoir lieu ».[146]

The difficulty in interpreting Art. 15 paragr. 4 of the Amendment Agreement is that the ECOWAS Court of Justice itself combines the competences of the ECJ and ECtHR. Has the extent of an obligation arising from a judgment been extended through the admissibility of individual complaints before the Court of justice ? Through the adoption of both competences, the signatory states could have adjusted the limitation of the regulations regarding legal force. Unfortunately, this was not the case. Due to a lack of adjustment of contractual regulations regarding the weight of the legal force on the decision by municipal courts in general and constitutional courts of Member States in particular, one must rely on the specification by the judges. The interpretation of the regulations of the Amendment Agreement of 1993 in general and Art. 15 paragr. 4 Amendment Agreement in particular should be made according to the basic rules of evolutionaryinterpretation by the International Court of Justice .[147] Such a regulation should not be interpreted statically but must be interpreted in an evolutionary manner. Thus, the following practice between states plays an important role. As a result, the original intention of the signatory states is of secondary importance.[148] What the signatory states will express in future rather corresponds with their contemporary intent. Thus, the Amendment Agreement and its respective normative regulations should be understood as a "living instrument".[149]

Future behaviour of the signatory states serves as an interpretation aid within the framework of the rules of interpretation as per Art. 31 VCLT. It should be mentioned in this context that the requirement to respect human rights has, step by step, taken on new dimensions. The ECOWAS rule of law for example expresses their supremacy through the guidelines in the Protocol of Good Governance. This prohibits any reform of the constitutional order or reform of the electoral law six months before elections.

146 CIJ, differend relatif à des droits de navigations et des droits connexes, Costa Rica c. Nica ragua, Recueil des Arrêts (13.08.2009), par. 64.

147 Conséquences Juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie nonobstant la Résolution 276 (1970) du Conseil de Sécurité, Avis Consultatif, CIJ, Recu- eil des Arrêts (1971), 16 (35), par. 53.

148 Payandeh, Internationales Gemeinschaftsrecht [International Community Law], 322.

149 Payandeh, Internationales Gemeinschaftsrecht [International Community Law], 322.

This temporal development of the requirement of the respect for the rule of law and human rights should be considered when interpreting any legal regulation regarding the individual complaint and its consequences.

II. Effects of Legal Force of other Regional Human Rights Courts

Other regional organisations, such as the East African Community, SADC and CEMAC, exist on the African continent. Regarding a legal comparison of the human rights jurisdiction, only those of the East African Court of justice and the SADC Tribunal are to be examined. Therefore, the legal force of the East African Court of justice will be discussed upfront (1). Subsequently, the SADC Tribunal will be introduced in this regard (2). Beyond the African continent, the ECtHR (3) and the Inter-American Court of Human Rights (4) represent interesting objects for comparison.

1. East African Court of Justice

The start of the effort regarding a regional organisation in East Africa can be dated to the period after the signatory states received independence. At first, three states participated in the project of a mutual regional market. In 1967, Kenya, Tanzania and Uganda founded an economic community by the name of EAC (East African Community).[150] This project crumbled in the year 1977 due to political differences and allegations of mutual interference between the concerned signatory states. Officially, the failure of the Community was due to a lack of political will by the signatory states.[151] In 1999 there was a revival of the efforts to establish an economic community. Subsequently, the agreement for the creation of the EAC was signed on 30 November 1999. At first only the states of Tanzania, Uganda and Kenya were again parties to the agreement. It came into force on 7 July 2000. Burundi and Ruanda are also among the members of the EAC

150 Also see § 3 of the preamble of the founding treaty (Treaty for the establishment of the East African Community, as amended on 14th December, 2006 and 20th August, 2007).

151 As in paragraph 4 of the preamble of the founding treaty (Treaty for the establishment of the East African Community, as amended on 14th December, 2006 and 20th August, 2007).

since 1 July 2007 and South Sudan recently (March 2016) became party to the agreement according to Art. 3 of the founding treaty.

The organs of the Community are listed in Article 9 of the founding treaty. Among these organs of the Community is the East African Court of Law (East African Court of Justice). It is responsible for the interpretation and application and for monitoring the implementation of the guidelines in the founding treaty (Art. 23 of the founding treaty). The organisation, competence of the Court of justice as well as the obligations of the signatory states regarding the decisions of the Court of justice will be briefly addressed in the following.

Regarding the organisation of the Court of justice , it consists of two chambers.

In this respect, Art. 23 paragr. 2 of the founding treaty stipulates:

> "The Court shall consist of a First Instance Division and an Appellate Division. 2. The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Art. 35 A, any matter before the Court in ac cordance with the Treaty".

This regulation is supplemented by Art. 24 paragr. 2 of the founding treaty. Thereby, the first chamber (First Instance Division) consists of ten judges. In contrast, the second chamber (Appellate Division) consists of no more than five judges. The heads of state elect the president and the vice-president of the Court of justice from the second chamber (Appellate Division).

It must be mentioned at this point that the appointment of the members of the Court of justice and the president and the vice-president of the Court of justice in particular could lead to an impairment of the independence of the Court of Law. As experience within the West African Community (ECOWAS) has already shown, the appointment of the judges by the heads of state may lead to an impairment of the independence of the ECOWAS Court of Justice. Therefore, an independent institution was established with the purpose of selecting judges of the ECOWAS Court of Justice (see above).

Regarding the authority of the Court of justice, the Court has a consultative as well as a contentious jurisdiction. In its contentious jurisdiction, the factual and the personal areas of competence of the Court of justice are regulated contractually. Regarding the factual and the personal competence of the Court of justice it has the competence to interpret the founding treaty. Moreover, the factual area of competence of the Court of Law

also includes the monitoring of the application of the founding treaty (Art. 27 paragr. 1 of the founding treaty). Interestingly, it was established that the Court of Law would, in future, receive other competences including, among others, the human rights competence (Art. 27 paragr. 2 of the founding treaty). Concerning the personal competence, the signatory states may approach the Court of Law by way of an infringement procedure (Art. 28 paragr. 1 of the founding treaty). Similarly, Art. 29 of the founding treaty stipulates that the general secretary may approach the Court of Law on the grounds of a breach of contract by a Member State. Furthermore, complaints by natural and legal persons are admissible before the Court of Law. Moreover, Art. 30 paragr. 1 of the founding treaty stipulates:

> "1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Part ner State may refer for determination by the Court, the legality of any Act, regulation, direc tive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provision of this Treaty".

On closer inspection of this regulation, it is clear that no particular prerequisite regarding citizenship of the authorized persons is required. Consequently, every natural person and not only citizens of the respondent signatory state, has the capacity to sue . Thus, expatriates or stateless persons are also authorised to bring a claim before the East African Court of Law. The only prerequisite is the lawful residence in one of the Member States of the Community.

Moreover, Art. 34 of the founding treaty provides that a preliminary procedure based on the model of Art. 267 TFEU. According to 34 of the founding treaty, national courts are authorised to submit to the Court of Law, in a concrete legal dispute, a legal question regarding the interpretation or application of the instruments of the Community if they deem this to be necessary. This possibility is to be welcomed as it prevents diverging interpretations and applications of the founding treaty depending on a particular signatory state.

A certain problem with interpretation can be seein in paragraph 3 of Art. 30 of the founding treaty. This regulation grants the Court of Law a negative competence. Art. 30 paragr. 3 of the founding treaty reads verbatim as follows:

> „The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State".

The question of which concrete matter is referred to the national instance could arise. Disputes may occur due to the fact that a signatory state, according to its interpretation of the founding treaty, claims the competence regarding the matter that may at the same time fall in the area of competence of the Court of Law. Regarding its consultative competence, every contracting party can, according to Art. 28 paragr. 2 of the founding treaty, approach the Court of Law if there are doubts whether their actions infringed an act of the Community. Furthermore, the other organs of the Community, such as the Conference of the Heads of States, seek the advice of the Court of Law regarding legal questions with regard to the founding treaty (Art. 36 of the founding treaty).

Regarding the obligations of the signatory states with respect to the judgments of the Court of Law, two regulations should be pointed out. The founding treaty stipulates a general obligation to comply in Art. 38 paragr. 3:

> „A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court".

This general obligation to comply refers to an obligation to omit as well as an obligation to act. However, a special regulation is provided for regarding the obligation to perform. Art. 44 of the founding treaty stipulates in this context that the implementation of an order to pay a sum of money should be executed according to the regulations of the respective Member State. Art. 44 of the founding treaty (EAC) can be compared to Art. 24 of Additional Protocol A/SP.1/01/05 (ECOWAS). However, in Art. 44 of the founding treaty (EAC)the reference of whether it is also to be applied regarding the signatory states' obligation to pay is missing. The regulation only mentions a "pecuniary obligation on a person". It may be deduced by means of interpretation that the general obligation to comply in Art. 38 paragr. 3 of the founding treaty (EAC) regarding the signatory states also applies to the obligation to pay. This is different from Art. 24 of Additional Protocol A/SP.1/01/05 (ECOWAS) in conjunction with Art. 15 of the Amendment Agreement (ECOWAS), where the signatory states are explicitly named with regard to the general obligation to comply as well as for the special obligation to pay in both regulations.

In the following, the human rights competence will be discussed in more detail. Indeed, the East African Court of Law clearly does not avail of

a human rights competence. From a substantive legal point of view, however, the African Charta on Human and Peoples' Rights is to be applied.[152] According to Art. 27 paragr. 2 of the founding treaty (EAC):

> "The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."

However, the preparatory work for the drafting of a Protocol has not yet been concluded. Regarding the question whether the East African Court of Law avails of a human rights competence, the following has been phrased in the legal matter Katabazi:

> "Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No it does not have."[153]

Nonetheless, the Court of Law elaborated on its arguments:

> "[T]hen Article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course as provided in Article 5 (1)".[154]

In the end, the EACJ deduced its competence from the purpose of Art. 6, 5 and 27 of the founding treaty. This purposeful method of interpretation regarding the justification of the individual jurisdiction is welcomed by some authors.[155] The EACJ's assumption is based on the principle of *Pacta Sunt Servanda* because the interpretation by the Court of Law is part of the founding treaty of the East African Community.[156]

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152 Ebobrah, Litigating Human Rights before Sub-Regional Court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009) 79 (88); Viljoen, In- ternational Human Rights Law in Africa, 2nd éd., 491 and 494.

153 Katabazi and other v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No.1 of 2007 (1st November 2007), 14, available at: www.eacj.org (last accessed on 08/04/2015).

154 Katabazi and other v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No.1 of 2007 (1st November 2007), 15, available at: www.eacj.org (last accessed on 08/04/2015).

155 Viljoen, International Human Rights Law in Africa, 2nd éd., 490.

156 Kamanga, 'Fast-Tracking' East African Integration and Treaty Law: *Pacta Sunt Servanda*,
Betrayed?, in: Journal of African and International Law (2010), 697 (697).

2. SADC Tribunal

SADC represents the development community in Southern Africa (Southern African Development Community). The first corner stones of a regional organisation in Southern Africa were established in July 1979 in Arusha (Tanzania). However, we can only speak about a regional community in its actual sense after the adoption of the founding treaty in 1992. This treaty has been amended several times. The last amendment of the founding treaty took place in 2009 in Kinshasa (Democratic Republic of Congo). With the joining of the Democratic Republic of Congo (28/02/2004) and the Republic of Madagascar (21/02/2006), there are currently fifteen signatory states in the region.

One of the permanent institutions of the community, according to Art. 9 of the founding treaty, is the Court of justice of the community (in the following referred to as the SADC Tribunal). The establishment of the SADC Tribunal took place in 2000 by the adoption of the Protocol on the Court of Law (07/08/2000) in Windhoek.[157] It also has its seat in Windhoek. However, the SADC Tribunal may hold external sessions according to Art. 13 of the Protocol, if special circumstances so require. According to the provisions in Art. 16 of the founding treaty, the SADC Tribunal is an independent court meant to settle all disputes submitted to it. To this effect, Art. 16 of the founding treaty states:

> "The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it".

In the following, the organisation, competence, and the impact of rulings by the SADC Tribunal are briefly presented.

Regarding the organisation of the Court , it is composed of ten judges (Art. 3 of the Protocol). Five of these judges are permanently in office (Art. 3 paragr. 2 of the Protocol). The appointment of the judges is done by each Member State according to Art. 4 paragr. 1 of the Protocol, whereby the last decision of the final assumption of office is taken according to the proposal by the Conference of the Heads of State (Art. 4 Abs. 4 des Protocol). As a permanent court, the judges enjoy immunity also after retiring from office according to Art. 10 of the Protocol.

157 Protocol on Tribunal and Rules of Procedure thereof (Windhoek, 07/08/2000).

The authority of the political organs to appoint the judges presents a danger to the independence of the judges. As shown in the case of the ECOWAS Court of Justice, it is recommended that an independent organ is established, which is responsible for appointing the judges. This would guarantee the right to an impartial court, as can be learned from Art. 7 of the African Charta on Human and Peoples' Rights.

With regard to the rationae materiae and personal competences of the SADC Tribunal, the Court of Law represents an international court. Regarding the substantive competence, according to Art. 14 of the Protocol, it is competent to settle disputes regarding the interpretation and application of the founding treaty and the associated Additional Protocol. The applicable law before the SADC Tribunal is the international law, principles under international law and its own jurisdiction (Art. 21.b of the Protocol).

In the personal area of competence, the signatory states as well as natural and legal persons are eligible to apply (Art. 15 of the Protocol). With regards to natural and legal persons it must, however, be stated that the admissibility of the application requires the prior exhaustion of the national legal process. In this sense, Art. 15 paragr. 2 stipulates:

> "No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction".

This regulation shows a significant difference between the SADC Tribunal and the ECOWAS Court of Justice because, as analysed above, the individual complaints are admissible before the ECOWAS Court of Justice without prior exhaustion of all possible legal remedies.

In this regard, the unifying function by way of the preliminary ruling procedure afther the modell of Art. 267 TFEU plays an important role for the SADC-Tribunal. The SADC Tribunal also exercises a consultative function. In this context, either the Conference of the Heads of State or the Council may ask the Court of Law for advice (Art. 20 of the Protocol in conjunction with Art. 16 of the founding treaty).

Regarding the obligations of the signatory states stemming from the decision of the SADC Tribunals, the brief formulation of Art. 16 paragr. 5 of the founding treaty must be referred to. It must be pointed out that all of the mentioned areas fall into the exclusive jurisdiction of the SADC Tribunal. This can be deduced from Art. 17, 18 and 19.

Regarding its human rights competence, it must be pointed out that the authorisation of the SADC-Tribunal regarding an individual human rights

complaint has already caused a fierce debate within the commission during preparatory work on the Protocol regarding the court.[158] Eventually, the possibility was rejected in the adopted protocol.[159] Logically, there is no catalogue of human rights that needs to be observed by the signatory states. However, the African Charta is applied as the acknowledged and mutual human rights instrument on the continent.[160] Despite the lack of an explicit authorisation, the SADC Tribunal has deduced and affirmed its competence in three cases against Zimbabwe, just like the EACJ, out of the express authorisation by the founding treaty.[161] Art. 4 paragr. 3 of the founding treaty states:

> "SADC and its member States shall act in accordance with the following principles […] (c) human rights, democracy, and the rule of law".

Moreover, the SADC Tribunal may develop its case law on the basis of Art. 21 paragr. 2 of the SADC Tribunal's Protocol which reads:

> "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."

Further proceedings are regulated in Art. 6 paragr. 1 of the founding treaty:

> "Member States undertake to adopt adequate measure to promote the achievement of the objectives of SADC and shall refrain from taking any measure likely to jeopardise the sus- tenance of its principles, the achievement of its objectives and the implementation of the provision of this Treaty."

The binding force and the binding effect of the judgments of the SADC-Tribunal are formulated even more briefly. Art. 16 paragr. 5 of the founding treaty namely reads:

> "The decisions of the Tribunal shall be final and binding."[162]

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158 Viljoen, International Human Rights Law in Africa, 2nd éd., 492; Ebobrah, Human rights developments in sub-regional court in Africa during 2008, in: African Human Rights Law Jour- nal (2009), 312 (334).

