Molmou v Guinea: The ECOWAS Court of Justice at the Service of its Member States

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On 17 May 2016, the Court of Justice of the Economic Community of West African States (ECOWAS) handed down a final judgment in the matter of Marie Molmou and 114 others against the Republic of Guinea and SOGUIPAH.[1] The decision—a victory for the state and its corporate co-defendant—diverges in several significant respects from international jurisprudence on corporate misconduct and the duty owed by states to protect their citizens from the abuses of non-state actors. As such, it may signal that the ECOWAS Court of Justice is retreating from its previous willingness to challenge the consequences that the economic decisions of ECOWAS Member States have for the human rights of their own people.

I. Background

Since May 1987, Société Guinéenne de Palmier Huile et d'Hévéas (SOGUIPAH), a Guinean oil palm company, has forcibly occupied land that was traditionally owned and farmed by the people of Saoro District in the Republic of Guinea. For more than 15 years, community members unsuccessfully resisted the occupation, and on 3 February 2003, the Guinean government granted SOGUIPAH an executive decree expropriating community land and transferring it to the company.

Over the ensuing eight years, community members organized protests and resistance to SOGUIPAH's occupation. The state's response was consistent and brutal, culminating between June and September of 2011, when SOGUIPAH began to demolish local farmers' rice fields: community members have alleged that the government repeatedly sent heavily armed police and soldiers to arrest and beat protesters, resulting in at least one rape and one death.[2]

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[1] *Marie Molmou & 114 Ors. v Guinea*, Judgment, ECW/CCJ/JUD/16/16, May 17, 2016 (hereinafter Judgment). The ECOWAS Court of Justice is the judicial organ of the Economic Community of West African States. Created originally to adjudicate questions of ECOWAS law, the Court was given jurisdiction to hear cases relating to violations of human rights within member states in 2005. See 'Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 AND 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol, art. 3(4) (adopted 19 January 2005)'.

[2] Ibid, at 2.

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Given the involvement of Guinean government forces, the people of Saoro concluded that they stood little chance of obtaining justice in the courts of Guinea. Consequently, they decided to sue Guinea and SOGUIPAH in the ECOWAS Court of Justice (the Court), seeking a declaration that the defendants had violated fundamental human rights and asking the court to declare null and void the expropriation of their land.[3] In support of their claims, the plaintiffs cited human rights protections included in the Guinean Constitution, the Civil Code and Code of Land Rights of Guinea, the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights (ICCPR), and the African Charter of Human and People's Rights.

II. Summary of the Judgment

In its decision, the Court rejected all claims against SOGUIPAH and the Republic of Guinea. First, the Court dismissed the claims against SOGUIPAH because 'only states can be defendants in suits for the violation of human rights'.[4] It explained this conclusion by noting that the international instruments on which the plaintiffs relied are signed only by states, and therefore bind states and not non-state actors. The Court then cited a string of its own precedents, all of which conclude that responsibility for violations of international human rights instruments—the basis for the ECOWAS Court's jurisdiction over human rights violations—can attach only to states. Notably, the Court's reasoning was based entirely on this idea of exclusive state responsibility; it did *not* find that it has competence only over claims against states.

Second, the Court rejected all claims based on the Guinean Constitution or Guinean domestic law, noting that it does not have jurisdiction to consider the internal legality of a state's actions. This left only claims that the state deprived a 'people' of their means of subsistence under the International Convention on Civil and Political Rights,[5] and also violated the plaintiffs' right to property under the Universal Declaration of Human Rights[6] and the African Charter on Human and People's Rights.[7]

With respect to the ICCPR, the Court concluded that its protection against deprivation does not apply to the people of Saoro because they do not constitute a 'people' as that term is understood in international law. Although the analysis is not entirely clear, it appears that the Court found that a 'people' must have some sort of officially recognized status or autonomy within the state, such that they can be recognized as a separate collectivity or entity.[8] Because the plaintiffs are not a 'people', the Court found that their ICCPR claim failed.

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[3] See Fréderic Foromo Loua, 'Our legal actions tell companies they cannot abuse the rights of communities and remain unpunished', *Business and Human Rights Resource Centre*, available at https://business-humanrights.org/en/our-legal-actions-tell-companies-they-cannot-abuse-the-rights-of-communities-and-remain-unpunished (accessed 6 October 2016).

[4] Judgment, note 1, at 6.

