Gombert v Côte d'Ivoire (jurisdiction and admissibility) (2018) 2 AfCLR 270

Application 038/2016, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*

Judgment, 22 March 2018. Done in English and French, the French text being authoritative.

Judges: KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Recused under Article 22: ORE

Case declared inadmissible in accordance with Article 56(7) of the African Charter as same claim already decided by the ECOWAS Community Court of Justice.

Admissibility (exhaustion of local remedies, domestic courts' violation of Charter rights, 29; submission within reasonable time, 35-38; previous settlement, 45-49, 52-59)

Separate Opinion: KIOKO and MATUSSE

Admissibility (identity, corporate veil, 3, 5, 9-13, 19)

I. The Parties

1. The Applicant, Mr Jean-Claude Roger Gombert, is Company Director of French nationality, domiciled in Abidjan.

2. The Application is brought against the State of Côte d'Ivoire (herein-after referred to as "Respondent State") which became a Party to the African Charter on Human and Peoples' Rights (herein-after referred to as "the Charter") on 31 March 1992 and to the Protocol on 25 January 2004. The Respondent State on 23 July 2013 made the declaration prescribed in Article 34(6) of the Protocol allowing individuals and Non-Governmental Organizations to lodge applications directly with the Court. It also became a Party to the International Covenant on Civil and Political Rights (herein-after referred to as "the ICCPR) on 26 March 1992.

II. Subject of the Application

3. The Application has its origin in a contractual dispute between private Parties which was brought before the Respondent State's courts. The Applicant mainly alleges the violation by the said courts, of his rights to a fair trial as guaranteed by the Charter.

A. The facts of the matter

4. The Applicant alleges that within the framework of the activities of AFRECO and AGRILAND companies, of which he is founder and majority shareholder, he entered into an agreement with Mr Koné DOSSONGUI, owner of the industrial citrus plantation ANDRE located in Guitry, in the region of Divo in Côte d' Ivoire, for the sale of the said property.

5. The agreement was concluded on 9 June 1999, and the price of Two Hundred Million (200,000,000) CFA Francs was agreed. The vendor received the sum of One Hundred and Sixty Million (160,000,000) CFA Francs but refused to sign the deed of sale prepared by his own Solicitor. The Applicant, who was already occupying the plantation with the approval of the mortgagees, filed a complaint with the competent courts to compel the vendor to honour his commitment.

6. As a result of the numerous proceedings undertaken between February 2000 and June 2014 by both the Applicant and the vendor, several decisions were rendered by the Ivorian courts, including, inter alia the Divo Court, the Daloa Court of Appeal and the Supreme Court of Côte d'Ivoire. Whereas some of the said decisions were in favour of the Applicant, others were not.

7. Believing that some of those decisions violated his rights, the Applicant referred the matter to ECOWAS Court of Justice which delivered two Judgments. By the first judgement referenced ECW/CCJ/JUD of 25 April 2015 on the merits of the case, the Court declared that the Application was baseless. By the second Judgment referenced ECW/CCJ/RUL/08/16 of 17 May 2016, the Court also declared baseless the Application filed by the Applicant in respect of the failure to adjudicate on the case. Dissatisfied, the Applicant decided to bring the matter before this Court by an Application registered at the Registry on 11 July 2016.

B. Alleged violations

8. The Applicant alleges:

"a. that his right to be tried by an impartial court as protected by Article 7(1)(d) of the Charter has been violated owing to:

i. the fact that the Daloa Court of Appeal discarded the agricultural appraisal it had ordered and sought to terminate the pre-hearing at the behest of the opposing party;

ii. the nullification of the receivers' decisions and the

rejection of his request for reinstatement by the special jurisdiction of the Section of the Divo Court;

iii. the appointment of a new counsellor for the pre-hearing; the interruption of the previously ordered appraisal and the closure of the pre-hearing by the Abidjan Court of Appeal;

