

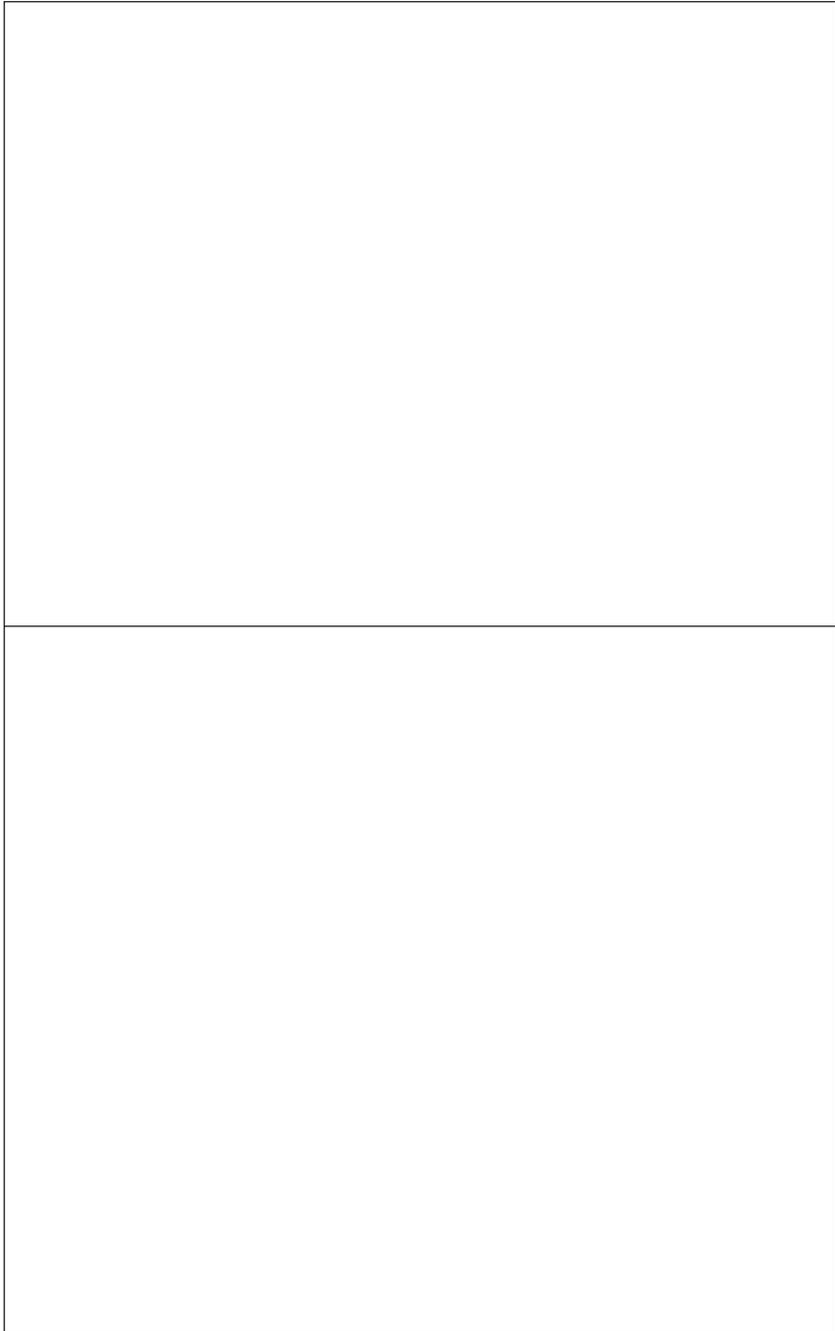
Kangnikoé Bado

The Court of Justice of the Economic Community of West African States as a Constitutional Court

Member States obligations resulting
from the Court's rulings



Nomos



Kangnikoé Bado

The Court of Justice of the Economic Community of West African States as a Constitutional Court

Member States obligations resulting
from the Court's rulings



Nomos

Open Access funding provided by Max Planck Society.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-8487-6051-0 (Print)
978-3-7489-0180-8 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-6051-0 (Print)
978-3-7489-0180-8 (ePDF)

Library of Congress Cataloging-in-Publication Data

Bado, Kangnikoé

The Court of Justice of the Economic Community of West African States as a Constitutional Court

Member States obligations resulting from the Court's rulings

Kangnikoé Bado

353 pp.