159 Viljoen, International Human Rights Law in Africa, 2nd éd., 492.

160 Viljoen, International Human Rights Law in Africa, 2nd éd., 494.

161 Viljoen, International Human Rights Law in Africa, 2nd éd., 492.

162 The binding effect of the legal decision by the Tribunal is complemented by Art. 24 paragr. 3 and Art. 32 paragr. 3 of the SADC Tribunal Protocol.

According to the wording, there is no possibility for the SADC Tribunal to order concrete corrective measures in case of the finding of a violation. However, in the case Campbell vs. the state of Zimbabwe it ordered to take all necessary measures that serve to make amends regarding the situation of the plaintiff and possibly pay compensation.[163] More specifically, the SADC Tribunal ordered the Republic of Zimbabwe, on the mutual application of Flick and Campbell, to implement the first judgment in the Campbell case by granting the plaintiff payment.[164] A difficult relationship between the regional Court of Law and the national courts developed in the jurisdiction of the SADC Tribunal.[165] This led to a situation where the activities of the SADC Tribunal were suspended in August 2010.

The Inter-American Court of Human Rights has more decision-making powers than courts of equal standing on the European and African continents.

3. ECtHR

The European Court of Human Rights became one of the most efficient protection systems for human rights after the Second World War. Before the organisation and the competence of the ECtHR are presented, it seems necessary to briefly summarise the historical background. The history of the ECtHR is logically tied to the adoption of the European Convention on Human Rights. The states of the European Council realised that the prevention of serious violations of human rights requires the establishment of an efficient human rights system within the European Council. The ECHR is an agreement under international law developed by the member states of the European Council. According to Art. 1 of the statute of the European Council it is the obligation of the European Council to ensure the protection of human rights and fundamental rights. The international protection of human rights was a basic concern of the United Na-

163 Viljoen, International Human Rights Law in Africa, 2nd éd., 493.

164 Judgment available at: http://www.sadc-tribunal.org/?cases=louis-karel-flick-others-v-the- republic-of-zimbabwe (last accessed on 16/05/2015); see also Cowell, The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction, in: Human Rights Law Review (2013), 153 (161).

165 Nkhata/Ebobrah, Is the SADC Tribunal under judicial siege in Zimbabwe? Reflections on Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Re- settlement and Another, in: The Comparative and International Law Journal of Southern Africa (2010), 81 (90).

tions after the Second World War. Therefore, the fundamental idea behind the ECHR was to transform the Universal Declaration on Human Rights of 1948 into a document under international law at a European level.[166] In order to end the terrible human rights violations, thestates of the European Council developed a human rights instrument in a relatively short time.[167] As a result, the ECHR was adopted on 04/11/1950 in Rome and came into force on 03/09/1953 through ratification by the first 10 member states of the European Council. However, the first version of the convention designed the monitoring system in such a cautious manner that the human rights protection was not even efficient within the European Council. The original system can be compared entirely with the current American human rights protection system and the African Court on Human and People´s Rights.[168] The European Commission for Human Rights even then received the competence to decide in individual complaints. This, however, required a respective declaration of submission by the member states of the European Council. Only after the inception of the 11th Additional Protocol[169] was the ECtHR established.

Regarding the organisation of the ECtHR: According to Art. 19 of the ECHR it is a permanent Court of Law. There are four different compositions of the ECtHR depending on the weight and the significance of each case to be decided. It can be constituted by a single judge, or sit in committees of three judges, in chambers of seven judges or in a Grand Chamber with seventeen judges (Art. 26 of the ECHR). Special rules regulate the sitting of the Grand Chamber and the sitting is of an exceptional nature because it can only deal with a case if a party requests the presentation of documents and a commission of five judges declares the referral to be admissible (Art. 43 paragr. 2 ECHR). The referral means that the legal matter refers to a serious question of interpretation or application of the convention. Regarding the election of judges, one has to refer to the highly democratic legitimation of the judges because the judges are elected according to the provisions in Art. 22 of the ECHR by the parliamentary as-

166 Meyer-Ladewig, Europäische Menschenrechtskonvention [European Convention on Human Rights], hand commentary, 3. edition, Einl.[introduction], Rn. 1 f.

167 Meyer-Ladewig, Europäische Menschenrechtskonvention [European Convention on Human Rights], hand commentary, 3. edition, introduction, Rn. 1 f.

168 Comparison: Art. 8 paragr. 3 (Protocol on the Statute of the African Court of Justice and Human Rights) with Art. 62 paragr. 1 (American Convention on Human Rights).

169 This Protocol came into force on 1 November 1998.

sembly of the European Council. This, in turn, guarantees a certain independence from the member states and from the executive organs of the European Council. This is a special feature of the ECtHR in comparison to other international courts of justice.[170]

Regarding the personal competence of the ECtHR: Here, every signatory party may approach the Court of justice with regards to an alleged human rights violation according to the convention or the associated Additional Protocols. This counterfactual scenario represents the inter-state complaint (Art. 33 of the ECHR).

This must be distinguished from the individual complaint. Art. 34 ECHR stipulates:

> « La Cour peut être saisie d'une requête par toute personne physique, toute organisation non gouvernementale ou tout groupe de particuliers qui se prétend victime d'une violation par l'une des Hautes Parties contractantes des droits reconnus dans la Convention ou ses protocoles. Les Hautes Parties contractantes s'engagent à n'entraver par aucune mesure l'exercice efficace de ce droit. »
>
> "The Court may receive applications from any person, nongovernmental or group of individ- uals claiming to be the victim of violation by one of the High Contracting Parties of the rights set forth in the Convention or Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".

It can be ascertained from this regulation that the circle of those entitled to apply before the ECtHR is as broad as possible. Its objective is not only to include the citizens of the respondent signatory state, but also every natural or legal person. Therefore, expatriates and stateless persons also have the capacity to sue before the ECtHR. The decisive prerequisite for admission is laid out in Art. 35 paragr. 1 of the ECHR. According to this article, the ECtHR can declare an application admissible after all national legal remedies have been exhausted. Furthermore, a period of six months after the final national decision must have passed.

In a factual regard, the ECtHR has the authority to interpret and apply the ECHR and the associated Additional Protocols according to Art. 32 of the ECHR. A complaint can, in this sense, be rejected *rationae materiae* as inadmissible if the case does not fall within the scope of the Convention or

170 Meyer-Ladewig, Europäische Menschenrechtskonvention [European Convention on Human Rights], hand commentary, 3. edition, Art. 22, Rn. 2.

one of the Protocols. Should a dispute regarding the competence of the Court arise, it will itself decide on possible conflicts of competence (Art. 32 paragr. 2).

The obligations of signatory states arising from the judgments of the ECtHR can be ascertained from Art. 46 paragr. 1. According to Art. 46 paragr. 1 of the ECHR:

> « Les Hautes Parties contractantes s'engagent à se conformer aux arrêts de la Cour dans les litiges auxquels elles sont parties. »
>
> "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

The reference to the phrase "in case to which they are parties" is important because it clearly expresses the personal limit or the subjective aspect [171] of res judicata regarding the declaratory judgement by the ECtHR. This reference is unfortunately, absent in the regulation of Art. 15 paragraph 4 ofthe ECOWAS Amendment Agreement of 1993. This absence results in the fact that a certain confusion must be noted regarding the interpretation of the binding effect res judicata in the human rights jurisdiction of the ECOWAS Court of Justice. However, Art. 46 paragraph 1 ECHR also causes a few problems with regard to the legal effect of the decision on merits by the ECtHR.[172] After more detailed examination of this regulation, it can be noted: Art. 46 paragraph 1 describes the duty of compliance or the obligation of implementation of the judgements by the ECtHR. This regulation does not clarify which concrete measures the signatory states must take regarding the implementation.[173] This complies with the peculiar nature of the judgements by the ECtHR because they only have a declaratory character. For this reason, there is no immediate obligation to act, tolerate or

171 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge-richt und europäischem Gerichtshof für Menschenrechte, in: Der Staat 44 (2005), 403 (420).
[Cooperation or Confrontation? – The Relationship between the Federal Constitutional Court and the Court of Law for Human Rights, in: The State 44.].

172 Cremer, Zur Bindungswirkung von EGMR-Urteilen [Regarding the Binding Effect of ECtHR judgements]. Comment regarding the Görgülü-ruling by the Federal Constitutional Court of 14/10/2004, in: EuGRZ (2004), 683 (690).

173 Rohleder, Grundrechtschutz im europäischen Mehrebenensystem, 44 [The protection of fundamental rights in the European multi-level system, 44].

omit in a certain way based on the declaratory judgement.[174] In no way does the declaratory judgement possess a design effect. The ECtHR clearly confirms this in its judgement in the legal matter Pakelli vs Germany:

> « [E]lle constate, à propos de la première demande, que la Convention ne lui attribue compé- tence ni pour annuler l'arrêt de la Cour fédérale ni pour ordonner au gouvernement de dé- savouer les extraits incriminés ».[175]

Despite this lack of specification of the content of the obligation set out in Art. 46 paragraph 1, there is at least an obligation to implement the declaratory judgement. Consequently, a signatory state may, after a declaratory judgement, no longer allege that its conduct had been in compliance with the convention.[176] An obligation to cease and desist follows, as a direct result that is. if the violation of the convention persists.[177]

Moreover, Art. 41 ECHR provides further references to the content of the obligations resulting from the declaratory judgement. In this respect, the right to order adequate compensation is conferred to the ECtHR in the case that the national law is directed against a comprehensive reparation of the violation of the convention. Acc. to Art. 41 ECHR:

> « Si la Cour déclare qu'il y eu violation de la Convention ou de ses protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effectuer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la Partie lésée, s'il y a lieu, une satisfaction équitable. »
>
> "If the court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting

174 Cremer, Zur Bindungswirkung von EGMR-Urteilen [Regarding the Binding Effect of ECtHR judgements]. Comment regarding the Görgülü-ruling by the Federal Constitutional Court of 14/10/2004, in: EuGRZ (2004), 683 (690).

175 CEDH, No. 8398/78, Arrêt (25/04/1983), Affaire Pakelli c. Allemagne, par. 45.

176 Klein, Should the binding effect of the judgements of the European Court of Human Rights be extended? in: Mahoney/Matscher/Petzold/Wildhaber, 705 (707).

177 Frowein, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Handkom- mentar, 3. edition, Art. 46, Rn. 6ff; Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, 1993, 251. [European Human Rights Convention. ECHR hand commentary 3rd edition, Art. 46, Rn. 6ff; Polakiewicz, The obligations by countries resulting from the judgements by the European Court of Human Rights, 1993, 251.].

Party concerned allows only partial reparation to be made, the Court shall if necessary, afford just satisfaction to the injured party."

Due to the lack of a more detailed specification regarding the specific content of the obligation as per the declaratory judgement, the ECtHR has at least cautiously pointed out that it is left up to the signatory states to decide how they prefer to implement the obligations as per declaratory judgement on a national basis.[178] Polakiewicz rightly regrets that the ECtHR did not take the case Marckx as an opportunity to further specify the content of the obligations as per the judgement.[179] Depending on the nature or urgency of the individual case, the ECtHR has made a welcome step forward through the evolutive interpretation by the ECHR to order concrete measures in order to facilitate the implementation of the declaratory judgement. In light of the wording adopted by the ECtHR, the ordering of concrete corrective measures takes place either in the salient reasons for the decision[180] or in the binding tenor of the judgement.[181] According to the prevailing scholarly opinions, only the tenor of the judgement is, however, relevant and binding.[182] Judge Malinverni, especially for this reason, regrets, in his concurring opinion of the legal matter Kudac, that the

178 ECtHR (GK), Marckx v. Belgien (13.06.1979), Ziffer 58 = EuGRZ 1979, 454 [Marckx vs Belgium(13/06/1979), clause 58 = EuGRZ 1979, 454]; Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte, 1993, 251. [The obligations of countries resulting from judgements by the European Court of Human Rights, 1993, 251].

179 Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichts- hofs für Menschenrechte, 1993, 250. [The obligations of countries resulting from judgements by the European Court of Human Rights, 1993, 250].

180 CEDH, Nr. 56581/00, Arrêt (01/03/2006), Affaire Sejdovic c. Italie, par. 126; CEDH, Nr. 15869/02, Arrêt (23/03/2010), Affaire Cudac c. Lituanie, par. 79; CEDH, Nr. 2555/03, Arrêt (18/01/2011), Affaire Guadagnino c. Italie et France, par. 81; ECtHR, Nr. 74969/01, Urteil (26.02.2004), Rechtssache G. v. Deutschland, Ziff. 64.[Judgement (26/02/2004) legal matter G. vs Germany, clause 64.].

181 CEDH, Nr. 71503/01, Arrêt (08/04/2004), Affaire Assanidzé c. Géorgie, par. 14 (dispositif), par. 202 et 203 (motif); CEDH, Nr. 14556/89, Arrêt (31/10/1995), Affaire Papamichalopoulos et autres c. Grèce, par. 2 (dispositif); CEDH, Nr. 28342/95, Arrêt (23/01/2001), Affaire Brumàrescu c. Roumanie, par. 22 (motif), par. 1 (dispositif).

182 Cremer, Zur Bindungswirkung von EGMR-Urteilen [Regarding the Binding Effect of ECtHR judgements]. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14/10/2004, in: EuGRZ (2004), 683 (690), [Comment regarding the Görgülü-ruling by the Federal Constitutional Court of 14/10/2004, in: EuGRZ (2004), 683 (690)] thus also the judge Malinverni regarding the case Kudak:

ECtHR does not express such specifically intended results in the tenor of the judgement.[183]

Ordering specific measures does not compare with the direct repeal of national court judgements which violate human rights. By ordering concrete measures, the Court of only shows which consequences under international law are to be drawn from the declaratory judgement.[184] A direct repeal does not matter at this point. Rem restitution is a mechanism of restitution of criminal conduct by a signatory state, recognised under international law. The consequences of a breach of international law are not just limited to the payment of a sum of money. Rather, this payment is in most cases an accessory to the obligation of restitution.[185] The ECtHR has rightly referred to the judgement of the permanent International Court of justice in order to apply rem restitution to its full extent.[186]

4. The Inter-American Court

The Inter-American Court of Human Rights (in the following: the Court of Law) nowadays represents the central control body in the American system of human rights protection. Before we touch on the effects of its rulings, it is advisable to take a quick glance at the history and the competence of the Court of Law.

The founding of the Inter-American organisation in its contemporary form has its origin in the Bogotá Pact of 1948. With this pact, the *Organization of American States* (OAS) was founded. The starting point of a re-

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CEDH, Nr. 15869/02, Arrêt (23/03/2010), Affaire Cudac c. Lituanie, opi- nion concordante du juge Malinverni, à laquelle se rallient les juges Casadevall, Cabral Barreto, Zagreberlsky et Popovic, par. 4.

183 CEDH, Nr. 15869/02, Arrêt (23/03/2010), Affaire Cudac c. Lituanie, opinion concordante du juge Malinverni, à laquelle se rallient les juges Casadevall, Cabral Barreto, Zagreberlsky et Popo- vic, par. 2.

184 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 regarding German courts], 64.

185 Arangio-Ruiz, Second Report on State Responsibility, UN Doc. A/CN.4/425 (09.06.1989), § 137.

186 CEDH, Nr. 14556/89, Arrêt (31.10.1995), Affaire Papamichalopoulos et autres c. Grèce, par. 36 et 38.

gional system of human rights protection within the OAS is the American Declaration of the Rights and Duties of Man that was issued on the 2nd of May 1948 within the framework of the founding of the OAS. This declaration, however, was not legally binding. It can therefore only be viewed as a political document (because the Court of Law only later in a legal opinion attributed the legal nature to this declaration). Subsequent to this declaration, the American Convention on Human Rights (American Convention on Human Rights, 22/05/1969) was adopted more than twenty years later in San José (Costa Rica). This Convention became effective with the eleventh ratification instrument on the 18th of July 1978. The Convention makes provision for the Court of Law and the Commission. This means that the basis of the Inter -American Court of Human Rights must be taken from theAmerican Convention on Human Rights.