iv. the fact, on the one hand, that the Supreme Court rejected the Applicant's claims in their entirety while granting all the claims brought by his opponent and, on the other, the fact that the President of the Judicial Chamber moved the case from the 2nd Civil Chamber B to the 1st Civil Chamber whose President has become the new Counsellor-Rapporteur;

b. that his right to equality before the law protected by Article 7 of the Universal Declaration of Human Rights, Article 3 of the Charter and Article 2(2) of the Constitution has been violated due to the rejection of his supplementary pleadings by the Supreme Court on the grounds of inadmissibility whereas the said pleadings have been filed within the statutory time limit;

c. that his right to effective remedy protected by Article 8 of the Universal Declaration of Human Rights, Article 3(4) of the ICCPR and Article 7(1) of the Charter has been violated due to the absence of remedies under Ivorian law against Supreme Court decisions dismissing a case."

III. Summary of the procedure before the Court

9. The Application was filed with the Registry of the Court on 11 July 2016. By a letter dated 19 July 2016, the Registry acknowledged receipt thereof and notified the Applicant of its registration.

10. By a letter dated 29 September 2016, the Registry served the Application on the Respondent State and invited the latter to forward the names of its representatives, as well as its Response, within the time limit prescribed by the Rules of Court.

11. By correspondence dated 18 October 2016, the Registry transmitted the Application to the other entities mentioned in Rule 35(3) of the Rules.

12. On 3 January 2017, the Registry received the Response of the Respondent State which raised objection to the admissibility of the Application and prayed the Court, in the alternative, to declare the Application baseless. By a letter dated 17 January 2017, the Registry transmitted this Response to the Applicant.

13. On 16 February 2017, the Registry received the Applicant's Reply, receipt of which it acknowledged and transmitted a copy thereof to the Respondent State on 17 February 2017 for information.

14. At its 44th Ordinary Session held in March 2017, the Court decided to close the pleadings. By correspondence dated 3 April 2017, the Registry notified the Parties of the closure of pleadings effective from that same date.

IV. Prayers of the Parties

15. The Applicant prays the Court to:

"i. declare that it has jurisdiction to hear the case;

ii. declare that his Application is admissible;

iii. rule that he is the owner of AGRILAND, of which he holds ninety-five percent (95%) of the share capital;

iv. rule that the human rights violations against AGRILAND affect him directly;

v. find that he and his company are victims of human rights violations committed by Ivorian justice;

vi. find the State of Côte d'Ivoire responsible for the said violations;

vii. order the Respondent State to pay him the amount of ten billion (10,000,000,000) CFA Francs as damages;

viii. order the Respondent State to pay the entire cost of the proceedings to Counsel Sonté Emile, Barrister at the Court, as of right."

16. In its Response, the Respondent State prays the Court to:

"i. declare the Application inadmissible;

ii. declare the Applicant unfounded;

iii. declare and rule that there has not been any human rights violation by the Respondent State;

iv. dismiss the Applicant's claim for damages

v. order the Applicant to pay the entire cost of the proceedings".

V. On jurisdiction

17. Pursuant to Rule 39(1) of the Rules, the Court "shall conduct preliminary examination of its jurisdiction". The Court must, in that regard, satisfy itself that it has personal, material, temporal and territorial jurisdiction to hear the instant Application.

18. The Court notes that the Parties do not contest its jurisdiction, and that in light of the evidence on file, the jurisdiction is established as indicated hereunder:

"i. Personal jurisdiction: the Application was filed on 11 July 2016, that is, subsequent to the dates mentioned herein-above. The Respondent State ratified the Protocol and deposited the Declaration prescribed under Article 34(6);

ii. Material jurisdiction: the Applicant alleges mainly the violation of the provisions of the Charter and of the ICCPR, instruments to which the Respondent State is a Party.

iii. Temporal jurisdiction: the alleged violations started prior of the deposit of the declaration, but continued thereafter, that is, up to 5 June 2014, the date on which the Supreme Court delivered the Judgment being challenged by the Applicant.[1]

iv. Territorial jurisdiction: the facts occurred on the territory of the Respondent State which does not contest the same."

