Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99

Application 016/2017, *Dexter Eddie Johnson v Republic of Ghana*

Judgment, 28 March 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicant was convicted of murder and sentenced to death. After his conviction and sentence was confirmed by the Court of Appeal he submitted a petition to the United Nations Human Rights Committee (HRC) which held that imposition of mandatory death penalty violated the right to life in Article 6(1) of the International Covenant on Civil and Political Rights. Subsequently, the Applicant approached the Court since the Respondent State did not implement the Views of the HRC. The Court held the case inadmissible since the HRC had already settled the same issues within the meaning of Article 56(7) of the Charter.

Admissibility (matter settled, 46-56; consideration of admissibility requirements, 57)

Separate opinion: BENSAOULA

Admissibility (consideration of admissibility requirements, 11)

Dissenting opinion: BEN ACHOUR

Admissibility (submission within reasonable time, 2; matter settled, 3)

Dissenting opinion: TCHIKAYA

Admissibility (matter settled, 13, 19, 22, 23)

I. The Parties

1. Dexter Eddie Johnson (hereinafter referred to as "the Applicant"), is a dual national of the Republic of Ghana and Great Britain who was convicted and sentenced to death for murder and is currently on death row awaiting execution.

2. The Application is filed against the Republic of Ghana (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 June 1989 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 16 August 2005. It deposited, on 10 March 2011, a Declaration under Article 34(6) of the Protocol, through which it accepts the jurisdiction of the

Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges, from the Application that on 27 May 2004, an American national was killed near the village of Ningo in the Greater Accra region of Ghana. The Applicant was accused of committing this crime and brought to trial. He denied the offence. On 18 June 2008, the Fast Track High Court in Accra, convicted the Applicant of the murder and sentenced him to death.

4. The Applicant appealed against his conviction and sentence before the Court of Appeal, arguing that while the death penalty *per se* is authorised by Article 13(1) of the Constitution of Ghana, the mandatory imposition of the death sentence, on which the Constitution was silent, was unconstitutional. To buttress this assertion, the Applicant argued that the mandatory death penalty violates the right not to be subjected to inhuman and degrading treatment or punishment, the right not to be arbitrarily deprived of life and the right to a fair trial, all of which are protected by Ghana's Constitution.

5. On 16 July 2009, the Court of Appeal dismissed the appeal both on the conviction and sentence.

6. The Applicant further pursued his appeal against both the conviction and sentence before the Supreme Court and on 16 March 2011 his appeal was**,** again**,** dismissed.

7. Subsequently, in December 2011 and April 2012, respectively, the Applicant made two clemency petitions to the President of Ghana**.**

8. In July 2012, the Applicant filed a communication to the United Nations Human Rights Committee (hereinafter referred to as "the HRC") under the First Optional Protocol to the International Covenant on Civil and Political Rights.

9. On 27 March 2014, the HRC found, in its Views, that since the only punishment for murder under Ghanaian law was the death penalty, courts had no discretion but to impose the only sentence permitted by law. The HRC held that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life contrary to Article 6(1) of the International Covenant on Civil

and Political Rights (hereinafter referred to as "the ICCPR").[1] It thus ordered the Respondent State to provide the Applicant with an effective remedy including the commutation of his sentence. The HRC also reminded the Respondent State that it was under a duty to avoid similar violations in future, including by adjusting its legislation in line with the provisions of the ICCPR.

10. The HRC requested the Respondent State to file, within one hundred and eighty (180) days, information about the measures taken to give effect to its Views and also requested the Respondent State to publish the HRC's Views and have them widely disseminated in the Respondent State. The HRC also reminded the Respondent State that by becoming a party to the First Optional Protocol to the ICCPR, it had recognised the competence of the HRC to determine whether there had been a violation of the ICCPR and to provide an effective and enforceable remedy when a violation is established.[2]

11. The Respondent State has not implemented the Views of the HRC. The Applicant remains on death row and his death sentence has not been commuted.

12. Since the Respondent State has not acted on the Views of the HRC, the Applicant decided to apply to this Court for the protection of his rights. The Applicant, while acknowledging the fact that there is a long-standing *de facto* moratorium on carrying out executions in the Respondent State, argues that this has no bearing on the merits of this Application.

B. Alleged violations

13. The Applicant alleges that the imposition of the mandatory sentence of death, without consideration of the individual circumstances of the offence or the offender, violates the following rights:

a. The right to life under Article 4 of the Charter**;**

b. The prohibition of cruel, inhuman or degrading treatment or punishment under Article 5 of the Charter;

c. The right to a fair trial under Article 7 of the Charter;

d. The right to life under Article 6(1), the right to protection from inhuman punishment under Article 7, the right to a fair trial under Article 14(1) and the right to a review of a sentence under Article 14(5) of the ICCPR; and

1 Article 6(1) provides as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

2 Communication 2117/2012 *Dexter Eddie Johnson v Ghana*, 27 March 2014 (hereinafter referred to as "*Dexter Johnson v Ghana" (HRC)).*

e. The right to life, and the protection of cruel, inhuman or degrading treatment or punishment under Article 5 of the Universal Declaration of Human Rights (hereinafter referred to as the "UDHR ").

14. The Applicant also submits that by failing to give effect to the rights cited above the Respondent has also violated Article 1 of the Charter.

III. Summary of the procedure before the Court

15. The Application was filed on 26 May 2017 and served on the Respondent State by a notice dated 22 June 2017, directing the Respondent State to file the names and addresses of its representatives and its Response to the Application within thirty (30) and sixty (60) days of receipt of the notice, in accordance with Rules 35(2) (a) and 35(4) (a) of the Rules of the Court (hereinafter referred to as "the Rules").

16. On 28 September 2017, the Court, upon the Applicant's request, ordered Provisional Measures directing that the Respondent State should refrain from executing the Applicant pending the determination of the Application.

17. On 28 May 2018**,** the Registry received the Respondent State's Response to the Application and the Respondent State's Report on Implementation of Provisional Measures. On 31 May 2018 the Registry transmitted these to the Applicant and requested him to file his Reply, if any, within thirty (30) days of receipt of the notice. The Applicant's Reply was received by the Registry on 5 July 2018.

18. On 10 August 2018**,** the Registry received the Applicant's submissions on reparations and transmitted these to the Respondent State by a notice dated 14 August 2018 requesting it to file the Response thereto within thirty (30) days of receipt of the notice.

19. On 11 September 2018**,** the Registry received a letter from the Applicant requesting to file further written submissions on the admissibility of the application and also providing a list of counsel who would appear for the public hearing, if any.

20. On 7 November 2018**,** the Registry sent a letter to the Applicant, copied to the Respondent State, informing the Applicant that the Court had denied his request to file additional submissions on the admissibility of the Application.

21. On 14 December 2018**,** the Registry received the Respondent State's Response to the Applicant's Submissions on Reparations and on 19 December 2018, this was transmitted to the Applicant

for information.