Includes bibliographic references.

ISBN 978-3-8487-6051-0 (Print)
978-3-7489-0180-8 (ePDF)

1st Edition 2019

© Kangnikoé Bado

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3-5 | 76530 Baden-Baden

www.nomos.de

Total Print Production:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3-5 | 76530 Baden-Baden

Printed and bound in Germany.

ISBN (Print): 978-3-8487-6051-0

ISBN (ePDF): 978-3-7489-0180-8

DOI: <https://doi.org/10.5771/9783748901808>



This work is licensed under the Creative Commons Attribution 4.0 International License.

To my parents with gratitude

Preface

Almost two years after the publication of the first edition in German, I am delighted to be able to present this English edition which aims at meeting the need to reach broader audience. In this respect, I owe my particular gratitude to Birgit Böttner, Leonie Spangenberg und Prof. Dr. André Thomashausen who were entrusted with the translation.

Substantially the topical issue remains, in my view, relevant and pertinent as it did in 2015 when I have completed the researches, since the court is always confronted by the problematic at the centre of this reflection and its jurisprudential practice has not really changed until now. The examination at hand broaches the subject of a supra-constitutional function of the Court of Justice of the Economic Community of West African States (ECOWAS). . A particular source of inspiration for this book has been the research project “Constitutional Jurisdiction and Democratisation in West Africa” financed by the German Research Foundation (DFG). Although I became a Member of the project team rather late, the work within the project inspired me to think about the role of the ECOWAS Court of Justice. For example, I refer to the decision in Ameganvi et al vs. Togo and its relevance for the relationship between the regional courts and the courts of the Member States, in particular, the Constitutional Courts. I especially wanted to show the development of human rights jurisdiction since the inception of the additional protocol in 2005 and on this basis the possible individual complaints before the Court of Justice. based on recent developments in international law, my main objective is to clarify all the legal consequences arising from this extension of competence of the Court, in particular with regard to the international responsibility of member states in the event of human rights violations. Moreover, this paper aims to examine the constitutional implications of this reform and the guarded use by the court of its own competence.

Finally, I would also like to contribute to the reduction of the deficit of legal protection within the Economic Community of West African States by strengthening the constitutional role of the ECOWAS Court of Justice. According to my thesis, the declaratory judgments by the Court of Justice should be able to unfold their legal force in the signatory-countries to their fullest extent.

Preface

During the preparation of this research, which was completed in December 2015 and accepted by the Justus-Liebig-University of Gießen's Faculty of Law as a dissertation, I have received support from numerous persons and institutions.

Firstly, I would like to thank my mentor Prof. Dr. Thilo Marauhn for his mentorship during this dissertation. I am endlessly grateful for his steadfast trust and patience. The exchange of ideas with him was always effective and constantly resulted in new findings. These exchanges belong to my fondest memories. I would like to thank Prof. Dr. Rainer Grote for contributing a second opinion and for his valuable further inspirations. Furthermore, I would like to thank Prof. Dr. Dres. h.c. Herbert Kronke for his constant support and for being a willing partner for discussion.

I would like to particularly thank Vera Strobel for her support regarding the editorial revision of the German edition.

I would like to thank Prof. Dr. Sven Simon for his tremendous support. I owe my special gratitude to the numerous discussions and professional suggestions. I would further like to extend my sincere thanks to Dr. Ignaz Stegmiller for his critical review of the completed version before the paper went to print.

I would like to sincerely thank professors Adama Kpodar, Joël Aivo, Babakar Kanté and Akuété Santos for their valuable advice during my research trip in West Africa.