19. In view of the aforesaid, the Court holds that it has jurisdiction to examine this Application.

VI. Admissibility of the Application

20. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter". Pursuant to Rule 39 of its Rules, "the Court shall conduct preliminary examination**…**of the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

21. Rule 40 of the Rules which in essence reproduces the contents of Article 56 of the Charter stipulates that:

"In terms of Rule 40 of the Rules of Court, which in substance reproduces the content of Article 56 of the Charter, Applications shall be admissible if they fulfil the following conditions:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language,
4. Are not based exclusively on news discriminated through the

1 Application 013/2011, Judgment of 21 June 2013 on preliminary objection, *Norbert Zongo et al v Burkina Faso*, para 62; Application 001/2014, Judgment of 18 November 2016 on the Merits, *APDH v Côte d'Ivoire*, para 66

mass media,

5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by the States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter."

22. The Court notes that, with regard to the admissibility of the Application, the Respondent State raises three preliminary objections concerning exhaustion of local remedies, belated referral of the case to the Court and the previous settlement of the dispute in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights.

A. Objection on the grounds of non-exhaustion of local remedies

23. The Respondent State contends that, by instituting actions before domestic courts against *La Compagnie de Gestion et de Participation* - **"***CGP"***,** a private law body corporate, the Applicant did not act appropriately and hence has not exhausted the local remedies. It argued that the local remedies should instead have been sought against the Ivoirian State, within the meaning of Article 56 of the Charter and Rule 40 of the Rules of Court.

24. In response, the Applicant argues that, whereas remedies should be available and sufficient, there is no remedy in the legal *corpus* of the Respondent State in respect of the legal situations submitted for consideration before this Court.

25. The Applicant further avers that he has exhausted the local remedies with respect to the case between *Société* AGRILAND and *Société CGP*. He cites the decisions rendered by various domestic courts, including the Divo Court of First Instance, the Supreme Court and the Courts of Appeal of Daloa and of Abidjan. The Applicant refers, in particular, to Judgement No. 405/14 of 5 June 2014 whereby the 1st Civil Chamber B of the Judicial Chamber of the Supreme Court, dismissed his appeal for annulment, after having excluded his supplementary pleadings from the hearing.

26. The Court notes that the evidence on file shows that the highest competent court, that is the Supreme Court of Côte d'Ivoire, dismissed the cassation application filed by the Applicant, thus bringing an end to

the procedures before the national courts.

27. However, the Respondent State alleges failure to exhaust the local remedies on the grounds that the relevant procedures were directed against a private entity. On this point, the Court notes that exhaustion of local remedies proceeds from the use of all the procedural steps provided under the legal system of the Respondent State for the settlement of issues brought before the competent national authorities.[2] Viewed from this perspective, the local remedies are supposed to be directed against the entity which the Applicant considers to be responsible for the alleged violation, be it an individual, a private law entity or a public entity, such as the State.

28. In the instant case, the Court notes that the initial dispute was between AGRILAND of which the Applicant alleges to be the founder and majority shareholder, and CGP Company. Since the two Parties are private law bodies corporate, domestic proceedings could not have been instituted against the State of Côte d'Ivoire, except to prove the latter's liability. It is therefore proper that the proceedings before the domestic courts were instituted against CGP and not the State.

29. On the other hand, in the proceedings before this Court, the Applicant alleges the Respondent State's liability for the domestic courts' violation of his rights guaranteed under the Charter. On this point, the Respondent State does not contest that the Applicant has exercised all the available remedies, since the Supreme Court Judgment is not subject to appeal.

30. In view of the aforesaid, the Court holds that the local remedies have been exhausted, and dismisses the admissibility objection raised in this regard.

