

A missed opportunity on the mandatory death penalty: a commentary on *Dexter Eddie Johnson v Ghana* at the African Court on Human and Peoples' Rights

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ABSTRACT: In March 2019, the African Court on Human and Peoples' Rights declared *Dexter Eddie Johnson v Ghana* inadmissible on the basis that the case had already been decided by the UN Human Rights Committee and therefore was 'settled' under article 56(7) of the African Charter. The UN Human Rights Committee had previously found Ghana in violation of its international human rights obligations by sentencing Johnson to a mandatory death sentence for murder, reaffirming a considerable body of comparative and international jurisprudence that the mandatory death penalty was a human rights violation. In finding the case inadmissible, the African Court construed Ghana's violation narrowly, as encompassing only the initial 2008 death sentence. However, conceiving of Ghana's violation more broadly, including its failure over ten years to commute Johnson's death sentence or offer him a sentencing hearing, and its failure to implement the 2014 finding of the UN Human Rights Committee, would have been consistent with the Court's rules and prior jurisprudence. Certainly, the combination of the delay, conditions on death row, and mental state of the petitioner would establish an additional human rights violation beyond the initial mandatory death sentence. Although the UN Human Rights Committee and the African human rights system have reciprocal rules to prevent re-examination of the same facts twice, the African Court was more restrictive in its admissibility holding in *Johnson* than the Committee would have been. The Court therefore missed an opportunity to contribute to the growing jurisprudence against the mandatory death penalty and has left Johnson without a remedy.

TITRE ET RÉSUMÉ EN FRANCAIS:

Une opportunit e manquee au sujet de la peine de mort obligatoire: commentaire de l'arret de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Dexter Eddie Johnson c. Ghana*

R ESUM E: En mars 2019, la Cour africaine des droits de l'homme et des peuples a d eclar e irrecevable la requ ete en l'affaire *Dexter Eddie Johnson c. Ghana*, au motif que le cas avait d eja fait l'objet d'un r eglement par le Comit e des droits de l'homme des Nations Unies et avait par cons equent  et e « r egl e » au sens de l'article 56(7) de la Charte africaine. Le Comit e des droits de l'homme des Nations Unies avait pr ec edemment conclu que le Ghana avait viol e ses obligations internationales en mati ere de droits de l'homme en condamnant Johnson  a une peine de mort obligatoire

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pour meurtre, réaffirmant ainsi une jurisprudence établie en droit comparé et international selon laquelle la peine de mort obligatoire constitue une violation des droits de l'homme. En déclarant la requête irrecevable, la Cour africaine a fait une interprétation restrictive de la violation commise par le Ghana comme n'incluant que la peine de mort initiale prononcée en 2008. Cependant, concevoir la violation du Ghana plus largement, y compris son incapacité pendant dix ans à commuer la peine de mort prononcée contre Johnson ou à lui accorder une audience sur la détermination de sa peine, et son incapacité à mettre en œuvre les conclusions du Comité des droits de l'homme de 2014, auraient été conformes aux règles de la Cour et de sa jurisprudence antérieure. Certes, la combinaison du retard, des conditions dans le couloir de la mort et l'état mental du requérant établirait une violation supplémentaire des droits de l'homme allant au-delà de la peine de mort obligatoire initiale. Bien que le Comité des droits de l'homme des Nations Unies et le système africain des droits de l'homme disposent de règles analogues pour empêcher le réexamen des mêmes faits à deux reprises, la Cour africaine a été plus restrictive quant à la recevabilité de l'affaire *Johnson* que le Comité l'aurait été. La Cour a donc raté une opportunité de contribuer à la jurisprudence croissante contre la peine de mort obligatoire et a laissé Johnson sans recours.

KEY WORDS: African Court on Human and Peoples' Rights, comparative constitutional law, admissibility, Ghana, *Johnson v Ghana*, mandatory death penalty, *non bis in idem*, *res judicata*

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1 BACKGROUND

On 28 March 2019, the African Court on Human and Peoples' Rights (African Court) declared the matter of *Dexter Eddie Johnson v Ghana* inadmissible on the grounds that the case had already been decided by the UN Human Rights Committee in Geneva.¹ The decision was an expansion of article 56(7) of the African Charter on Human and Peoples' Rights (African Charter), which prevents the African Court from considering any case that has been 'settled by these 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 provisions of the present Charter.'² In declaring the case inadmissible, the African Court refused to join a growing global consensus that mandatory capital punishment is a human rights violation because it overpunishes, and therefore constitutes cruel and degrading treatment.³ As explained below, however, the African Court could have ruled that Ghana's continuing failure to commute Johnson's death sentence or implement the views of the UN Human Rights Committee, was a separate violation

1 *Dexter Eddie Johnson v Ghana*, Application 016/2017, African Court on Human and Peoples' Rights, Ruling (Jurisdiction and Admissibility) (28 March 2019).