Moreover, I would like to thank Dr. Daniel Behailu as well as Katharina Bielka, Dr. Prosper Simbarashe Maguchu, Dr. Wisdom Momodu, Dr. Collins Mbuayang and Dr. Asmin Franziska for the constant exchange of ideas. Similarly, I would like to thank my colleagues Dr. Ayşe-Martina Böhringer, Judith Thorn, Joscha Müller, Marie-Christin Stenzel, Dr. Lisa Hemann, Dr. Anne Winter and Chadischa Schöpffer for their collegiality and support. I would like to sincerely thank Ms Ulrike Rein and Ms Susanne Seitz for the friendly environment and their helpfulness within the team of the professorship.

Furthermore, my circle of friends in Germany has contributed considerably to the realisation of this paper. I would like to thank my friends Fabian Kiehlmann, Edem Atsiatorme, Juliane and Cornelia Glinz as well as Vera Bense, Fanny Raisch, Robin Azinovic, Gabriel Noll, the Degbè family (Brussels), the Doglo family and the Tèko family.

This work presented thrilling scientific challenges for me. The handling of these would not have been possible without the support of my family. In particular, I owe my brothers Ékoé Richard and Messanh Nicolas as

well as my sisters Marie Povi and Ayélévi endless gratitude for giving me strength through their continued support and encouraging words.

Amongst various institutions which I would like to thank, I owe my thanks first and foremost to the Konrad-Adenauer Foundation which not only financed significant part of my researches in Germany but also covered the costs of translation and publication of the English edition of the manuscript. I must acknowledge my sincere thank to Dr. Arne Wulff who has been available to coordinate the English translation and publication of this work. Moreover, I am genuinely grateful to Ms Anja Berretta's and Mr. Berthold Gees' for their understanding during my scholarship period at the Konrad-Adenauer foundation. In the same manner, I owe gratitude to the Max Planck Institute for Social Law and Social Policy and the Max Planck Society for making the Open Access publication of this Book possible. Furthermore, I am also grateful for the German Research Foundation's (DFG) interest in the legal developments in Africa and for their funding.

I would also like to thank the Max-Planck Institute for Comparative Public Law and International Law (Heidelberg) for making their library available to me. Besides, I would like to thank Mr. Albrecht Günther of the branch library for Law and Economy for his assistance in trying to locate documents that were not available in Gießen. My sincere thanks go to the library manager, Mr. Vincente Mendes Correia, for giving me access to the ECOWAS-Court of Justice Library and for making numerous official documents by the ECOWAS Community.

This dissertation is dedicated to my sisters Kayi and Tsotso.

Kangnikoé Bado Munich, in the spring of 2019

Abstract

Whereas the Court of the Economic Community of West African States (ECOWAS) had originally been established to address matters of regional integration only, it has been tasked to rule on human rights violations since 2005. This has led to jurisdictional conflicts between national (constitutional) courts of ECOWAS member states and the Court itself. This study analyses the relationship between the national and the regional level, and develops proposals on how to overcome such jurisdictional conflicts. This thesis is based on the ruling of the Constitutional Court of Togo N°E-018/10 of 22 November 2010 and the position of the ECOWAS Community Court of Justice, N°ECW/CCJ/JUG/09/11 of 7 October 2011 and N°ECW/CCJ/JUG/06/12 of 13 March 2012, concerning the aforementioned ruling of the Constitutional Court of Togo. The thesis is an attempt at finding an answer to the question as to whether the judgments of the Court carry a binding effect within the Member States and particularly on judgments of constitutional courts.