B. Objection on the grounds of failure to file the Application at a reasonable time

31. In its Response, the Respondent State recognises that the Court "has the discretionary power to determine the time limit within which Applications should be brought".

32. The Respondent State alleges, however, that the instant Application was not filed within reasonable timeframe. It contends in this regard that whereas the Supreme Court Judgment to which Application refers, was rendered on 5 June 2014, this Court was seized of the matter only on 11 July 2016, that is, two years and one month later.

33. In reply, the Applicant recalls that the provisions of Rule 40(6)

2 *Zongo*, Judgment on preliminary objections, supra, paras 68-70; *APDH* Judgment *supra*, para 68-70. Judgment APDH, *supra*, para 93-106.

of the Rules do not confine actions brought before this Court to a specific time limit beyond which the Application may be found to be belated and inadmissible. According to the Applicant, Article 56(7) of the Charter offers him the option of referring the matter first to the Community Court of Justice, ECOWAS "before going continental" [sic]. Accordingly, the Applicant alleges that the timeframe being challenged by the Respondent State is perfectly reasonable, especially as it concerns the duration of the proceedings before ECOWAS Court of Justice.

34. According to Article 56(6) of the Charter, Applications shall "be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

35. The Court notes that, as it held earlier, the internal remedies have been exhausted in the instant case. The starting point for computing the reasonable time provided under Article 56(6) is therefore the date the Judgement was rendered by the Supreme Court, which is 5 June 2014.

36. The Court recalls that the Application was brought before it on 11 July 2016. While noting that the period that elapsed between the above date and the date the Court was seized is two (2) years and one (1) month, it lies with this Court to determine whether this period is reasonable within the meaning of Article 56(6) of the Charter. According to its jurisprudence on reasonableness of the time, the Court has adopted a case-by-case approach.[3]

37. The Court notes that the remedy exercised before ECOWAS Court of Justice is not a remedy to be exhausted within the meaning of Articles 56(5) and 56(6) of the Charter. However, since Article 56(7) has offered him an option, the fact that the Applicant brought the case before ECOWAS Court of Justice, before seizing this Court is a factor that may be taken into consideration in assessing the reasonableness of the period mentioned in Article 56(6).[4]

38. In view of the aforesaid, the Court holds in conclusion that the timeframe of two years and one month used by the Applicant to file the case before it, is reasonable within the meaning of Article 56(6). It accordingly dismisses the Respondent State's objection based on

3 *Zongo*, Judgment *supra,* para 121; Application No.005/2013 Judgment of 20/11/2015 on the Merits, *Alex Thomas v United Republic of Tanzania*, paras 73-74.

4 See Application 003/2015, Judgment of 28/09/17 on the Merits in *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, para 65. It is the opinion of this Court that when the Applicant opts to exercise another remedy such as the review remedy, the period of seizure should begin to count from the date the said remedy was exhausted, that is, the date of dismissal of the application for review.

belated referral.

C. Objection regarding previous settlement of the dispute by the ECOWAS Court of Justice

39. The Respondent State submits that the instant Application is inadmissible given that the Applicant has earlier, using the same wording, brought the matter before the Community Court of Justice, ECOWAS, which, on two occasions, dismissed his prayer relying on the legal instruments mentioned in Article 56(7).

40. The Respondent State alleges further that the same objection relates to the referral of this case to the Centre international pour le règlement des différends relatifs aux investissements (CIRDI) which refused to register the Application on the ground that the matter clearly exceeded its jurisdiction.

41. In reply, the Applicant argues that ECOWAS Court of Justice did not, in any of its two judgements, apply the instruments mentioned in Article 56(7) of the Charter. In this regard, the Applicant submits that, in its first decision, ECOWAS Court of Justice held that evidence of the alleged violations has not been provided, whereas for the second decision, that Court simply reiterated the findings contained in the first decision.