The competence and the effect of rulings by the Court of Law can thus be presented. In order to better explain the competence of the Court of Law, most of the following references regard its competence. But based on the admissibility requirements of a complaint before the Court of Law, the Commission will also be discussed (see explanation below). In order to monitor the human rights granted in the Convention, the Convention created two important organs. According to the wording in Art. 33:

> "The following organs shall have competence with respect to matters relating to the fulfil- ment of the commitments made by the States Parties to this Convention: the Inter-American Commission on Human Rights […]; and the Inter-American Court of Human Rights".

Both the Inter-American Court and the Commission are comprised of seven judges (Art. 34 and Art. 52 of the Convention). The judges are chosen from a list of candidates proposed by the signatory states of the OAS. This means that not only the parties to the pact may propose a candidate for the position as a judge, but also every member state of the OAS (Art. 53 paragraph 2 of the Convention). The general assembly of the OAS has the last word in the decision of who may hold the office of judge. Therefore, the election of the judges takes place with the majority of votes by the Member States in the general assembly of the OAS (Art. 53 paragraph 1 of the Convention). There is a peculiarity regarding the organisation of the Inter -American Court of Human Rights compared to the other regional courts of justice, such as the ECOWAS Court of Justice: the Inter-American Court sits at regular meeting periods which are necessary to fulfil its function (Art. 11 in the Rules of Procedure). The majority of the judges may decide, on the president judge's initiative, that an extraordinary meeting should be

held (Art. 12 in the Rules of Procedure). Therefore, the Court of Law is not a permanent court[187] like the ECtHR. According to Art. 3 of the statute, its current seat is in San José, Costa Rica.[188]

However, the Court of Law is not automatically competent for all Member States of the OAS. This requires a separate declaration of competence. Acc. to Art. 62 paragraph 1 of the Convention:

> "A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognises as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention".

This regulation limits the scope of the Convention as a regional human rights instrument. It cannot be expected that all Member States of the OAS will readily submit the declaration of submission. This makes the American human rights system comparable to the system of the African Court of Justice because even within the framework of the African human rights system, a separate declaration of submission by the Member States regarding the competence of the African Court of Justice is required.[189] It must be noted that the declaration of competence can be viewed in two ways. It constitutes a negative as well as a positive authority of competence regarding the jurisdiction of the Court of Law toward the Member States of the OAS. However, the Commission acts on behalf of all the Member States of the OAS (Art. 35 of the Convention).

With regard to the personal competence, those persons who are entitled to apply before the Court of Law are, acc. to Art. 61 paragraph 1, rather restricted. Accordingly, only the Commission and the signatory states have the capacity to sue and be sued through the submission of a complaint before the Court of Law. Therefore, direct individual human rights complaints before the Court of Law are inadmissible. Here, a close collaboration between the Commission and the Court of Law must be noted. Re-

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187 Figari Layus, Überblick über das interamerikanische Menschenrechtssystem [Overview of the Inter-American Human Rights System, in: MenschenRechts-Magazin (2008), 56 (60), [in: HumanRightsMagazine (2008), 56 (60)].

188 Art. 3 of the Statute of the Inter-American Court of Human Rights (Adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 according to Resolution N°448).

189 Vergleich: Art. 8 Abs. 3 (Protocol on the Statute of the African Court on Human and Peoples' Rights) mit Art. 62 Abs. 1 (American Convention on Human Rights).

garding the admissibility of individual human rights complaints, the Commission has the competence to assess whether the admissibility requirements in Art. 46 of the Convention have been met. This competence of the Commission to rule with regard to individual human rights complaints was one of the successes of the second extraordinary Inter-American Conference in Rio de Janeiro in 1965. During this summit the Commission's mandate was extended by a corresponding amendment of its statute.[190] According to Art. 46 paragraph 1.a of the Convention, individual human rights complaints are only admissible when the national legal remedies have been exhausted. The Commission can declare individual human rights complaints inadmissible if the aforementioned admissibility prerequisites set out in Art. 46 of the Convention are not fulfilled. The prior control procedure of the Commission before the Court of Law in turn shows the limited effect of the Inter-American Commission onHuman Rights for the citizens in this region.

Regarding the substantive jurisdiction of the Court of Law, the Inter-American Court on Human Rights rules on the interpretation and application of the Inter-American Convention on Human Rights. Strictly speaking, the Court of Law rules on human rights violations. However, one must differentiate between advisory competence and contentious jurisdiction. The signatory states may request, according to the regulations in Art. 64, the opinion of the Court of Law regarding the interpretation of the Convention and of other human rights instruments (Art. 64 paragraph 1 of the Convention). In this case, the Court of Law issues a legal assessment of the national act of law and the regional human rights convention (Art. 64 paragraph 2 of the Convention). Within the framework of this consultative competence, the Court of Law has specified the significance of the *American Declaration of the Rights and Duties of Man* as the legal source of obligations under international law by the OAS Member States.[191] The contentious jurisdiction follows the procedure laid out in Art. 61 in conjunction with Art. 48 and 50 of the Convention.

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190 Figari Layus, Überblick über das interamerikanische Menschenrechtssystem, in: MenschensRechtsMagazin (2008), 56 (59). [Overview of the Inter-American Human Rights System, in: MenschenRechtsMagazin [in: HumanRightsMagazine]. (2008), 56 (59).

191 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC- 10/89, July 14, 1989, Inter-Am.Ct.H.R. (Ser. A) N °. 10 (1989).

Regarding the obligations of the signatory states that ensue from the judgements of the Inter-American Court on Human Rights acc. to Art. 68 of the Convention and Art. 31 paragraph 1 of the Rules of Procedure, the judgements of the Court of Law are final and incontestable. Therefore, there are no legal remedies available against this legal process. The signatory states are subject to the following obligations acc. to Art. 68 of the American Convention on Human Rights:

> « 1. Les Etats parties à la présente Convention s'engagent à se conformer aux décisions ren- dues par la Cour dans tout litige où elles sont en cause.
> 2. Le dispositif de l'arrêt accordant une indemnité pourra être exécuté dans le pays intéressé conformément à la procédure interne tracée pour l'exécution des jugements rendus contre l'Etat. »[192]

> "1. The States Parties to the Convention undertake to comply with the judgement of the Court in any case to which they are parties.
> 2. The part of a judgement that stipulates compensatory damages may be executed in the coun- try concerned in accordance with domestic procedure governing the execution of judgements against the state."

Here, the same problem emerges as in Art. 46 paragraph 1 of the ECHR. Because of the manner in which Art. 68 paragraph 1 of the Inter-American Convention on Human Rights is worded, it does not provide any information regarding the reach of the declaratory judgement's binding effect. Thus, our opinions regarding the scope of the binding effect acc. to Art. 46 paragraph 1 of the ECHR are applicable *mutatis mutandis*. A special dispensation can be noted when looking at Art. 68 paragraph 2 of the Inter-American Convention on Human Rights.[193] Namely, that the enforcement of the claim for damagses as the part of the declaratory judgment which

192 Übersetzung der originalen Fassung durch [translation of the original version by] Bourgorgue-Larsen/Úbeda de Torres, in: Les Grandes Décisions de la Cour Interamericaine des Droits de l'Homme, 792.

193 Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, in: European Journal of International Law (2008), 101 (102); Rota, Chronique de jurispru- dence de la Cour interaméricaine des Droits de l'Homme, in: Centre de Recherche pour les Droits Fondamentaux (CDRF) (2009), 189 (191 und 194); Gialdino, Le Nouveau Règlement de la Cour Interaméricaine des Droits de l'Homme, in: Revue Trimestrielle des Droits de l'Homme (2005), 981 (980); Mazzuoli, The Inter-American human rights protection system: Structure, functioning and effectiveness in Brazilian law, in: African Human Rights Law Journal (2011), 194 (203).

grants monetary damages, is left to the national enforcement procedure law of the signatory State concerned. Kokott rightly points out that the effectiveness of Art. 68 paragraph 2 depends on the manner in which the state liability law is implemented in the individual signatory states.[194] Insofar, paragraph 2 of Art. 68 of the Inter-American Convention is comparable to Art. 24 paragraph [sic] of the ECOWAS-Protocol A/P1/7/91 (06/07/1991)[195]. However, there is an important peculiarity within the system of the Inter-American Convention on Human Rights.[196] This peculiarity is found in Art. 63 paragraph 1 of this Convention. In fact, Art. 63 paragraph 1 expressly provides the Inter-American Court with the authority to order concrete corrective measures if it is determined that it is in the sense of the implementation of the judgement. It is helpful in this respect to understand the gist of the regulation. Art. 63 paragraph 1 of the Inter-American Convention on Human Rights[197] reads as follows:

> « Lorsqu'elle reconnait qu'un droit ou une liberté protégés par la présente Convention ont été violés, La Cour ordonnera que soit garantie à la partie lésée la jouissance du droit ou de la liberté enfreints. Elle ordonnera également, le cas échéant, la réparation des conséquences de la mesure ou de la situation à laquelle a donné lieu la violation de ces droits et le paiement d'une indemnité juste à la partie lésée. »[198]

> "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured Party be ensured the enjoyment of his right or freedom that was violated. It shall also rule if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

194 Kokott, Der Interamerikanische Gerichtshof für Menschenrechte und seine bisherige Pra- xis, in: ZAöRV (1984), 806 (819). [The Inter-American Court for Human Rights and its present practice, in: ZAöRV (1984), 806 (819). This regulation can be compared to Art. 44 of the founding treaty of the East African Community Scheme.

195 See also: Art. 6 of Protocol A/SP.1/01/05 (19/01/2005).

196 Hilling, Le système interaméricain de protection des droits de l'homme: le modèle européen adapté aux réalités latino-américaines, in: Revue Québécoise de Droit International (1991–1992), 210 (214).

197 Signed in San José, Costa Rica, on 22/11/1969.

198 Translation of the original version by Burgorgue-Larsen/Úbeda de Torres, in: Les Grandes Décisions de la Cour Interaméricaine des Droits de l'Homme, 791.

In light of this regulation, the Inter-American Court has ordered concrete corrective measures to convicted Member States in many of its decided cases.[199] The comparative considerations can now be summarized:

The ECtHR and the Inter-American Court for Human Rights have interpreted the Human Rights Conventions in their respective areas of application in such an evolutive manner that they made a great contribution to the development of the protection of human rights.[200] Moreover, a mutual influence of the systems can be observed due to the reciprocal reference to jurisdiction in similar cases.[201] This reciprocal reference can be justified based on the commonality of human rights instruments.[202]

After a comparative observation on a continental level in Africa, the following results can be noted: The African Charter represents the general standard for review regarding the competence on human rights for all three regional courts on the continent.[203] Other than the East African Court of Law and the SADC-Tribunal who must find their own way with regard to its competence in human rights disputes,[204] the ECOWAS Court

199 Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, in: European Journal of International Law (2008), 101 (104); Kokott, Der Interamerikani- sche Gerichtshof für Menschenrechte und seine bisherige Praxis, in: ZAöRV (1984), 806 (816) [The Inter-American Court for Human Rights and its present practice, in: ZAöRV (1984), 806 (816); Huneeus, Court resisting Court, in: Cornell International Law Journal (2011), 101 (114).

200 Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, in: European Journal of International Law (2008), 101 (106).

201 Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, in: European Journal of International Law (2008), 101 (104, 111, 114, 116); Olinga, Les Emprunts normatifs de la Commission Africaine Droits de l'Homme et des Peuples aux systèmes européen et Interaméricain de Garantie des Droits de l'Homme, in: Revue Trimestrielle des Droits de l'Homme (2005), 499 (500).

202 Padilla, An African Human Rights Court: Reflections from the perspective of the In- ter-American system, in: African Human Rights Law Journal (2002), 185 (186); Murray, A compa- rison between the African and European Court of Human Rights, in: African Human Rights Journal (2002), 195 (215, 216).

203 Enabulele, Reflections on the ECOWAS-Community Court Protocol and the Constitutions of Member States, in: International Community Law Review (2010), 111 (138).

204 Viljoen, International Human Rights Law in Africa, 2nd éd., 490; Alter/Helfer/McAllister, A new international human rights court for West Africa: the ECOWAS Community Court of Ju- stice, in: The American Journal of International Law (2013), 737 (739).

of Justice has an express legal competence in human rights issues.[205] Surprisingly, the ECOWAS Court ofJustice has a restrictive self-understanding. In contrast, the East African Court of justice and the SADC Tribunal tend to interpret their respective bases of authority in a broad sense.[206]

One of the important consequences of the interpretation of the African Charter by the new regional courts for the protection of human rights on the continent is that the interpretation of the Charter by the courts develops a binding effect for the convicted signatory states and its organs [sic].[207]

It must be pointed out that an excessively strong position of the regional courts could, due to the loss of sovereignty, lead to a lack of acceptance. In the worst case scenario, this could lead to a withdrawal of the authorisation by some of the signatory states. This was the case within the Southern African Development Community (SADC) in 2010, where the activities of the SADC Tribunal were suspended. Within the ECOWAS Community, such intentions were observed with regard to the Republic of Gambia after a conviction. This luckily did not lead to a withdrawal by the Republic of Gambia. It must be pointed out that the withdrawal of the authorisation or the suspension of the ECOWAS Court of Justice can hardly be imagined because, unlike the other regional organisations in Africa, the ECOWAS Member States are obliged to observe the guidelines of the Protocol of Good Governance. A withdrawal from the Additional Protocol A/SP.1/01/05 would in turn constitute a violation of the Protocol of Good Governance. Therefore, the events of August 2010 regarding the SADC-Tribunal are not applicable to the ECOWAS Community. It also depends on the historical development of the ECOWAS Community as described in the introduction of the analysis.

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205 Alter/Helfer/McAllister, A new international human right court for West Africa: the ECOWAS Community Court of Justice, in: the American Journal of International Law (2013), 737 (739).

206 Ebobrah, Litigating Human Rights before sub-regional court in Africa: Prospects and challenges, in: African Journal of International and Comparative Law (2009), 79 (91).

207 Olinga, La première décision, au fond de la Cour africaine des droits de l'homme et des peuples, in: La Revue des droits de l'Homme (2014), 2 (2); Rousseau, Droit International Public, Tome I, p. 248.

F. Manifestations of Legal Force of the Judgements of the ECOWAS Court of Justice

The decision by the Court of justice is a purely declaratory judgement which, as such, has a declaratory effect.[208] However, the declaratory nature of the judgement does not diminish the legal force of the decision. The formal legal force thus takes effect once the decision by the Court of Law has been issued. Nevertheless, the declaratory judgement has a constitutive effect within the national legal system of the convicted Member State.[209] In the following, the formal and substantive legal force of the decision by the Court of justice will be discussed.

Here, the obligation of the convicted signatory state resulting from a judgement by the Court of Law needs to be considered. Acc. to Art. 15 paragraph 4 of the Amendment Agreement, the decisions of the Court of justice develop a binding effect on the Member States, the institutions of the Community as well as all natural and legal persons. It is clear from this provision that the signatory states must observe the judgements by theECOWAS Court of Justice . This in turn results in an obligation to also implement the judgements. For this reason, the legal force of the decision will be discussed before the question of the binding effect is addressed. The following questions are examined in this section: Does the declaratory judgement have an effect on the initial proceeding violating human rights? Does the declaratory judgement lead to an automatic break of the legal force?

With regard to the binding effect: the starting point in establishing the effect under international law of the declaratory judgement by the Court is described in Art. 15 paragraph 4 of the Amendment Agreement. Since the Court of Law has the final jurisdiction regarding the interpretation and application of the founding treaty and the corresponding Additional Protocol, formal legal force takes effect after the judgement has been pronounced (I). The content of a formal and final decision is decisive for the parties to the proceedings. Therefore, the object of the legally binding decision is no longer available to the parties to the proceedings. Hence, a substantive legal force takes effect (II). Consequently, the legal force brings

208 Schaffrin, Rechtskraft der Entscheidung[Legal Force of the Decision], in: Karpenstein/Mayer, EMRK, 2. edition, Art. 27 paragraph 2, Rn. 7.

