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Good governance as a precondition for subsidiarity: human rights litigation in Nigeria and ECOWAS

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ABSTRACT

Similar to the European Union, the Economic Community of West African States (ECOWAS) evolved gradually from little more than a customs union to a supranational organisation with sophisticated governance arrangements. As a consequence, subsidiarity has become an inevitable adjustment mechanism to align individual member state policies with objectives of the Community as a whole. In particular, since the inclusion of a protocol on good governance and democracy in 2001 an increasing number of policy areas require a delineation of competencies between state and Community organs. Moreover, the ECOWAS Community Court of Justice confines itself to the vertical application of human rights law and does not accept human rights claims against private persons since the extension of its mandate in 2005. Many cases involving the Federal Republic of Nigeria illustrate well a double procedural effect of the principle of subsidiarity in the human rights litigation within the ECOWAS legal order.

KEYWORDS Subsidiarity; human rights; Nigeria; ECOWAS

Introduction

The principle of subsidiarity operates in a multi-level legal order or system. The fundamental condition for its operationalisation depends on the presumption of at least one of the levels concerned to be well-functioning. Therefore the principle of subsidiarity relies on the existence of normative and institutional criteria for its implementation within a multi-level system (Von Staden, 2016b, p. 1115). Nigeria, a Commonwealth country, is a founding member and a core state among the 15 countries that make up the Economic Community of West African States (ECOWAS). The principle of subsidiarity presupposes that member states act according to the principles of good governance and respect the rule of law as well as human rights. Since the adoption of the ECOWAS Protocol on good governance and democracy in 2001, and the

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subsequent extension of the judicial mandate of the ECOWAS Community Court of Justice (ECCJ), key practices in environmental policy and human rights protection show that there is no consistent or uniform application of subsidiarity. This is most obvious in the case of Nigeria.

In fact, the high contracting parties to ECOWAS were 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 collective political will. (Preamble of the Revised Treaty ECOWAS of 1993)

Therefore the preamble confirms the supranational nature of the governance architecture of ECOWAS (Von Staden, 2016a, p. 42). In the light of the 1993 Revised Treaty, the Community sets out the respect, protection and promotion of human rights as necessary conditions directly tied to the attainment of economic union and other integration objectives. Moreover, by recognising the principle of a partial transfer of sovereignty the member states accepted at the same time the concession of some attributes of sovereignty in the legislative, judicial and executive fields to the regional order. The organs that exercise the supranational powers of ECOWAS are enumerated in Article 6 of the Revised Treaty. From the principle of delegation of powers referred to in the preamble some organs of the organisation are vested (at least in theory) with legislative, executive and judicial powers in such a way that the institutional nomenclature of the organisation resembles the governance architecture of the European Union (Von Staden, 2016a, p. 41). However, the principle of subsidiarity has been explicitly established neither in the Revised Treaty nor in the subsequent protocols. Nonetheless, some community instruments refer to the principle as is the case with the ECOWAS Vision 2020, the 2007–2010 Strategic Plan, ECOWAS Environmental and Renewable Energy Policy, and the six guiding principles of the ECOWAS Community Development Programme of 2012.

The growing attention that the principles of good governance and the respect of human rights enjoy at the level of the Community precludes henceforth the exclusive jurisdiction of member states in human rights matters (Donnelly, 2014, p. 225). In other words, the exclusive territorial jurisdiction has become a fundamental antagonist to international human rights in West Africa. This antagonism must be considered in terms of substantive human rights as well as in terms of procedural rights that render the former effective.

The general conception of the ECOWAS principle of subsidiarity

The principle of subsidiarity in modern international law can be well understood if it is analysed together with the principle of sovereignty. Sovereignty has its contemporary expression in article 2(1) of the Charter of the United

Nations which specifies that: 'The organisation is based on the principle of the sovereign equality of all its members'. Pursuant to that principle of equal sovereignty, subsidiarity has been established in international law as a legitimate principle to govern the exercise of sovereignty in a multi-level polity and pluralistic legal order (Besson, 2011, p. 384). Due to this intrinsic relationship with sovereignty, the principle of subsidiarity is considered to be a structural principle of international human rights law (Carozza, 2003, p. 38).