42. The Applicant further contends that the instant Application "is not entirely the same as the one filed with ECOWAS Court of Justice"; that in the latter, he "did not plead the fact that the Daloa Court of Appeal's refusal to exercise jurisdiction amounted to a violation of human rights". The Applicant submits in conclusion that "the instant Application which is brought for the first time does not fall within the provisions of Article 40(7) referred to above".

43. In terms of Article 56(7) of the Charter which is reiterated by Rule 40(7) of the Rules of Court, Applications shall be considered if they "do not deal with cases which have been settled… in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity, or the provisions of the present Charter".

44. In light of the aforesaid provisions, the Court is of the opinion that examining compliance with this condition amounts to making sure both that the case has not been "settled" and that it has not been settled "in accordance with the principles" under reference.

45. The Court notes that the notion of "settlement" implies the convergence of three major conditions: 1) the identity of the Parties; 2) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and

3) the existence of a first decision on the merits.[5]

46. As regards the first condition, it is necessary to establish only the identity of the Applicants, as there is no doubt that the State of Côte d'Ivoire is the Respondent in both cases. The Applicant before this Court, à priori, is Mr. Jean-Claude Roger GOMBERT whereas AGRILAND Company had acted before the Community Court of Justice, ECOWAS. However, a closer scrutiny of the evidence on file reveals that before the ECOWAS Court of Justice, the Company AGRILAND acted as the Applicant "in the actions and proceedings of its Chairman and Chief Executive Officer, Mr. Jean-Claude GOMBERT having elected domicile in the Chambers of his Counsel Advocate Emile SONTE, lawyer at the Court of Appeal of Abidjan ". The Application before this Court was, for its part, filed by "Mr GOMBERT Jean-Claude Roger for whom domicile is elected in the Chambers of his Counsel, Advocate SONTE Emile, lawyer at the Court of Appeal of Abidjan".

47. The Court affirms that, as a human and peoples' rights court, it can make a determination only on violations of the rights of natural persons and groups to the exclusion of private- or public law entities.

48. In this case, the Court notes that, despite the fact that AGRILAND was the Applicant before ECOWAS Court of Justice, the rights claimed by that company directly affect the Applicant's individual rights before the Court given the fact that he is the President, Chief Executive Officer, founder and majority shareholder of this Company.

49. In view of the foregoing, the Court finds that the Parties are identical and that, as such, the first condition has been met.

50. With regard to the second condition, namely, identity of the claims, this Court notes that in the case examined by ECOWAS Court of Justice, the Applicant prayed the Court to "find and rule that the decisions rendered by the Ivorian courts … constitute serious violations of his rights" guaranteed, inter alia, by the Charter and "to order the State of Côte d'Ivoire to pay him the sum of two billion (2,000,000,000) CFA Francs as damages" as well as pay the costs of the proceedings. These claims are identical with those made before this Court with the exception of the claim regarding the partiality of the Daloa Court of Appeal.

51. In its Reply, the Applicant argues that the present Application "is

5 See Communication 409/12 *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and thirteen Others* (AfCHPR 2013) para 112; Reference No 1/2007 *James Katabazi et al v Secretary General of the East African Community and Another* (2007) AHRLR 119 (EAC 2007) paras 30-32; Application 7920, Judgment of 29 July 1988, *Velásquez-Rodríguez v Honduras* CIADH para 24(4); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Serbia-and-Montenegro*) Judgment of 26 February 2007, ICJ., Collection 2007, p 43.

not entirely identical to that submitted to ECOWAS Court of Justice" given that the Court did not "refer to the situation whereby the Court divested the Daloa Court of Appeal, as a case of human rights violation". Noting that this claim was not expressly invoked before the ECOWAS Court of Justice, this Court observes that the claim is not detachable from those claims examined by ECOWAS; and as such, the issue in reality is one of a bloc of claims. Going by the accepted notion of "settlement" adopted above, the identity of claims also extends to their additional and alternative nature or whether they derive from a claim examined in a previous case.