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

about fundamental legal consequences for the convicted signatory state (III).

I. Formal Legal Force

The binding effect requires a court decision. This is a legally binding sentence by the Court of Law. Essentially, the binding effect represents a logical consequence of the legal force. After an admissible individual complaint, the Court of Law decides whether or not the complaint is justified. The complaint will be rejected if the application is unjustified in the Court of Law's opinion. This means that the national measure does not contravene the provisions of the African Charter. On the other hand, the Court of Law might declare the contested conduct by the Member State to be incompatible with the provisions of the Charter. The sentence by the Court of Law in the operative part of the judgement is final and enters into formal legal force with its pronouncement to the parties to the dispute. The commencement of the formal legal force represents the irrevocability of the judgement because there is no legal remedy regarding the judgement by the Court of justice . The formal legal force therefore has two significant consequences, namely: the non-appealability and the irreversibility of the judgement. For this purpose, Art. 19 paragraph 2 of the Protocol (A/P1/7/91) expressly stipulates that after their pronouncement, the decisions by the Court of Law immediately enter into legal force. Furthermore, there is no other legal action available against the judgements by the Court of Law acc. to Art. 19. Paragraph 3 of the Protocol (A/P1/7/91). Moreover, the Court of Law decides only once on each object of dispute. While the non-appealability expresses the effect of the formal legal force towards the parties to the dispute, the irreversibility concerns the effect towards the Court of Law. This means that neither the parties are allowed to seek another instance, nor may the Court of Law alter the judgement retrospectively. Consequently, this can be regarded as the irrevocability of the judgement.

II. Substantive res judicata

With regard to substantive res judicata, the question concerning the procedural binding effect must be asked. The following aspects of the binding effect of res judicata will be presented: the content of substantive res judi-

cata, the extent of the legal force (1), the scope and approximate consequence of substantive res judicata and finally, the limit of the legal force. The limits of substantive res judicata are examined in the following regarding their objective (2), subjective (3) and temporal (4) aspects.

1. Extent of the Legal Force

Substantive res judicata refers to the pronounced opinion in the operative part of the judgement by the Court of Law. Regarding the procedural aspects, substantive res judicata hinders a renewed submission of a complaint regarding the same object of dispute. Therefore, substantive res judicata must be regarded as an obstacle to legal proceedings under international law. The content of the judgement is decisive and binding for the parties to the dispute.[210] However, the question must be asked, whether the principal reasons of the decision and the determination of facts are part of the legal force. Some voices in literature are in favour of a unity between the principal reasons of the decision and the operative part of the judgement. The principal reasons of the decision in the declaratory judgement are to be taken into account when implementing the judgement because here the Court of Law shows the required action in order to remove the violation. There is rarely a detailed "description of the criminal act"[211] to be found in the operative part of the judgement. Should the aforesaid be left in place, one can assume that the ECOWAS Court of Justice has already found the judgement by the Togolese Constitutional Court in the legal matter Ameganvi in the initial case to be expressly in violation of human rights in its principal reasons for the decision, when the Court of Law made the point that:

> « Il résulte des faits de la cause que les Requérants n'ont jamais exprimé leur volonté de dé- missionner ».[212]

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210 Cremer, Zur Bindungswirkung von EGMR -Urteilen [Regarding the binding effect of judgements by the ECtHR]. Anmerkung zum Görgülü-Beschluß des BVerfG vom [Comment regarding the Görgülü judgement by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (690).

211 Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung [The implementation of judgements by the ECtHR and how they are monitored], in: EuGRZ (2003), 168 (171).

212 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/09/11s (07.10.2011), par. 63.

Further, the Court of Law expressly confirms what the violation consists of by pointing out:

> « [L]a Cour constitutionnelle à statuer comme elle l'a fait, privant ainsi les Requérants de leur mandat, sans qu'ils aient été entendus, et ce en violation des dispositions pertinentes de la Déclaration Universelle des Droits de L'Homme et de la Charte Africaine des Droits de l'Homme et des Peuples ».[213]

By using these words in the principal reasons in the judgement, the Court of Law is expressly drawing attention to the fact that it decides in the last instance on the monitoring of the African Charter. At the same time, it expresses therelativisation of the legal force of national constitutional courts in human rights disputes.[214]

2. Objective limit of the legal force

The objective limit of the legal force refers to the legal issue raised in the object of the dispute. The determination of the violation of this primary duty is the basis for the validity of the object of the dispute. The answer to the raised legal issue represents the objective limit of the legal force. Accordingly, the content of the statements by the Court of Law, expressed in the operative part with regard to the specific object of the dispute, unfold. The reasons for the judgement serve the interpretation and the communication of the operative part. It is possible that the Court of Law may refer to one of its previous judgements. This reference only serves to give reasons for the concrete legal dispute and is therefore not legally binding.[215]

3. Subjective limit of the legal force

The subjective limit of the legal force primarily regards the personal limit of the declaratory judgement. First and foremost, a declaratory judgement

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213 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/09/11 (07.10.2011), par. 66.

214 Kane, La Cour de justice de la CEDEAO à l'épreuve de la protection des droits de l'homme, Mémoire de Maitrise, Université Gaston Berger (2012–2013), 46.

215 Tsikrikas, Die Wirkungen der Urteile des Europäischen Gerichtshofs im Vertragsverlet- zungsverfahren [The effects of judgements by the European Court of Justice in infringement proceedings, 57.

develops an *inter-partes* effect (a). This is not to say that the legal force is without consequence for Member States, who are not part of the proceedings (b).

a. Inter-partes-legal force

From a subjective legal perspective, the legal force refers to the parties to the dispute who are involved in the individual complaint proceedings, namely the plaintiff and the Member State, whose act of public authority is invalidated by the Court of Law due to an incompatibility with the Charter.[216]

Art. 15 of the Amendment Agreement, however, lacks the concept of the party although the same regulation concerns the effects of the legal force of an individual complaint, and thus concerns the party status[217]of the individual in proceedings under international law. The question must at least be asked, whether one should assume the regulation of an *erga-omnes* relationship based on the unchanged wording.

b. Erga-omnes impact of the legal force in practice

The binding effect res judicata of a decision under international law must always be differentiated from the impact of a judgement by a national constitutional court. The *res judicata* acc. to Art. 106 of the Togolese Constitution comprises of the entire national legal system *de jure.* On the contrary, the *res judicata* of the ECOWAS Court of Justice is limited to a particular object of dispute and parties to a dispute. In principle, the decisions of the Court of Law develop an *inter-partes*-effect. Since the given formal legal force solely concerns the parties to the proceedings, other Member States

216 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und europäischem Gerichtshof für Menschenrechte [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat [The State], 44 (2005), 403 (411).

217 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge- richt und europäischem Gerichtshof für Menschenrechte [Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat [The State], 44 (2005), 403 (420).

are not affected by this. This means that every decision is binding for the convicted signatory state and the plaintiff. However, the development of regional law and the demand for respect of human rights at ECOWAS-level show that all signatory states should adjust their actions to comply with the provision of ECOWAS-standards. An "adjustment" of the national legal system is necessary in the light of the jurisdiction by the International Human Rights Court.[218]

Hence the distinction in the literature between the binding effect res judicata (convicted Member State and individual plaintiff) and the persuasion effect (other Member States).[219]

Consequently, the question must be asked whether the judgements by the ECOWAS Court of Justice can generate legal obligations for non-participating member States.[220] In the restrictive sense, and based on the subjective limits of the legal force, the non-participating Member States are not bound by the legal force. The legal force rather only extends to the plaintiff and the Member State convicted in the proceedings (i.e. the respondent). Furthermore, the Court of Law does not judge in the field of human rights in abstracto[221] but rather always on application by a plaintiff against a Member State in a specific case. However, the judgements by the Court of justice specify the standards and the claim of validity by the African Charter within the constitutional community, toward which all Member States should orientate their action. Due to the duty of realization of theCharter by the Court of justice, the judgements by the Court have a

218 Cremer, Zur Bindungswirkung von EGMR-Urteilen. [Regarding the binding effect of judgements by the ECtHR]. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004 [Comment regarding the Görgülü judgement by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (693); dazu auch: Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung, in: EuGRZ (2003), 168 (174) [see also: Okresek, the implementation of ECtHR judgements and their supervision, in: EuGRZ (2003), 168 (174)].

219 Ress, Wirkung und Beachtung der Urteile der Straßburger Konven- tionsorgane, in: EuGRZ (1996), 350 (351) [Effect of and Compliance with the judgements of the Straßburg Convention organs in: EuGRZ (1996), 350 (351)]; Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung, in: EuGRZ (2003), 168 (168) [see also: Okresek, the implementation of ECtHR judgements and their supervision, in: EuGRZ (2003), 168 (168)].

220 Mellech, Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung, 75 [The reception of the ECHR and the judgements of the ECtHR in the French and German jurisdiction, 75].

221 Mellech, Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung, 76. [The reception of the ECHR and the judgements of the ECtHR in the French and German jurisdiction, 76].

normative orientation function within the Community. The most important advantage of the *erga-omnes*-effect is the avoidance of future complaints against other Member States who are, in principle, not affected by the legal force. The general effect of the judgements therefore disburden the Court of justice and, at the same time, serve to avoid the conviction of the other Member States.[222]

In the system of convergence of constitutional principles such as ECOWAS', one can assume that the jurisdiction by the Court of justice develops an *erga-omnes*-effect toward all national courts of Member States. The *erga-omnes*-binding effect has the advantage to avoid a divergent level of protection through the Charter within the same legal system of the Community.

This especially also applies to the Court of justice which represents a pedagogic legal instrument within the overall legal system of the Community. Thus, the decisions by the ECOWAS Court of Justice, in practice, act as precedent for the courts of Member States and, in particular, for the constitutional courts which play an exemplary role with regard to state law. Therefore, a uniform human rights standard is established within the constitutional order within the Community.[223] It is the task of the Court of Law to ensure a uniform West African standard for human rights. This goal can only be reached if a uniform human rights development can be achieved through its decisions. Just as at the European level (ECHR), the Protocol on Good Governance promotes a common West African development of human rights within the legal order of ECOWAS. At the European level, the German Federal Constitutional Court has rightly pointed out that:

> „[D]ie Heranziehung der Europäischen Menschenrechtskonvention und der Rechtsprechung des Europäischen Court of Law für Menschenrechte als Auslegungshilfe auf der Level des Verfassungsrechts über den Einzelfall hinaus dient dazu, den Garantien der Menschenrechts- konvention in der Bundesrepublik Deutschland möglichst um-

222 Schilling, Deutscher Grundrechtsschutz zwischen staatlicher Souveränität und menschen- rechtlicher Europäisierung [German constitutional protection between the sovereignty of the state and Europeanisation in terms of human rights], 109.

223 Pache, Die europäische Menschenrechtskonvention und die deutsche Rechtsordnung [The European Convention on Human Rights and the German legal system], in: EuR (2004), 393 (409).

fassend Geltung zu verschaf- fen, und kann darüber hinaus Verurteilung der Bundesrepublik Deutschland vermeiden ver- helfen".[224]

Furthermore, the orientation effect applies to the legislative, the judicial and the executive powers. There are already examples of Member States within theEuropean framework, who are not directly affected by a declaratory judgement by the ECtHR, but who have carried out precautionary legal changes, in order to comply with the standard of the Convention through jurisdiction by the ECtHR. Among these countries are the Netherlands and Austria. Austria had namely, in the case Zimmermann and Steiner vs Switzerland, taken action with the alleviation of the Constitutional Court and the Supreme Administrative Court [sic].[225] The Netherlands also reacted accordingly with the Act of 27/10/1982 to the effect of the Marckx judgement vs Belgium on the discriminating regulations of the Dutch legal system.[226]

The binding effect, however, goes beyond the individual case and generally takes effect on all national cases with the same criteria because, with the conviction, the responding Member State carries three responsibilities [sic], namely:

- The obligation of termination;
- The obligation of compensation and granting of just reparation;
- and the obligation to take measures to prevent further violations in the future.

The two first obligations principally concern the decided case. The last obligation refers to all further potential cases, which would lead to another conviction of the Member State, should they end up before the ECOWAS Court of Justice. It is precisely for this reason, that it is imperative that the Member State concerned take measures to remove or, if necessary, put an end to the offences which gave rise to the violation.[227] The declaratory judgements by the ECOWAS Court of Justice therefore serve as an inter-

224 BVerfGE [German Constitutional Court] 128, 326 (326).

225 Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung [The implementation of judgements by the ECtHR and their supervision], in: EuGRZ (2003), 168 (170).

226 Zitiert nach: Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung [The implementation of judgements by the ECtHR and their supervision], in: EuGRZ (2003), 168 (170).

227 Ress, Die Europäische Menschenrechtekonvention und die deutsche Rechtsordnung [The European Convention on Human Rights and the German legal system], in: EuGRZ (1996), 337 (350).

pretation aid for the affected Member State's own national affairs. Hence, the declaratory judgement develops a national multi-case legal effect.

Above all, the goal of the Amendment Agreement and the Protocol A/ SP.1/ 01/05 is to achieve a uniform adherence to the human rights as guaranteed by the Charter throughout the Community. After the case Koraou e. g., no Member State would now allege that e.g. slavery is lawful in its own legal system. This is because the ECOWAS Court of justice has already made a final decision that this conduct represents a serious violation of the African Charter. Should there be similar conduct within a member State that was not judicially reviewed, it should take national measures to ensure that this violation is terminated. Therefore, this Member State has the advantage of sparing itself of such a judicial review or to prevent it. Moreover, the jurisdiction of the ECOWAS Court of Justice creates the basis for a dialogue between the courts. The national legal practice of the Member States is based on the case law of the Court of justice in order to justify its own decisions. This dialogue can be implicit or explicit (discussed in more detailed in chapter 4).

4. Time-boundary of the legal force

The formal legal force takes effect at the time the judgement is announced. This point in time is significant because it can only be measured by this point in time whether any future complaint has already been covered by the res judicata that took place. In other words: Should there be a future plea relating to aspects of the object of the dispute, the Court of justice , in order to assess a new individual complaint and to decide whether it concerns the same case which it has already decided on, orientates itself on the date of the announcement of the declaratory judgement.[228] In this context, the point in time is an important "*repère*" regarding the assessment of the legal force. Moreover, the point in time plays an important role with regard to an application for review: in order to decide whether the points in question in the application for review were already known to the individual plaintiff at the point of the commencement of the res judicata. Should this question be answered in the affirmative, then the application for re-

228 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], 43.

view would be rejected as inadmissible (this has been dealt with in more detail in chapter 2).

III. Legal consequences of the legal force for the convicted signatory state

Three types of obligations arise from the declaratory judgement with regard to government liability principles under international law:
– The obligation to cease and desist;
– The obligation of reparation;
The obligation to accommodate reparation and the prevention of future violation through applicable preventive measures.[229]

This list means that the obligation to cease and desist (1) is to be differentiated from the compensation obligation (2).[230] The accommodation of reparation or compensation and the prevention of future violation conform with the consequence in future time of the declaratory judgement (3)

1. The obligation to cease and desist

The obligation to cease and desist, or of "termination" regarding the violation of obligations under international law can be defined as the obligation by the Convention state to terminate a violation determined by an instance under international law. This includes an obligation to remove or stop a continuing unlawful offence under international law. The obligation to terminate, in a restrictive sense, can be deduced from Art. 1 of the African Charter on Human Rights. Acc. to Art. 1 of the Charter:

> « Les Etats Membres de L'Organisation de l'Unité Africaine, parties à la présente Charte, reconnaissent les droits, devoirs et libertés énoncés dans cette Charte et s'engagent à adopter des mesures législatives ou autres pour les appliquer ».

