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The ECOWAS court of justice and the prevention of environmental damage to indigenous peoples in the exploitation of oil and gas resources

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Abstract
The ECOWAS Court of Justice has since the reform of January 19, 2005 have been responsible for ensuring the protection of human rights. In the exercise of this mission, she was able to detect and sanctioned the damage to the environment of indigenous peoples in the context of the exploitation of natural resources. She aligned herself with the case law of other jurisdictions to engage the responsibility of the failing states and order reparation measures in order to relieve the suffering of the victims.

Keywords: ECOWAS Court, gas resources

Introduction

Wherever natural resources are exploited, particularly oil and gas, there is a permanent tension between the State and the local populations. This is largely explained by oil spills which cause considerable damage to the populations by destroying crops damaging the quality and productivity of the land used by the communities for farming, and contaminating waters used for fishing, consumption, etc.

Despite the existence of a legal framework governing the exploitation of oil and gas, States and their internal jurisdictions are unable to deal promptly with disputes relating to the infringement of the people's right to a healthy environment. This laxity can be explained by two fundamental reasons. On the one hand, most of the legal instruments adopted in environmental matters are not binding. They are texts that have a programmatic, declarative, or preventive nature; in short, they fall under soft law. For example, the United Nations Conference on the Environment from 5 to 16 June 1972 or the Rio Declaration of 1992 specifies in generic terms the obligations of States according to the following terms: "States shall take all measures to prevent the pollution of the seas, water, etc." On the other hand, there is a clear lack of political will to enforce national and international texts that thwarted powerful lobbies.

Faced with such a situation, international human rights courts are increasingly offering themselves as a last resort for victims. In Africa, these are particularly the most active courts, in particular the ECOWAS Court of Justice and the ADHP Court. Senegal, having not agreed to make the declaration under Article 34 (6) of the Protocol on the ACHPR, which gives individuals and NGOs the possibility of introducing contentious appeals, can only be sanctioned before the ECOWAS Court for violation of the right of Indigenous peoples to a healthy environment. It is for this reason that our reflection will focus on the theme: "the ECOWAS Court of Justice and the prevention of damage to the environment of Indigenous peoples in the exploitation of oil and gas resources". for methodological reasons, it is important to make some terminological clarifications before analyzing the issue in depth. This involves giving content to the notion of the environment, pollution, and indigenous peoples.

According to the Institute of International Law, in particular, the resolution of September 4, 1997, in its article 1: "the environment includes biotic and abiotic natural resources, including air, water, land, fauna, and flora, as well as the interaction between these same factors". The International Court of Justice (ICJ) specifies in its advisory opinion of July 8, 2006, Legality of the Threat or Use of Nuclear Weapons that: "The environment is not an abstraction, but rather the space where human beings live and on which their quality of life and health depend, including for future generations". Therefore, due to the extraction of oil and gas resources, this environment can be polluted. Pollution refers to anything that alters our environment or our health, usually in the form of substances, but also in the form of waves. Pollution attacks the air, water, soil, our ears, our eyes, etc. This infringement naturally causes harm to Indigenous peoples.

Concerning the concept of Indigenous peoples, it is important first of all to define what is meant by people. When asked to answer the question of whether the people of Quebec should be understood to mean the entire permanent population of the said province or whether it refers only to Francophones established in this province, the Supreme Court of Canada specifies that this concept can refer to both the heterogeneous population of a State and specific population groups identified by their culture.

According to Olivier Nay, the people are a "historical community living on a territory and sharing a sense of common belonging". Therefore, in the current study, the Indigenous people refer to a community living on a portion of the national territory, particularly in localities where oil and gas resources are exploited.

Our presentation will focus on individual and collective environmental damage that produces their effects within national borders, which allows us to exclude transboundary damages that may be subject to international litigation before the ICJ.

This communication aims to inform NGOs and individuals who may be victims of pollution about the existence of supranational remedies in the event of an infringement of the right of people to a healthy environment, and that States have proven lax in preventing this infringement. This communication will be based on judgment No.

ECW/CCJ/JUD/18/12, SERAP v. the Federal Republic of Nigeria of 14 December 2012, which remains the only case judged on the merits by the Court in matters of violation of environmental standards.

Such a study will make it possible to raise awareness of the regulatory framework governing the exploitation of mining, oil, and gas resources, in particular the obligation on multinationals to reduce pollution risks as much as possible. Then, this work will contribute to developing among NGOs and individuals the reflex to bring lawsuits against multinationals before international courts, particularly the ECOWAS Court of Justice, in the event of damage to the environment, when domestic courts prove incompetent.