2 African Charter on Human and Peoples' Rights (1982) 21 ILM 58.

3 A Novak *The global decline of the mandatory death penalty: Constitutional jurisprudence and legislative reform in Africa, Asia, and the Caribbean* (2014) 6-7.

of the African Charter and was not precluded by article 56(7). The result is that the African Court missed an opportunity to join the chorus of courts around the world that have found the mandatory death penalty to be cruel and degrading treatment.

Dexter Johnson is a British national convicted in 2008 of murdering an American national four years earlier, which resulted in a mandatory death sentence under Ghanaian law. In a subsequent constitutional challenge, the Ghanaian Supreme Court upheld the mandatory death penalty in a disastrous 2011 opinion that involved significant statutory misinterpretation and disregarded weighty comparative jurisprudence.⁴ Perhaps most troubling, the Supreme Court's decision mischaracterised the nature of a discretionary death penalty in which a judge could weigh aggravating and mitigating factors and appropriately tailor a death sentence to the 'most serious crimes' in accordance with article 6 of the International Covenant on Civil and Political Rights (ICCPR).⁵ The majority created a straw man, predicting chaos and uncertainty if judges had discretion to substitute the death penalty with a lesser punishment.⁶ By contrast, a dissent by Justice Samuel Date-Bah found jurisprudence from throughout the common law world 'irrefutable' and noted that Ghana's constitutional provisions were *in pari materia* with those of other common law jurisdictions. He believed that a determination that all murders were equally heinous and deserving of death was 'an unreasonably inflexible ideological position, belied by actual human experience'.⁷

With the door closed in domestic courts, Johnson's legal team, including lawyers working pro bono with the Death Penalty Project in London, challenged Ghana's mandatory death sentence at the UN Human Rights Committee in Geneva. On 27 March 2014, the Committee affirmed its earlier findings against the mandatory death penalty in the Commonwealth Caribbean and found that Johnson's death sentence violated article 6(1) of the ICCPR, which prohibits arbitrary deprivation of life.⁸ The Committee reiterated its earlier views that a de facto moratorium on the death penalty or the existence of a clemency mechanism to seek a commutation of the sentence did not make a mandatory death sentence consistent with the right to life.⁹ The Committee believed that Ghana was in breach of the right to life at Article 6 of the ICCPR and therefore did not reach the alternative grounds that the mandatory death penalty constituted cruel and degrading punishment (article 7) or the right to a fair trial (article 14).

4 *Dexter Johnson v Republic* (2011) 2 SCGLR 601. A Novak 'The mandatory death penalty in Ghana: a comparative constitutional perspective on *Dexter Johnson v Republic*' (2014) 12 *Cardozo Public Law Policy and Ethics Journal* 669.

5 International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

6 *Johnson* (n 4) 692-93, 699.

7 *Johnson* (n 4) 622 (Date-Bah JSC dissenting).

8 *Johnson v Ghana*, Communication 2177/2012, UNHR Committee (27 March 2014), UN Doc CCPR/C/110/D/2177/2012.

9 *Weerawansa v Sri Lanka*, Communication 1406/2005, UNHR Committee (17 March 2009), UN Doc CCPR/C/95/D/1406/2005; *Thompson v St Vincent and the Grenadines*, Communication 806/1998, UNHR Committee (18 October 2000), UN Doc CCPR/C/70/D/806/1998.

Finally, the Committee added that Ghana was obligated to provide Johnson with an effective remedy, including commutation of his death sentence.¹⁰

Ghana never implemented the UN Human Rights Committee's views and Johnson remained under an automatic death sentence. For that reason, Johnson's legal team approached the African Court in 2017 to increase pressure on the Ghanaian government to respect its international human rights obligations. On 28 September 2017, the African Court issued an Order for Provisional Measures to prevent Johnson's execution while the case was still pending.¹¹ Finally, on 28 March 2019, the African Court ruled that Johnson's case was inadmissible owing to the earlier UN Human Rights Committee ruling. As a result, the African Court did not reach the merits of Johnson's application and missed an opportunity to clearly and unequivocally condemn the mandatory death penalty as a human rights violation.