The principle of subsidiarity is defined in ECOWAS Environmental Policy as follows: 'The principle of subsidiarity, according to which only what cannot be better addressed at the national or local level, will be treated at the regional level'. It is agreed that, 'national competence shall be the rule whereas community competence shall be the exception'.¹ With regard to good governance, the term does not have an exhaustive definition and the ECOWAS Protocol on good governance and democracy of 2001 does not contain any specific definition either. However, the United Nations have identified some characteristics of good governance as being participatory, consensus-oriented, accountable, transparent, responsive, effective, efficient and equitable as well as inclusive. In short, forms of government that follow the rule of law.² Many provisions of the ECOWAS Protocol on good governance refer to these characteristics. For instance, according to Article 33, subsection 1, of the Protocol:

Member states recognise that the rule of law involves not only the promulgation of good laws that are in conformity with the provisions on human rights, but also a good judicial system, a good system of administration, and good management of the state apparatus.

In addition, Article 2 of the same instrument insists on consensual decision-making processes with regard to electoral matters. In sum, good governance includes joint action of the legislative, executive and judiciary powers. In the ECOWAS conception, as defined earlier, the principle of subsidiarity holds that the regional power (ECOWAS) should not exercise functions that can be carried out efficiently by the organs of the member states. In order to ensure the implementation of human rights in the ECOWAS context, a judicial body vested with formal jurisdiction to adjudicate human rights violation has been established. The principle of subsidiarity is normally reflected in human rights litigation, which requires, as a rule, domestic remedies to be exhausted prior to international action. The principle is therefore based on the need to respect the normal functioning of a domestic regime. The International Court of Justice restated its foundations in the following terms:³

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a state has adopted the cause of its national whose rights are claimed to have been

disregarded in another state in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

Among the main organs of ECOWAS, the Community Court of Justice (ECCJ) should normally be considered the most appropriate actor applying the principle of subsidiarity.

The common requirements for good governance and democracy in the Commonwealth and ECOWAS

As a member state of the Commonwealth Nigeria is bound by the Harare Declaration of 1991 which pledges its members to work with renewed vigour in areas such as:

Democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government; fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief.

With regard to sanctioning mechanisms the Commonwealth Ministerial Action Group (CMAG) set up by the Heads of Government plays a key role in dealing with persistent and serious violations of fundamental political values incorporated in the Harare Declaration of 1991. The main task of the CMAG is to examine the nature of infringements and recommend measures for collective Commonwealth action with the purpose to achieve a speedy restoration of democracy and constitutional rule in the member country concerned. In 1995 when democracy and human rights were severely violated in Nigeria by the military government of General Sani Abacha, the Commonwealth took appropriate action by suspending its membership. This sanction was imposed after the military government had carried out executions of activists in a gruesome and heartless manner (Mole, 2013, p. 9). The suspension began in November 1995 and Nigeria was readmitted in the Commonwealth only in May 1999 when the country had restored democracy. The difference between the Commonwealth sanction mechanisms and the ECOWAS is that the latter allows direct complaints by individuals against member states at regional level. It is worth mentioning briefly the historic development which led to the establishment of this individual protection mechanism.

In December 1999 the Heads of State and Government of ECOWAS agreed on the Protocol relating to the mechanism for conflict prevention, management, and resolution, as well as peacekeeping and security. Later the member states realised that the effectiveness of the Protocol depends necessarily on good governance and the respect for the rule of law. For this reason, the Protocol on Good Governance and Democracy was adopted.⁴

Interestingly, the Protocol refers to the Harare Declaration adopted by the Commonwealth on 20 October 1991, as mentioned above.

The reference to the Commonwealth in an ECOWAS Protocol demonstrates, if not confirms, the convergence of interests and objectives between the two organisations at least in the field of good governance, human rights and the rule of law. To ensure their protection, the two organisations do not necessarily adopt the same mechanisms and methods. Within the Commonwealth, the mechanisms for monitoring member states obligations are basically of a political nature, as demonstrated by the sanction against Nigeria in 1995. Within ECOWAS, these mechanisms are both political and jurisdictional. Following the common objective, violations of democratic principles, human rights and the rule of law may lead to sanctions on the part of ECOWAS as well as the Commonwealth. In fact, there is a competition of sanctions against the state belonging to both organisations as the experience of Nigeria shows. As all ECOWAS member states, Nigeria has international as well as community obligations to promote, protect, and fulfil human rights. Accordingly, it has to provide for an adequate judicial system for the enjoyment of fundamental rights incorporated in the African Charter on Human and Peoples Rights and other relevant human rights instruments recognised within the jurisdiction of the court.