22. On 4 February 2019, the Parties were informed that the pleadings had formally been closed.

23. On 20 March 2018 the Registry informed the Applicant that the Court would not hold a public hearing in the matter.

IV. Prayers of the Parties

24. The Applicant prays the Court for the following:

On merits

"a. grant a declaration that the imposition of the mandatory death penalty on the Applicant violates Articles 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the ICCPR and Articles 3, 5 and 10 of the UDHR.

b. For the Court to grant a declaration that by failing to adopt legislative or other measures to give effect to the Applicant's rights under Article 4, 5 and 7 of the Charter, the Respondent State also violated Article 1 of the Charter.

c. order the Respondent to take immediate steps to effect the prompt substitution of the Applicant's sentence of death with a sentence of life imprisonment or such other non-capital sentence as reflects the circumstances of the offence and the offender and the violations of his rights under the Charter.

d. order the Respondent State to take legislative or other remedial measures to give effect to the Court's findings in their application to other persons".

On reparations

"e. An order for the Respondent State not to carry out the death penalty imposed on the Applicant and to take immediate remedial measures, by commutation or otherwise, to effect the prompt substitution of the Applicant's sentence of death with a sentence of life imprisonment or such other non-capital sentence as reflects the circumstances of the offence and the offender and the violations of his rights under the Charter and other relevant instruments.

f. An order for the Respondent State to amend its laws in order to bring them in line with the relevant provisions of the applicable international instruments, including Articles 3(2), 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the ICCPR and Articles 3, 5, 7 and 10 of the UDHR, by amending section 46 of the Criminal Offences Act, 1960 (Act 29) so that the death penalty is not stipulated as the mandatory sentence for the offence of murder.

g. An order for the Respondent State to review within six months from the date of this judgment the sentences of all prisoners in the Respondent State who have been mandatorily sentenced to death

and to adopt remedial measures by commutation or otherwise to ensure that such sentences are compatible with this judgment.

h. An order that the judgment of the Court represents a form of reparation for the moral prejudice suffered by the Applicant as a result of the imposition of an unlawful mandatory death sentence and his subsequent incarceration on death row pending execution of sentence and an order that, in addition, the Respondent State shall pay the Applicant a sum in such amount as the Courts sees fit as reparations for the said prejudice.

i. An order for such other reparations as the Court sees fit.

j. An order for the Respondent State to publish within six months from the date of the judgment:

- a summary in English of the judgment as prepared by the Registry of the Court in the Ghana Gazette;
- the summary in English of the judgment as prepared by the Registry of the Court in a widely read national daily newspaper; and
- the full text of the judgment in English on the official website of the Respondent State, to remain available for a period of at least one year.

k. An order for the Respondent State to submit to the Court within six months from the date of this judgment a report on the status of compliance with all the orders contained within it.

l. An order that each party bear its own costs".

25. The Respondent State prays the following declarations from the Court:

On merits

"a. That the death penalty was imposed on the Applicant in accordance with the proper judicial process in Ghana and was therefore not in violation of Articles 4, 5 and 7 of the Charter.

b. That the Respondent State has not violated Article 1 of the Charter.

c. That the Application be dismissed in its entirety.

d. That all the reliefs sought by the Applicant be denied".

On reparations

"e. That the death penalty was imposed on the Applicant in accordance with the proper judicial process in Ghana and was therefore not in violation of Article 4, 5 and 7 of the Charter;

f. That the Respondent State has not violated Article 1 of the Charter.

g. That Applicant has not established any grounds for reparations and as such the reparations sought by the Applicants should be denied".

V. Jurisdiction

26. Under Article 3(1) of the Protocol the "jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned". Further, in terms of Rule 39(1) of the Rules "the Court shall conduct preliminary examination of its jurisdiction …".

27. The Applicant submits that the Court has previously ruled that as long as the rights alleged by the Applicant(s) are protected by the Charter or any other human rights instrument ratified by the State in question, then the Court will have jurisdiction over the matter.[3] In the present Application, the Applicant set out the specific provisions of the Charter, the ICCPR and the UDHR that he alleges have been violated by the Respondent State and submitted that the Court has material jurisdiction to hear this matter.[4]

28. The Applicant further avers that the Court has personal jurisdiction, temporal jurisdiction and territorial jurisdiction in the present matter.

29. The Respondent State did not make any submissions regarding the Court's jurisdiction to hear this case.

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30. Notwithstanding the absence of any objection to the Court's jurisdiction by the Respondent State, the Court must satisfy itself that it has jurisdiction before it proceeds.

31. In this Application, the Court finds that it has:

i. material jurisdiction given that the Application invokes violations of human rights protected under the Charter and other human rights instruments ratified by the Respondent State;

ii. personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the declaration prescribed under Article 34(6) thereof, allowing individuals to institute cases directly before it, in accordance with Article 5(3) of the Protocol;

iii. temporal jurisdiction since the alleged violations are continuous, given that the Applicant remains sentenced on the basis of what he

3 Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi & others v United Republic of Tanzania*, para 57.

4 The Applicant alleges that the Respondent State has violated Articles 4, 5 and 7 of the Charter together with Articles 6(1), 7, 14(1) and 14(5) of the ICCPR and Articles 3, 5 and 10 of the UDHR.

considers as not being in line with the provisions of the Charter and other human rights instruments;[5]

iv. territorial jurisdiction because the alleged violations took place in the Respondent State's territory and the Respondent State is a State Party to the Protocol.

32. In view of the foregoing, the Court holds that it has jurisdiction to hear the instant Application.

VI. Admissibility

33. 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".

34. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, stipulates that 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 disseminated through the mass media,

5. Are filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,

6. Are filed 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 principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter".

35. The Applicant submits that the Application discloses the Applicant's identity since he did not request anonymity. Furthermore, he avers that the Application accords with the objectives of the African Union because it invites the Court to consider whether the Respondent State is meeting its obligations to protect the

5 Application 013/2011. Judgment of 21 June 2013 (Merits), *Beneficiaries of Late Norbert Zongo and others v Burkina Faso*, paras 73-74 (hereinafter referred to as "*Norbert Zongo v Burkina Faso"*).

Applicant's rights under the Charter. In support of his submission, he cites the case of *Peter Chacha v Tanzania,* where the Court held that an application will be admissible if its facts reveal a *prima facie* violation of a protected right.[6]

36. The Applicant also submits that the Application does not contain disparaging or insulting language and the Application is not based on news disseminated through the mass media.

37. The Applicant further submits that local remedies have been exhausted since he has taken his appeal against the imposition of the mandatory death penalty as far as possible within the Respondent State's domestic courts, namely the Supreme Court of Ghana which is the highest court in Ghana from which no further appeal can be brought.