2 GHANA'S MANDATORY DEATH PENALTY IN GLOBAL CONTEXT

The death penalty was mandatory for murder at English common law, mitigated only by the monarch's frequent commutations of death sentences, often to transportation to a penal colony.¹² The punishment passed to most former British colonies, with three exceptions. The first was the United States of America, which as early as the 1790s began to separate murder into degrees and use judicial discretion in sentencing.¹³ The second exception was British India where the 1860 Penal Code allowed a judge to reduce a death sentence to life imprisonment with valid reasons, except for murder committed by a life-term prisoner.¹⁴ The third exception was South Africa and neighboring countries, which developed the doctrine of extenuating circumstances, whereby a judge could reduce a death sentence based on certain types of mitigating factors.¹⁵

The 1892 Criminal Code in Ghana, like the penal codes of most colonies in the Caribbean, West and East Africa, and Southeast Asia, provided for a mandatory death penalty for murder. The post-

10 *Johnson* (UNHRC) (n 8) paras 7.4, 9.

11 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Order for Provisional Measures (28 September 2017).

12 JM Beattie *Policing and punishment in London, 1660-1750* (2001) 362-63.

13 Pennsylvania was the first state to make the change, in 1793. ER Keedy 'History of the Pennsylvania statute creating degrees of murder' (1949) 97 *University of Pennsylvania Law Review* 759 at 771.

14 India Penal Code Act, Number 45 of 1860 secs 302 and 303; D Skuy 'Macaulay and the Indian Penal Code of 1862: the myth of the inherent superiority and modernity of the English legal system compared to India's legal system in the nineteenth century' (1998) 32 *Modern African Studies* 513 at 513, 518-20, 526-27.

15 Criminal Procedure and Evidence (Amendment) Act 46 of 1935; A Novak 'Capital sentencing discretion in Southern Africa: a human rights perspective on the doctrine of extenuating circumstances' (2014) 14 *African Human Rights Law Journal* 24.

independence Criminal Offences Act of 1960 retained much of the colonial criminal law architecture except that it abolished juvenile corporal punishment.¹⁶ Even in the early years after independence, Ghana used the death penalty relatively infrequently, though under military dictatorship in the 1970s and 1980s a separate system of military courts authorized firing squad for civilians accused of national security offenses.¹⁷ Today, Ghana retains the mandatory death penalty for murder, genocide, attempted murder by an incarcerated prisoner, and treason.¹⁸

By the time of Johnson's constitutional challenge to the mandatory death penalty, the Ghanaian government was seriously considering abolition of the death penalty. In 2012, a constitutional review commission presented a White Paper to then-President John Atta Mills advocating death penalty abolition.¹⁹ The constitutional amendments must be passed by Parliament and then approved in a public referendum with a super majority, though in principle it has the support of the two major parties.²⁰ A 2015 public opinion survey in Ghana revealed that the large plurality (48.3%) of respondents strongly opposed the death penalty and only a small minority (8.6%) were strongly in favour. Seven in ten supported a discretionary death sentence instead of a mandatory one.²¹ As to its international posture, Ghana routinely abstains on the UN General Assembly and UN Human Rights Council resolutions calling for abolition of the death penalty.²² As no executions have been carried out since 1993, Amnesty International declares Ghana *de facto* abolitionist.²³

The decline of the mandatory death penalty in the English-speaking world over the last 25 years is the product of a remarkable confluence of grassroots advocacy, strategic litigation, and intervention by United Nations and regional human rights systems. The first common law countries to abolish the mandatory death penalty were the United States and India. In the United States, the Supreme Court struck down North Carolina's recently-passed mandatory death sentence in 1976 on the grounds that it was 'arbitrary' insofar as it constrained a judge's

- 16 RB Seidman and JD Abaka Eyison 'Ghana' in A Milner (ed) *African penal systems* (1969) at 68-69.
- 17 J Appiahene-Gyamfi 'Crime and punishment in the Republic of Ghana: a country profile' (2009) 33 *Journal of Comparative and Applied Criminal Justice* 309 at 313; B Agyeman-Duah 'Ghana, 1982-6: the politics of the P.N.D.C.' (1987) 25 *Journal of Modern African Studies* 613 at 625-627.
- 18 Criminal Offences Act, No 29 of 1960, secs 46, 49, 49A, 180.
- 19 Republic of Ghana *White paper on the report of the Constitutional Review Commission of Inquiry* (June 2012) 44.
- 20 Ghana Constitution art 290 (1993).
- 21 J Tankebe, KE Boakye, AP Atupare *Public opinion on the death penalty in Ghana: final report* (2015) at ix.
- 22 'Moratorium on the use of the death penalty' UN General Assembly, UN Doc A/RES/69/186 (18 December 2014); 'Moratorium on the use of the death penalty' UN General Assembly, UN Doc A/RES/71/187 (19 December 2016); 'Moratorium on the use of the death penalty' UN General Assembly, UN Doc A/RES/73/175 (17 December 2018).
- 23 Amnesty International Global Report *Death Sentences and Executions 2018* (April 2019) 49.