At the jurisdictional level it is the possibility of a direct application to the ECCJ that essentially marks the West African Community. In this context Nigeria has played a leading role following on from an individual petition first submitted in 2004 by Olajide Afolabi, a Nigerian citizen. He had concluded a contract with a fellow businessman in the Republic of Benin to purchase goods and deliver them on an agreed date. Unfortunately, Mr Afolabi could not complete this transaction because Nigeria unilaterally closed its border with Benin. Alleging that he endured heavy loss for the said closure, he filed an application with the ECCJ to find Nigeria in violation of the ECOWAS Protocol on Free Movement of Persons and Goods (Protocol A/P.1/5/79). The Federal Republic of Nigeria challenged this complaint as well as the Court's jurisdiction, arguing that by the time the Afolabi case was brought to its attention, it was not clear whether the Court had jurisdiction over human rights and whether it may rule on individual actions. Furthermore, the Protocol of 1991 relating to the Court did not contain any mention of the Charter. Therefore, the only plausible legal basis for the plea could have been the reference to the Charter in the Revised Treaty. Yet, this was not a sufficient ground for a successful complaint. Noting the lack of a sufficient legal basis, the ECCJ struck out the complaint and declared that an individual had no standing and access to the Court's jurisdiction.⁵ Against this background, i.e. the denial of individual access to the Court in the Afolabi case, the Additional Protocol A/SP.1/01/05 amending the Supplementary Protocol A/P.1/7/91 relating to the ECOWAS Community Court of Justice (ECOWAS,

2005). The activation of judicial remedies at the regional level thus responded to the lack of adequate relief for human rights abuses at national level and further in line with the combined pressure of NGOs and other private actors (Alter, Helfer, & McAllister, 2013, p. 750).

The dual human rights order within the ECOWAS system: the case of Nigeria

At the domestic level, the interpretation of Section 13 of the Constitution of the Federal Republic of Nigeria of 1999 suggests that state actors bear the prime responsibility for the realisation and effectiveness of the fundamental liberties and the implementation of basic constitutional principles. Section 13 provides as follows:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this constitution.

A catalogue of fundamental human rights has been recognised by Sections 33 to 44 of the Constitution. Furthermore, Section 14 of the Constitution emphasises that the state is based on the fundamental principles of democracy and social justice. It is worth mentioning that the recognition of those fundamental liberties and human rights is part of the international obligations of Nigeria as stipulated in Article 1 of the African Charter on Human and People's Rights, Article 1 Section 3 of the International Covenant on Civil and Political Rights, and Articles 4(g) and 5 Section 3 of the ECOWAS Revised Treaty. Although fundamental freedoms and human rights were incorporated in the Nigerian Constitution of 1999, various impediments have seriously hampered their effectiveness with regard to judicial remedies in a way that Nigeria continues to grapple with the challenges of democratic governance (Abiodun Dada, 2013, p. 16; Odo, 2015, p. 4). Judicial remedies should satisfy minimum objective criteria to be deemed appropriate for human rights redress at domestic level: they must be available, effective and sufficient. The observation of the Nigerian judicial system shows that these criteria are not fulfilled (Abiodun Dada, 2013, p. 16). The ECCJ becomes in this regard a direct and effective guarantor to fill internal gaps so that the victim does not endure the consequences arising from the violation for excessive periods of time. However, this would not mean that the ECCJ becomes a court of first and last resort for the protection of human rights.

The Court has the competence to enforce the Charter in ECOWAS member states (Article 9 paragraph 4 and Article 10(d) of the Protocol A/SP.1/01/05 in combination with Article 4(g) of the Revised Treaty). The analysis of its jurisprudence shows that a dual human rights regime exists within the Community. The first regime is constituted by the domestic orders of the member

states established by the national constitutions, and the second regime is the regional human rights order whose principal sources are the Charter and relevant international human rights instruments recognised in the practice of the ECCJ (Nwauche, 2013, p. 43). The existence of this dual human rights regime within the Community constitutes the main argument against the horizontal application of the ECCJ's human rights mandate.

The Court was established to drive the purposes of the Community and to promote individual rights within the jurisdiction of its member states (Enabulele, 2012, p. 287). It is for that purpose that the Court was empowered to play a key role in eliminating obstacles to the realisation of community objectives and accelerating integration (Preamble to the Supplementary Protocol); bearing in mind that fundamental principles of the Community, as set out in article 4(g) of the Revised Treaty, are, among other things, the promotion of human rights, respect for the rule of law and good governance. Therefore the human rights jurisdiction of the ECCJ is intrinsically linked to the implementation of human rights obligations by the member states in accordance with the aforementioned fundamental principles of the Community. Hence, Article 34(1) of the Protocol on Good Governance and Democracy declared that:

Member States and the Executive Secretariat shall endeavour to adopt at national and regional levels, practical modalities for the enforcement of the rule of law, human rights, justice and good governance.