What then is the role of the ECOWAS Court of Justice in protecting the right of indigenous peoples to a satisfactory environment, as a human right?

The paradox in Africa is that human rights are constantly violated in most countries, even though beautiful and ambitious constitutions proclaim them everywhere as the foundation of civilized societies. The judge in Abuja is trying to rectify the situation in the ECOWAS area by ensuring the defense of all rights and freedoms, whether civil or political, economic or social, whether they are of the 1st, second, or 3rd generation.

This Communication will be on two axes. We will first see the commitment of the State's responsibility in the event of failure to prevent damage to the environment of indigenous peoples and secondly, we will address the alignment of the ECOWAS Court of Justice with the jurisdictional movement in favor of protecting citizens against the violation of environmental standards through borrowing from case law and granting remedial measures.

1. The commitment of the State's responsibility in the event of failure to prevent damage to the environment of Indigenous peoples

When a State fails to respect its obligations in terms of preventing damage to the environment of indigenous peoples, its responsibility may be engaged. In its jurisprudence, the ECOWAS Court of Justice has made its courtroom accessible to litigants, particularly individuals and non-governmental organizations (NGOs) before finding a violation of the right of people to a healthy environment.

Accessibility of individuals to the Court’s courtroom in the event of a violation of the right of Indigenous peoples to a healthy environment. Accessibility to the Court’s courtroom necessarily requires recognition of the justiciability of environmental law and the applicant’s interest in bringing proceedings.

In the only case judged on the merits to our knowledge of environmental law, the ECOWAS Court of Justice first took care to establish its jurisdiction to judge the dispute relating to the application of environmental standards on the referral of an NGO before ruling on the merits of the case.

The ECOWAS Court of Justice sanctioned in the famous case SERAP v. Nigeria the violation of Articles 1 and 24 of the African Charter on Human and Peoples’ Rights (ACHPR) by the latter. The SERAP case has its roots in an application dated 23 July 2009 by which this NGO brought proceedings before the Abuja Court against Nigeria, the Attorney General of Nigeria, the oil companies Nigeria National Petroleum, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigerian PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC, and Exxon Mobil. The applicant complained that the oil companies had violated the right to health, quality of life, a healthy environment, and economic and social development of the people of the Niger Delta. The Federal Republic of Nigeria claims that the Court has no jurisdiction to consider alleged violations of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICCPR). It also requests the Court to declare that it has no jurisdiction to hear this case because the applicant failed to attach to its application the report published by Amnesty International, which violates the provisions of the Rules of Procedure and infringes the rights of the respondent.

The first stage of the Court’s reasoning consisted of deciding on the preliminary issues raised by Nigeria. It first recalled that it derived its jurisdiction from Article 9 (4) of the 2005 ECOWAS Supplementary Protocol. Then, concerning the standing to act, it adopted the position adopted in its judgment of 10 October 2010, recognizing the said standing of the NGO SERAP. Finally, Nigeria’s two other arguments relating to the inadmissibility of the Amnesty International report and the statute of limitations were rejected. The Court subsequently recognized the standing of an NGO in matters of violation of environmental standards.

One of the particularities of international environmental law is the role played by non-state entities in its implementation. This particularly concerns environmental defenders who have organized themselves into national or international NGOs. Thus, "defending human rights is both an exhilarating and perilous job because the human rights defender is the voice of the voiceless, the mouth of those who have no mouths, in short, the person of people who have no one".

NGOs play an important role in litigation over human rights violations related to the violation of environmental standards. They can do this in several ways. For example, when they find authorization, they can present an Amicus curiae brief.

The Abuja Court in the SERAP case recognizes NGOs' interest in acting. According to the State of Nigeria, the application was filed without consultation or prior agreement of the population of the Niger Delta. However, the Court found no determining factor that could force it to set aside the previous case law of October 2010 in the SERAP case.

After admitting the appeal of the NGO SERAP, the ECOWAS Court of Justice sanctioned Nigeria for environmental pollution of ethnic minorities; violation of the specific rights of the peoples of the Niger Delta.

The finding of the violation of the right to a healthy environment. In the case of SERAP v. Niger, the Court first relaxed the burden of proof before sanctioning the attitude of the Nigerian State about its obligations under the ACHPR.