sentencing discretion while failing to control the discretion of other actors in the criminal justice process.²⁴ In India in 1983, the Supreme Court used a similar rationale to abolish the mandatory death penalty for prisoners already serving a life sentence, the remaining exception at Section 303 of the Penal Code.²⁵ These two decisions have gone global, widely cited in later Constitutional challenges to the mandatory death penalty.

The Death Penalty Project in London, working with pro bono lawyers in London law firms, represented hundreds of death row inmates in the Commonwealth Caribbean before the Judicial Committee of the Privy Council, then the highest court of appeal for English-speaking Caribbean jurisdictions.²⁶ In a famous series of cases, the Privy Council found the mandatory death penalty unconstitutional on the grounds that it overpunished, and therefore constituted cruel and degrading treatment.²⁷ The Privy Council also accepted a fair trial challenge, as the punishment deprives death row inmates of a sentencing hearing. The decision was reaffirmed in 2018 by the Caribbean Court of Justice, which invalidated the mandatory death penalty in Barbados, the last holdout in the region.²⁸ The Privy Council's long line of jurisprudence was reaffirmed by complementary judgments from the Inter-American Court and Commission of Human Rights and from the UN Human Rights Committee.²⁹

After the victories in the Caribbean, the Death Penalty Project and its partners succeeded in challenging the mandatory death penalty in Malawi, Uganda, and Kenya.³⁰ Like the Commonwealth Caribbean countries, these jurisdictions developed enormous death rows but had not executed anyone in years. In addition, these countries have bills of rights that are modeled on the ICCPR and other international

24 *Woodson v North Carolina* (1976) 428 US 280.

25 *Mithu v Punjab* (1983) 2 SCR 690.

26 L Hughes-Hallett 'Death to death row' (March/April 2015) *The Economist* 1843 Magazine; A Boon, 'Cause lawyers in a cold climate: the impact(s) of globalization on the United Kingdom' in A Sarat and S Scheingold (eds) *Cause lawyering and the State in a Global era* at 169-70.

27 *Reyes v Queen* [2002] UKPC 11 (appeal from Belize); *Queen v Hughes* [2002] 2 AC 259 (PC) (appeal from Saint Lucia); *Fox v Queen* [2002] 2 AC 284 (PC) (appeal from Saint Kitts and Nevis); *Balson v State* [2005] 4 LRC 147 (PC) (appeal taken from Dominica); *Coard v Attorney General* [2007] UKPC 7 (appeal taken from Grenada); *Queen v Monelle* Criminal Case 15/2007 (Antigua and Barbuda High Court of Justice, 18 September 2008); *Bowe v Queen* (2006) 68 WIR 10 (PC) (appeal taken from Bahamas).

28 *Nervais and Severin v Queen* [2018] CCJ 19 (AJ) (27 June 2018).

29 *Thompson v Saint Vincent and the Grenadines*, Communication 806/1998, UNHR Committee, UN Doc CCPR/C/70/D/806/1998 (2000); *Edwards v Bahamas* case 12.067, Inter-American Commission on Human Rights, Report No 48/01, OEA/Ser.L/V/II.111, doc. 20 (2000); *Hilaire, Constantine, and Benjamin v Trinidad and Tobago*, Inter-American Court of Human Rights (Ser. C) No. 94 (21 June 2002).

30 *Kafantayeni v Attorney General* [2007] MWHC 1; *Attorney General v Kigula* [2009] 2 EALR 1 (Uganda SC); *Muruatetu v Republic* (14 December 2017) Petitions 15/2015 and 16/2015 (Kenya SC).

instruments, as in many former colonies.³¹ Ghana's Constitution is representative of this template, as it contains a right to life, right to human dignity, right to be free from cruel and degrading treatment, and right to a fair trial.³² A constitutional challenge also succeeded in Bangladesh, which has a penal code derivative of India's 1860 Penal Code.³³ However, challenges in Malaysia and Singapore failed because those two Constitutions lack some of the important human rights protections found in other postcolonial constitutions or in international instruments.³⁴ Seen in this context, the Ghana Supreme Court decision was highly aberrational, running contrary to the Commonwealth-wide trend, as Ghana has a modern constitution with an elaborate bill of rights, unlike Malaysia and Singapore.