This provision is complemented by Article 39 of the same Protocol which provides for the amendment of Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice.

The exceptional removal of the requirement to exhaust local remedies

The relationship between the domestic and the international legal orders has been disrupted and the prerogatives of national courts in the area of human rights are no longer exclusive. Hence, an interaction between the two orders is instituted by the provision of Articles 9(4) and 10(d) of the Supplementary Protocol A/SP.1/01/05 (hereinafter the Supplementary Protocol). Pursuant to Article 9(4): 'the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State'. For the effectiveness of that provision Article 10(d) of the Supplementary Protocol provides:

Access to the Court is open to individuals on application for relief for violation of their human rights, the submission of application for which shall not be anonymous; nor be made whilst the same matter has been instituted before another International Court for adjudication.

The Court was thus empowered to ensure that the member states fulfil their international obligations.

The principle of prior exhaustion of domestic remedies is a customary rule of public international law that manifests itself in litigation relating to the international responsibility of states. This rule is justified by the double violation of both domestic and international law. Indeed, the principle is based on the fact that the same result that is sought before the international body can be obtained before the domestic courts. This objective element is not only the condition of the rule, but also the justification for its application. Thus, the purpose of this principle of domestic remedies is to give the state concerned the opportunity to redress the situation of violation. The persistence of the breach is found and the violation of international law becomes final only if the judicial decisions also violate international law.

Thus, the principle of subsidiarity (exhaustion of local remedies) is to protect the domestic legal order. Consequently, states may agree on a waiver of the rule of exhaustion of local remedies as an exercise of their sovereign power within the framework of a treaty or otherwise. In this regard, the ECHR has stated that: 'There is nothing to prevent states from waiving the benefit of the rule of exhaustion of domestic remedies, the essential aim of which is to protect their national legal order'. There exists on this subject a long established international practice from which the Convention has definitely not departed as it refers, in the former Article 26 (now Article 35) to 'the generally recognised rules of international law'.⁶ In the exercise of their sovereign powers states are allowed during the conclusion of a treaty to remove rules of international customary law which do not constitute peremptory norms of general international law (*jus cogens*) from which no derogation is permitted.⁷ The implicit removal of the local remedies rule in the Supplementary Protocol is an expression of sovereignty by the member states of ECOWAS.

It is obvious and understandable that the application of the principle may be excluded when states as parties to a convention decide to do so. The ECOWAS protection system enshrines this exception to the rule of prior exhaustion of domestic remedies by keeping silent on the issue. The implicit removal of the principle derives from the combined provisions of articles 9(4) and 10(d) of the Supplementary Protocol. In a well commented case where the Republic of Niger challenged the admissibility of a petition without prior exhaustion of local remedies, the ECCJ rejected the preliminary exception (Bado, 2017, p. 97). In the interpretation of the provision of article 10(d) of the Supplementary Protocol, the court found that the Protocol is silent on whether the admissibility of an individual petition before the court is pre-conditioned by the prior exhaustion of domestic remedies. Hence, the court decided that it had to fill this gap through the interpretation of ECOWAS laws.⁸ Some criticise the court's position on this matter, but disregard the general context that has prevailed (and is still prevailing) throughout the

region regarding the respect for human rights at the domestic level (Enabulele, 2012, p. 290). In the absence of an explicit stipulation on the issue of local remedies exhaustion, the court has to align its interpretation of the provision in the light of the general context prevailing at the time of the adoption of the Protocol. It may also take into account the general system of laws in which the court exercises its jurisdiction. Following the interpretation of rules set out in the Vienna Convention on the Law of Treaties (Article 31), the court has taken on many factors in the construction of the provision of Article 10(d) of the Supplementary Protocol, including good governance, the rule of law, access to justice within the domestic order of member states and so on. Most importantly, in the drafting of the Supplementary Protocol the court should consider the systematic position of the instrument by taking into account other legal instruments adopted by the same member states and the general context prevailing at the time of coming into being of the Protocol (Bado, 2017, p. 121).