52. In the instant case, the Court notes that, by his own contention, the Applicant "convinced of the flagrant partiality of the First Civil Chamber of the Daloa Court of Appeal" brought before the Supreme Court of Justice an application for divestiture on the grounds of legitimate suspicion. According to the Applicant, the Supreme Court ruled in that direction, divesting the Daloa Court of Appeal and moving the case to Abidjan Court of Appeal.

53. In the circumstances, the Court is of the opinion that in adjudicating the allegation of violation arising from the proceedings before the Abidjan Court of Appeal, ECOWAS Court of Justice covered the settlement of the allegation of violation founded on the partiality of the Daloa Court of Appeal, the two allegations forming a set of claims. The Court therefore finds that the claims are identical and that the second condition has been met.

54. Lastly, as regards the third condition, this has also been met since the Parties agree that ECOWAS Court of Justice rendered two decisions on the merits of the same case. The decisions include, in particular, Judgment No. ECW/CCJ/JUD of 24 April 2015 on the merits of the case and Judgment No. ECW/CCJ/RUL/ 08/16 of 17 May 2016 on the Application in respect of failure to adjudicate on the aforesaid Judgment.

55. In view of the aforesaid, it follows that the instant Application has been settled by ECOWAS Court of Justice within the meaning of Article 56(7) of the Charter regarding the first condition set by this Article.

56. What remains to be determined is whether the settlement was "in accordance with the principles" invoked in Article 56(7). In this respect, this Court is of the opinion that, of the three instruments mentioned in that Article, the Charter is applicable in this case.

57. In light of the evidence on file, this Court notes that ECOWAS Court of Justice examined the case on the basis of the following provisions of the Charter:

i. Equality of justice, fair trial and impartiality of justice (Article 7 of the African Charter): the Court defined the rights concerned, pronounced itself on their violation in light of

the facts related by the Applicant and the conduct of the national courts, and then declared the claim unfounded by finding either that the right in question had not been infringed or that the evidence thereof was produced.[6]

ii. Equality before the law (Article 3 of the African Charter): after defining the rights concerned, the Court, recalling its jurisprudence, examined the allegations of violation in light of the facts and the conduct of the national courts. Like the previous point, it declared the claim unfounded for lack of evidence.[7]

iii. Effective remedy before national courts (Article 7(1) of the African Charter): by the same reasoning as in the previous claims, the Court ruled in a similar direction.[8]

58. This Court, after comparison, notes that ECOWAS Court of Justice examined the case on the basis of the same provisions of the Charter as those relied upon by the Applicant in this Application. The case has, consequently, been settled *in accordance with* the principles of one of the instruments invoked in Article 56(7) of the Charter, as regards the second condition set by this Article.

59. From the foregoing, the Court holds in conclusion that the instant Application has not fulfilled the condition set by Article 56(7) of the Charter. It therefore upholds the inadmissibility objection on the grounds of an earlier settlement of the dispute by ECOWAS Court of Justice.

60. Having ruled in this direction, the Court holds that there is no need to make a determination on the other condition of admissibility and on the objection raised on the grounds of settlement of the matter by the International Center for the Settlement of Investment Disputes *(CIRDI).*

61. The Court notes that, according to Article 56 of the Charter, the conditions of admissibility are cumulative and, as such, when one of them is not fulfilled, it is the entire Application that cannot be received. In the instant case, the Application does not meet the conditions set forth in Article 56 (7) because the matter has previously been settled by ECOWAS Court of Justice.

62. Consequently, the Court declares the Application inadmissible.

6 *Société AGRILAND v The State of Côte d'Ivoire*, Judgment No. ECW/CCJ/JUD of 24 April 2015, paras 36-39.

7 *Idem,* paras 40-47.

8 *Idem,* paras 48-52.