[5] International Convention on Civil and Political Rights, UN Doc A/6316 (1966), 999 UNTS 171 (entered into force 23 March 1976), Art 1, para 2 ('In no case may a people be deprived of its own means of subsistence.').

[6] Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948), Art 17.

[7] African Charter of Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (adopted 27 June 1981, entered into force 21 October 1986), Arts 21, 24.

[8] Judgment, note 1, at 9.

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Turning to the allegations of expropriation, the Court attacked the plaintiffs' allegations on two bases: first, that they failed to challenge the expropriation decree in the Guinean courts, and second, that they have been unable to produce any land title that would prove their ownership of the land.[9] Finally, the Court dismissed the claims of violent abuse, again on the basis of a lack of documentary proof.[10] In effect, the Court concluded that without documentary proof of land ownership or physical abuse, the oral and written testimony of the victims is insufficient to support allegations of human rights violations.

III. Critique

The extremely cursory analysis that the Court gave to the plaintiffs' allegations is a source of grave concern for civil society. Rather than seriously engaging with allegations that a state has perpetrated and sanctioned human rights abuses that benefit a corporation, the Court immunized both the state and non-state actors in a way that might effectively make it impossible to impugn official abuses of power when the victims are a state's own citizens.

A. Complete Rejection of Applicability of International Law to Corporations

The Court's treatment of corporations as a subject of international law is idiosyncratic and deeply concerning. Rather than finding that its own competence is limited to cases against ECOWAS member states and ECOWAS institutions, the Court made the unfounded and confounding determination that only states can be defendants in human rights lawsuits.

In fact, non-state actors can be held liable for violations of international human rights law—including some of the fundamental principles of international law underlying provisions in the human rights instruments that form the basis of the plaintiffs' claims.[11] Moreover, there is a growing body of jurisprudence from the treaty bodies of the major international human rights conventions showing that corporations are expected to respect international human rights principles and states are expected to provide access to remedy in order to enforce that expectation.[12]

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[9] Ibid at 10.

[10] Ibid at 10–11.

[11] For example, US federal court decisions under the Alien Tort Statute have, on a number of occasions, concluded that the ICCPR can be used as evidence of universal principles of customary international law that are applicable to non-state actors, such as the prohibition on arbitrary detention or violations of the right to life and physical integrity. See, e.g., *Bowoto v Chevron Corp.*, 557 F. Supp. 2d 1080, 1090 (N.D. Cal. 2008); *Khulumani v Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 284 (2d Cir. 2007).

[12] See, e.g., Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 34 on the rights of rural women, CEDAW/C/GC/34 para 13 (4 March 2016) ('States parties should regulate the activities of domestic non-State actors within their jurisdiction, including when they operate extraterritorially. GR 28 (2010) on the core obligations of States parties under article 2, reaffirms the requirement under article 2(e) to eliminate discrimination by any public or private actor, which extends to acts of national corporations operating extraterritorially.'); UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, CCPR/C/CAN/CO/6 para 6, (13 August 2015) (noting concern about human rights abuse by Canadian companies and failure of Canadian state to enact a legal framework that would regulate them effectively or facilitate access to justice).

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B. Rejection of National Law-based Claims

By rejecting all arguments based in national law, the Court abdicated its responsibility to consider whether the execution of those laws is consistent with the universal juridical principles that underlie them, as well as the international human rights treaties that the Court is required to uphold. The *SOGUIPAH* plaintiffs invoked national law not primarily because they believe their claims arise under Guinean statutes and decrees but because the state's conduct pursuant to those laws violated their human rights.

The Court also glossed over the fact that compliance with internal law is often a key consideration in determining whether international legal requirements—in this case, due process and just compensation for expropriation—have been complied with.[13]

It is hard to see the Court's choice to dismiss the Guinean law-based claims as anything more than a ploy to avoid addressing the fact that the expropriation of the residents of Saoro was woefully irregular and devoid of due process. While on the one hand disavowing any competence to assess the state's compliance with internal law, the Court expressly relies on the *plaintiffs'* purported failure to use the domestic legal order to challenge the expropriation decree as justification to dismiss their claim under the African Charter.[14] If the Court truly believed that internal law was irrelevant to its jurisdiction over human rights claims, then the plaintiffs' choice of a forum should have no bearing on the Court's evaluation of the state's behavior, especially given that the Court has rejected exhaustion of domestic remedies as a prerequisite for victims of human rights abuse seeking its intervention.[15]

C. Analysis of the Term 'people'

Almost without analysis, the Court dismisses the plaintiffs' ICCPR-based claim by concluding that the residents of Saoro do not constitute a 'people'. Although it is not clear what unjustifiably restrictive definition of the term the Court adopted,[16] by decreeing that the inhabitants of Saoro are not a 'people' or a 'collectivity', the Court flouts all sensitivity to the meaning of those words.

