

Is the African Court's decision in *Dexter Eddie Johnson v Ghana* a missed opportunity? A reply to Andrew Novak

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ABSTRACT: This note is a reply to Andrew Novak's commentary on the African Court's ruling in *Dexter Eddie Johnson v Ghana*. Novak's thesis is that the African Court missed an opportunity, by dismissing the application by Dexter Eddie Johnson, to join other courts that have declared the mandatory death penalty as being against international human rights law. In my reply, I argue that the Court did not miss any opportunity because the case before the Court did not provide the Court with an opportunity to pronounce itself on the substantive issues raised by the applicant. My main argument is that Novak makes an error by over-focussing on the potential merits of Dexter Eddie Johnson's case, in determining that the Court missed an opportunity, when the case itself was preliminarily dismissed for inadmissibility. My conclusion is that the African Court correctly applied article 56(7) of the African Charter on Human and Peoples' Rights in declaring the application inadmissible.

TITRE ET RÉSUMÉ EN FRANCAIS:

La décision de la Cour africaine dans *Dexter Eddie Johnson c. Ghana* est-elle une opportunité ratée? Une réponse à Andrew Novak

RÉSUMÉ: Ce commentaire de décision est une réponse au commentaire d'Andrew Novak sur la décision de la Cour africaine dans l'affaire *Dexter Eddie Johnson c. Ghana*. La thèse de Novak est qu'en rejetant la demande de Dexter Eddie Johnson, la Cour africaine a manqué l'occasion de rejoindre d'autres juridictions qui ont décidé que la peine de mort obligatoire était en marge du droit international des droits de l'homme. Cette contribution soutient que la Cour n'a raté aucune opportunité, car l'affaire dont elle était saisie ne lui offrait pas l'occasion de se prononcer sur les questions de fond soulevées par le requérant. Mon principal argument est que Novak commet une erreur en se focalisant de manière indue aux potentielles questions de fond de l'affaire *Johnson* pour conclure que la Cour a raté une occasion, alors que l'affaire elle-même a été rejetée pour irrecevabilité. Le présent commentaire conclut que la Cour africaine a fait une application correcte de l'article 56(7) de la Charte africaine des droits de l'homme et des peuples en déclarant la requête irrecevable.

KEY WORDS: African Court on Human and Peoples' Rights, mandatory death penalty, admissibility, Ghana, *Johnson v Ghana*, *res judicata*

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1 INTRODUCTION

In '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',¹ Andrew Novak argues that the decision of the African Court on Human and Peoples' Rights (African Court or Court) represents a missed opportunity for the Court. In his view, the African Court, by finding the case inadmissible, refused to 'join a growing global consensus that mandatory capital punishment is a human rights violation'. According to Novak, instead of declaring the case inadmissible under article 56(7) of the African Charter on Human and Peoples' Rights (African Charter), the Court should have 'ruled that Ghana's continuing failure to commute Johnson's death sentence or implement the views of the UN Human Rights Committee (HRC or Committee), was a separate violation of the African Charter and was not precluded by article 56(7).'

In this brief note, I attempt to respond to Novak's arguments. My position is that, regrettable though the decision of the Court may seem to people like Novak, especially considering that the Court has yet to pronounce itself on the death penalty under the African Charter, it is erroneous to categorise the Court's decision as a 'missed opportunity.' As I will demonstrate later, I contend that Novak's major mistake, in labelling the decision as a missed opportunity, stems from him inferring conclusions from the possible merits of Johnson's case and imputing those conclusions to a determination on admissibility.

In terms of presentation, the section following from this introduction summarises the Court's decision in *Dexter Eddie Johnson v Ghana* (*Johnson v Ghana*).² Thereafter, a quick summary of Novak's argument is presented. The section following thereafter attempts to highlight why the Court's decision cannot be classified as a missed opportunity. The conclusion is the last part of the note.

1 In this volume of the *African Human Rights Yearbook* at 456-469.

2 Application 16/2017, Ruling (Admissibility), 28 March 2017.

2 THE COURT'S DECISION IN *JOHNSON v GHANA* AND ITS CONTEXT

In 2008 Johnson was convicted of murder and sentenced to death. He appealed against both his conviction and sentence all the way to the Supreme Court of Ghana without success. In 2012 he filed a communication against Ghana before the Human Rights Committee. In its views, the Committee held that the automatic and mandatory imposition of the death penalty, which applies in Ghana, amounts to an arbitrary deprivation of the right to life contrary to article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). Following from this finding, Ghana was ordered to provide Johnson with an effective remedy including the possible commutation of his sentence. The HRC also requested Ghana to file a report about the measures taken to implement its views within 180 days. Ghana, it turns out, never took any steps to implement the views of the HRC.