Reflecting the global trend away from mandatory capital punishment, both the UN Human Rights Committee and the African Commission on Human and Peoples' Rights (African Commission) have issued General Comments on the Right to Life that address the mandatory death penalty. According to the African Commission's General Comment 3, issued in 2015, '[i]n no circumstances shall the imposition of the death penalty be mandatory for an offence'.³⁵ This falls within the scope of the African Charter's prohibition on the arbitrary deprivation of life at article 4.³⁶ In 2018, the UN Human Rights Committee issued General Comment 36, which relates to article 6 on the right to life under the ICCPR. According to the Committee, 'mandatory death sentences that leave domestic courts with no discretion on whether or not to designate the offence as a crime entailing the death penalty, and on whether or not to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature'.³⁷ The General Comments serve dual roles, reflecting the consensus of state practice while also laying out normative constraints on state behaviour. The abolition of the mandatory death penalty is a successful example of how domestic constitutional litigation has helped alter international norms on capital punishment.

31 W Dale 'The making and remaking of Commonwealth constitutions' (1993) 42 *International and Comparative Law Quarterly* 67 at 67-68; AW Munene 'The bills of rights and constitutional order: a Kenyan perspective' (2002) 2 *African Human Rights Law Journal* 135 at 154; M Ndulo, R Kent 'Constitutionalism in Zambia: past, present and future' (1996) 40 *Journal of African Law* 256 at 263.

32 Ghana Constitution arts 13, 15, 19 (1993).

33 *Bangladesh Legal Aid and Services Trust v Bangladesh* (2010) 30 BLD (HCD) 194.

34 *Yong Vui Kong v Public Prosecutor* [2010] SGCA 20; *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 (CA).

35 African Commission on Human and Peoples' Rights, General Comment 3 on the African Charter on Human and Peoples' Rights: the right to life (article 4), adopted at 57th Ordinary Session of the African Commission on Human and Peoples' Rights (4 to 18 November 2015).

36 African Charter on Human and Peoples' Rights (1981), art 4.

37 General comment 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UNHR Committee (30 October 2018), UN Doc CCPR/C/GC/36, at para 37.

3 THE AFRICAN COURT RULING IN *JOHNSON V GHANA*

The African Court ruled with a majority of 9 to 1 that Dexter Johnson's application was inadmissible, and therefore the Court did not reach the merits of the mandatory death penalty challenge. By a vote of 8 to 2, the Court found that the UN Human Rights Committee's previous findings precluded consideration of the mandatory death penalty challenge by the African Court.³⁸

The applicant's submissions traced the Ghanaian constitutional litigation through the Supreme Court decision in 2011 and detailed his two clemency petitions to the President in December 2011 and April 2012. The application also detailed the UN Human Rights Committee's March 2014 findings that Ghana's mandatory death penalty violated article 6(1) of the ICCPR. The applicant argued that the mandatory death penalty in Ghana violated the right to life (article 4 of the African Charter), prohibition on cruel and degrading treatment (article 5), right to a fair trial (article 7), and the corresponding rights under the ICCPR and Universal Declaration of Human Rights. The applicant sought a declaration from the African Court that Ghana should take immediate steps to substitute the applicant's death sentence with a lesser sentence and provide legislative changes in other mandatory death cases. The Court agreed that it had jurisdiction in the case as Ghana was a state party and Johnson was an actual victim.

Turning to admissibility, the African Court listed the seven criteria in Rule 40 of the Court's rules, which are based on article 56 of the African Charter. The application must not be (1) anonymous and must be (2) compatible with the African Charter. In addition, the application cannot be (3) disparaging or insulting or (4) based exclusively on news articles. The application must be (5) filed after exhausting local remedies and (6) in a timely manner. Finally, and most relevant here, the application must not (7) deal with a case that had been settled by the parties already, in accordance with the UN or African Charters. The Court found the case was timely, owing to the applicant's indigence and the time spent pursuing the clemency application and the communication to the UN Human Rights Committee. The applicant further argued that the UN Human Rights Committee's decision did not preclude consideration by the African Court, since it did not address any matter related to the UN or African Charters and was not 'settled' insofar as Ghana did not comply with the Committee's views.