VII. Costs

63. According to Rule 30 of the Rules of Court, "Unless otherwise decided by the Court, each party shall bear its own costs".
64. The Court notes that in the present procedure, each Party has prayed the Court to order the other to pay the costs. In the circumstances, the Court holds that each party shall bear its own costs.

VIII. Operative part

65. For these reasons
The Court,
unanimously

on jurisdiction:
i. *declares* that it has jurisdiction;

on admissibility
ii. *dismisses* the inadmissibility objection for non-exhaustion of the local remedies;
iii. *dismisses* the inadmissibility objection for failure to submit the Application within a reasonable time;
iv. *upholds* the inadmissibility objection on the grounds that the dispute has been settled within the meaning of Article 56(7) of the Charter;
v. consequently *rules* that the Application is inadmissible;

on costs
vi. *rules* that each party shall bear its own cost.

Joint Separate Opinion: KIOKO and MATUSSE

1. We agree with the Majority Judgment, of which we are both part, in all respects that the Application, as filed by Mr Jean-Claude Roger Gombert against the Republic of Côte d'Ivoire, is inadmissible on the grounds that the dispute has been "settled" within the meaning of Article 56(7) of the African Charter on Human and Peoples' Rights. The provision prescribes that an Application filed before the Court should "not deal with cases which have been settled …in accordance with the

principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter."

2. We have, however, felt the need to make our position known with regard to the issue of the identity of the Applicant and his company AGRILAND which pursuant to Article 56(1) or Rule 40(1) of the Rules is an important admissibility criterion. This is an issue that arose several times in the Judgment.

3. We are of the opinion that the Court should have addressed the issue at the onset and given an elaborate explanation as to why the Applicant and AGRILAND are deemed to be the same person for the purposes of the Application. Though the Applicant and the company are two separate persons, the Court opted to lift the corporate veil of AGRILAND and take the two as one without adequately expatiating on how it arrived at this conclusion. In our considered view, the justifications the Court gave to support its positions are insufficient for the following reasons.

4. First, the Court only mentioned the fact that the Applicant and his company, AGRILAND,[1] are two different personalities at a later stage in the judgment. Given the importance of clearly identifying the identity of the Parties for the Court's assessment of the Application, this exercise should have been made and clearly spelt out at earlier, at least, at admissibility stage (paragraphs. 21-22).

5. Secondly, there are instances where the Court assumed that the Applicant was the one who filed the case before the ECOWAS Court of Justice although it is patently clear from the record that he did not and that it was rather filed by his company, AGRILAND. Had the Court clarified this matter earlier, there would not have been such confusion as to the true identity of the Applicant.

6. Lastly, the issue of identity of Parties is something, which has been dealt with by other international courts in similar cases. The Court's reticence to do the same and reach conclusions without having clearly identified the true identity of the Applicant for no cogent reasons is thus at odds with international jurisprudence. We are of the opinion that the Court should have drawn inspiration from similar jurisdictions that have relevant jurisprudence in this regard.

7. In this regard, we refer to two particular cases, namely *Cantos v Argentina* and *Agrotexim and Others v Greece*.[2] Both these cases dealt with the issue of the identity of individual shareholders and the

1 Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, para 46.

2 Inter-American Court of Human Rights, case of *Cantos v Argentina* Judgment of September 7 2001 *(Preliminary Objections) and Agrotexim and Others v Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42.

company as well as the issue of the corporate veil. In both cases the Inter-American Court of Human Rights and the European Court of Human Rights, respectively, were faced with the conundrum of whether or not individual shareholder(s) can be regarded as being the same person as the company.

8. Although the approaches of both Courts in the cases mentioned above were not the same, they both gave detailed reasons for how they reached their conclusions. [3]

9. The Majority Judgment's failure to elaborate on why the Court reached the decision it did in determining that the Applicant and AGRILAND are deemed to be the same person potentially leaves a wide room for various interpretations.