In 2017, Johnson filed an application before the Court. In this application, Johnson, centrally, asked the African Court to pronounce that the imposition of the mandatory death penalty for murder, which applies in Ghana, is contrary to 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 Universal Declaration of Human Rights (Universal Declaration). In considering Johnson's application, the Court confirmed that it had jurisdiction to hear the matter but that the application was inadmissible for failure to comply with the admissibility requirements under the Charter.

It must be recalled that admissibility of applications before the African Court follows the criteria set out in article 56 of the Charter. These requirements are also restated in Rule 40 of the Rules of Court (Rules). In *Johnson v Ghana*, the decision of the Court turned on the applicability of article 56(7). Article 56(7) stipulates that an application before the Court shall be considered if it does '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 Organisation of African Unity or the provisions of the [African Charter]'.³

In applying the requirement in article 56(7), the Court relied heavily on its earlier decision in *Jean Claude Gombert v Côte d'Ivoire*³ from whence it extracted the test for determining when a matter can be said to have been already 'settled'. According to the test applied by the Court, a matter is deemed to have been 'settled' if there is a convergence of three conditions and these are: first, the identity of the parties; second, the identity of their applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case, and, third; the existence of a first decision on the merits.⁴ The Court, in applying this test, found that Johnson's case, as filed

3 Application 38/2016. Judgment of 22 March 2018.

4 *Johnson v Ghana* (n 2) para 48.

before it, had already been settled by the HRC. In the Court's reasoning, first, the parties that were before the HRC were the same parties that were involved in the case. Second, it found that the applicant before it was raising the same issues that he had raised before the HRC. Third, the court held that there was already a decision on the merits of the applicant's application by a body that was 'legally mandated to consider the dispute at international level.'⁵ It bears pointing out that the Court did allude to Ghana's non-implementation of the views of the HRC. According to the Court, however, the fact that Ghana had opted not to implement the views of the HRC did not mean that the matter had not been 'settled' within the meaning of article 56(7).

3 A SUMMARY OF ANDREW NOVAK'S ARGUMENT

I will be careful not to distort Novak's argument. However, my reading leads me to conclude that Novak's argument is as follows: The rule prohibiting the reconsideration of cases that have already been adjudicated on by other bodies is meritorious as it serves 'both administrative efficiency and consistent jurisprudential development, so that human rights mechanisms do not conflict.' The validity of this rule notwithstanding, *Johnson v Ghana*, as filed before the Court, could have been distinguished from the communication filed before the HRC without offending the principle in article 56(7) of the Charter. The key ground for distinguishing the case before the Court from the communication before the HRC, is that at the time *Johnson v Ghana* was filed before the African Court, Ghana had yet to implement the views of the HRC. This failure to implement the findings of the HRC should have been treated as a continuation of the violation of Johnson's rights and also as 'new and separate harm than that considered by the UN Human Rights Committee'. Further, the Court should not have over-relied on *Gombert v Côte d'Ivoire* since this was a 'final ruling of a court, whereas the UN Human Rights Committee's views are non-binding recommendations from experts.' Furthermore, the Court's reliance on the *non bis in idem* principle was wrong since it applies primarily to criminal offences and that, 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.'

4 FOR EVERYTHING THERE IS A SEASON: IN DEFENCE OF THE COURT'S RULING

In my view, stripped to its bones, the argument by Novak revolves around two key points. First, the failure by Ghana to implement the views of the HRC amounted to a continuation of the violation of

5 As above, para 51.

Johnson's rights, which had begun with the imposition of the mandatory sentence, and also created a fresh violation of Johnson's rights. Second, because of the preceding, the Court should not have adopted a 'zealous' interpretation of article 56(7) with the result that notwithstanding the HRC's views on the same matter, the Court should have found the case admissible. As earlier alluded to, I view this argument as misapprehending the Court's ruling in *Johnson v Ghana* and draws conclusions that do not follow from the pleadings that Johnson filed with the Court. In the following paragraphs I attempt to explore why the Court's ruling is correct, in principle.

4.1 A case is defined by the parties' pleadings

I believe it is important, at the outset, to dispose of Novak's argument that the Court should have addressed the question whether 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.' In Novak's view, Johnson's case before the African Court was different from the communication filed before the HRC since, over and above complaining about his mandatory sentence of death, he also raised issue with Ghana's failure to implement the views of the HRC.

In paragraph 24 of the Court's ruling, a summary of the prayers made by Johnson before the Court is reproduced. While I see no need to fully restate these prayers, it is notable that nowhere in the prayers did Johnson seek any relief specifically arising from the alleged continued violation of his rights due to Ghana's failure to implement the views of the HRC. This much is also clear from a review of a copy of the application filed by Johnson before the Court. Admittedly, the application does make reference to the fact that Ghana had failed to implement the findings of the HRC up to the time the case was being filed with the Court. In my view, however, Johnson did not specifically invite the Court to consider that Ghana's failure to implement the views of the HRC was a separate and distinct violation of his rights and that, importantly, this created an exception to the application of the requirement under article 56(7). While Johnson's application did raise the question of the continuing violation of his rights, so far as I can tell, this was raised for purposes of establishing the Court's temporal and territorial jurisdiction and not create an exception to the application of article 56(7) of the Charter.