States must "take necessary measures" to ensure the protection of the population against the risk linked to the exploitation of mineral resources. However, there are difficulties in proving environmental damage in litigation. The source of pollution is often difficult to identify, in particular due to uncertainties because the necessary causal link between the breach and the damage cannot be established with certainty. In the case of SERAP v. Nigeria, the Court stated: "The question of determining the causes of

the spills or who is responsible for them is not relevant in the present case. What is being examined here is the attitude and conduct of the respondent as a State party to the ACHPR". Is this conduct consistent with Article 24 of the ACHPR which states: "All peoples have the right to a satisfactory and holistic environment conducive to their development".

In principle, "the alleging party must prove". It must be shown how the alleged victim is individually affected, it must not simply be contested as a law or a policy or practice of the State in the abstract. It requires a photograph, and an expert report to show the extent of the degradation and its impact on the victims (10 October 2017, Nosa Ehanir Esaghae and others v. RF. of Nigeria).

The ECOWAS Court of Justice showed leniency by not requiring the applicant to necessarily establish all the evidence of the violation of the right of the local populations to a healthy environment. Indeed, based on analogical reasoning, it made the following observation: "the quality of life of people being determined by the quality of the environment, the government had failed in its duty to maintain a satisfactory environment conducive to the development of the Niger Delta region". The Court notes that from the moment the damage to the environment is noted, one can deduce the deterioration of the quality of life of the people living in the area considered. It reaffirms the right of the Nigerian people to a life free from all pollution by sanctioning Nigeria's attitude. In its arguments in defense, the State of Nigeria wanted to demonstrate the efforts it has made for the protection of the environment through the adoption of legislative and regulatory texts. However, the Court recalls that the mere adoption of laws, or the establishment of bodies, is not sufficient to prove that the State has complied with its international commitments in the field of the environment. It specifies that "the adoption of legislation, also however advanced, the creation of bodies inspired by renowned international models, or the allocation of financial resources paid equitably, do not systematically meet the criteria of international obligations in terms of environmental protection, if these measures remain simply written and are not accompanied by other concrete additional measures aimed at limiting incidents causing damage or ensuring that the perpetrators are held responsible, in particular for effective compensation for the environmental damage suffered". Even if the laws are adopted and control bodies have been established, the Court sanctions the State's inability to use State authority, per international obligations, to prevent the oil industry from harming the environment, the livelihoods, and the quality of life of the populations of this region. Thus, despite all the laws adopted and all the bodies created, the Federal Republic of Nigeria has not been able to take action in the Niger Delta region in recent years to incriminate the perpetrators of numerous environmental degradations perpetrated." The Court clearly expresses the attitude of the State of Nigeria which constitutes the violation of its international commitments. Thus, "the failure to act, to prevent environmental degradation and to assert the responsibility of offenders who continue their harmful activities with impunity and in full knowledge of the facts, is what characterizes the failure of the Federal Republic of Nigeria to fulfill its international obligations. Consequently, the Court concludes and declares that the RFN by its conduct and by regard to its obligations of abstention and diligence as a State party to the ACHPR has violated Articles 1 and 24 of the latter." The bold position of the Court in the case of SERAP v. The Federal Republic of Nigeria is in line with the evolution of environmental law, which tends towards the jurisdictionalization of the protection of its standards.

2. An alignment of the ECOWAS Court of Justice with the jurisdictional movement in favor of environmental protection

Environmental standards that were relegated to the rank of soft law are increasingly justiciable before international courts. The ECOWAS Court of Justice has taken part in this dynamic by drawing inspiration from its counterparts to sanction the violation of environmental law and order remedial measures.

The jurisprudence of international jurisdictional and quasi-jurisdictional bodies is a source of inspiration for the ECOWAS Court. Today, there is a movement in the making for the protection of environmental law by international jurisdictional and quasi-jurisdictional bodies. In sanctioning the violation by the Nigerian State of the right of peoples to a healthy environment, the ECOWAS Court of Justice drew inspiration from the jurisprudence of other jurisdictional and quasi-jurisdictional human rights bodies that have a rich jurisprudence on the matter.

The African Commission on Human and Peoples' Rights (ADHP Com.) recognized the right of peoples to the free disposal of their natural resources under Article 21 of the Charter by noting the violation by Kenya of the rights of access and exploitation of the land of the Endorois people expelled from the Lake Bogoria region.