Some questions need to be raised: does the principle of subsidiarity, as practiced within the ECOWAS system, constitute a source of cooperation or of conflict between the domestic order and the regional order? How can the removal of the prior exhaustion of the local remedies rule be compatible with state sovereignty? These questions need to be asked because the existence of the local remedies rule is to emphasise the complementary or subsidiary role of the international jurisdictional system. The fact, however, that the ECOWAS system has lifted the procedural barrier of local remedies exhaustion, in theory, puts the regional order on the same footing as domestic courts. Hence, the ECCJ seems to exercise a power of first instance jurisdiction in human rights litigation. By scrutinising the historical context of the human right litigation within the region, the removal of the local remedies rule can be justified. Even within the legal orders where the principle of subsidiarity is applied, ineffective local remedies justify the removal of the principle of prior exhaustion of local remedies. For instance, if the rule is established that local remedies should be exhausted, it is also established in the jurisprudence as well as in conventional law that in cases where domestic laws do not afford due process of law or render the access to remedies impossible or difficult, the rule does not apply. The American Convention on Human Rights, for example, removes the subsidiarity rule in the provisions of Article 46 Subsection 2 which provides that exhaustion of local remedies is not necessary if:

- (a) The domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

- (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Furthermore, in the guide to good practice in respect of domestic remedies adopted by the Council of Europe, it is attested that:

The way in which the principle of subsidiarity is applied may, however, interfere with the effectiveness under article 13 of the Convention of a constitutional complaint. (Committee of Ministers, 2013, p. 48)

In sum, the principle of subsidiarity is reasonable when local remedies are available and effective.

Obviously, if the principle of subsidiarity is not handled well, it may become a source of conflict between international judicial bodies like the ECOWAS court and the organs of member states (Enabulele, 2012, p. 293). However, there are criteria that can resolve potential conflicts between the two orders and it is not precluded that those kinds of conflict do not exist where the principle of subsidiarity is observed through the exhaustion of local remedies as some cases before the ECHR confirm. The ECCJ as a constitutional court in the new regional order, governed by the rule of law, democracy and an imperative respect for human rights, plays a crucial and leading role in the construction of the rule of law and in the consolidation of democratic processes in regional constitutional orders (Bado, 2017, p. 82).

Procedural consequences of the principle of subsidiarity before the Community Court of Justice

All said, the principle of subsidiarity has two legal dimensions in human rights litigation: the vertical application of human rights norms and the dismissal of the horizontal application.

Vertical application of human rights within the ECOWAS jurisdictional system

The vertical application of human rights in the ECOWAS regional regime is first of all attested by the provision of Article 1 of the Charter which states that:

The member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Following that provision the vertical application implicates that international human rights law creates international obligations on states, not on private parties. Hence, human rights law operates vertically, not horizontally (Knox,

2008, p. 1). Since the adoption of the Universal Declaration of Human Rights, the vertical concept has been adopted to prevent states from finding an excuse behind the possible responsibility of private actors for the realisation of human rights within their jurisdiction. The horizontal application of international human rights law might provide governments with an excuse for the non-implementation of their own international obligations (Knox, 2008, p. 3).

The violation of state obligations recognised in the Charter and relevant ECOWAS instruments form the legal basis of claims of individual parties against member states before the ECCJ. The vertical application of human rights at regional level can thus be explained by the fact that the possibility of human rights violations by private parties committed against other private parties should be sanctioned through appropriate judicial or other proceedings before domestic courts; because member states of the Charter have the obligation to render human rights within their domestic jurisdictions effective. In the light of this rationale the horizontal application of human rights at regional level should be excluded because conduct of private parties infringing the Charter must be prohibited by the national legal order and sanctioned by domestic courts. The failure of member states to ensure appropriate guarantee determines the vertical application of the Charter and other relevant human rights instruments before the jurisdiction of the ECCJ. Even at domestic level a direct horizontal application of human rights is hardly conceivable in constitutional proceedings, even though some distinctions might be made considering the particular nature of socio-economic rights and the difference between countries with a strong commitment to social welfare obligations and those with a weak commitment (Tushnet, 2003, p. 92).