The African Court, however, ruled that the last prong of the admissibility test, that the case had already been 'settled' in accordance with the UN and African Charters, rendered Johnson's application inadmissible. A case was 'settled' if it had previously been adjudicated if three major conditions had been fulfilled. First, the parties were identical. Second, the two applications at the UN Human Rights Committee and the African Court were the same or derivative, or at

least ‘flow[ed] from a request made in the initial case’. And third, the previous application resulted in a final decision on the merits. The African Commission had previously determined that a case was inadmissible if it involved the ‘same parties, the same issues and ... [was] settled by an international or regional mechanism’.³⁹ The Court found all three conditions fulfilled and therefore the case had already been ‘settled’. Although the Human Rights Committee’s views were not based on the UN or African Charters, but rather the ICCPR, they involved nearly identical human rights provisions to those contained in the African Charter. To the Court, ‘it does not matter that the decision of the HRC has been implemented or not’ or that the decision ‘is classified as binding or not’. Although the Human Rights Committee was not a ‘court’, its experts were not ‘judges’, and its views were not ‘decisions’, the underlying rationale for article 56(7) of the African Charter was to protect a state from having to account more than once for the same human rights violation.⁴⁰ Decisions of other international or regional tribunals operated a ‘res judicata’ principle that prevented relitigating them elsewhere.

Two Judges dissented. The first, Judge Rafâa Ben Achour of Tunisia, argued that Johnson’s claim was inadmissible not because it had been ‘settled’ by the UN Human Rights Committee, but because it was untimely. He rejected the majority’s ruling that the UN Human Rights Committee’s decision ‘settled’ the case for purposes of article 56(7) of the African Charter. However, he explained that six years and six months had passed from the Supreme Court of Ghana’s decision which exhausted domestic remedies and the application to the African Court, longer than the longest ‘reasonable time’ period upheld by the Court to that point, five years and five months. According to Judge Achour, only judicial remedies count for ‘exhausting domestic remedies’, so non-judicial relief such as seeking clemency or applying to the UN Human Rights Committee would not toll the time period.⁴¹ This is in my view a debatable interpretation. Seeking a pardon and petitioning the UN Human Rights Committee have real costs, raising complex legal issues and requiring significant legal fees. Johnson was also indigent. Given this context, an interpretation that a delay of six years and six months is timely versus five years and five months is an equally defensible interpretation of the law.

The second dissenting Judge, Judge Blaise Tchikaya of the Republic of Congo, similarly rejected the majority’s holding that Johnson’s case had been ‘settled’ by the UN Human Rights Committee. Tchikaya argued that the Court’s decision was a ‘setback for human rights development’ and added that an exception to the *non bis in idem* principle should have applied. *Non bis in idem* required a binding court judgment that was *res judicata*, that is, already judged. The principle derived from criminal law and was intended to protect a defendant’s

39 *Johnson* (n 1) para 48.

40 *Johnson* (n 1) paras 54-55.

41 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples’ Rights, Dissenting Opinion of Judge Rafâa Ben Achour (28 March 2019).

rights after he or she had previously been prosecuted. Tchikaya argued that the UN Human Rights Committee was not a prior judgment: it was not a court, its ‘views’ were not a decision, and its experts were not judges. In addition, the facts were not the same. The challenge at the UN Human Rights Committee was whether Johnson’s mandatory death sentence was compliant with article 6 of the ICCPR, while the challenge at the African Court was whether Ghana’s *continued refusal* to commute Johnson’s mandatory death sentence or provide him a sentencing hearing violated the African Charter.⁴² This was a new and greater harm, as Johnson faced the mental anguish on death row over many years from the initial sentencing decision. In my view, Judge Tchikaya’s decision is particularly convincing both because it directly addresses rather than disregards Ghana’s actual violation, which the majority did not do, and because it better aligns with the purposes of the African Charter to protect individuals’ human rights and complement other human rights regimes like that created by the ICCPR.

4 CONCEIVING OF GHANA’S VIOLATION AS ‘CONTINUING’

The African Court’s decision was not inevitable. The rule prohibiting reconsideration of a human rights violation that had been considered elsewhere serves the purposes of both administrative efficiency and consistent jurisprudential development, so that the human rights mechanisms do not conflict. In the current case, however, administrative efficiency was only a weak consideration since the case had been fully briefed and a consistent jurisprudential development was not an issue, as the *Johnson* case could have been distinguished from the African Court’s prior precedent while still retaining the integrity of article 56(7).

Perhaps the best argument in favor of article 56(7) is that such a rule is reciprocal to those at other regional and international tribunals. The UN Human Rights Committee does not accept petitions that have been considered by regional tribunals, including the African Court, in order to ‘avoid unnecessary duplication’ at the international level.⁴³ Article 56 of the African Charter and Rule 40 of the Rules of the African Court are the reciprocal provisions of article 5(2) of the First Optional Protocol to the ICCPR and Rule 99 of the UN Human Rights Committee, which prohibit consideration of any case that had previously been considered by other international tribunals. Article 5(2) of the First Optional Protocol to the ICCPR, states in relevant part: ‘The Committee shall not consider any communication from an individual unless it has ascertained that the same matter is not being

42 *Dexter Eddie Johnson v Ghana*, Application 016/2017, African Court on Human and Peoples’ Rights, Dissenting Opinion of Blaise Tchikaya (28 March 2019).