229 Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichts hofs für Menschenrechte [The obligations by the states arising from the judgements by the European Court of Human Rights], 52 ff.

230 Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichts- hofs für Menschenrechte [The obligations by the states arising from the judgements by the European Court of Human Rights], 53.

> "The Member States of the Organisation of African Unity to the present Charter shall recog- nize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measure to give effect to them".

It can be deduced, by implication, that the Member States commit themselves to also refrain from all measures opposed to the rights within the Charter.[231] In case the ECOWAS Court of Justice determines a violation of the Charter and the violation continues at the time of the declaration, the Court of Law may order the convicted Member State to take measures at a national level in order to terminate the violation. Along with this, the order is to be seen as an *appeal* to the primary obligation of the Member States stipulated in Art. 1 of the Charter.[232] This is coherent: according to the provision in Art. 1, the Member States are obliged to guarantee the human rights embedded in the Charter to all persons subject to their respective sovereign territory. Withholding the guaranteed human rights is a typical case of an ongoing violation.[233] Should it be necessary for the decision to establish that this obligation has been denied, the Court of justice is entitled to order the removal of the cause of the violation of the Convention.[234] The obligation to terminate must hereby be regarded as the direct consequence of the primary obligation.[235]

It can be noted from the aforementioned that the obligation to terminate must be strictly differentiated from the obligation to compensate. This distinction is important because, in terms of the legal consequences in

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231 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], 49.

232 Vgl. Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measure by the ECHR], in: EuGRZ (2004), 257 (259); Verdross/Simma, Universelles Völkerrecht [Universal International law], 3rd edition, § 1294.

233 Polakiewicz, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Court of Law für Menschenrechte [The obligations by the states arising from the judgements by the European Court of Human Rights], 64.

234 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die deutschen Gerichte [The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 49.

235 Vgl. Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measure by the ECHR], in: EuGRZ (2004), 257 (260).

the area of a state's responsibility, additional measures may be required from the responsible signatory state.[236] The obligation of non-recurrence as well as the obligation of termination may be considered.[237] Ultimately, the obligation of termination can be understood as the obligation to remove the cause of the violation. The best way to terminate a violation of international law is via legislative reforms of national law. In this regard, the ICJ explains in its interpretation of the Avena-case:

> « Un Etat qui a valablement contracté des obligations internationales est tenu d'apporter à sa législation les modifications nécessaires pour assurer l'exécution de des engagements pris ».[238]

Thus, the obligation of compensation is also included.

2. The obligation of compensation

In contrast to the obligation of termination, the obligation of compensation is the duty of the convicted Member State to reverse the activity of violation as much as possible. All measures should thus be taken in order to reach a situation as if the violation had not occurred. In this sense, the reparation could qualify as an obligation to eliminate the consequences of this act and restore the orderly condition.[239] The Permanent International Court of Justice summarises the obligation to eliminate the consequences as follows:

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236 Verdross/Simma, Universelles Völkerrecht, 3. edition, § 1294; so auch: Heckötter, Die Bedeu- tung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die deutschen Gerichte [The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 50.

237 Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR [Regarding the order of concrete corrective measure by the ECHR], in: EuGRZ (2004), 257 (260).

238 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.

239 Heckötter, Die Bedeutung der Europäischen Menschenrechtskonvention und der Rechtsprechung des EGMR für die deutschen Gerichte [The meaning of the European Convention on Human Rights and the jurisdiction of the ECtHR for German courts], 50 f.

> « [L]e principe essentiel qui découle de la notion même d'acte illicite et qui semble se dégager de la pratique internationale, notamment de la jurisprudence des tribunaux arbitraux, est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis».[240]

No easier *escape route*[241] may be provided under international law that would stand in the way of the obligation of compensation by the International Court of Justice. Should such misconduct be present, yet another violation of International Law would exist because, after a declaration of unconventionality, the Member State in question carries an obligation to reach results. Based on the declaratory judgement, all opposing national legal acts must be set aside.[242]

a. Order to reinstate the initial proceedings in the operative part of the judgement

As shown, the responsible signatory state carries a triple obligation of transposition under international law: the obligation to terminate, to compensate and to prevent comparable acts in the future. Thus, importance must further be attached to the legal nature of the act by the state that violates international law. When it comes to judgements regarding the violation of international law, the resumption of the initial proceedings represents an appropriate remedy to implement the declaratory judgement on a national level. This view can also be justified through the jurisdiction by the ECtHR. In more recent decisions which involved violations of procedural safeguards, the ECtHR always stresses the point that the appropriate form of compensation is in principle the provision of new proceedings or

240 Affaire relative à l'usine de CHORZÓW (demande en indemnité) (fond), CPJI, Série A N° 17 (13/09/1928), 47.

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

242 Okresek, Die Umsetzung der EGMR-Urteile und ihre Überwachung, in: EuGRZ (2003),
168 (171) [see also: Okresek, the implementation of ECtHR judgements and their supervision, in: EuGRZ (2003), 168 (171)].

the resumption of the proceedings on application by the concerned party under national law.[243]Thus, a renewed assessment of the object of the dispute must take place with particular regard to the ECOWAS decision. This is the logical way to do justice to the national obligation to terminate the measure in violation of human rights. For the convicted state, the finding of the violation means the existence of an offence under international law. The existence of this offence under international law,[244] arising from the conviction, triggers the termination or the elimination obligation of the offence that led to the conviction.

The judgement by the ECOWAS Court of Justice constitutes a performance-triggering declaratory judgement. The decision by the ECOWAS Court is, in principle, a declaratory judgement. However, this declaratory judgement gives rise to an obligation of the responsible Member State. Arising from the declaratory judgement, a duty to act is laid on the responsible contracting state.

From this, the Court can or should indirectly make provision for the implementation of its judgement. This is done by way of ordering concrete measures in the tenor of the judgement. The Court of justice would make an important contribution to the effective implementation of the judgement by ordering the implementing measures in the tenor of the declaratory judgement in order to fully comply with the restoration obligation (Cudak, Seydovic und Görgülü).[245] Although the Court of Justice does not avail of any competence to directly intervene in the national legal system, there are numerous ways in which the ECOWAS Court of justice can explicitly point to a certain measure that may provide a remedy for the removal of the national human rights violation. The ECtHR has sometimes made use of this method of wording in its recent jurisdiction, in order to

243 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommen tar, [European Human Rights Convention. ECHR commentary], 3rd edition, Art. 6, Rn. 140, 185; Breuer, Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR, in: EuGRZ (2004), 257 (263); Rohleder, Grundrechtsschutz im europäischen Mehrebenen- system [Protection of human rights in the European multi-level system], 76; CEDH, N. 71503/01, Arrêt (08.04.2004), Affaire Assanidzé c. Géorgie, par. 202; CEDH, Nr. 15869/02, Arrêt (23/03/2010), Affaire Cudac c. Lituanie, par. 79; CEDH, Nr. 1620/03, Arrêt (28.06.2012), Affaire Schütz c. Allemagne, par. 17.

244 Schilling, Deutscher Grundrechtsschutz zwischen staatlicher Souveränität und menschen- rechtlicher Europäisierung [Protection of the German constitutional law between state sovereignty and Europeanisation], 110.

245 Rohleder, Grundrechtsschutz im europäischen Mehrebenensystem [Protection of constitutional law in the European multi-level system], 141.

explain to the convicted Member State, which results the ECtHR expects from the declaratory judgement. In its Görgülü-decision of 26 February 2004, the ECtHR pointed out that from the obligation in Art. 46 ECHR "follows e.g. that a judgement in which the Court of justice observes a violation, obligates the responding state in legal terms not only to a just compensation of the concerned parties, but also to possibly take individual measures regarding its national legal system under the auspices of the ministerial committee, in order to stop the violation determined by the Court of justice and to remedy the consequences as much as possible."[246] After the establishment of an infringement, the convicted Member State must do or refrain from doing something. The continuation of the situation which existed before thedeclaratory judgement constitutes an ongoing offence by the convicted signatory state. In this respect, and with regard to the system of protection by the ECOWAS Court of Justice, these questions may also be asked: How is the enforcement by way of the individual complaint procedure before the ECOWAS Court of Justice useful if no reparation is carried out at a national level after the finding of a violation of the Charter? Thus, the question of the result-oriented binding legal effect of the declaratory judgement arises. It follows that the tenor of the judgement, as well as the salient reasons for the decision, should be regarded as a unit because the salient reasons for the decision are signposts regarding the implementation of the declaratory judgement: the main reasons for the decision in the declaratory judgement already provide information regarding the national conduct, in which the wrongdoing is rooted. The order, especially in the tenor of the judgement, has the advantage of being able to accelerate the implementation of the declaratory judgement.[247]

However, it should be clarified that the manner in which the state is expected to render compensation is left to the convicted state's discretion. However, the binding requirement and the efficiency of the declaratory judgement by the Court of justice is to be observed. The logical way to achieve an effective implementation of declaratory judgements, is to repeal the legally binding national decision in violation of human rights. The law

246 ECtHR, Urteil vom 26.02.2004, G.v. Deutschland, Beschwerde Nr. 74969/01, Ziff. 64.
[Judgement of 26/02/2004, G.v. Germany, complaint No. 74969/01, clause 64.

247 Schaffarzik, Europäische Menschenrechte unter der Ägide des Bundesverfassungsgericht, in: Die öffentliche Verwaltung. Zeitschrift für öffentliches Recht und Verwaltungswissenschaft (2005), 860 (864). [European human rights under the aegis of the Federal Constitutional Court, in: The Public Administration. Magazine for Public Law and Administrative Science (2005), 860 (864).].

of state responsibility represents the fundamental basis of this obligation under international law. The obligation deriving from the compensation means that the guarantee under procedural law as per Art. 7 paragraph 1 of the Charter must be included in formal and substantive terms. The safeguarding of the procedural guarantee (the admissibility of the individual complaint and the associated declaratory judgement by the ECOWAS Court of Justice) has the purpose of ensuring the exercise of the plaintiff's substantive human rights. This institution of legal force does not preclude the obligation to repeal. The legal force is ensured in such a manner if the underlying national judgement does not infringe on the obligation under international law of the prosecuted Member State. The legally binding decisions by national courts of law are not sacrosanct based on these obligations by the state under international law.

b. Justification of the order to reinstate

The resumption of the original national proceedings in violation of human rights is an effective means of reparation. There are many reasons in favourof such an approach. First of all, the declaration by the Court of justice does not possess direct national executive power. As a result of the fact that the decisions by the Court do not have a direct penetrative effect regarding the national judgements in violation of human rights, the Court of justice does not have the competence to repeal the national judgement. Secondly, the national courts have a greater degree of factual proximity and can therefore better judge the concrete circumstances of the case which should lead to the effective implementation of the declaratory judgement. Moreover, the ECOWAS Court of Justice may not speculate with regard to the result of the original national proceedings. In fact, it is unthinkable that the judges in Abuja ask themselves the question: How would the proceeding have ended if the national violation by the Constitutional Court had not taken place? In other words: How would the national constitutional complaint have proceeded if the Constitutional Court had complied with the right to a fair trial provided for in Art. 7 Abs. 1 of the Charter? The ECOWAS Court of Justice cannot consider such questions in the declaratory judgement. It cannot therefore predict the answer.

The resumption of the original proceedings after the conviction of the Member State also provides practical reasons for justification. The national Constitutional Court is closer to the facts and can therefore judge the case better, while considering the main arguments the ECOWAS Court of Jus-

tice made. The initiation of the possibility to resume also takes the sovereignty of the sued Member State into consideration. Furthermore, the ECOWAS Court of Justice is, as a general rule, not a trial judge. The initiation of trial resumption in favour of the convicted plaintiff represents the logical solution of the comparison between *res judicata* and *restitutio in integrum*. The answer to the question regarding the result of the original national proceedings in violation of human rights can only be comprehensively answered by the Constitutional Court considering the salient points made by the ECOWAS Court of Justice. The resumption of the national complaint proceedings therefore offers the only way to fulfil the obligation of the prosecuted Member State as per the convention in the case of concluded violations.

3. Obligation to take preventative measures

This requires the convicted Member State to take all measures necessary to prevent a repetition of the criminal misconduct in future cases. The preventive obligations of the convicted Member State are owed in certain cases. Should the declaratory judgement e.g. show a structural deficit in the national organisation of courts, the defendant signatory state is subject to an obligation to take preventive measures.[248] The *guarantees of non-repetition of the wrongful act*[249] are seen by Arangio-Ruiz even as an *obligation of result.*[250] This view is accurate because the obligations under international law, especially in the area of human rights, possess an objective character. Beyond the case that was decided, the convicted member State is expected to take measures to prevent a repetition. The causes that could give rise to future offences are to be removed as a precautionary measure. In this context, ECtHR correctly pointed out in the Deweer case [251]:

248 Polakiewicz, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Court of Law für Menschenrechte [The obligations by the states arising from the judgements by the European Court of Human Rights], 155.

249 Arangio-Ruiz, Second Report on State Responsibility, UN Doc. A/CN.4/425 (09/06/1989), § 148 ff.

250 Arangio-Ruiz, Second Report on State Responsibility, UN Doc. A/CN.4/425 (09/06/1989), § 157.

251 ECtHR, Urteil vom 27.2.1980, Nr. 6903/75 [judgement of 27/2/1980, no. 6903/75] – Deweer v. Belgien [Belgium] = EuGRZ 1980, 667.

> « [A]u surplus, les paragraphes 1 et 2 de l'article 11 de la loi de 1945–1971 restent en vigueur […], de sorte que qu'ils peuvent à chaque instant donner lieu à une application combinée comme dans le cas de M. Deweer. *Le principal problème soulevé par l'affaire demeure par conséquent posé; il dépasse la personne et les intérêts du requérant et de ses héritiers.* »[252]

A further reason for the obligation to take preventive measures is that the individual legal situation of the plaintiff is paramount in the declaratory judgement. The Court of justice rather postulates the misconduct of the Member State in the declaratory judgement. Therefore, the convicted signatory state must restore the legal situation of the plaintiff under international law, but must also take measures to prevent similar cases in the future. The Court of justice doesn't have to stipulate such follow-up measures in the tenor of the judgement. Taking into account the finding in the individual case, the obligation to take preventive general measures in future is activated.[253] The objective obligation stemming from the declaratory judgement is thereby finally affirmed.[254] In general, three types of preventive measures can be differentiated.[255] They involve the publication of the declaratory judgement and the announcement of the same to the national authorities. Moreover, the convicted Member State should introduce reforms designed to prevent similar violations in the future. As a last consequence of the declaratory judgement, it must be considered that instructions should be given to the enforcement authorities to take the

252 ECtHR, Urteil vom 27.2.1980, Nr. 6903/75, Ziff. 38 [judgement of 27/2/1980, no. 6903/75, clause 38], Deweer v. Belgien [Belgium] = EuGRZ 1980, 667 (Hervorhebung des Verfassers) [(emphasis by the author)].

253 Polakiewicz, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Court of Law für Menschenrechte [The obligations by the states arising from the judgements by the European Court of Human Rights], 153.

254 Ress, „Die Einzelfallbezogenheit" in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, in: Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, FS für H. Mosler [The relatedness of "the individual case" in the jurisdiction by the European Court of Human Rights, in: International law as a legal system – international jurisprudence – human rights, FS for H. Mosler] (1983), 719 (744).

255 Polakiewicz, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Court of Law für Menschenrechte [The obligations by the states arising from the judgements by the European Court of Human Rights], 150 f.

declaratory judgement into account with regards to their areas of competence.[256]

The Member States not participating in the individual proceedings are excluded from the formal res judicata. Although the declaratory judgement has no effect regarding the judgement towards the Member States that are not part of the proceedings, the declaratory judgements by the ECOWAS Court of Justice have a regulatory character of the African Charter within the Community. The declaratory judgements raising fundamental normative questions of general importance, such as the prohibition of slavery, should be implemented by all Member States within their respective sovereign territories.