38. The Applicant further avers that he is lay, indigent and incarcerated and after exhausting local remedies, he unsuccessfully attempted to use "extraordinary measures" by pursuing an application for clemency and then filing an application to the HRC before turning to this Court. The Applicant, therefore, submits that the Application was filed within a reasonable time since he explored "extraordinary measures" before bringing the Application to the Court. The Applicant relies on the case of *Alex Thomas v Tanzania* in support of his submission.[7]

39. Lastly, the Applicant submits that the Application does not raise matters or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

40. In this regard, the Applicant submits that the fact that the HRC has adopted Views in his case does not preclude the admissibility of the present Application under Rule 40(7) of the Rules since the HRC did not address any matter or issue in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union and the Views of the HRC were based on the ICCPR which contains its own detailed provisions on human rights, which are separate and distinct from the Charter of the United Nations and the other instruments listed

6 Application 003/2012. Ruling of 28 March 2014 (Jurisdiction and Admissibility), *Peter Chacha v United Republic of Tanzania*, para 123.

7 Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania*, (hereinafter referred to as "*Alex Thomas v Tanzania"*), paras 73 -74.

in Rule 40(7) of the Rules.

41. Furthermore, the Applicant avers that none of the issues in the HRC proceedings have been settled by the parties because the Respondent State has chosen to ignore the HRC's Views such that the issues remain entirely unsettled and unresolved.

42. The Respondent State submits that in determining the admissibility of the Application the Court should be guided by the provisions of Article 56(5) of the Charter, Article 6(2) of the Protocol and Rule 40 of the Rules.

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43. The Court notes that with regard to the admissibility of the Application, the Respondent State merely notes that in determining admissibility, the Court should be guided by the provisions of Article 56(5) of the Charter, Article 6(2) of the Protocol and Rule 40 of the Rules. The Respondent State did not raise any objection to the admissibility of the Application.

44. Nevertheless, the Court will, *suo motu*, and as empowered by Rule 39 of the Rules, examine whether the Application meets the admissibility requirements set out in Rule 40 of the Rules and Article 56 of the Charter.

45. The Court notes that the Application discloses the identity of the Applicant; is compatible with the Constitutive Act of the AU and the Charter because it invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter; is not written in disparaging or insulting language directed at the Respondent State and its institutions or the African Union; is not based exclusively on news disseminated through mass media; and was sent after the Applicant exhausted local remedies since the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State; and was also filed with this Court within a reasonable time after the exhaustion of local remedies.[8] The Court, therefore, finds that the Application meets the admissibility requirements under Article 56(1) to 56(6) of the Charter, which are reflected in Rule 40(1) to 40(6) of the Rules.

46. The Court, however, notes that in terms of Article 56(7) of the Charter, which is reiterated by Rule 40(7) of the Rules, Applications shall be considered if they "do not deal with cases which have

8 *Norbert Zongo v Burkina Faso*, (Preliminary Ruling) para 121; *Alex Thomas v Tanzania*, para 73-74 and Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Another v United Republic of Tanzania,* para 61.

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".

47. The Court further notes that examining compliance with this provision requires it to make sure that this Application has not been "settled" and that it has not been settled "in accordance with the principles" of the Charter of the United Nation or the Constitutive Act of the African Union or the provisions of the Charter.[9]

48. The Court observes that the notion of "settlement" implies the convergence of three major conditions: (i) the identity of the parties; (ii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and (iii) the existence of a first decision on the merits.[10] This position has also been confirmed by the African Commission which has held that for a matter to fall within the scope of Article 56(7) of the Charter, it should have involved the same parties, the same issues and must have been settled by an international or regional mechanism.[11]

49. With respect to the first condition, it is not in dispute that the Applicant, Dexter Eddie Johnson, is the same person who filed a communication against the Respondent State before the HRC. The Court, therefore, finds that the parties, in this Application and the communication before the HRC, are identical and, therefore, the first condition has been met.

50. With regard to the second and third conditions, the Court notes that in the communication examined by the HRC, the Applicant claimed that a mandatory death penalty for all offences of a particular kind, such as murder, prevents the trial court from considering whether this form of punishment is appropriate and thus, the death penalty amounts to a violation of his right to life under Article 6(1) of the ICCPR. The Applicant further claimed that the imposition of the death penalty, with no judicial discretion to

9 Application 038/2016. Judgment of 22 March 2018 (Merits)*, Jean-Claude Roger Gombert v Cote d Ivoire (hereinafter referred to as "Jean-Claude Gombert v Cote d Ivoire"),* para 44.

10 See, ACHPR Communication 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and thirteen others* para 112; EACJ Reference 1/2007 *James Katabazi et al v Secretary General of the East African Community and Another* (2007) AHRLR 119, paras 30-32; IACHR Application 7920, Judgment of 29 July 1988, *Velasquez-Rodriguez v Honduras* 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

11 ACHPR Communication 266/03, *Kevin Mgwanga Gunme and others v Cameroon*, para 86.

impose a lesser sentence, violates the prohibition of inhumane or degrading treatment or punishment under Article 7 of the ICCPR and that the imposition of this sentence violated his right to a fair trial since part of this right is the right to review his sentence by a superior court contrary to Article 14(1) and (5) of the ICCPR. Lastly, the Applicant averred that the Respondent State failed in its obligations under Article 2(3) of the ICCPR to provide an effective remedy to the above-mentioned violations of his rights and he requested the HRC to make a finding to that effect.

51. In the present Application, the Court notes that there is a decision on the merits of the communication that was brought before the HRC and neither of the parties deny the existence of such a decision.[12] The Court observes that although the Respondent State may have opted not to follow the Views of the HRC this does not mean that the matter has not been considered and consequently settled within the meaning of Rule 40(7) of the Rules or Article 56(7) of the Charter. What is crucial is that there must be a decision by a body or institution that is legally mandated to consider the dispute at international level.

52. The Court further notes that although the communication at the HRC and the Views of the HRC were based on the ICCPR and not on the Charter of the United Nations or the Constitutive Act of the African Union, or the provisions of the Charter, the principles contained in the provisions of the ICCPR that the HRC gave its Views on are identical to the principles provided for in the provisions of the Charter.[13] Substantively, therefore, the HRC adjudicated on the same issues that the Applicant has brought before this Court.

53. As has been noted by the Court, if the subsequent claim is not detachable from the claim(s) earlier examined by another tribunal, then it follows that the matter will be deemed to have been settled especially since "the identity of the claims extends to their additional and alternative nature or whether they derive from a claim examined in a previous case".[14] Applying the foregoing reasoning, it follows that the present Application has been settled by the HRC within the meaning of Article 56(7) of the Charter and

12 *Dexter Eddie Johnson v Ghana* (HRC).

13 By way of example, Article 6(1) of the ICCPR provides for the right to life and this is mirrored by Article 4 of the Charter; Article 7 of the ICCPR prohibits torture, cruel, inhuman or degrading treatment and punishment and this is captured by Article 5 of the Charter; and the right to a fair trial under Article 14 of the ICCPR finds its equivalent in Article 7 of the Charter.

14 *Jean-Claude Gombert v Cote d'Ivoire,* para 51.

Rule 40(7) of the Rules.