43 UNHR Committee, ‘Procedure for complaints by individuals under the human rights treaties’, <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx> (accessed 13 October 2019).

examined under another procedure of international investigation or settlement'.⁴⁴

Rule 99 of the UN Human Rights Committee provides more specific guidance. Under Rule 99, a case is inadmissible if it fails to meet any of six criteria: (1) it is anonymous; (2) the applicant was not an actual victim; (3) the communication is an abuse of the right of submission because it is frivolous, duplicitous, or untimely; (4) the communication is not incompatible with the purposes of the Covenant; (5) the matter was already examined 'under another procedure of international investigation or settlement'; or (6) the individual has not exhausted all domestic remedies.⁴⁵ These criteria are almost identical to article 56(7) of the African Charter. Furthermore, the Human Rights Committee found a communication admissible in *Prince v South Africa* (2007) even though the African Commission had already dismissed the complaint. The Committee found that the complaint was no longer 'being examined' by the Commission and therefore was eligible to be considered on the merits.⁴⁶ The Human Rights Committee therefore is less strict about the application of article 5 of the ICCPR than the African Court is with article 56 of the Charter.

For three reasons, however, the African Court should have considered Ghana's violation as continuing, as new and separate harm than that considered by the UN Human Rights Committee. First, in death penalty cases, delay and conditions on death row may create a human rights violation that is derivative of but conceptually separate from the initial death sentence.⁴⁷ Johnson had been on death row in Ghana for ten years by the time of the African Court's final ruling. The initial death sentence was determined to be a violation of article 6 of the ICCPR, but was Ghana's *only* violation the passing of the initial mandatory death sentence in 2008? To me, it appears possible to consider that Ghana's violation of the African Charter was not just the 2008 death sentence (already found to be a violation by the UN Human Rights Committee and therefore inadmissible), but rather the failure over ten years to rectify the violation and either remove Johnson from death row or provide him with a sentencing hearing. The African Court did not address when a state's failure to comply with its international obligations over a long period of time could become a separate violation of the African Charter.

Second, the controlling precedent at the African Court could be distinguished from the *Johnson* case, as it did not involve a continuing violation of the African Charter. In *Johnson v Ghana*, the majority and

44 First Optional Protocol to ICCPR (1966), art 5(2)(a).

45 Rules of procedure of the Human Rights Committee, UNHR Committee (9 January 2019), UN Doc CCPR/C/3/Rev.11 (2019).

46 *Gareth Anver Prince v South Africa*, Communication 1474/2006, UNHR Committee (31 October 2007), UN Doc CCPR/C/91/D/1474/2006, para 6.2.

47 P Hudson 'Does the death row phenomenon violate a prisoner's human rights under international law' (2000) 11 *European Journal of International Law* 833 at 844-847. The UNHR Committee has not found that delay *alone* constitutes a violation of Article 7 of the ICCPR, but a violation may arise when combined with conditions of death row and the mental state of the prisoner.

one of the dissents emphasised the African Court's March 2018 decision in *Jean-Claude Roger Gombert v Côte d'Ivoire*, which held that a ruling of the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) precluded consideration of the same matter by the African Court.⁴⁸ In that case, the ECOWAS Court issued a judgment on the merits finding no violation of the ECOWAS Treaty where a seller of property failed to convey a plot of land to a buyer after payment had been made.⁴⁹ When the buyer of the property filed a complaint at the African Court, the judges found that the matter had already been 'settled' by the ECOWAS Court.

However, the *Gombert* judgment has two notable features that distinguish it from *Dexter Johnson v Ghana*. First, the ECOWAS Court judgment was actually a final ruling of a court, the UN Human Rights Committee's views are non-binding recommendations from experts. Nonetheless, I accept the reciprocity of the two organisation's rules not to revisit the other body's rulings. Second, and more importantly, the UN Human Rights Committee found Ghana in violation of the ICCPR and at the time of the application to the African Court, Ghana was still in violation. By contrast, Côte d'Ivoire had not been found to be in violation of the ECOWAS Treaty or the African Charter. This is an important point because Dexter Johnson claimed that Ghana had violated the African Charter *by failing to comply* with the UN Human Rights Committee's Views. In other words, his application to the African Court could have been construed not as a challenge to his original death sentence, but as a challenge to Ghana's subsequent and continuing failure to rectify the human rights violation. The *Gombert* case would not have prevented such a reading.