This work explores real and potential tensions within the ECOWAS legal order. The tensions stem from the legal force of judgments of constitutional courts of Member States and the admissibility of individual petitions before the Court according to Art. 9.4 and 10.d of Supplementary Protocol A/SP.1/01/05 Amending the Protocol A/P.1/7/91 Relating to the Community Court of Justice. Since the binding effect of the rulings of the Court is not clearly defined, Member States resist implementing the Court's decisions particularly in constitutional matters. Pursuant to article 9.4 of the aforementioned supplementary protocol the Court has authority to examine the conformity of the actions of Member States' institutions with the African Charter on Human and Peoples' Rights whether the organ exercises legislative, executive, and judicial or any other similar functions. However, it is interesting to note that the decisions of Constitutional Courts or Supreme Courts of ECOWAS Member States are final and not subject to further appeal. It is true that a Constitution and decisions of Constitutional Courts express the sovereignty of a state. Nevertheless Art. 27 of the Vienna Convention on the Law of Treaties forbids the states to invoke their national law to hinder the implementation of their international obligations. To that extent the *res judicata* is not a valid argument to hinder the implementation of the Court's rulings. Then a state party en-

dorses the obligation of restitution in integrum according to international customary law and judicial precedents of the International Court of Justice. Moreover, according to international customary law, all organs of the state involved in a case are bound by the rulings of the Court. Constitutional Courts are state organs. Hence, they are also bound by the findings of the ECOWAS-Court.

This work also identifies some deficiencies in the current regime of the human rights mandate of the Court. Gaps exist not only at the level of the Member States constitutional order but also at the community level. At the national level, there are no legal provisions in ECOWAS Member States about the legal force and how the rulings of the Court should be domesticated. At the community level, the binding effect of the rulings of the Court is not adapted to its human rights mandate. With regard to its human rights mandate, the Court plays a role of supranational constitutional court. For instance, the Court is empowered to decide on individual petitions and its rulings are final and binding. For a better compliance with the judgments of the Court, this thesis suggests innovative remedies to render national legislation adequate to the human rights mandate of the ECOWAS Community Court of Justice. Some of the key remedies proposed in the thesis include the following: the Court should be empowered to order concrete measures about how its rulings should be implemented. Art. 15 par. 4 of the Revised Treaty should be adapted to extend the jurisdiction of the Court; a Committee should be created to work with the Court about the implementation of its rulings; Member States should provide exceptional provisions that permit a new enrolling of a case after the rulings of the Court, as available in many Member States of the European Council, and particularly kindred to Art. 122 of the Constitutional Process Law of Switzerland.

Table of Contents

List of Abbreviations	19
Introduction	21
Chapter 1 Research Question and Structure of the Study	24
A. The ECOWAS Court of Justice as an International Court	24
B. The Jurisdiction of the Court of Justice	25
C. In particular: the Jurisdiction of the Court with regards to Human Rights since the Inception of the Additional Protocol of 2005	37
D. Reason for the Study: The Case of Ameganvi et al vs. Togo	40
I. Decision by the Togolese Constitutional Court	41
II. Declaratory Judgment by the ECOWAS Court of Justice	42
III. Interpretation of the Declaratory Judgment by the ECOWAS Court of Justice	43
E. Binding Force of the Decision by the ECOWAS Court of Justice	45
I. Contractual Foundations	46
II. Teleological Interpretation	46
III. The Problem of National Implementation	47
F. Limitation of Question and Structure	49
Chapter 2 The Legal Effect of Rulings by National Constitutional Courts	56
A. The Initial Case under Municipal Law	57
B. The Legal Force of Decisions by National Constitutional Courts	59
I. Formal Legal Force	59
1. The Binding Force of Internal Proceedings of the Constitutional Court	59
a. Irrevocability of the Decision in Principle	59
b. Interdiction of deviation	61
c. Possibility of a Rectification of Material Errors	62
d. Resumption due to gross miscarriage of justice	63