The East African Court (EAC), in the ANAW v. Tanzania judgment, declared itself competent to hear cases of violation of the right to the environment before sanctioning the said State for violation of certain environmental rights. In this case, ANAW, the EAC states that the project which provides for the rehabilitation and construction of the Natta-Loliondo road, dubbed the “super highway” or “Northern Route” which was to cross the Serengeti National Park, a reserve famous for its variety of animal and plant species envisaged, has adverse effects on the environment and will cause irreversible damage to the ecosystem of the Serengeti Park and that of neighboring parks such as the Masai Mara in Kenya. The applicant invokes in support of its application a violation by Tanzania of several of its obligations contained in the EAC Treaty, the UNESCO declaration of the Serengeti as a world heritage site, and the 2003 Maputo Convention on the Conservation of Nature and Natural Resources, the Rio Declaration and the Convention on Biological Diversity. The applicant therefore requests the Court to find these violations and to definitively prohibit Tanzania from carrying out any implementation of the planned works. In its judgment of 20 June 2014, the Trial Chamber of the EAC Court found that the execution of these works will cause damage to the ecosystem of the Serengeti Park and that of neighboring parks such as the Masai Mara in Kenya before concluding that Tanzania had violated the listed provisions of the EAC Treaty. The appeal judge will confirm the judgment of his counterpart in court and rule in favor of ANAW.

In addition, the European Court, interpreting Article 2 of the European Convention on Human Rights on the right to life, indirectly detected the failure of the Turkish State to fulfill

its positive obligation in the Öneryildiz judgment against the latter concerning the methane explosion that occurred in a municipal landfill. Based on expert reports that had drawn the authorities' attention to such a risk, the Court considered that the State had failed in its positive obligation to take preventive measures to protect people living near the landfill.
The finding of a violation by a State of its environmental obligations logically leads to the enactment of remedial measures.

3. The granting of reparation measures as a sanction for the violation of the right of Indigenous peoples to a healthy environment

The ECOWAS Court of Justice upheld the argument of the NGO, SERAP, which accused the Federal Republic of failing to take measures to prevent "the discharge of hydrocarbons and polluting waste into the water for domestic use including drinking, the failure to secure health parameters, including a healthy environment, and the inability to enforce laws and regulations to protect the environment and prevent pollution". The violation of the right of people to a healthy environment has caused enormous damage to the local populations who deserve the granting of reparation measures. There are several forms of reparation, including full reparation, restitution, or restoration of the situation before the occurrence of the unlawful act; compensation, concerns material damage, in the impossibility of putting things back to the state that we adopt the formula of reparation by equivalence and satisfaction.
However, in the case of SERAP v. Nigeria, the Court highlights the difficulties of reparation of damages through compensation of victims by specifying that "the fact of paying compensation only to certain victims would pose a serious problem in terms of justice, morality, and equity within a very large population. The compensation must not be a pecuniary advantage". This is why it opts for other forms of reparation, particularly, guarantees of non-repetition. Thus, "the Court orders the Federal Republic of Nigeria to take as soon as possible, all necessary measures to guarantee the restoration of the environment of the Niger Delta". Nigeria must also "take all necessary measures to prevent the environment from deteriorating. Take all measures to hold responsible the perpetrators of the damage caused to the environment". However, the form of reparation chosen by the Court has limits that should be highlighted. The reparation measures ordered in this case do not include sufficiently binding provisions. It is important that in the future the Court tries to identify the victims of pollution especially those affected by respiratory diseases, and loss of agricultural income to grant financial compensation.
Then other measures of satisfaction such as the immediate cleaning of the affected area, the construction of water towers for the population, or the total care of the sick, especially those who have bodily injuries caused by the spillage of crude oil, the flaring of gas in the appropriate care centers may seem very useful.

Conclusion

The Abuja Court intervenes to fill the difficulties encountered by the emotional application of solidarity rights including that of the environment in the internal order of States. There is a gap between the formally justiciable right and the materially invocable right about this right. The Abuja jurisdiction encounters less difficulty than the internal jurisdictions in apprehending the holders of solidarity rights collectively. Therefore, NGOs and potential victims must be aware of the existence of remedies at the level of international courts when they have not obtained satisfaction at the level of domestic courts. But these must play their role in ensuring the effective protection of citizens. This litigation will only explode at the level of Community and international courts in the event of the failure of national courts.
The following question was put to the former President of the European Court of Human Rights: what could you wish the European Court for the coming decade?
Jean-Paul Costa, I would say: that it becomes useless! In other words, the States, bound by the Convention, respect it and do not violate the rights and freedoms of their inhabitants. Some countries (rare) violate them very little. so my wish is that the Court becomes useless for Senegal, which will soon become an oil and gas producer, not because this State will refuse to apply its decisions, but because it does not violate the rights and freedoms of indigenous populations, or that it does so very little.

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