In conclusion, other Member States are factually bound by declaratory judgements. The Member States should be bound to the decisions by the Court of justice in the same way that they are bound to the instruments of the Community. Particularly because the regulation regarding the binding effect (Art. 15 paragraph 4 of the Amendment Agreement) makes no difference between the binding effect on the parties to the agreement participating and not participating in the proceedings. Due to this silence of the text, the legal effect must be deduced from general rules of international law. Moreover, the objective meaning of the regulation in Art. 15 paragraph 4 of the Amendment Agreement should be taken into account in the legal effect of the declaratory judgement. From the aforesaid it can thus be established: the declaratory judgement by the Court of justice does not establish a cross-case effect for the entire legal order of the Community according to the analogous interpretation of Art. 15 paragraph 4 of the Amendment Agreement.[257] Therefore, in principle, no legal obligation to implement the judgement arises for the signatory states that are not part of the proceedings. However, a declaratory judgement represents the current meaning of the African Charter for the entire legal order of the Community. Therefore, a quasi *erga-omnes*-effect is ascribed to the declaratory judgements.

256 Polakiewicz, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Court of Law für Menschenrechte [The obligations by the states arising from the judgements by the European Court of Human Rights], 150.

257 Rohleder, Grundrechtsschutz im europäischen Mehrebenensystem [Protection of constitutional law in the European multi-level system], 230.

G. Justification for Breaching the Legal Force: Function to Close Loopholes

At this stage, the question must be asked of how the human rights competence of the ECOWAS Court of Justice can be explained. There are two fundamental justifications, namely the structural problems within the national law of some of the Member States (I) as well as the bias of the national courts in some of the cases (II). However, the human rights competence of the Court of justice is accompanied with several problems (III).

I. Entry Barriers for individual complaints according to national law

It must be pointed out upfront that the constitutional acknowledgement of the rule of law and the civil and human rights have become a reality in the process of democratisation.[258] Nevertheless, the rights and principles have yet to be implemented by the Constitutional Court. The constitutional regulations are faced, in particular, with a certain resistance by the state authorities.[259] That is because there is a long tradition of authoritarian regimes on the African continent with a concentration of state authorities in favour of a single executive.[260] The complete overview of the legal system of the ECOWAS Member States paints a colourful picture of the possibility of access to the constitutional complaint. On the one hand, there are Member States which permit constitutional complaints. On the other hand, there are Member States that impose strict access requirements. This, in turn, constitutes a contravention of the right to an effective com-

258 Du Bois de Gaudusson, Défense et Illustration du constitutionnalisme en Afrique après quinze ans de pratique du pouvoir, in: Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu, 609 (611).

259 Du Bois de Gaudusson, Défense et Illustration du constitutionnalisme en Afrique après quinze ans de pratique du pouvoir, in: Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu, 609 (617); Diop, La Justice constitutionnelle au Sénégal. Éssai sur l'evolution, les enjeux et les réformes d'un contre-pouvoir juridictionnel, 263.

260 Gonidec, Constitutionnalismes Africains, in: African journal of international and compara- tive Law (1996), 23 (43); Benedek, Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene [Enforcing the rights of the individual and the peoples in Africa on a regional and national level], in: ZaöRV (1994), 150 (151).

plaint.[261] Lastly, there are signatory states who make access to the Constitutional Court or an equally legal instance possible but obstruct the actual realisation of this possibility.

The principle of subsidiarity in international law is based on the fundamental idea that the obligation to adhere to agreements under international law is first and foremost the task of the signatory states. In order to enforce the rights in the African Charter, the signatory states represent the original addressees of such obligations.[262] International law entrusts, so to speak, the respective contracting party with the adherence to these obligations. Since the signatory states have a priority position regarding the adherence to the obligations under international law, they must provide for national measures and procedures that lead to the adherence of these obligations. Only once it has been determined that a signatory state cannot fulfil or has violated its obligation is the international instance called upon, as a subsidiary remedy, by which to enforce international law.

What does it mean when the signatory state cannot fulfil its obligation? This means that the state has not taken measures to fulfil its obligations under international law. Alternatively, the signatory state has taken such measures but they turn out to be insufficient.

Within the ECOWAS legal system, the task of monitoring the adherence to the African Charter falls directly on the ECOWAS Court of Justice without the need for national legal remedies having to have been exhausted.[263] How can the derogation of the general practice of international law be explained within the ECOWAS human rights protection? There are several reasons for this: on the one hand, human rights complaints are either not admissible before national courts or they are admissible, but the requirements for admissibility are strict.[264] On the other hand, the direct admissibility of the individual complaint is to be remedied by the principle of effective legal protection.

Among the signatory states that allow constitutional complaints without such strict admissibility requirements is, first of all, Benin (Art. 122 of the

261 Nicaise, Jurisprudence constitutionnelle, in: Afrilex N°4, 353 (359), available at http:// cerdradi.u-bordeaux4.fr/la-revue-afrilex.html (last accesses on 20/01/2015).

262 Breuer, Staatshaftung für judikatives Unrecht, 3.

263 Onoria, The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter, in: African Human Rights Law (2003), 1 (3).

264 Österdahl, Implementing Human Rights in Africa. The African Commission on Human and Peoples' Rights and Individual Communications, 173.

Constitution of Benin). With regard to such Member States, it can be presumed that they have theoretically fulfilled their procedural legal obligation to protect under Art. 7 paragraph 1 of the Charter. However, in many other Member States, such as Togo for example, individual constitutional complaints are strictly inadmissible. It will be discussed in the following how the inadmissibility of the constitutional complaint (1) and the strict requirements for the individual constitutional complaint (2) justify the direct constitutional role of the ECOWAS Court of Justice. This legal situation forms the basis ofthe role of the ECOWAS Court of Justice as a guarantor of effective legal protection in West African States (3).

1. Inadmissibility of a national human rights complaint

First of all, we will look at the Member States that do not allow an individual constitutional complaint. The primary obligation to adhere to human rights and fundamental freedoms is provided for by the Member States of the ECOWAS Community. It is therefore necessary that the Member States open up constitutional guarantees to their citizens in order to fulfil this obligation. It is regrettable that many Member States do not allow individual constitutional complaints access to the Constitutional Court. Art. 99 of the Togolese Constitution stipulates:

> « La Cour constitutionnelle est la plus haute juridiction en matière constitutionnelle. Elle est juge de la constitutionnalité de la loi et elle garantit les droits fondamentaux de la personne humaine et les libertés publiques. Elle est l'organe régulateur du fonctionnement des institutions et de l'activité des pouvoirs publics ».

From a substantive point of view, this regulation sufficiently guarantees individual rights and fundamental freedoms. With this constitutional regulation, it is certain that the Togolese Constitution guarantees human rights and that the Constitutional Court monitors the fundamental rights and freedoms of the people. However, neither in the constitution nor in the supplementary constitutional act[265] is there any reference to how citizens can legally exercise the rights guaranteed under the constitution. In terms of competence, the question must be asked as to whether constitutional law allows constitutional complaints by natural and legal persons directly before the constitutional court as the Constitutional Court represents the

265 See Art. 27 to 32 of the *Loi Organique* (Togo) N°2004–004 of 01/03/2004.

natural guardian of fundamental freedoms.[266] However, a direct constitutional complaint by natural and legal persons to the Constitutional Court is, on closer inspection of the constitutional regulations and the rules of procedure of the Constitutional Court, not admissible. This means that whilst human rights are sufficiently guaranteed in the constitution, there are no procedural guarantees to realise these rights. Therefore, the Togolese Constitutional Court has declared a complaint by members of parliament in the initial proceedings to be inadmissible. Furthermore, the court confirms that there are no legal remedies against its judgements:

> « Qu'aucune autorité civile ou militaire, qu'aucune institution, fut-elle internationale, ne peut s'opposer à une décision de la Cour».[267]

These findings already represent an infringement against the procedural guarantee as per Art. 7 paragraph 1 of the African Charter on Human and Peoples' Rights.[268] The only possibility to find a judicial guarantee of individual human rights in the Togolese constitutional system is the co-called procedure of *Exception d'inconstitutionnalité.*[269] This procedure only affects the complaint with regard to the unconstitutionality of a law. Even in this case, natural persons are not directly admissible before the Constitutional Court with regard to a complaint. On the contrary, they must prove the objection of unconstitutionality of the act before the national courts. The national courts alone are directly entitled to make submissions for the procedure *Exception d'inconstitutionnalité* before the Constitutional Court. Moreover, another question arises concerning which constitutional guarantee applies if the act has entered into force in a constitutional manner but is used by legal practitioners and authorities in an unconstitutional manner. The constitution is quiet on this point. Therefore, citizens are powerless against much injustice by the judiciary and against the unconsti-

266 Nicaise, Jurisprudence constitutionnelle, in: Afrilex N°4, 353 (359), Available at http:// cerdradi.u-bordeaux4.fr/la-revue-afrilex.html (last accessed on 20/01/2015).

267 Cour constitutionnelle du Togo, Décision N°E-002/2011 vom 22. June 2011, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

268 Germelmann, Das rechtliche Gehör vor Gericht im europäischen Recht, 29.

269 Art. 104 paragr. 6 Constitution of Togo of 14 October 1992; Art. 96 paragr. 4 Constitution of Guinea of 07 May 2010; Art. 96 Constitution of Ivory Coast of 23 July 2000. Vgl. Abebe, Towards more liberal standing rules to enforce constitutional rights in Ethiopia, in: African Human Rights Law (2010), 407 (418).

tutional behaviour of the executive.[270] Thus, just to take the case of Togo, in February 2005, once Faure Gnassingbé[271] came to power, many human rights violations and constitutional infractions were determined, but as a constitutional judge wrote: the Constitutional Court could not take action in this case, as there was no possibility in the constitutional system for the Constitutional Court to make an official decision.[272]

2. Strict prerequisites for admissibility for the human rights complaint

There are also constitutional systems which provide for the possibility of a constitutional complaint. The prerequisites are, however, so selective that theyrarely lead to an effective constitutional guarantee.[273] It is, however, well-known that the Constitutional Court represents a „rampart" of fundamental rights in a democratic system.[274] Especially for this reason, a restriction of the prerequisite of admissibility before Constitutional Courts is, at the same time, an impairment of individual human rights and fundamental freedoms. Indeed, e.g. the constitutional system of Togo allows the constitutional complaint but also requires the meeting of conditions, making its realisation more difficult [sic].[275] The legal situation constitutes a serious and ongoing violation of the constitutional guarantee with regard to the rights in the African Charter because the constitutional complaint counts as one of the procedural guarantees. Unfortunately, this is not the case in some Member States within the ECOWAS legal system. Acc. to Art. 152 of the Constitution of Burkina Faso, e.g., those who are entitled

270 Onoria, The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter, in: African Human Rights Law (2003), 1 (21).

271 The current State President of Togo.

272 Maman-Sani, Vacance de la présidence de la République: la constitution togolaise à l'épreuve des faits, in: Revue nigérienne de droit (2006), 11 (28).

273 Koussetogue Koude, Peut-on à bon droit parler d'une conception africaine des droits de l'homme?, in: Revue Trimestrielle des Droits de l'Homme (2005), 539 (541).

274 Diop, La justice constitutionnelle au Sénégal. Éssai sur l'evolution, les enjeux et les réfor- mes d'un contre-pouvoir juridictionnel, 254.

275 Benedek, Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Level [Enforcing the rights of the individual and the peoples in Africa on a regional and national level], in: ZaöRV (1994), 150 (151).

to submit a complaint to the Constitutional Court are stipulated rather restrictively:

> « Le Conseil constitutionnel est saisi par le Président du Faso, le Premier Ministre, le Présent de l'Assemblée Nationale, et un cinquième (1/5) au moins des membres de l'Assemblée Na- tionale ».[276]

These prerequisites for admission represent a limitation of the right to an effective complaint.[277] This should be corrected at ECOWAS-level particularly because it does not represent a "*self-executing*" instrument under international law.[278] In order to allow implementation at a national level, the constitutional systems of the Member States recognise the African Charter as a firm component of the *bloc de constitutionnalité*.[279] Nevertheless, one must wait and see how those seeking justice will be able to exercise the provisions of the African Charta in court.[280]

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276 The requirements have been relatively more favourable under the new constitution after the completion of the first edition of this book. See Art. 157 of the Loi Constitutionnelle N°072-2015/CNT amending the Constitution of Burkina Faso.

277 Onoria, The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter, in: African Human Rights Law (2003), 1 (21).

278 Flauss, L'effectivité de la Charte Africaine des Droits de l'Homme et des Peuples dans l'or- dre juridiques des Etats Parties contractantes: Bilan et Perspectives, in: Flauss/Lambert-Abdelgawad (Publ.), L'application nationale de la Charte africaine des droits de l'homme et des peuples, 247 (249).

279 Flauss, L'effectivité de la Charte Africaine des Droits de l'Homme et des Peuples dans l'or- dre juridiques des Etats Parties contractantes: Bilan et Perspectives, in: Flauss/Lambert-Abdelgawad (Publ.), L'application nationale de la Charte africaine des droits de l'homme et des peuples, 247 (248).

280 Flauss, L'effectivité de la Charte Africaine des Droits de l'Homme et des Peuples dans l'ordre juridiques des Etats Parties contractantes: Bilan et Perspectives, in: Flauss/Lambert-Abdelgawad (Publ.), L'application nationale de la Charte africaine des droits de l'homme et des peuples, 247 (249).

3. The ECOWAS Court of Justice as guarantor of the effective protection of human rights

As shown in the introduction of the present paper, the ECOWAS Court of Justice did not originally constitute a human rights court.[281] The settling of human rights disputes at continental level was reserved for other institutions. The signatory states of the Charter became aware that the actual improvements of the human rights situation at continental level require procedural mechanisms.[282] In order to specify this finding, two institutions were installed. The African Charter on Human Rights and Peoples' Rights was adopted in 1981. Art. 1 prescribes the signatory states with the primary obligation to observe human rights as stipulated in the Charter. The organs of the convention put in place to monitor the contractual obligations are the African Commission as well as the African Court on Human and People´sRights.[283] In principle, the African Court on Human Rights and Peoples' Rights embodies the natural monitoring organ in regards to the guaranteed human rights in the African Charter. This Court , in particular, has the authority to determine a human rights violation on application by individual complainants and to order corrective measures. The judgement of the African Court develops a binding effect for the signatory states.

The African Commission for Human Rights and Peoples' Rights was established acc. to the instructions in Art. 30 of the Charter. Therefore, the doctrine describes the Commission as the primary judiciary body on the African continent.[284] Regarding its mandate, the Commission avails of an extensive authority. According to the regulation in Art. 45 paragraph 2 of the Charter, the following subjects of reference are bestowed on the Commission: the promotion of human rights and peoples' rights; protection of

281 Ebobrah, A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice, in: African Human Rights Law Journal (2007), 307 (312); Ndiaye, La protection des droits de l'homme par la Cour de justice de la CEDEAO, Mémoire de Master II, Université Montesquieux Bordeaux IV, 14.

282 Gumedze, Bringing communication before the African Commission on Human Rights and Peoples' Rights, in: African Human Rights Law Journal (2003), 118 (128).

283 Österdahl, Implementing Human Rights in Africa. The African Commission on Human and Peoples' Rights and Individual Communications, 177.