54. In the Court's view, and in respect of the admissibility requirement under Article 56(7) of the Charter, it does not matter that the decision of the HRC has been implemented or not. It also does not matter whether the said decision is classified as binding or not. In its jurisprudence, the Court has consistently refused to deal with any matter that is pending before the Commission or one that has been settled by the Commission, this notwithstanding the fact that the findings of the Commission are termed "recommendations", which are not binding.[15] In the present case, the Applicant elected to file his case before the HRC, and not before this Court, over a year after Ghana had deposited its Declaration under Article 34(6) of the Protocol. In the circumstances, the Applicant cannot, therefore, claim that the forum he chose does not make binding decisions and that since the Views of the HRC have not been implemented then the matter has not been settled in line with Article 56(7) of the Charter.

55. The Court wishes to reiterate the fact that the rationale behind the rule in Article 56(7) of the Charter is to prevent States from being asked to account more than once in respect of the same alleged violations of human rights. In the words of the African Commission:

"This is called the *non bis in idem* rule (also known as the Principle or Prohibition of Double Jeopardy, deriving from criminal law) and ensures that, in this context, no state may be sued or condemned [more than once] for the same alleged violation of human rights. In effect, this principle is tied up with the recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals and/or institutions such as the African Commission. (*Res judicata* is the principle that a final judgment of a competent court/ tribunal is conclusive upon the parties in any subsequent litigation involving the same cause of action.)"[16]

56. In conclusion, the Court finds that the present Application does not fulfil the admissibility requirement under Article 56(7) of the Charter, which is also reflected in Rule 40(7) of the Rules.

57. The Court recalls that the conditions of admissibility under Article 56 of the Charter are cumulative and as such, when one of them is not met, then the entire Application cannot be considered.[17] In the

15 Cf Application 003/2011. Judgment of 21 June 2013 (Jurisdiction and Admissibility), *Urban Mkandawire v Republic of Malawi,* para 33.

16 ACHPR Communication 260/02 *Bakweri Land Claims v Cameroon,* para 52.

17 See, ACHPR, Communication 277/2003, *Spilg and others v Botswana,* para 96 and ACHPR, Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Egypt*, para 80.

instant case, since the Application does not meet the requirement set forth in Article 56(7) of the Charter the Court, therefore, finds the Application inadmissible.

VII. Costs

58. The Applicant prays that the Court order each party to bear its own costs.

59. The Respondent State did not make any submissions pertaining to costs.

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60. According to Rule 30 of the Rules of Court, "Unless otherwise decided by the Court, each party shall bear its own costs".

61. The Court, in this matter, does not see any reason why it should depart from the position in Rule 30 and as such it orders each Party to bear its own costs.

VIII. Operative part

62. For these reasons:

The Court,

Unanimously:

On jurisdiction

i. *Declares* that it has jurisdiction to hear the Application;

On admissibility

By a majority of Eight (8) for, and Two (2) against, Justices Rafaâ BEN ACHOUR and Blaise TCHIKAYA dissenting:

ii. *Declares* that the Application is inadmissible;

On costs

iii. *Orders* that each Party shall bear its own costs.

Separate Opinion: BENSAOULA

[**1.**] I share the opinion of the majority of the judges regarding the admissibility of the Application, the Court's jurisdiction and the Operative Part.

[**2.**] I believe, however, that the way in which the Court dealt with the admissibility of the Application runs counter to:

- the Respondent State's request and
- the provisions of Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40 of the Rules.

1. Counter to the Respondent State's request

[**3.**] In effect, in terms of Rule 39 of the Rules, the Court is required to conduct preliminary examination of its jurisdiction and the conditions of admissibility laid down in Articles 50 and 56 of the Charter and Rule 40 of the Rules.

[**4.**] This clearly implies that:

A. If the parties raise objections concerning the conditions governing jurisdiction and admissibility, the Court must examine the same.
   - if it turns out that one of the conditions is founded, the Court will so declare.
   - if, on the other hand, none is founded, the Court has the obligation to discuss the other elements of admissibility not discussed by the parties and make a ruling accordingly.

B. If the parties do not discuss the conditions, the Court is obliged to do so, and in the order set out in Article 56 of the Charter and Rule 40 of the Rules.

[**5.**] It seems to me illogical that the Court should select one of the conditions such as reasonable time, for example, whereas there are issues with identity and therefore not covered.

[**6.**] In the present case, subject of separate opinion, it is clear that if the defendant asked "that the Court be guided by Articles 56(5) of the Charter, 6(12) of the Protocol and Rule 40 of the Rules" (paragraph 43 of the Judgment), this request quite simply means that the Court is required to ensure that each condition set out by Rule 40 is covered.

[**7.**] In responding to the defendant's request in paragraph 43 of the Judgment "that the defendant simply indicated that, in making a ruling on admissibility, the Court takes into account Articles 56(5) of the Charter, 6(2) of the Protocol and Rule 40 of the Rules" and hence that "it did not raise particular objection on the Application's

admissibility", the Court misinterpreted the defendant's statement.

2. And to the provisions of Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40 of the Rules

[**8.**] It is noteworthy that, in its paragraph 45, the Court in seeking to "determine" whether the Application fulfilled the conditions set forth in paragraph 44 of the Judgment, only reiterated the conditions enumerated under the afore-cited Articles without really analyzing most of them (paragraphs 45 and 46 of the Judgment); and in contrast the Court dwelt at length on condition No. 7 of Rule 40 of the Rules in paragraphs 50 *et seq.* of the Judgment, thus giving the impression that the conditions enumerated surpass one another in terms of importance or purpose; which is obviously not the spirit of the Articles in question and the intention of the legislator.

[**9.**] In Rule 40(6) of the Rules, it is clearly indicated that, for Applications to be admissible, they must 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".

[**10.**] It is clear that the legislator has set down two options as to how to define the commencement of reasonable time:

a. the date local remedies were exhausted which the Court could have set as the date of the Supreme Court Judgment of March 2011, and would have entailed a timeframe of 6 years and 2 months from 27/05/2017, the date of submission of the Application.

b. the date set by the Court as the commencement of the period within which it shall be seized with the matter, such as the date of the decision rendered by the human rights committee or any other date that the Court would have decided to take into consideration.

[**11.**] By not taking this date into account and merely saying in paragraph 45 of the Judgment that "it was brought before this Court within a reasonable time after local remedies were exhausted" and to hold in conclusion "that the Application fulfills the conditions of admissibility set forth in Article 56(1) to (6) of the Charter reiterated under Rule 40(1) to (6) of the Rules", the Court failed in its obligation to determine the legal and juridical basis of its decisions.

Dissenting opinion: BEN ACHOUR

1. I voted against the above Judgment *(Dexter Eddie Johnson v Republic of Ghana)* for two reasons.

2. I consider that the Court should have declared the Application inadmissible, not on the basis of Article 56(7)[1] of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and Rule 40(7) of the Rules of Court (hereinafter referred to as "the Rules"), but rather on the basis of Article 56(6)[2] of the Charter and Rule 40(6) of the Rules, that is, for failure by the Applicant, Dexter Eddie Johnson (hereinafter referred to as "the Applicant") to file his Application before the Court within a reasonable time after the exhaustion of local remedies (hereinafter referred to as "LR") (**I**).