Finally, the African Court's invocation of the *non bis in idem* rule as the rationale for article 56(7) did not preclude an interpretation in which Ghana's violation was not the 2008 sentence alone but the decade-long failure to rectify it. The *non bis in idem* principle is a core protective mechanism found in most of the world's legal systems. In English Common Law, it may be conceived as a prohibition on double jeopardy or as 'autrefois acquit, autrefois convict' (previously acquitted, previously convicted). It also operates as the principle of *res judicata pro veritate habetur* (a thing adjudged is regarded as truth), which operates as a principle of finality in continental European legal systems. The prohibition on double jeopardy is also codified in international human rights instruments.⁵⁰ Conway writes that the rule is derived from Roman law and has Greek and Biblical roots.⁵¹ However, the *non bis in idem* principle as originally conceived only applies to criminal

48 *Jean-Claude Roger Gombert v Côte d'Ivoire*, Application 38/2016, African Court on Human and Peoples' Rights, Judgment (22 March 2018).

49 *La Société Agriland v Côte d'Ivoire*, Judgment ECW/CCJ/JUD/07/15, ECOWAS Community Court of Justice (24 April 2015).

50 D Bernard 'Ne bis in idem – Protector of defendants' rights or jurisdictional pointsman?' (2011) 9 *Journal of International Criminal Justice* 863 at 864.

51 G Conway 'Ne bis in idem in international law' (2003) 3 *International Criminal Law Review* 217 at 221-22.

offenses and not to disciplinary or administrative measures.⁵² Therefore, a ruling from the UN Human Rights Committee, which is non-binding and not a judgment of a court of law, could have been distinguished from a ruling of an international or regional court on this basis.

Furthermore, the world's legal systems differ as to whether they apply *res judicata* to 'offences' or to 'facts'. For instance, van den Wyngaert and Stessens write that, if a person took prohibited drugs across the border from country A to country B, jurisdictions differ as to whether that person could be prosecuted for export of drugs in country A and import of drugs in country B. If *res judicata* applied to offences only, and not to facts, then the defendant could be tried twice; that would not be true if a same-facts analysis were used. European civil law systems frequently use a 'facts' analysis, while Common Law systems tend to use an 'offences' analysis.⁵³ The African Court could well have used a broader test encompassing Ghana's full range of conduct, rather than the narrow violation of passing a mandatory death sentence initially. The UN Human Rights Committee only considered whether the initial mandatory death sentence in 2008 was a violation of the ICCPR. However, Ghana's subsequent conduct, including its denial of clemency and its failure to implement the UN Human Rights Committee's Views, not to mention more than ten years (at this point) of delay on death row, may well have been violations of the African Charter that were not precluded by the earlier UN Human Rights Committee decision.

5 CONCLUSION

Article 56(7) and the reciprocal rules at other regional and international courts prohibiting the 're-litigation' of issues 'settled by' other human rights bodies exist to conserve resources and prevent conflicting judgments. It is a rule designed to reduce inefficiencies and inconsistencies caused by forum shopping. It certainly does not have the gravity of the prohibition on double jeopardy in criminal proceedings. Condemning Ghana for a continuing human rights violation twice is hardly the same as trying an offender for a criminal offence twice. A strict application of article 56(7) is not necessary and operates as a constraint on developing human rights jurisprudence. It places concerns for administrative efficiency above substantive human rights concerns.

A better reading would be to treat article 56(7) narrowly and find admissible cases in which an applicant is worse off due to a continuing violation, despite the earlier ruling of another international or regional

52 A Poels 'A need for transnational *non bis in idem* protection in international human rights law' (2005) 23 *Netherlands Quarterly of Human Rights* 329 at 336-37.

53 C van den Wyngaert and G Stessens 'The international *non bis in idem* principle: resolving some of the unanswered questions' (1999) 48 *International and Comparative Law Quarterly* 779 at 789-90.

tribunal. In *Johnson v Ghana*, the African Court missed a golden opportunity to join a chorus of voices around the world in condemning the mandatory death penalty as cruel and degrading punishment. A different decision could have galvanized the moribund cause of death penalty abolition in Ghana, to which both major political parties have committed in principle but failed to achieve. Doing so would have ended the perpetual uncertainty faced by death row prisoners in Ghana, who have never had the opportunity to present mitigating evidence to a judge or jury, but who are unlikely ever to be executed.