284 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 85; Elsheikh, The future relationship between the African Court and the African Commission, in: African Human Rights Law Journal (2002), 252 (253).

human rights and peoples' rights; interpretation of the regulations in the Charter on request by a state party, an organ of the then OAU (Organisation of African Unity) or of an organisation recognised by the OAU. This list and sequence clarify which weight is laid on human rights regarding the Commission's function. In addition, the Commission represents an investigative Commission (Art. 45 paragraph 1 of the Charter). Regarding the procedure before the Commission, it must be stated that the complaint by a state was preferred to the individual complaint. Generally, the signatory states may submit complaints directly to the Commission (Art. 49 of the Charter). Regarding the individual complaint before the Commission, one must use the interpretation of Art. 55 paragraph 1 as there is no clear definition for the individual complaint according to the wording of the regulation. Rather, they are recorded in Art. 55 paragraph 1 of the Charter as other "notifications". On the other hand, individual complaints are not directly admissible before the Commission. The possibility of access for individual complaints has been restricted by the fact that the chairperson of the Commission must, with regard to submitted notifications, obtain the votes of the members of the Commission before each session. The members of the Commission then decide with an absolute majority of votes (Art. 55 of the Charter). The fundamental prerequisite for this is the exhaustion of the national legal procedures (Art. 56 paragraph 5 of the Charter). With regard to the binding effect, it must be pointed out that the decisions are not binding (Art. 59 of the Charter). However, the Commission has slowly developed recommendations.[285]

The human rights mission by the Commission was apparently not sufficient.[286] Not only were the possibilities of submission limited to the persons entitled to complain, but the decisions by the Commission were also not binding. Therefore, the signatory states of the organisation of the African Union adopted an Additional Protocol to the Charter with regard to the African Court on Human and Peoples' Rights in the year 1998. This took effect in January 2004. This allowed the first judges of the African Court on Human and Peoples' Rights to take office.[287] In July 2004, it had

285 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 85.

286 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 87; Wachira, African Court on Human Rights and Peoples' Rights: Ten years on and still no justice, 8.

287 Ebobrah, Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of ECOWAS, 87.

been decided that the African Court on Human and Peoples' Rights should become part of the African Court of Justice.[288] This proposal was adopted by the signatory states with the passing of an Additional Protocol regarding theAfrican Court of Justice in 2009.[289] However, the Protocol regarding the African Court of Justice has developed the control system at a continental level very carefully, so that the rights embedded in the Charter in favour of the individual can hardly be realised. Indeed, a separate declaration of submission by the signatory states is required for the admissibility of the individual complaint. In this context, Art. 8 paragraph 3 of Additional Protocol (2009) stipulates:

> « Tout Etat partie, au moment de la signature ou du dépôt de son instrument de ratification ou d'adhésion, ou à tout autre période après l'entrée en vigueur du Protocole peut faire une dé- claration acceptant la compétence de la Cour pour recevoir les requêtes énoncées à l'article 30 (f) et concernant un Etat partie qui n'a pas fait cette déclaration».
>
> "Any Member State may, at the time of signature or when depositing its instrument of ratifi- cation or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f) involving a State which has not made such a declaration."

It is hereby confirmed that individual complaints are not automatically admissible before the African Court of Justice (human rights section). Therefore, the new African Court of Justice does not automatically have jurisdiction over individual complaints.[290] The individual complain arguing an infringement of the Charter is only admissible if the Member State con-

288 Kindiki, The Proposed Integration of the African Court of Justice and the African Court on Human and Peoples' Rights: Legal difficulties and merits, in: African Journal of International and Comparative Law (2007–2009), 138 (138); Ipsen, Völkerrecht [International Law], 6. edition, § 7, Rn. 13; Dujardin, La Cour Africaine de Justice et des Droits de l'Homme: Un Projet de fusion opportune et progressiste des juridictions panafricaines par l'Union Africaine, in: Revue Juridique et Politique (2007), 511 (513).

289 The original designation in both official languages is: « Protocole portant Statut de la Cour Africaine de Justice et des Droits de L'Homme » or "Protocole in the Statute of the African Court of Justice and Human Right".

290 Mubiala, L'accès de l'Individu à la Cour Africaine des Droits de l'Homme et des Peuples, in: Promoting Justice, Human Rights and Conflicts Resolution through international Law (2007), 369 (371).

cerned has made a particular declaration.[291] According to this declaration, the signatory state must acknowledge the competence of the African Court of Justice in this regard. Without this declaration of competence, individual complaints are rejected as inadmissible by the Court of Justice. Article 30 (f) of this Protocol confirms the conditional requirements for the authority on individual complaints as follows:

> « Les entités suivantes ont également qualité pour saisir la Cour de toute violation d'un droit garanti par la Charte africaine des droits de l'Homme et des peuples, par la Charte africaine des droits et du bien-être de l'enfant, le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de a femme en Afrique ou par tout autre instrument juridique pertinent relatif aux droits de l'homme, auxquels sont parties les Etats concernés […] (f) les personnes physiques et les organisations non-gouvernementales accréditées auprès de l'Union ou de ses organes ou institution, sous réserve des dispositions de l'article 8 du protocole »
>
> "The following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples Rights on Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by States Parties concerned […] (f) Individual or relevant Non-Governmental Organisations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol".

A condition of this sort does not create an easy situation for the individual complainant because it cannot be expected that all Member States readily submit this necessary declaration of submission in due time.[292] Indeed, the signatory states had agreed on the idea of a Court on Human Rights at a continental level. They are, however, not prepared to submit the necessary

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291 Olinga, Regard sur le Premier Arrêt de la Cour Africaine des Droits de l'Homme et des Peuples, Cour africaine des droits de l'homme et des peuples, Michelot Yogogombaye c. Sénégal, 15 décembre 2009, in: Revue Trimestrielle des Droits de l'Homme (2010), 749 (752).

292 Nach derzeitigem Ratifizierungsstand haben nur 16 Vertragsstaaten das Protokoll über den Gerichtshof ratifiziert, Ratifizierungsstand [According to the current ratification status, only 16 signatory states have ratified the Protocol regarding the Court of Law], ratification status available at: http://www.african-court.org/fr/ (last accessed on 26/08/2015).

declaration.[293] Subsequently, the African Court of Justice has little opportunity to examine the legal matter submitted to it in detail.[294] As a result, the individual complaints by persons living in the territory are systematically declared inadmissible by the African Court of Justice if the provisions as per Art. 8 i. c. w. Art. 30 of the Additional Protocol (2009) are not met.[295] The regional legal process within the ECOWAS Community therefore represents the guarantor of effective legal protection. Based on the futility on a continental as well as national level, the task of monitoring the Charter falls to the ECOWAS Court of Justice. The admissibility of the individual complaint before the ECOWAS Court of Justice should fulfil the requirements of the reason of fairness in Art. 7 paragraph 1 of the African Charter.

It can, from the aforementioned, be established that only the ECOWAS Court of Justice can guarantee an effective protection of human rights for the persons living in the territory of the Community. After reviewing the constitutional systems of the Member States it can be deduced that the possibility for theindividual complaint to be submitted to the ECOWAS Court of Justice can be justified by a deficient legal protection in most member States.[296] It can be deduced from this that the ECOWAS Court of Justice has a supranational role as a Constitutional Court. The ECOWAS acts as a guarantor due to the failure of the national legal protection system. For, as shown in the introduction (Chapter 1), the goal of the Community is, the safeguarding of the human rights guaranteed in the Charter within the legal system of the Community. Hence, the principle of effective legal protection is being applied. This principle is based on the idea that the complainant is given the opportunity to raise attention to his rights. However, if it is established that the national procedure does not provide him with sufficient legal remedies, as in the case of the Togolese constitutional code of procedure, through which the constitutional guarantees cannot be safeguarded by way of a constitutional complaint, the direct admissibility of the individual complaint at Community level is justified.

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293 O'Shea, A critical reflection on the proposed African Court on Human and Peoples' Rights, in: African Human Rights Law Journal (2001), 285 (287).

294 Bhoke, Judgement in the First Case before the African Court on Human and Peoples' Rights a Missed Opportunity or a Mockery of International Law in Africa?, in: Journal of African and International Law (2010), 187 (228).

295 Barsac, La Cour africaine de Justice et des droits de l'homme, 42.

296 Österdahl, Implementing Human Rights in Africa. The African Commission on Human and Peoples' Rights and Individual Communications, 173.

The same applies if the national legal system formally provides constitutional guarantees but if these are not carried out on a fair basis (case Koraou vs Niger). However, the Court of justice is not authorised to act *ex-officio*. According to the previous basis of authority, an *ex-officio*-action would be seen as a transgression of competence. It can only be employed on application. This prerequisite adheres to the principle *nullo actore, nullus iudex* (i.e. if there is no plaintiff, there is no judge).

In conclusion, it appears that the transfer of the human rights competence to the ECOWAS Court of Justice is based on the fact that, on the one hand, there are obstacles at a continental level[297] and, on the other hand, the guarantee of the human rights enshrined in the Charter is in jeopardy.[298]

The disregard of the constitutional state and the contempt for human rights and fundamental rights within national legal systems of the Member States was the reason for an extension of the competence of the ECOWAS Court of Justice in 2005. In the preamble of the Protocol A/SP.1/01/05 it is expressly pointed out that the extension of the responsibility of the Court of Law is meant to serve the removal of the obstacle to realise the goals of the Community. These goals mainly include the effective guarantee of the rights in the African Charter and the democratic principles within the entire system of the Community. The Court of justice embodies the assurance of this guarantee and the safeguarding of the human rights recognised in the Charter. The Court of justice is, so to speak, the guardian of the African Charter on Human Rights and peoples' Rights within the ECOWAS legal system. The only problem is that, in terms of competence, the relationship between the ECOWAS Court of Justice and the African Court of Justice is not clearly defined.[299]

297 Wachira, African Court on Human Rights and People's Rights: Ten years on and still no justice, 15.

298 Onoria, *The Locus Standi* of Individual and Non-State Entities before Regional Economic Integration Judicial Bodies in Africa, in: Journal of African and International Law (2010), 91 (95).

299 Barsac, La Cour africaine de justice et des droits de l'homme, 46.

II. Possible Conflict of Interest of the Constitutional Court of a Member State

The procedural guarantees represent a positive obligation by the signatory states (2). It is thereby left up to the signatory states on how they would like to meet their obligations with regard to the procedural guarantees. However, it can be gathered from the African Charter that the national courts must be organised in such a way that structural as well as organisational problems should not arise. However, it can be gleaned from an examination of the legal systems of the ECOWAS Member States that there is a certain prejudice of the judges. Therefore, the legal criteria of a judges' bias must be focused on more closely (1).

1. Elements of the complaint of a conflicted court

The constitutional regulations guarantee the independence of the constitutional judges with regard to other organs of the state for exemple acc. to Art. 102 of the Togolese Constitution:

> « Les membres de la Cour Constitutionnelle, pendant la durée de leur mandat, ne peuvent être poursuivis ou arrêtés sans autorisation de la Cour Constitutionnelle sauf les cas de fragrant délit. Dans ce cas, le Président de la Cour Constitutionnelle doit être saisi immédiatement et au plus tard dans les quarante-huit heures. »

Although the constitutional regulations guarantee the independence of the constitutional judges, it cannot be excluded that the constitutional judges may issue biased judgements based on personal interests. This can be explained: the independence of the judges is the objective aspect regarding the performance of official duties. There is, however, a subjective aspect, namely the impartiality of the judges. The impartiality of the judges must be strictly differentiated from the independence. There are many cases regarding the jurisprudence of Member States which leave no doubt as to the diffidence of the judges in general and that of constitutional judges in particular.[300] Within the francophone African judicial area, the Constitu-

300 Tambedou, De l'indépendance du Pouvoir Judiciaire au Sénégal, in: Revue Juridique et Politique (2008), 271 (276).

tional Court is regarded as the "chien de garde"[301] of the constitution and the fundamental freedoms as enshrined in it. However, with regard to the performance of official duties, a certain proximity of the constitutional judges to politics can be noted.[302] This fact can be established by the interference of the executive in the functioning and jurisdiction of the constitutional courts.[303] The suspicion becomes blatant when the Constitutional Court contributes to a challenge of the guarantee of the constitution. An example of a definitive failure of its office was delivered by the Togolese Constitutional Court in 2005 during the transfer of power after the death of the State President .[304] Bias represents a justified objection to the official performance of the judges in the constitutional process. This is always the case when objective facts are established that could lead a rationally thinking individual to doubt the impartiality and objectivity of the judges.[305] Furthermore, it should be demonstrated that the judicature in general, and the jurisdiction of national constitutional courts in particular, is under political pressure at a national level. Due to the special task of the courts, especially the constitutional courts, compliance with the law is a fundamental prerequisite for an impartial court when enforcing human rights.

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301 Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou de l'exclu- sion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Sciences Juridiques (2013), 65 (78).

302 Ahadzi-Nonou, Les nouvelles tendances du constitutionalisme africain, in: Afrique Juri- dique et Politique (2002), 35 (43); Diop, La justice constitutionnelle au Sénégal. Éssai sur l'evolu- tion, les enjeux et les réformes d'un contrepouvoir juridictionnel, 263.

303 Tambedou, De l'indépendance du Pouvoir Judiciaire au Sénégal, in: Revue Juridique et Politique (2008), 271 (276).

304 Maman-Sani, Vacance de la présidence de la République: la constitution togolaise à l'épreuve des faits, in: Revue nigérienne de droit, N°09 décembre 2006, 11 (28); Kokoroko, L'ap- port de la Jurisprudence constitutionnelle africaine à la consolidation des acquis démocratiques, in: Revue Béninoise des sciences juridiques et administratives (2007), 85 (95); Kessougbo, La Cour constitutionnelle togolaise et la régulation de la démocratie au Togo, in: Revue Béninoise des sciences juridiques et administratives (2005), 59 (96).

305 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 départe- ment de Droit administratif de la Faculté de Droit de L'Université de Gand (02.03.2012), Lomé, 4; Decaux/Imbert/Pettiti, La convention Européenne des Droits de l'Homme, Commentaire article par article, Art. 6, 261; Grabenwarter, Europäische Menschenrechtskonvention [European Human Rights Convention], 4. edition, § 24, Rn. 45; Matscher, Der Gerichtsbegriff der EMRK [The concept of a court by the ECHR], in: FS Baumgärtel, 363 (376).

Even though it is recognised that the filing of a suit before international courts is subject to the exhaustion of all national legal remedies, this can be justified by the principle of subsidiarity to the international complaint procedure. However, adherence to the principle of subsidiarity in the West African context is currently problematic when it comes to the the guarantee of the constitutional courts as a civil right as national judges in many countries tend to render judgements in favour of the most powerful political player, be it an individual or a state body, such as the executive in some cases (The case Korau vs Niger or the case Fall Ameganvi vs Togo).

This could hinder the neutrality or impartial jurisdiction, as shown by the decision of the Togolese Constitutional Court. Voices in literature quite rightly point out that the decisions rendered by the constitutional courts in the African legal system are in some cases "orientated", biased or erring in law.[306] This bias by the national judges, which, without fail, leads to a threat to the protection of human rights, must be removed by the guardian of the regional protection of human rights. The ECOWAS Court of justice has determined the right to a fair trial regarding initial proceedings. It must be pointed out that the ECOWAS signatory states have undertaken the process of democratisation since the 1990s. This means that the principle of the rule of law and the adherence to fundamental freedoms by governmental authorities is in need of a legal culture. This can only be achieved if a functioning judicial system exists. Currently, the executive is struggling to enforce the principles of the rule of law. This is clearly because the principle of the separation of powers is hardly ever adhered to. The executive tries to impose a certain dominance in the constitutional system of the state.[307] The violation of the principle of separation of powers leads to a situation whereby the judicial power is exposed to pressure by the executive. The fragility of new democracies can be noted, in particular, in this factual dependency of the jurisdiction.

In conclusion, it can be noted that there are, on the one hand, structural problems in the procedural orders of Member States as a sign of a deficit of legal protection within the signatory states. At the same time, these structural problems represent an obstacle to an effective protection of human rights within national law. This situation justifies the admissibility of a di-

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

307 Kessougbo, La Cour constitutionnelle togolaise et la régulation de la démocratie au Togo, in: Revue Béninoise des sciences juridiques et administratives (2005), 59 (96).

rect human rights complaint before the ECOWAS Court of Justice. On the other hand, the declaration of competence of the African Court on Human Rights as an admissibility requirement constitutes a serious obstacle at continental level.