3. Furthermore, and assuming that the said timeframe is reasonable, as held by the Court in paragraph 45 of the Judgment, the Court should have declared the Application admissible and proceeded to the merits of the case, because, in my opinion, the case has not been "settled in accordance with the principles of the United Nations Charter, the Charter of the Organization of African Unity and the provisions of the present Charter." The Views of the UN Human Rights Council (hereinafter referred to as "HRC") do not, in my opinion, "settle" the case. (**II**)

I. Non-observance of reasonable time for seizure of the Court

4. The requirement of the Charter, also reflected in the Rules of Court, to file the application within a reasonable time, is a requirement based on the need for legal safeguards. This requirement is enshrined in the instruments of the three regional human rights Courts. However, whereas the Inter-American and European conventions have set the deadline at six months as from the date of exhaustion of local remedies,[3] the Charter left it first at the discretion of the Commission, and later, that of the

1 For commentary on this article: See F Ouguergouz 'Article 56' in M Kamato (ed) *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court of Human and Peoples' Rights: Article-by-article Commentary* (2011) 1044.

2 For commentary on this article: See *idem*, p 1043.

3 Art 35(1) of European Convention and article 46(1)(b) of the Inter-American Convention.

Court, taking into consideration the circumstances of each case.

5. It should be recalled that, in the instant case, the Application was brought before the Court on 26 May 2017, whereas the Supreme Court of Ghana, the apex court of the Ghanaian judicial system, delivered its final judgment, dismissing the Applicant's appeal and upholding the death sentence imposed on him on 16 March 2011.[4] Thus, a period of six years and two months elapsed between the date of delivery of the Judgment of the Supreme Court of Ghana and the filing of the Application before the Court. Are there any objective and subjective justifications for such a delay?

6. The Court did not even try to justify the Applicant's delay in filing his Application. It glanced through, and without the slightest analysis, all the admissibility requirements enumerated in Articles 56 (from paragraph 1 to paragraph 6) of the Charter and Rule 40 (from paragraph 1 to paragraph 6) of the Rules. The Court dealt with the six grounds of inadmissibility in one *lump*, noting "that the Application discloses the identity of the Applicant; is compatible with the Constitutive Act of the AU and the Charter because it invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter; is not written in disparaging or insulting language directed at the Respondent State and its institutions or the African Union; is not based exclusively on news disseminated through mass media; and was sent after the Applicant exhausted local remedies since the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State; and was also filed with this Court within a reasonable time after the exhaustion of local remedies". Accordingly, "the Court [found] that the Application meets the admissibility requirements under Article 56(1) to 56(6) of the Charter, which are reflected in Rule 40(1) to 40(6)".

7. It is unfortunate that, in dealing with such an important issue, the Court simply states that "[…] and was also filed with this Court within a reasonable time." Thus, the Court turns a blind eye to the time taken by the Applicant to bring his application before it and provides no justification, from this point of view, for the admissibility of the Application.

8. However, the Court substantiated its stance, albeit cursorily, with respect to other grounds of admissibility of the Application. Such was the case when it talked of the Application being compatible with the Constitutive Act of the AU and the Charter because,

4 Judgment, para 26.

according to the Court, the Application "invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter". Similarly, as regards the exhaustion of local remedies, the Court notes that "the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State". Yet no justification is given, no matter how brief, with respect to "reasonable time".

9. The fact that the Respondent State did not raise any objection to admissibility is no justification for such a quick glance, reduced in just one sentence, through six admissibility requirements that the Court has a duty to analyse. The Court seems to have been in a hurry to dwell only on one requirement, namely the one provided for in Articles 56(7) of the Charter and 40(7) of the Rules.

10. However, it would have been of utmost importance, for the proper administration of justice and in compliance with the Protocol and the Rules, for the Court to focus more on the issue of timeframe, as it has always done in its settled jurisprudence.

11. In other cases, however, where the timeframes for bringing an application were shorter, the Court had always analysed the reasons which could have prevented the applicants from being more diligent in respect of the "reasonable time".

12. Indeed, in its settled jurisprudence, the Court has always been very sensitive to the personal circumstances of the applicants (indigence, illiteracy, detention, extraordinary or non-judicial remedies, etc.), and has always shown great flexibility in computing reasonable timeframe.[5]

13. The Court has always had to rule, and very rightly so, on a case-by-case basis, in order not to be stuck in a very rigid and strict arithmetical consideration.[6] In *Werema Wangoko and Waisiri Wangoko Werema of 7 December 2018,* the Court considered 5 years and 5 months as a reasonable timeframe. It, however, justified its generosity in the following words: "The Court further notes that the Application was filed on 2 October 2015, that is,

5 The European Court of Human Rights, though bound to respect the six months timeline, also stated: "The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute". Judgment, *Comingersoll SA v Portugal,* Application 3532/97, Grand Chamber, 6 April 2000.

6 In *Zongo & others v Burkina Faso*, the Court stated: "The reasonableness of timelines for referral of cases to the Court depends on the circumstances of each case and must be determined on a case-by-case basis". Preliminary Objections, Application, 21 June 2013, para 121.

after five (5) years and five (5) months from the date of the deposit of the said declaration. In the intervening period, the applicants attempted to use the review procedure at the Court of Appeal, but their application for review was dismissed on 19 March 2015 as having been filed out of time. In this regard, the key issue for determination is whether the five (5) years and five (5) months' time within which the Applicants could have filed their Application before the Court is reasonable".[7] The Court further noted that "the Applicants do not invoke any particular reason as to why it took five (5) years and five (5) months to seize this Court after they had the opportunity to do so, the Respondent having deposited the declaration envisaged under the Protocol, allowing them to directly file cases before the Court. Nonetheless, although they were not required to pursue it, the Applicants chose to exhaust the above-mentioned review procedure at the Court of Appeal. It is evident from the record that the five (5) years and five (5) months delay in filing the Application was due to the fact that the Applicants were awaiting the outcome of the [review proceedings] and at the time they seized this court, it was only about six (6) months that had elapsed after their request for review was dismissed for filing out of time".[8]

14. Whereas this is the first time that it has been seized of a case within a timeframe of six years and two months after the exhaustion of local remedies, the Court now pushes its liberalism to the point of emptying the "reasonable time" requirement of all its content, thus opening the door to legal insecurity, which the Charter and the Rules seek to prevent. The Court's total silence on such an issue of public order leaves the litigation open-ended. In allowing a period as long as six years and two months without conclusive factual reasons, the Court has gone too far beyond the margin, thereby denying Article 56(6) of the Charter and Rule 40(6) of the Rules of Procedure any meaningful effect. It has widely opened a door that will be very difficult for it to close and, moreover, this would not encourage States to make the Declaration accepting the competence of the Courts to receive petitions from individuals and NGOs, pursuant to Article 34(6) of the Protocol.