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[13] This principle is perhaps most often tested in the context of arbitrary detention. See, e.g., UN Human Rights Committee Communication No. 770/1997, *Gridin v Russian Federation* (views adopted on 20 July 2000), in UN Doc GAOR, A/55/40 (vol. II) 175, para 8.1 (failure to comply with domestic law requiring arrest warrant to be issued within 72 hours of arrest rendered detention unlawful and therefore inconsistent with ICCPR Art. 9(1)). However, the notion of compliance with domestic law as a prerequisite for legality under international law is also a common feature of protections against expropriation in international investment treaties. See Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) 375–6.

[14] Judgment, note 1, at 9–10. Moreover, by using this logic, the Court also completely misunderstands the situation of the community of Saoro, where a majority of the population is illiterate and deprived of all financial means of asserting their rights in court.

[15] See *Hadijatou Mani Koraou v Niger*, Judgment No. ECW/CCJ/JUD/06/08 para 45, 27 October 2008.

[16] The judgment states only:

> In law, the notion of people is subject to several meanings, but none of them can be applied to the inhabitants of Saoro … They cannot … invoke any particular characteristic, cultural or otherwise, that would grant them autonomy within the Guinean nation; the collective applicants do not constitute a "collectivity" as that term is understood under international law and cannot invoke the prerogatives that attach to a "people" … .

Judgment, note 1, at 9.

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Without a doubt, the Court's task is a difficult one. ECOWAS is a vast assemblage, and the customs and usages of the people and peoples inhabiting its territory are diverse and varied. Even beyond the obvious desire of the Court to serve its member states—of which the defendant Republic of Guinea is one—it must overcome the problem of its ignorance of the people who live in the regions and locales for which it is tasked with pronouncing the law.

It is difficult to discern, exactly, the basis for the Court's conclusion on the status of the residents of Saoro, because it fails to apply *any* definition at all to 'people'. However, its approach is manifestly at odds with the careful approach of the African Commission, which—while noting ambiguity in the international law definitions of the term 'people'—has concluded that the African Charter and other sources provide a basis for allowing plaintiffs to proceed as a collectivity to vindicate collectively held rights when they share:

- a common historical tradition,
- a common racial or ethnic identity,
- cultural homogeneity,
- linguistic unity,
- religious and ideological affinities,
- a common territorial connection,
- a common economic life or other bonds,
- identities and affinities they collectively enjoy—especially rights enumerated under Articles 19 to 24 of the African Charter—or suffer collectively from the deprivation of such rights.[17]

While the Commission's analysis of the term 'people' is difficult to extricate from its consideration of indigeneity, the clear sense is that self-identification as distinct from the overall population, along with a 'common history, culture and religion', are central to the inquiry.[18] By refusing to engage in this analysis with respect to the residents of Saoro, the Court in effect rejects one of the principal innovations of the African Charter that it is charged with upholding: the fact that the Charter 'substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes … group and peoples' rights'.[19]

The Court could have adopted an approach consistent with international law that would respect the self-definition of the community itself, for example, by accepting a common dictionary definition of the term 'people': 'a community of persons united by their origin, lifestyle, language, or culture'.[20] The residents of Saoro satisfy this definition beyond a shadow of a doubt.

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[17] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm. No. 276/2003 para 151, African Commission on Human and Peoples' Rights (2006) (hereinafter *Endorois* Case).

[18] Ibid, para 162.

[19] Ibid, para 149.

[20] Dictionnaire de français Larousse, definition of *peuple*, available at http://www.larousse.fr/dictionnaires/francais/peuple/60039?q=peuple#59668 (accessed 6 October 2016).

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D. Proving Property Rights and Violent Attacks

Of the glaringly political choices the Court makes in its analysis, perhaps the most obvious is its insistence that the plaintiffs produce some proof of formal title in order to be able to maintain their property rights claims under the African Charter and the Universal Declaration of Human Rights. First, as a formal matter, even if the Court were not inclined to recognize customary, collective, and informal land tenure systems, it neglected even to consider whether the plaintiffs' long-term possession and occupation of the land amounted to adverse possession. More fundamentally, however, the Court's approach is neither supported in international law nor appropriate in the African context.