Table of Contents

e. Delimitation with regard to future disputes	68
2. The Non-appealability of the Decision	70
a. The principle of non-appealability	70
b. Justification of non-appealability	71
c. Need for legal protection as an exception	72
II. Substantive Res Judicata	73
1. Object of Substantive res judicata	74
2. Elements of Substantive res judicata	74
a. Extent of legal force	74
b. Limits of legal force	76
3. Consequences of Substantive res judicata	77
a. Substantive res judicata as an obstacle to proceedings	77
b. Admissibility in the presence of new causes of action	79
C. The Binding Effect of the Decision	80
I. Erga-omnes-Effect	80
II. Inter-omnes-Effect	84
1. The impact of the decision on the facts of the case	84
2. The material impact of the decision	85
D. Appreciation and Criticism of the Decision in the Initial Case	86
I. Preliminary Question regarding the Object of the Dispute	87
II. The prohibition of the imperative mandate and declaration of renunciation	90
Chapter 3 Supranational Derogation of the Legal Force in Municipal Law	97
A. The Initial Case before the ECOWAS Court of Justice	99
B. Role of the ECOWAS Court of Justice as a Constitutional Court	109
I. Articulations of the Constitutional Role of the ECOWAS Court of Justice	109
1. Status of the ECOWAS Court of Justice, in particular, its independence	110
2. Exclusive and ultimate power of decision-making competence	115
II. Objections with regard to sovereignty	120
C. Individual Complaints Procedure before the ECOWAS Court of Justice	123
I. Admissibility of the Individual Complaint before the ECOWAS Court of Justice	124

II. Object of the complaint and those entitled to complain	128
1. Those entitled to complain	128
2. Object of the complaint (breach of primary duty, compare Art. 1 ECHR)	131
D. Types of Judgments by the ECOWAS Court of Justice	132
I. Declaratory Judgment	133
II. Judgment granting Reparation (Compensation)	133
1. Standards of a Judgment granting Reparation	134
2. Enforcement Procedure	136
III. Interpretative Judgments	139
IV. Not a Court of Cassation	139
V. Appeal proceedings (de lege ferenda)	142
E. Legal Force According to Art. 15 of the Amendment Agreement	145
I. Rule of Interpretation of Art. 31 VCLT	147
1. Literal Interpretation	147
2. Systematic Interpretation	150
3. Historical Interpretation	152
4. Teleological Interpretation	154
5. Principle of effectiveness and evolutive/dynamic interpretation	156
II. Effects of Legal Force of other Regional Human Rights Courts	162
1. East African Court of Justice	162
2. SADC Tribunal	167
3. ECtHR	170
4. The Inter-American Court	176
F. Manifestations of Legal Force of the Judgements of the ECOWAS Court of Justice	184
I. Formal Legal Force	185
II. Substantive res judicata	185
1. Extent of the Legal Force	186
2. Objective limit of the legal force	187
3. Subjective limit of the legal force	187
a. Inter-partes-legal force	188
b. Erga-omnes impact of the legal force in practice	188
4. Time-boundary of the legal force	192
III. Legal consequences of the legal force for the convicted signatory state	193
1. The obligation to cease and desist	193

Table of Contents

2. The obligation of compensation	195
a. Order to reinstate the initial proceedings in the operative part of the judgement	196
b. Justification of the order to reinstate	199
3. Obligation to take preventative measures	200
G. Justification for Breaching the Legal Force: Function to Close Loopholes	203
I. Entry Barriers for individual complaints according to national law	203
1. Inadmissibility of a national human rights complaint	205
2. Strict prerequisites for admissibility for the human rights complaint	207
3. The ECOWAS Court of Justice as guarantor of the effective protection of human rights	209
II. Possible Conflict of Interest of the Constitutional Court of a Member State	215
1. Elements of the complaint of a conflicted court	215
2. Conflicted judges as a violation of the positive obligation of the Member State	218
III. Foreseeable problems of the ECOWAS jurisdiction	219
1. Challenge to legal certainty	219
2. Overburdening of the Court of Justice and proposed solutions	220
a. Landmark and pilot judgments as a possible solution	221
b. The solution from the perspective of the national legal system	224
3. Dialogue between both levels	225
Chapter 4 The Reception of the Legal Force in the National Legal System	227
A. Preliminary Question: Binding Force of International Law and the ECOWAS Judgments	228
I. Binding Force of the International Law in francophone Member States	229
1. Question of rank	229
2. Principle of reciprocity	233
II. Binding Force in Anglophone Member States	236
III. Principle of the convergence of constitutions	240