In most of cases of ECCJ in which Nigeria is involved, the court does not refer explicitly to the vertical application. Rather, the court based its reasoning on the law of state responsibility to better refocus the issue of the vertical effect of human rights, and rendered Nigeria accountable for the acts of its agents. According to Article 5 Section 3 of the Revised Treaty Nigeria as a member state of ECOWAS has to fulfil its international obligations under ECOWAS laws. The compliance with the Charter is an integral part of Nigeria's obligations under the Revised Treaty. The violation of the Charter whether by action or omission constitutes an internationally wrongful act under international customary law. Moreover, Nigeria cannot discharge itself on the ground that the human rights violation originates from its organs.⁹ Bearing in mind that the ECCJ applies all sources of international law as set out in Article 38 of the Statute of the International Court of Justice (see Article 19 of the Protocol A/P1/7/91) the rules of international customary law with regard to state responsibility are applicable as regards the standing in court procedures.

The law of state responsibility is the fundamental basis on which the court implements the vertical application of human rights. In that sense the principle of subsidiarity has two fundamental procedural consequences in the practice of the ECCJ. The first procedural consequence of the vertical effect of the human rights litigation is that the jurisdiction of the court is inferred from the plaintiffs not from the defendant in each case.¹⁰ The other procedural consequence directly related to the first is the inapplicability of the horizontal effect with respect to the defendant in the human rights litigation before the ECCJ. This is confirmed by the case law of the court. Some examples may illustrate both aspects.

The case *Dorothy Chioma Njemanze and others v the Federal Republic of Nigeria* illustrates well the vertical application through the mechanism of the law of state responsibility and summarises well the court's approach to the vertical application of human rights law. From the facts of the case it emerges that Dorothy Chioma Njemanze and the other three plaintiffs sued the Federal Republic of Nigeria before the ECCJ for the violation of their human rights, wherein they alleged that they were abducted and assaulted sexually, physically and verbally, as well as threatened and unlawfully detained by state agents in Abuja working, at different times, for the Abuja Environmental Protection Board (AEBP), the Nigerian Police and the Nigerian Military. According to the facts of the case they were neither informed about the reason of their arrest nor charged with any offence in any court in Nigeria. In its consideration of the facts, the ECCJ found that: having arbitrarily arrested, detained and harassed the plaintiffs, the officials have violated the rights of the plaintiffs under Articles 5 and 6 of the African Charter on Human and People's Rights and Article 9 (1) of the ICCPR. Nigeria is responsible for the conduct of its agents, and the court finally concluded that:

The failure and/or refusal of the defendant state to investigate, discipline and prosecute the persons responsible for the violations of the plaintiffs' rights, amounts to a violation of the state's international obligations.

Finally, the court observed that: 'The state remains the sole obligator to respect, protect and fulfil human rights under the Treaty' and placed reliance on Article 6 of the Report of the 53. Session of the International Law Commission which states:

The conduct of an organ of state shall be considered as an act of that state under International Law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of international or subordinate position in the organisation of the state.

Nigeria was thus found to be in violation of the applicants' rights under the Charter and other relevant human rights instruments, and due compensation was awarded to the applicants.¹¹

With regard to the conduct of the judiciary the latest judgment against Nigeria emphasises well the reasoning of the ECCJ based on state responsibility. From the facts of the case, it appears that the plaintiff, Mary Sunday, was allegedly brutalised by her fiancé who is a policeman and agent of the government. She suffered from severe facial burns, and she took the matter to the judicial services of Lagos State. However, due to a malfunctioning of the judicial system her file was lost so that her complaint remained ineffective. It is as a result of the lack of appropriate domestic remedy that the case was brought before the ECCJ. The counsel for Nigeria attempted to argue that the incident occurred outside of the official working hours of the agent and therefore the defendant state was not responsible. The ECCJ did not follow that reasoning. In considering the facts, the court recognised that the right to access to justice, effective remedy, and the right of the plaintiff to be heard within a reasonable time, had been violated by Nigeria. On these grounds the ECCJ held Nigeria responsible for the damage suffered by the plaintiff and awarded her the sum of 15 million Naira.¹² The interesting motivation of the court concerns the issue of the responsibility of the state due to the conduct of its judicial malfunction. Following the court's argument, it is clear that the state is not responsible for the conduct of its agents outside their professional activities. However, the state should put in place an appropriate judicial system to redress the damage suffered by the victim. Thus the vertical application of the relevant human rights instruments constitutes an adequate guarantee against human rights abuse without appropriate remedy at domestic level.