It should be mentioned that in Guinea, as in most African countries, rural land is typically governed with reference to customary rights. Given this, the Court's position, according to which a rural community can only be considered the owner of the land on which it has been established for generations if it can back up its possession with a land title, is deeply worrying.

To the authors' knowledge, every other international and regional tribunal that has considered the question has concluded that informal, customary land tenure—even if not supported by formal land title—is protected under international law. In *Dogan and others v Turkey*, the European Court of Human Rights held that villagers who lacked land title had a protected property interest in their homes and their use rights over common land and resources.[21] In the seminal case of *The Mayagna (Sumo) Awas Tingni v Nicaragua*, the Inter-American Court of Human Rights concluded that unbroken possession of traditional lands was sufficient to establish indigenous property rights.[22] And the African Commission has recognized that access to formal, written title was a typical problem faced by traditional African communities that could not be allowed to obstruct the protection of their property rights under the African Charter.[23]

In none of these cases did the tribunal insist, as did the ECOWAS Court in this case, that the plaintiffs provide 'at least the beginning of proof' that they 'hold title to the property at issue'.[24] And there is certainly no suggestion that the failure to provide 'either a title deed, land document, or testimonial proof' was fatal to their claims because it would require the court to 'take the Plaintiffs at their word'.[25] In fact, in all these cases, the existence of a customary right was sufficient. Moreover, customary land tenure was in each case supported primarily—if not exclusively—through 'attestations'[26] by the plaintiffs, which is only natural when considering title for mostly non-literate populations whose land-holding patterns are not subject to extensive scholarly documentation.

Perhaps even more disturbing is the Court's adoption of the same requirement of documentary evidence for the plaintiffs' claims of physical violence. The Court almost completely discounts the firsthand accounts of the victims as a credible source of proof,

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[21] Applications 8803–8811/02, 8813/02 and 8815–8819/02 (2004), paras 138–9.

[22] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights, (Ser. C) No. 79 (2001) paras 140(b), 151.

[23] *Endorois* Case para 187.

[24] Judgment, note 1, at 10.

[25] Ibid.

[26] Ibid.

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ignoring the fact that the plaintiffs lived in a remote area of a poor country that functioned as a virtual police state in which documentary proof of just about anything could be impossible to obtain. This approach serves primarily to save the Court from engaging with the substance of the allegations themselves, and to allow repressive states to hide behind the practical difficulties of obtaining documents in places like rural Guinea.

IV. Conclusions

Whether the ECOWAS Court of Justice exists to protect the people of West Africa from human rights abuse perpetrated or sanctioned by their governments, or to shield those governments from accountability for human rights violations, is an open question.

Until recently, ECOWAS and its institutions had proven to be important bulwarks for the protection of human rights in the face of corporate abuse in Africa. In 2009, for example, government representatives, civil society organizations, and communities affected by mining in West Africa agreed on an ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector. This Directive enshrines respect for human rights as a centerpiece of all Mining Codes in the sub-region. As for the Court, it has previously taken a much less narrow view of its role in cases involving the failure of the state to protect its own people from the depredations of non-state actors. For example, in *SERAP v Federal Republic of Nigeria*, the Court apparently accepted without challenge that the inhabitants of the Niger Delta constituted a self-designated 'people',[27] and held Nigeria responsible for failing to protect those plaintiffs' right to a healthy living environment.

There is reason to worry, however, that the organization is abdicating this role. The Mining Directive, which was meant to be domesticated by each member state by July 2014, has stalled in much of ECOWAS.[28] And in the *SOGUIPAH* case, the Court has rendered a judgment whose approach and analysis—if adopted more widely—could make justice unattainable for traditional communities lacking formal land title or documentary proof of human rights violations.

[27] Judgment, ECW/CCJ/JUD/18/12 para. 98, 14 December 2012 (analyzing whether Nigeria had violated Art. 24 of the African Charter, which requires that 'All peoples shall have the right to a general satisfactory environment favourable to their development').

[28] See, e.g., 'Domesticate ECOWAS mining principles – gov't told', *Reportingoilandgas* (22 April 2015), available at http://www.reportingoilandgas.org/domesticate-ecowas-mining-principles-govt-told (accessed 6 October 2016).

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