10. This concern becomes more troublesome when we look into the issue of admissibility in terms of Article 56(6) of the Charter, where the Court held that, local remedies had been exhausted although the Party which exhausted remedies at the local level was AGRILAND, as opposed to the Applicant before the Court.

11. We take cognisance of the fact that at the national level the company or corporate veil is lifted under very strict conditions and therefore the shareholders generally do not bear individual responsibility at that level for any violations by their companies but such shareholders can come before this Court to assert violations of their individual rights if they can demonstrate that the Respondent State had an opportunity to rectify such violation through its domestic judicial procedures.[4] In our considered view, such an approach would ensure that the Court adopts a cautious approach when applying Article 56(6) of the Charter and Rule 40(1)in such circumstances.

12. Furthermore, the fact that the shareholders can come before the African Court to assert violations of their individual rights is an illustration of how the corporate veil can be lifted and based on this the identity of the shareholders and the company in question will be deemed to be the same.

13. It is based on the above-mentioned consideration that the Court held that local remedies had been exhausted because the Applicant and his company AGRILAND are one person. Furthermore, since the Applicant and AGRILAND were found to be one person it would have not been necessary for the Applicant to institute a case in local courts based on the same facts and arising from the same matters as the

3 *Cantos v Argentina* (Preliminary Objections), paras 27- 31 and *Agrotexim and Others v Greece* paras 62 and 66.

4 Application No 006/2012. Judgment of 28/05/2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 94.

case that was instituted by his company AGRILAND.

14. Now moving on to the issues of the identity of the Parties as one of the conditions to be fulfilled for *res judicata* to apply under Article 56(7), it is important to note the positions of the aforementioned jurisprudence of the Inter-American Court of Human Rights and European Court of Human Rights.

15. In the case of *Cantos v Argentina,* the Inter-American Court of Human Rights stated the following:

> "Argentina asserts that legal entities are not included in the American Convention and, therefore, its provisions are not applicable to them, since they do not have human rights. However, the Court observes that, in general, the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation."[5]

16. In the case of *Agrotexim and Others v Greece the European Court of Human Rights* noted the following:

> "The Applicants complaint was based exclusively on the proposition that the alleged violation of the Brewery's right to the peaceful enjoyment of its possessions had adversely affected their own financial interests because of the resulting fall in the value of their shares. The Applicants considered that the financial losses sustained by the company and the latter's rights were to be regarded as their own, and that they were therefore victims, albeit indirectly, of the alleged violation. In sum, they sought to have the company's corporate veil pierced in their favour."[6]

17. The European Court of Human Rights further noted that "the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances."[7]

18. Based on the above cited passages we are of the opinion that one of the reasons why the Applicant's identity was said to be the same as that of his company in this case is because the corporate veil had been lifted and as a result of this, the rights and obligations which were attributed to the company became the rights and obligations for the Applicant, which in turn meant that the two have the same identity. These are the same observations that were made by the Inter-American Court on Human Rights and the European Court on Human Rights in the above-mentioned passages. It is therefore our opinion that the above-mentioned views should have been adopted

5 *Cantos v Argentina* Judgment of September 7 *2001 (Preliminary Objections),* para 27.

6 *Agrotexim and Others v Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42, para 63.

7 *Agrotexim and Others v Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42, para 66.

and explicitly stated in the judgment of the majority.

19. One last thing we would like to make emphasis on regarding Article 56(7) of the Charter is the fact that the reason why the corporate veil was lifted and the identity of the Applicant and his company was considered the same in the national level is because it was noted in the judgment (in the Applicants prayers) that the Applicant holds ninety five percent (95%) of the company and is the President, Chief Executive Officer, founder and majority shareholder of AGRILAND.[8] This is to say that the company's losses are his losses and the company's gains are also his gains. We feel that the judgment should have emphasised this point and clarified it.

8 Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, para 15(iii) and para 48.