Rejection of horizontal application within the ECOWAS jurisdictional system

Under the original Protocol of 1991 relating to the ECCJ (A/P1/7/91), the horizontal application of community laws has been instituted by the provision of Article 9 of the Protocol A/P1/7/91 in two respects. In one sense the court is competent to settle disputes that arise between member states or between one or more member states and the institutions of the community on the interpretation and application of the provisions of the Treaty. Another horizontal effect finds its expression according to the same provision when a member state on behalf of its nationals starts proceedings against another member state or institutions of the Community on the interpretation or application of the Treaty after an attempt to settle the dispute amicably has failed. Therefore under the regime of the original provision of Article 9 of Protocol A/P1/7/91 only horizontal application is imaginable. The veil has been lifted and the new Article 9(4) of the Supplementary Protocol has instituted the vertical effect as described above and solved the limitation experienced by the plaintiff Mr Afolabi against the Federal Republic of Nigeria (Ukaigwe, 2016, p. 76).

The horizontal application of human rights refers to the procedural constellation where individual parties appear in the proceedings as bearers of duties and, thus, as defendants before the ECCJ (Nwauche, 2013, p. 32). The fact that the state has the possibility and obligation to define the general frame of rights and duties of individual parties within its jurisdiction excludes the horizontal effect of human rights before the ECCJ as an international court. This implies that individual parties owe duties toward their society or their state only within the framework of domestic jurisdiction and as a counterpart of their rights (Knox, 2008, p. 6). Consequently, the state has to take appropriate measures for the respect of individual duties. If there is a lack of due diligence, it is the state rather than an individual party that is accountable at international level. Moreover, individual parties are neither signatories of international human rights nor of the ECOWAS Treaty and its Protocols. Without being a party to these instruments, they cannot be sued before an international court such as the ECCJ.

The direct consequence of the vertical effect of human rights is manifest in the inadmissibility of actions brought against individuals before the court. Clearly, the vertical effect is an obstacle to the horizontal applicability of human rights. This inadmissibility is justified by several reasons relating to both the nature of the obligation, the debtor of this obligation, and the means available at the international level to sanction the violation by the regional system of justice. Therefore, the conditions of admissibility of applications relating to the defendant are in relation with the debtor of the obligation to protect, respect and fulfil human rights. The state is the guarantor of the respect for human rights. Consequently, the state is the only entity accountable for the consequences of the violation in international trials. It is important to recall that this type of obligations by their nature and purpose can only be violated by member states of the community. All this justifies the admissibility of individual actions as plaintiffs and the rejection of actions against private persons as defendants.

Also, according to Article 10(d) of the Supplementary Protocol, 'access to the Court is open to individuals on application of relief for violation of their human rights'. The literal interpretation of this provision suggests that the respective individual application of Article 10(d) is only on the plaintiff's side and not on the side of the defendant. In three cases the ECCJ has refused the horizontal application of human rights law, and subsequently, has consistently declared that only member states and Community institutions can be sued.¹³

The case of *SERAP v. the Federal President of Nigeria and others* summarises well the position of the court. The Socio-Economic Rights and Accountability Project (SERAP), a non-governmental human rights organisation acting on behalf of hundreds of people affected by continuing environmental damage that is caused by oil production in the Niger Delta, had filed

proceedings against the President of the Federal Republic of Nigeria and the Attorney General of the Federation, as well as against the Nigerian National Petroleum Corporation (NNPC), the Shell Petroleum Development Company (SPDC), Royal Dutch Shell, Elf Petroleum, Agip, Chevron Oil, Total and Exxon Mobil. The complaint was based on the assumption that government failure to protect rights does not absolve non-state actors (the aforementioned defendants in the proceedings) from responsibility for their actions and the human rights impact thereof. Allegedly the defendants were charged with violation of the following rights: an adequate standard of living (including adequate access to food), access to healthcare, to clean water, to a clean and healthy environment, to socio-economic development. In addition, the right to life in human security and dignity was seen as under threat. SERAP sought appropriate redress from the ECCJ. The defendants challenged the jurisdiction of the court over disputes between private parties and asked the court to decline competence over the issue.

The main concern in the case was the nature of disputes over which the court has jurisdiction and the *locus standi* of the court against individual parties. In giving consideration to the whole case, the court held that the appropriate avenue open to the victims for seeking redress as regards their grievance against private parties would be the domestic court system of the Federal Republic of Nigeria. Moreover, the ECCJ referred to its previous position of the same year relative to the issue of individual defendants and stated explicitly that:

The international regime of human rights imposes obligations on states. All mechanisms established thereof are directed to the engagement of state responsibility for its commitment or failure towards those international instruments.¹⁴

The court goes on by insisting that only when the state does not offer appropriate redress for the alleged violation an action can be brought against the state party to use the relevant international and ECOWAS instruments. This option, however, is not available against individual parties. On these grounds the court has declined its competence over the defending corporations in respect of the alleged human rights violations.¹⁵

Conclusion

The application of the principle of subsidiarity in international human rights adjudication presupposes that the domestic institutions of the states are functioning properly. The exceptional removal of the rule of prior exhaustion of local remedy, a rule that constitutes the jurisdictional application of the principle of subsidiarity, is symptomatic of the democratic deficit and structural problems within the member states with regard to states obligations. This marks the particularity of human rights litigation practices in West Africa.