15. In the instant case, it should be noted that the Applicant did not hasten to seize the Court. He waited until 26 May 2017 to do so. Throughout this period, he spent time seeking other

7 Judgment, para 48.

8 Judgment, para 49.

remedies internally (request for presidential pardon)[9] and before an international tribunal (The Human Rights Committee), which are not considered by the African Court as remedies that had to be exhausted. This is clearly pointed out in paragraph 57 of the Judgment.

16. According to the Court's settled case-law, the request for presidential pardon is not considered as a LR to be exhausted by applicants. Consequently, the date on which the request for pardon was denied cannot be considered as a starting point for the calculation of the time limit for bringing an application before the African Court. In its judgment of 3 June 2016, in *Mohamed Abubakari v United Republic of Tanzania*, the Court held that "the remedies that must be exhausted [by the Applicants] are ordinary judicial remedies". Obviously, the request for presidential pardon does not fall into this category.

17. Similarly, recourse to an international, universal or regional judicial or non-judicial body cannot constitute a LR. It is by definition an external remedy whose admissibility is predicated upon the exhaustion of LRs. In its Views, on 27 of March 2014, the CDR noted that [The Committee has ascertained, as it is required to do in accordance with the provisions of article 5(2)(a) of the Optional Protocol, that the same question was not under consideration before another international body for purposes of investigation or settlement. It notes that domestic remedies have been exhausted. The State Party has not challenged this finding. The requirements set forth in Article 5(2)(a) of the Optional Protocol are therefore fulfilled.]

18. In fact, the Applicant, weary of the dilatory tactics of the Respondent State, decided to seize this Court six years and two months after the delivery of the Supreme Court judgment dismissing his appeal and upholding his sentence, and more than four years later, the

9 The Republic of Ghana is one of the 29 States that respected the moratorium on executions. In case of a death penalty, it is customary to seek a presidential pardon.
The President of Ghana has always commuted death penalties to life imprisonment. Thus, in 2009, the outgoing President of Ghana, John Agyekum Kufuor, commuted the penalties of all those who had been sentenced to death to life imprisonment, or to an imprisonment term of twenty years for those who had spent a decade on death row. In the same vein, those who had received a death penalty but had fallen seriously ill were released following a medical report to that effect. We have no information as to whether Applicant Dexter Eddie Johnson benefitted from such a measure. https://www.peinedemort.org/document/3481/Grace_presidentielle_Ghana_condamnes_mort
Also, in 2014, on the occasion of the 54th anniversary of the Republic of Ghana, President John Dramani Mahama commuted the death penalties of 21 inmates to life imprisonment. *https://www.peinedemort.org/document/7564/grace_presidentielle_commue_peines_21_condamnes_mort_Ghana*

Views of the HRC. For this Court, all these facts are of no moment!

19. In my opinion, not only does the six years and two months' timeframe for bringing an application before the Court exceeded all the reasonable time limits, but that fact also deserved to be noted. Until this Judgment, never had the African Court stretched its indulgence to such limits and never had it dealt with an issue in such a rapid and uncontested manner.

II. Settlement of the case by the Human Rights Committee

20. Just like Article 56(6) of the Charter and Rule 40(6) of the Rules, Article 56(7) and Rule 40(7) of the Rules are aimed at preserving judicial safeguards by ensuring that a case of human rights violation is not considered by several international courts at the same time. Pursuant to these Articles and Rules, for an application to be admissible, it must "not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or any legal instrument of the African Union". These articles and Rules fail to mention cases where the principle of "*non bis in idem*" has to apply. It simply presents a laconic formula which refers to the principles of the UN Charter.

21. Considering the deadline of six years and two months as reasonable, the Court declared the Application admissible pursuant to Article 56(7) of the Charter and Rule 40(7) of the Rules. It held that the case has been settled "in accordance with either 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." In making such a finding (the HRC's settlement of the case), the Court refers to *Gombert* v *Côte d'Ivoire* of 22 March 2018 in which it stated that: "The Court also notes that the notion of "settlement" implies the convergence of three major conditions: (i) the identity of the parties; (ii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and (iii) the existence of a first decision on the merits."[10]

22. In the instant case, in scrutinising the said three conditions, the Court failed to note that the *Gombert* case was settled by a sub-regional judicial body, namely, the Community Court of Justice of the Economic Community of West African States (ECOWAS),

10 Judgment, para 48.

whereas the *Dexter* case was before a quasi-judicial body, the HRC, whose "decisions" do not constitute res *judicata*.

23. In my opinion, the case has not been "settled" by the HRC. The findings made by the HRC are legally called "Views." As the name suggests, the Views of the HRC merely "note," "observe," "identify" a situation of human rights violations contrary to the International Covenant on Civil and Political Rights. This explains why the Committee uses diplomatic and non-authoritative language at the end of its decision, in that it "*requests* the Respondent State to file, within 180 days, information about the measures taken to give effect to its views, and also *requests* the Respondent State to publish the HRC's Views and have them widely disseminated in the Respondent State". The requests do not create a legally binding obligation on the Respondent State. As a party to the Covenant, the Respondent State must do its utmost to stop the violation.

24. On the contrary, a court decision "settles" the case, that is, it closes the hearing. It settles the dispute by stating the law as it is and, thus, places on the Respondent State an absolute obligation which produces a specific result, and not a best efforts obligation.

25. Since the Court held that the Application was admissible because it was filed within a reasonable time, it should have made an analysis of the notion of settlement for its finding that the Application is admissible and, then, proceeded to consider the merits of the case.

26. Thus, the one and only reason for the inadmissibility of the Application arises from the Applicant's non-observance of the reasonable time to file his Application and not from the HRC's settlement of the case.

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27. Having demonstrated extreme flexibility with respect to the requirement of Article 56(6) of the Charter and Rule 40(6) of the Rules on reasonable time, the Court should also have found the Application admissible pursuant to Article 56(7) of the Charter and Rule 40(7) of the Rules, since the Views of HRC did not amount to a settlement of the case.

Dissenting opinion: TCHIKAYA

Introduction

1. I beg to disagree with the Court's decision of 29 March 2019, as well as the *rationes decidendi* in *Dexter Eddie Johnson v Ghana.* I would have added my vote to the majority opinion, but the arguments in support thereof seem to be insufficient. The reasons for this dissenting opinion are stated below:

2. My dissent focusses on the outcome of the Court's line of reasoning as a whole and on its findings in the operative part. Moreover, as sufficiently shown by the Court, it pays particular attention to matters concerning the protection of the essential aspects of human rights, particularly the integrity of persons and the right to life; *Eddie Johnson* afforded us that opportunity.