2. Conflicted judges as a violation of the positive obligation of the Member State

Up til now, the State has been regarded as the violating party of the guaranteed human rights in the Charter. With the positive obligation of the Member State, the question is addressed in which respect the Member State is to be viewed as the guarantor of human rights. The violation of this obligation by the State can only be measured with this in mind. It is self-evident that the positive obligation is to be understood as the obligation by the signatory states to take measures to realise the recognised human rights. According to Art. 1 of the Charter:

> « Les Etats membres de l'Organisation de l'Unité Africaine, partie á la présente Charte, re- connaissent les droits, devoirs et libertés énoncés dans cette Charte et s´engagent á adopter des mesures législatives ou autres pour les appliquer ».
>
> "The Member States of the Organisation of African Unity parties to the present Charter shall recognize the rights, duties and freedom enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."

The obligation laid out in the provisions is a primary obligation under international law. The signatory states have a positive duty to realise these rights because the adherence to the contractual rights is to be regarded primarily as the task of the individual contracting states. Every signatory state shall take national measures to achieve this contractual goal. The national judicial guarantee of the aforementioned human rights comes into consideration. Only if this guarantee fails at a state level can the international guarantee be considered as an alternative. The international protective organ materialises the collective measure mutually provided for by the contracting states in order to close the deficit at a national level. The procedural guarantee is seen as the minimum in respect of the material legal guarantee. In other words: The infringement of material human rights is elimi-

nated by the procedural guarantee.[308] Thus, procedural warranties help in implementing substantive rights. Through the procedural guarantee, it is up to the human rights entities to have the violation of their rights examined by an impartial court.

The state must take positive and recognisable measures which must serve the independence of the control authorities. In this sense, the procedural guarantees are taken into account in addition to the substantive rights. In total, the contractual state carries two positive protective obligations: substantive protective duties and procedural protective duties. Only in the procedural guarantee can the right to an impartial trial be realised.

However, it must be pointed out that the judicial power exercised by theECOWAS Court of Justice entails several problems.

III. Foreseeable problems of the ECOWAS jurisdiction

Here, the question must be asked whether problems with the jurisprudence in convicted member State may arise that are caused by the human rights jurisdiction of the Communal Court. In the following, a comparison of the national legal certainty and the equity under international law is demonstrated (1). Nonetheless, the judicial power exercised by the ECOWAS Court of Justice could entail some problems (2). These can only be resolved if a dialogue between the two legal systems can be established (3).

1. Challenge to legal certainty

The suggested resumption of the national initial proceedings based on a superseding legal effect causes tension between the legal certainty and the correct decision. As discussed, judgements by a constitutional court develop an effect with regard to the facts and the design. The design effect causes a legal situation for the parties to the proceedings or in favour of third parties that should be ensured by principles of a constitutional state: This is the principle of legal certainty. This results in the right of protection of the confidence of third parties. The prohibition of repealing constitutional judgements has the advantage of securing this legal protection. The role of

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

the international instance consists, however, in ensuring the accuracy and correctness of the occurrence of national legal acts such as judicial decisions. A decision that is taken after taking the human rights standards into account should be given preference compared to the decision in violation of human rights because fairness and justice have more weight than legal certainty. The legal certainty which follows from a misjudgement in constitutional proceedings is in turn a threat to legal peace and thus legal certainty because, if citizens no longer have confidence in the justice system, they will go another route, namely political unrest.

This situation would in turn be an obstacle in ensuring peace.

As a result, the correction by the ECOWAS Court of Justice of a constitutional court decision which violates human rights is preferable in order to ensure legal peace within the entire constitutional system of the Community. Whoever benefitted under national law from the contravention of the convention should not be better off than the individual complainant at an international law level. The rights of the successful individual complainant are more deserving of protection than those of the third party in the initial proceedings. From a justice point of view, the immutability of the legal force leads to non-acceptable situations, in the face of gross procedural injustice. Moreover, the exceptional overcoming of the legal effect due to gross procedural injustice serves both justice as well as legal certainty. The resumption, especially of such decisions which produce obvious injustice within the national legal system, constitute definitive legal certainty.

2. Overburdening of the Court of Justice and proposed solutions

In view of a population density of approx. 300 million inhabitants[309], the seven judges (in Abuja, Nigeria) are hardly able to guarantee the right to a fair trial within a reasonable period (Art. 7 paragraph 1 of the African Charter) if the lodging of regional individual complaints before the ECOWAS Court of Justice would not be subject to the prior national exhaustion of legal remedies. There is, however, the possibility to anticipate such problems. The possible alternative solutions may be realised from the perspective of the Court of justice (a) as well as from the perspective of the Member States (b).

309 In addition, see http://news.abidjan.net/h/426775.html (last accessed on 25/02/2015).

a. Landmark and pilot judgments as a possible solution

There are various possibilities of how a quasi-constitutional function could be assigned to the Court .

The function of the ECOWAS Court of Justice regarding the setting of principles: It can be determined from the preamble of Protocol A/PS. 1/01/05 that the admissibility of the individual human rights complaint has a main objective and a secondary objective. It is the main objective that the Court of justice should guard the adherence to human rights in its jurisdiction. The performance of this task is in the general interest of the Community because the realisationof the integration process and the unified adherence to international obligations of the Member States can only be achieved if the regional Court of justice is able to ensure a unified interpretation and application of the African Charter. There are many sections in the Community Agreement where in the least the commitment of the Community to the Charter and the democratic principles are expressed (Preamble of the Amendment Agreement).

The secondary objective is to grant the possibility of effective legal protection to every citizen through a direct human rights complaint at a regional level. The realisation of the secondary objective serves the main objective (in the general interest of the Community). For these reasons, the National Constitutional Courts consult the principles emerging from the ECOWAS Court of Justice in addition to their own jurisdiction. This consultation of the human rights principles from the ECOWAS Court of Justice in the constitutional jurisdiction should serve the objective to strengthen the ECOWAS-standards in all signatory states. In this context, two possibilities from the operative practice of the ECtHR could contribute to the relief of the Court of justice . Namely, the passing of landmark judgments and of pilot judgments.

The Court of justice can make landmark judgments. These must be adhered to by the National courts because the decisions of the Court are always based on the most current status of the Charter's development. The signatory states are bound by the Charter in the same way as they are bound to the decisions by the Court of justice in this respect. Now the question must be asked: How do legal practitioners in Member States know that a certain decision by the Court of justice is a landmark judgment? There are criteria with regards to this that may usually be of help when it comes to their identification. This concerns namely the legal question, and the Court 's answer to this question – this answer must be a counter-position regarding the same question in previous case law with re-

gard to the same question –, the time and the main reasons for the decision. Or behaviour that the Court of justice would have declared compatible with the African Charter, might be declared by it incompatible at a later point in time. The opposite is also possible. This modus operandi at least takes the further development of the understanding of human rights on state and international level into account.[310] With regard to such changes in case law, the time limit of the legal force is expressed.[311]

The legal opinion of the Court of justice may change due to various factors. The change might be based on a need to coordinate the law. In this case, the Court confirms a human-rights-friendly tendency of the majority of the signatory states. The tendency justifies a change in case law. This approach does not represent a transgression of competences because in order to interpret the agreements under international law, the subseaquent practice by the signatory states is to be taken into consideration acc. to Art. 31 VCLT. The Court of justice should use the evolutive approach of this regulation to develop the law.[312]Judicial power after all counts to the most important functions of the Community. Therefore, the development of the law by way of landmark judgments is in conformity with international law. Especially for this reason the national legal systems of the Member States should continue to orientate themselves according to the current status of the human rights jurisdiction by the Court of justice . The content of the Charter is mirrored, so to speak, in the judgments of the ECOWAS Court of Justice.

The ECOWAS Court of Justice should primarily play its part as a Constitutional Court through its pilot judgments and landmark judgments. A pilot judgment represents a particular decision by the ECtHR (a kindred regional Court), which is passed to adress a structural problem of a respondent state. A pilot judgment is passed if several subsequent complaints of the respondent member State involve the same problem. According to the

310 Polakiewics, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Court of Law für Menschenrechte, 49. [The obligations by countries resulting from the judgments by the European Court of Human Rights, 49.].

311 Polakiewics, Die Verpflichtung der Staaten aus den Urteilen des Europäischen Court of Law für Menschenrechte, 50. [The obligations by countries resulting from the judgments by the European Court of Human Rights, 50.].

312 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004, in: EuGRZ (2004), 683 (694). [Regarding the binding effect of judgments by the ECtHR. [Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (694);].

decision-making practice of the ECtHR, such problems can be of an organisational as well as a structural nature.[313] The ECtHR defined the practice of pilot judgments as follows:

> « La Cour a estimé que lorsqu'elle constate une violation découlant d'une situation à caractère structurel concernant un grand nombre de personnes, des mesures générales au niveau natio- nal peuvent s'imposer dans le cadre de l'exécution de ses arrêts. Cette approche juridiction- nelle adoptée par la Cour pour traiter les problèmes systémiques ou structurels apparaissant dans l'ordre juridique National est désignée par l'expression ‹ procédure d'arrêt pilote ›. Celle- ci a avant tout pour vocation d'aider les Etats contractants à remplir le rôle qui est le leur dans le système de la Convention en résolvant ce genre de problèmes au niveau National, en sorte qu'ils reconnaissent par là même aux personnes concernées les droits et libertés définis dans la Convention, comme le veut l'article 1, en leur offrant un redressement plus rapide tout en allégeant la charge de la Cour qui, sinon, aurait à connaître de quantités de requêtes sem- blables en substance ».[314]

In case of such a failure of the legal system within the respondent Member State, a pilot judgment is issued. The ECOWAS Court of Justice may pass pilot judgments in order to confirm its role as a Constitutional Court. In such judgments, the general interest, rather than the individual interest of the individual plaintiff is expressed. The practice of pilot judgments can only be effective at a national level if an expansion of the legal force regarding the national parallel proceedings takes place. Only in this way can a renewed sentencing of the Member State in subsequent proceedings, the object of the complaint being based on the same behaviour of the Member State, be avoided. This corresponds to the thought behind the obligation to comply: resulting from the declaratory judgment, the respondent Member State has the obligation, not only to change its behaviour toward the individual complainant so as to conform to the convention, but also, in a preventive fashion regarding all other National parallel cases suffering from the same type of infringement, to remedy the situation according to the declaratory judgment. This has the advantage of preventing a repeat conviction of the Member State. This is consistent because, if the other na-

313 Die Definition des Piloturteils lässt sich dem Urteil Sejdovic gegen Italien entnehmen: CEDH, Nr. 56581/00, Arrêt (01.03.2006), Affaire Sejdovic c. Italie, par. 120.

314 CEDH, Nr. 56581/00, Arrêt (1.3.2006), Affaire Sejdovic c. Italie, par. 120.

tional cases of the same Member State reach the ECOWAS Court of Justice, this Court would, without a doubt, arrive at the same result.[315] This also does not represent a contravention of the factual and personal limit of the legal force. Indeed, the legal force limits itself to the parties to the proceedings. This means that the relevance of the declaratory judgment refers at least to a certain object of dispute.[316] The broader effect already supported in the literature[317] is based on the basic idea of the obligation to provide a general effective national legal protection as a consequence of the declaratory judgment.

b. The solution from the perspective of the national legal system

From the perspective of the national constitutional systems of the Member States, it must be ensured that the human rights guaranteed in the constitutions are also protected from a procedural point of view, in order to prevent violations under international law.

The principle of subsidiarity: This international law principle takes state sovereignty into account, as it is designed to effect primarily to the Member States' own responsibility to adhere to their obligations under international law. The primary obligation to monitor the adherence to human rights is the equal responsibility of both national Constitutional Courts and national courts. Therefore, it is recommended to introduce the subsidiary principle in theprotective system of the Community whenever all Member States allow for the direct constitutional complaint by natural and legal persons in their respective legal systems. Art. 7 par. 1 of the Charter namely implies the obligation of the Member States to provide a legal process against the violation of individual fundamental rights and hu-

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

316 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004, in: EuGRZ (2004), 683 (690). [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (690);].

317 Mückl, Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsge richt und Europäischem Court of Law für Menschenrechte, Der Staat 44 (2005), 403 (420).
[Cooperation or confrontation? – the relationship between the Federal Constitutional Court and the European Court of Human Rights], in: Der Staat [The State], 44 (2005), 403 (420).

man rights. This would meet the obligation to the right and access to a court. This includes the obligation to allow national constitutional complaints against all measures of state powers. These substantive guarantees are ineffective if, in order to enforce them, the constitutional principle of fairness is not adhered to.[318] Effective legal protection is primarily the task of the signatory states. These will safeguard such if good procedural legal conditions are created on a national level. But even in this case, the guarantee as per Art. 7 par. 1 of the Charter must be ensured so that the Member States do not create theoretical opportunities at a national level without contributing to an effective legal protection system. The judicial systems of the Member States must have identifiable objective characteristics which comply with the principle of fairness. The constitutional guarantees include the right to a hearing in an equitable manner before an independent and impartial court of law[319] as well as the right to a decision and execution in an appropriate time period. In short, the procedural guarantee assumes that the trial takes place on a fair basis before a court of law (see Art. 6 ECHR). The compliance with this obligation will reduce an overload of the ECOWAS Court of Justice. Moreover, no parallel complaint pending before National courts and the ECOWAS Court of Justice need to be feared. However, the Court of justice should always have the last word, with regard to judicial decisions by Member States.

From the above, a dialogue between the regional Human Rights Court and National Constitutional Courts seems necessary, which would, in turn, serve to improve and ensure an effective human rights protection.

3. Dialogue between both levels

ECOWAS Court of Justice case law will not be static but dynamic. It is possible that the Court of justice issues a change in case law with regard to certain questions in order to continuously take into account the improved development status of human rights within the Community and taking into account the practice of other comparable international courts. Such

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

319 Peukert, in: Frowein/Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar [European Human Rights Convention. ECHR-commentary], 3. edition, Art. 6, Rn. 112.

changes in the jurisdiction towards an improved direction should be seen by other Constitutional Courts of Member States as precedent judgment within the framework of the dialogue process between the regional courts and the Constitutional Courts of Member States. This dialogue which is already taking place between judicial bodies at a national level can be transferred to the relationship between the ECOWAS Court of Justice and the National courts of the Member States.[320] The aim of the dialogue between the two levels is to avoid a clash between the two legal systems, i.e. to prevent a conflict of jurisdiction between national courts and the international ECOWAS Court of Justice. It is therefore recommended that there is an exchange of and reference to case law between both legal systems.[321] This dialogue should be carried out in both directions. Furthermore, a collaboration between both (ECOWAS-level and National level) should be promoted. In order to resolve alleged or actual conflicts between the national Constitutional Courts, or courts with comparable competences, and the ECOWAS Court of Justice, the idea of complementarity of the guarantee is useful.

This discussion within the multi-level systems can be implicit or explicit. The dialogue is referred to as explicit if the courts of both legal systems quote each other. This is the case in the decision N° DCC 15–027 of the Constitutional Court of Benin.[322] When it quoted the judgment by the ECOWAS Court of Justice in the legal matter of Mamadou Tandja vs the Republic of Senegal when explaining its own legal interpretation. The exchange should not only be used with regards to its organisational and structural aspects. There also needs to be an improved interlocking of international law and state law with a strong mutual consideration regarding the interpretation of both international and national law.[323]

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320 Diop, La justice constitutionnelle au Sénégal. Éssai sur l'evolution, les enjeux et les ré- formes d'un contre-pouvoir juridictionnel, 191.

321 Cremer, Zur Bindungswirkung von EGMR-Urteilen. Anmerkung zum Görgülü-Beschluß des BVerfG vom 14.10.2004, in: EuGRZ (2004), 683 (694). [Regarding the binding effect of judgments by the ECtHR. Comment regarding the Görgülü judgment by the Federal Constitutional Court of] 14/10/2004, in: EuGRZ (2004), 683 (694)].

322 Décision DCC 15–027 (12.02.2015), available at: www.cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

323 Peters, Legal systems and constitutionalisation: Regarding the redefinition of the relationships, in: DÖV (2010), 3 (55); Häberle, Europäische Verfassungslehre, 6. edition, 92. [European Constitutional Theory, 6th edition, 92].