The fundamental lesson one should learn from the practice of subsidiarity in the human rights litigation of the ECCJ involving Nigeria is the use of the law of state responsibility and subsequent double procedural consequences. These procedural consequences are expressed in the admissibility or the declination of the court's jurisdiction in its human rights mandate.

On the one hand, state responsibility produces a vertical application of the human right laws and justifies the admission of complaints from individual parties. On the other hand, state responsibility implies the rejection of horizontal application of human rights law and therefore constitutes the legal basis on which the ECCJ declines its competence for individual parties as defendants before the jurisdiction of the court. Individuals are neither a state party to international human rights law nor to the ECOWAS treaty. Hence they cannot be accountable at international level for obligations they have not subscribed to. Fundamentally, the ECCJ declines the horizontal application of human rights law because the dual human rights legal order within the Community and the obligations of member states incorporated in Article 1 of the Charter suppose a mere state obligation to promote, respect and fulfil human rights in the domestic jurisdiction, and to provide for an appropriate system. As regards human rights related conflicts between private parties, they have to be resolved by the national judicial system. Here the ECCJ is of a clearly subsidiary nature in that it has the power to intervene only if national authorities fail to provide legal protection to the victims of (alleged) rights abuses by private citizens.

After dreadful experiences with military regimes in many West African Countries, including Nigeria, the governance of the member states of ECOWAS continues to be difficult and nation building remains a serious challenge (Cisse, 2013, p. 9; Prempeh, 2006, p. 21). Under these circumstances, ECOWAS plays a model role as instigator for the respect of the rule of law, human rights and democracy. Conscious of this leading role, member states have transferred significant powers to the main organs of the community and particularly to the ECCJ. Through its mandate the ECCJ has become an arbiter between citizens and member states and, thus, offers a broader picture on the vertical effects of ECOWAS human rights jurisprudence.

Notes

1. See ECOWAS Environmental Policy (2008, p. 22).
2. See United Nations, Economic and Social Commission for Asia and the Pacific. Retrieved from <http://www.unescap.org/sites/default/files/good-governance.pdf>
3. International Court of Justice, *Interhandel Case, Switzerland v. United States of America*, Judgment of 21 March 1959, p. 27.

4. Protocol A/SP1/12/01 on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (ECOWAS, 1999).
5. Olajide Afolabi v. Federal Republic of Nigeria, ruling n°: ECW/CCJ/JUD/01/04 of 27 April 2004.
6. ECHR, De Wilde, Ooms and Versyp v Belgium, 28 June 1971, para. 55.
7. See Article 53 of the Vienna Convention on the Law of Treaties.
8. Hadijatou v. Republic of Niger, ruling n°: ECW/CCJ/JUD/06/08 of 27 October 2008.
9. See Article 4 of the draft articles on Responsibility of States for internationally wrongful acts.
10. Dorothy Chioma Njemanze and others v the Federal Republic of Nigeria, ruling n°: ECW/CCJ/JUD/08/17 of 12 October 2017, p. 24.
11. As above, note 10.
12. Mary Sunday v. the Federal Republic of Nigeria, suit n°: ECW/CCJ/APP/35/15, delivered on 17 May 2018, unreported.
13. Peter David v. Ambassador Ralph Uwechue, ruling n°: EWC/CCJ/RUL/03/10, delivered on the 11 June 2010; SERAP v. the Federal President of Nigeria and others, ruling n°: ECW/CCJ/APP/07/10 delivered on 10 December 2010; and Mamadou Tandja v. Salou Djibo and the Republic of Niger, ruling n°: ECW/CCJ/JUD/05/10, delivered on 8 November 2010.
14. Peter David v. Ambassador Ralph Uwechue, ruling n°: EWC/CCJ/RUL/03/10, delivered on the 11 June 2010.
15. SERAP v. the Federal President of Nigeria and others, ruling n°: ECW/CCJ/APP/07/10, delivered on 10 December 2010.

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