B. National Articulation of Legal Force	243
I. National procedural binding force	244
1. Resumption of the initial proceedings	244
a. Prerequisites for a resumption	245
b. Justification of the obligation to resume	251
2. Declaratory judgment by the ECOWAS Court of Justice as a prohibition of enforcement	253
3. Effects Transcending the Individual Case	254
4. ECOWAS Court of Justice Decisions as the basis for QPC	255
II. Effect on all state powers	262
1. Indirect legal force for all state organs	263
2. Special binding effect of the Constitutional Court	268
a. The Constitutional Court as a state organ	269
b. Role Model Function of the National Constitutional Court	270
c. The possibility of a judgment in violation of human rights	273
C. Consequences of Contempt of Judgments of the ECOWAS Court of Justice	277
I. State liability due to a breach of the obligation to implement	278
1. Introduction of a new complaint procedure due to a breach of the obligation to implement	279
2. Enforcement of general state liability law	280
a. Applicability of the general rules of customary International law	281
b. Sanction mechanisms in the ECOWAS legal order	282
II. Monitoring and Implementation of the Decisions by the ECOWAS Court of Justice	284
1. Monitoring of the implementation	284
2. Status of the implementation according to previous practice by the ECOWAS Court of Justice	285
Chapter 5 Result and Concluding Comment	287
A. Criticism of the Self-Restraint of the ECOWAS Court of Justice in the Ameganvi et al vs. Togo Case	287
I. Criticism of the Self-Restraint	287
1. Legal basis of the self-restraint	287

Table of Contents

2. Implied authority	288
3. Development of the law by International Courts	292
II. Criticism from a Constitutional Perspective	294
1. Object of dispute and party to the dispute before National and the ECOWAS Courts of Justice	294
2. Confusion in the Exercise of Jurisdiction	296
3. Confusion regarding the applicable law	298
III. <i>Marge Nationale d'appréciation</i> as a possible Limit to the Empowerment Authority?	301
1. The term <i>marge Nationale d'appréciation</i>	301
2. Appreciation of reverting to the discretion of the state	303
a. Procedural guarantees as a basis for other human rights	304
b. Non-existence of a collision with National interests	317
c. Procedural Guarantees as the resulting obligation	318
B. Concluding Comment	320
Bibliography	335

List of Abbreviations

ANC	Alliance Nationale pour le Changement
AU	African Union
BVerfGE	Decisions by the Federal Constitutional Court of the Federal Republic of Germany
CDRF	Centre de Recherche pour les Droits Fondamentaux
CEDEAO	Communauté Economique des Etats de l'Afrique de l'Ouest
CEDH	Cour Européenne des Droits de l'Homme
CHARTA	African Charta for Human Rights and Peoples' Rights
CIJ	Cour Internationale de Justice
CJ CEDEAO	Cour de Justice de la CEDEAO
CJEU	Cour de Justice de l'Union Européenne
CPJI	Cour Permanente de Justice Internationale
ders.	By the same author
DÖV	Die Öffentliche Verwaltung (Legal Journal)
EAC	East African Community
EACJ	East African Court of Justice
ECCJ	ECOWAS Community Court of Justice
ECOWAS	Economic Community Of West African States
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EuGH	European Court of Justice
EuGRZ	European Magazine on Fundamental Rights
EuR	Journal on European Law
FS	Commemorative Publication
ICJ	International Court of Justice
ILC	International Law Commission
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
R.Q.D.I	Revue Québécoise de Droit International
SADC	Southern African Development Community
UFC	Union des Forces du Changement
VRÜ	The Journal "Law and Politics in Africa, Asia and Latin America"
ZaöRV	Journal for Foreign Public Law and International Law