3. I regret to disagree with the majority here; yet my dissent reflects my commitment to the protection of the rights in question. My desire to formally record this inevitable sentiment, born out of compelling respect for human rights in accordance with continental legal instruments, is thus aroused. As noted by the Human Rights Committee, Dexter Eddie Johnson was sentenced to death, and should Ghana, the Respondent State proceed[1] to carry out the death sentence, it would violate his rights under Articles 2(1), 3, 6, 5, 7, 14 of the International Covenant on Civil and Political Rights (1966).

4. On 27 May 2004, a US national was killed near Accra, Ghana. Dexter Eddie Johnson was brought to trial, having been charged with committing the crime, which charge he denied. The High Court of Accra convicted him of murder and sentenced him to death on 18 June 2008. Following lengthy internal proceedings marked by Mr. Dexter's challenge to the merits of the death penalty, he brought the matter before the Human Rights Committee.

5. In its Communication in Communication 2177/2012, the 110th Session of the Human Rights Committee of 28 March 2014, in accordance with article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts presented to it show a violation of Article 6, paragraph 1 of the Covenant. The Committee stressed that "the State party is under an obligation to provide the author with an effective remedy, including the commutation of the author's

1 The Optional Protocol entered into force in Ghana on 7 December 2000.

death sentence. The State party is under an obligation to avoid similar violations in the future, including by adjusting its legislation to the provisions of the Covenant".[2] The Respondent State did not take further action. It is in these circumstances that Mr Dexter brought his Application before the Court, which, in its Decision of 30 March 2019, dismissed the Application as inadmissible, a refusal to re-adjudicate on the matter.

6. This Opinion seeks to establish, on the one hand, that it was possible to invoke an exception to *non bis in idem* in the Decision in order to render the *Dexter* Application admissible (I) and, on the other hand, that the decision taken is a setback for the development of the law (II).

I. An exception to *non bis in idem* was possible

7. The Court's interpretation of *non bis in idem* in the *Dexter* case is literal and does not reflect the current position of the principle. I will consider its inappropriate meaning (A), and then discuss the known exceptions which he could be entitled to (B).

A. Literal and inappropriate interpretation of "*non bis in idem*"

8. The Court's reasoning is articulated around the application of Article 56. The Court reiterates: "the fact that the rationale behind the rule in Article 56(7) of the Charter is to prevent member States from being faulted twice in respect of the same alleged violations of human rights."[3] The African Commission has held on the same rule that "this is the *non bis in idem* rule (also known as the principle of prohibition of double jeopardy for the same act, deriving from criminal law) which ensures in this context that no State may be twice prosecuted or convicted for the same alleged violation of human rights". "In fact, this principle is tied up with the recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals".

9. The Court considers this principle to mean, based on its criminal and roman origins, that "no one shall be prosecuted or punished criminally (for a second time) for the same elements of law and fact. The Court further considers that *res judicata* effectively removes

2 HRC, Communication 2177/2012, ***Dexter Eddie Johnson v Ghana***, 28 March 2014, para 9 *et seq*.

3 AfCHPR, *Dexter Edddie Johnson v Ghana*, 30 March 2019, para 59.

any new lawsuit against the same person for the same elements.[4] According to Article 56(7), applications shall be considered if they "do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity […]" Such are the words of Article 56(7) that impacted the Court's deliberation. Since the Respondent State had already been tried in this case, it will no longer be tried a second time by this Court.

10. There are questions which are very relevant to understanding the present case. A reading of the *Dexter* decision does not provide answers thereto. However, the principle invoked by the Court is not absolute. It admits of exceptions, nuances; in fact, exceptions in many already mentioned cases.

11. The ECHR in the Case of *A and B v Norway*, on 15 November 2016, noted that "An individual should have the certainty that when an acquittal or conviction had acquired the force of *res judicata*, he or she would henceforth be shielded from the institution of new proceedings for the same act. This consideration did not apply in a situation where an individual was subjected to foreseeable criminal and administrative proceedings in parallel, as prescribed by law, and certainly not where the first sanction (tax penalties) was, in a foreseeable manner, taken into account in the decision on the second sanction (imprisonment)".[5] Such reasoning of the European court is germane to The *Dexter Eddie Johnson* case. This case, per its determination by the Human Rights Committee, called for additional judicial proceedings. It is not affected by *non bis in idem*, to say the least. Having interpreted the principle literally, the Majority departed from the now well-known exceptions to this principle.

B. The known exceptions to *non bis in idem* should have applied

12. According to the Decision, it is desirable that: "no state may be sued or condemned [more than once] for the same alleged violation of human rights". The *Dexter* case provided at least

4 Art 14(7) of the International Covenant on Civil and Political Rights; Art 4 of the European Convention on Human Rights, para 1 of Additional Protocol 7: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

5 ECHR, Grand Chamber, *A and B v Norway,* 15 November 2016, para 79.

three reasons for raising an exception to the "*non bis in idem"* principle, guaranteed by Article 56(7) of the Charter.

13. The first reason is that the "*bis*" which implies a resumption of an identical case, is absent, is not actually present in the instant case. The facts and the law are different. The Applicant's requests before the Court were underpinned by the Committee's Communication.[6] Requests for compliance with the Committee's views, requests for legislative amendments to the death penalty and requests for damages. The Inter-American Court of Human Rights states it bluntly: "The Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *non bis in idem* principle".[7] The Inter-American Court added that "the *non bis in idem* principle, even if it is a human right recognized under Article 8.4 of the American Convention, is not an absolute right". The most striking fact remains the Respondent State's stubborn refusal to acknowledge the violation noted by the Committee. This alone would have justified a different decision by the Court.

14. The second reason is that it was dictated by the context. The conceptual and legal rigour of human rights was compelling. It was necessary to consider, as did the Committee, that the facts in issue concerned an essential aspect of human rights. As was emphasized by the Inter-American Court of Human Rights in *Rodriguez Velasquez,*[8] relying on Article 4(1), which provides that: "Every person has the right to have his life respected. This right shall be protected by law […]. No one shall be arbitrarily deprived of his life," as well as Articles 5 and 7 of the American

6 On the substance, the Applicant requests the Court to: "a) Find that the mandatory death sentence imposed on the Applicant is a violation of Arts 4, 5 and 7 of the Charter, 6(1), 7, 14(1) and 14(5) of the ICCPR and 3, 5 and 10 of the UDHR. b) Find that the Respondent State has violated Article 1 of the Charter by failing to adopt legislative or other measures to give effect to the Applicant's rights under Articles 4, 5 and 7 of the Charter."

7 IACHR, *Almonacid Arellano and others v Chile*, (Preliminary objections, substance, reparations, fees and costs), 26 September 2006, para 154 *et seq*., The Inter-American Court further notes: "The State cannot, therefore, rely on the *non bis in idem* principle to avoid complying with the order of the Court." para 155.

8 IACHR, *Velasquez Rodriguez v Honduras*, Preliminary Objections, 26 June 1987; the merits, 29 July 1988, Case No. 7920, Inter-Am. CHR, Res. No. 22/86, OEA/ Ser. L/V/II.61, Doc. 44 ; ILM, 1989, p 294.

Convention on Human Rights which guarantee the "right to life and physical integrity". The execution of the sentence which one of the competent organs of the international system (the HRC)[9] had just considered as improper should be considered by the other organs of the system.

15. This major factor explains, in part, why the Applicant resorted to some kind of "foreign shopping", so as to bring his case before "many" international human rights courts. The application was brought before the Court on 26 May 2017, after the Committee had given its decision on 27 March 2014. In conformity with its jurisprudence, whereby reasonable delay is determined on a case-by-case basis and according to the law governing the matter,[10] it allowed it. It should have examined it fully, rather than find it inadmissible.

16. There is a third reason. The Court seems to give the Respondent State "more than its due". The irregularities noted by the Committee persist. The Respondent State should have been ordered by this new tribunal to comply with the norms of international human rights law.[11] According to the law as it is, the operative part of the Committee's judgment still remains, in the instant case, the applicable law. As pointed out by Fatsa Ouguergouz[12] in his commentary on Article 56(7), this provision does not, in any manner whatsoever, prohibit the operation of *lis alibi pendens;* international human rights judges may be called upon, each one in accordance with their competence, to complement each other. On the one hand, this case would enable this Court to lay down its judicial opinion on the *non bis id idem* rule and the basis thereof, as framed in Article 56(7) and, on the other hand, it would have been an opportunity for the Court to make a major judicial contribution to "respect for the right to life" which, as the

9 The HRC stated in its communication: "the automatic imposition of the death penalty in the author's case, by virtue of Section 46 of the Criminal and Other Offences Act, violated the author's rights under article 6, paragraph 1, of the Covenant. The Committee also reminds the State party that by becoming a party to the Covenant it undertook to adopt legislative measures in order to fulfill its legal obligations," para 7.3.

10 AfCHPR, *Minani Evarist v Tanzania*, 21 September 2018: In Beneficiaries of late *Norbert Zongo and others v Burkina-Faso*, the Court stated as follows: " ……the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis", para 51.

11 ECHR, *Margus v Croatia*, 27 May 2014: [A State cannot refuse to execute an order of the Court on grounds of the principle of non bis in idem].

12 F Ouguergouz *The African Charter on Human and Peoples' Rights and the Protocol relating thereto on the establishment of an African Court, Article by article Commentary* (2011) 1024 and following.

International Court of Justice stated, "is a provision that cannot be derogated from".[13]

II. The decision taken is a setback for the development of the law

17. The decision taken is a setback, in view of the development of the law on the subject. On the one hand, it leads to a complete loss of the opportunity to control the rights which would emerge from this case (A) and, on the other hand, it highlights the peculiarities of the case in view of the recent *Gombert* Judgment, rendered in 2018 (B).

A. Lost opportunity of expected control

18. There can be no doubt that a judgment on the merits by this Court would have made its mark in this dispute, rather than in its present form which limits itself to inadmissibility. The Human Rights Committee in its Decision, and in accordance with its applicable law, puts into perspective the idea of control of the Respondent State. Indeed, the decision states in its operative part: "the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the State party". It would not be an overstatement to say that the Court could draw inspiration from certain points in the operative part of the Committee's decision to take a stand. The means that could be available to the Court are dashed by this inadmissibility ruling.

19. Judicial bodies and quasi-judicial bodies that contribute to the effectiveness of human rights in the international sphere have an obligation to complement each other.[14] The Court, in the instant *Dexter* case, can apply regional instruments, in addition to international human rights law. This is, moreover, the useful interpretation that can be made of certain provisions of the Protocol: "The Court shall apply the provisions of the Charter

13 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep 1996, p 226, para 25.

14 See the analyses of RJM Ibáñez *Le droit international humanitaire au sein de la jurisprudence de la Cour interaméricaine des droits de l'Homme [International humanitarian law in the jurisprudence of the Inter-American Court of Human Rights], Revue des droit de l'homme*, 2017, No 11.

and any other relevant human rights instruments ratified by the States concerned". Indeed, conventional drafters expect ordinary interpretation of their instruments; yet, these provisions allow undeniable complementarity of legal means.

20. The Court therefore had the means of controlling rights unknown to the Respondent State and of making them applicable. In addition, there was a new legal basis, namely the findings made by the Human Rights Committee and its orders. The *Dexter* case differs from the Court's jurisprudence in *Jean-claude Roger Gombert v Cote d'Ivoire,* 22 March 2018.

B. The Dexter case has peculiarities that *Jean-claude Roger Gombert*[15] of 2018 did not have

21. For the Court, the conditions of admissibility provided for in Article 56 of the Charter are cumulative. A condition would be deemed fulfilled only if the application is fully considered.[16] The Court considered that this was not the case in the instant case, as it was in the recently decided case of *Jean-Claude Roger Gombert*. In the case at bar, the Application did not meet the conditions set forth in Article 56(7) of the Charter, so the Court declared it inadmissible.[17]

22. A number of factors immediately show that the *Gombert* case and the *Dexter* case have different contexts. *Gombert* concerns the sale of commercial property, unlike *Dexter*. Willy-nilly, the urgency and degree of seriousness are not the same with respect to the issues at stake. This is apparent from the Committee's request "to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the State party".[18] This aspect of urgency and time limit could have informed the Court.

23. Another factor, purely legal, is that the Application should be admissible because it was possible for the Court to consider that

15 AfCHPR, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, 28 March 2018. See Joint Separate Opinion of Judge Ben Kioko and Judge Angelo V Matusse.

16 ACHPR, Communication 277/2003, *Spilg and others v Botswana* (hereinafter referred to as "*Spilg v Botswana"*), para 96 and ACHPR, Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Egypt* (hereinafter referred to as *"Egyptian Initiative v Egypt")*, para 80.

17 The Court upheld the preliminary objection of inadmissibility under Article 56(7) of the Charter, para 25.

18 HRC, *Dexter Eddie Johnson Communication*, *supra*, para 10.

the issue in *Dexter*, as circumscribed by the Committee, had not yet been settled. There is still a perpetuation of the violation and a mandatory death penalty is still part of the domestic law of the Respondent State. At paragraph 7.3 of its Communication, the Committee clarified this point, referring to its jurisprudence to the effect that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant", reiterating that this is so "where the death penalty is imposed without regard to the defendant's personal circumstances or the circumstances of the particular offence.[19] The existence of a *de facto* moratorium on the death penalty is not sufficient to make a mandatory death sentence consistent with the Covenant".[20] The Court could have shown a sense of initiative.

In the light of the foregoing, I append this dissenting opinion.

19 HRC, ***Communication, Mwamba v Zambia***, 10 March 2010, para 6.3; ***Chisanga v Zambia***, 18 October 2005, para 7.4; ***Kennedy v Trinidad and Tobago***, 26 March 2002, para 7.3; ***Thompson v Saint Vincent and the Grenadines***, 18 October 2000, para 8.2.

20 HRC, Communication *Weerawansa* v *Sri Lanka*, 17 March 2009, para 7.2.