It is apparent to me that Johnson's legal representatives were fully aware of the possible effect of article 56(7) on their client's case. They therefore argued that their client's case fell within the exceptions to the application of the rule in article 56(7). Two arguments were raised as justifying the exception: first, that Johnson's case did not deal with any issues that had already been dealt with in accordance with the Constitutive Act of the African Union (AU) or the Charter of the United Nations or any other AU legal instrument. It was argued that although Johnson had earlier filed a communication before the HRC, this had been resolved on the basis of the ICCPR and hence, ostensibly, his application was not caught by article 56(7). Second, Johnson argued

that since Ghana had failed to implement the views of the HRC the issues that he was raising before the Court remained ‘unsettled.’

Johnson’s argument in respect of the supposed non-applicability of article 56(7) to his case was fully dealt with by the Court. I have not been able to discern any consistent argument against the Court’s findings on this particular point by Novak. To recap, in response to the first argument, the Court held that although the HRC may indeed have used the ICCPR in adopting its views, the provisions under consideration and the principles that were applied were substantially similar to those available under the Charter. This, according to the Court, meant that the HRC had pronounced itself on substantially the same issues on which Johnson was inviting the Court to adjudicate.⁶ Further, in response to the second limb of Johnson’s argument for an exception under article 56(7), the Court held that for purposes of understanding ‘settlement’, it did not matter that the original decision had not been implemented. According to the Court, what is important is that there must be a decision on the merits by a body competent in international law to conduct the adjudication.⁷

Given the above context, it is important to recall that courts determine cases on the basis of the issues that the parties have raised before them. It is, therefore, important that parties, in framing their cases, must clearly plead the issues over which they wish the Court to pronounce itself. With regard to *Johnson v Ghana*, my own assessment is that in the absence of the applicant specifically raising the alleged continuing violation as an exception to the requirements in article 56(7), it is not fair to castigate the Court for not considering it. Although the Court is a human rights court, it must still follow procedural safeguards lest it be accused of appropriating for itself powers that it has not been given by its founding instruments.

4.2 The choir, the chorus and the alleged missed opportunity

Following Novak’s argument, I sense that the ‘choir’ refers to the courts around the world that have outlawed the mandatory death penalty and the ‘chorus’ is the message being conveyed by this choir, to wit, that the mandatory death penalty is inconsistent with human rights. According to Novak, therefore, the Court, in *Johnson v Ghana* missed an opportunity to join the choir and sing the same chorus. In my view, however, the Court did not have a proper invitation to join the choir and was not, therefore, in a position to sing the chorus.

I also believe it is here that Novak makes a fatal error in his argument. The Court could only join the ‘choir’ if it received a proper invitation. In practical terms, this means that the Court can only

6 As above, para 52.

7 As above, paras 51 and 54.

pronounce itself on any issue once an application has fulfilled the requirements as to jurisdiction and admissibility.⁸ Singing the ‘chorus’, in my view, amounts to the Court pronouncing itself on the merits and taking a position as to whether the mandatory death penalty is against the Charter or not. In respect of the *Johnson* case, it is clear that the application having been dismissed for inadmissibility the question as to whether an opportunity was missed or not should not arise. Novak’s argument, surreptitiously, also assumes that should the Court have gone on to consider the merits, only one conclusion was tenable and that is to outlaw the mandatory death penalty. This assumption disregards the chasm across the globe in approaches in relation to the death penalty, generally, and the mandatory death penalty, specifically. While progress has indeed been registered in rolling back both the death penalty and the mandatory death penalty, it is also an incontestable fact that this progress has not been uniform and universal.

I also believe it is not insignificant to note that to date, the Court has yet to pronounce itself in relation to the death penalty or mandatory death penalty under the African Charter. For others, this lack of pronouncement on what is invariably a very contested issue may seem anomalous. The truth of the matter, however, is that the Court must wait for an appropriate case, one that fulfils the requirements as to jurisdiction and admissibility and poses the correct questions for the Court’s determination. Only then ought the court to make a pronouncement. In fairness, therefore, the door is not closed yet but the visitor with the correct passcode has not knocked yet.

4.3 The allegation of continuing violations and article 56(7) of the Charter

The notion of ‘continuing violations’ is indeed well known in the African human rights system. Generally, the notion of ‘continuing violations’ has been applied to confer jurisdiction on the Court, and also the Commission, to assume jurisdiction over a matter where jurisdiction would have been lacking especially because the violations at stake happened before the respondent state became a party to the treaty being applied.⁹ Although the precise boundaries of the principle seem uncertain,¹⁰ it applies where the on-going effects of the original violation(s) are still apparent even though the original violation may be dated. As earlier pointed out, in the context of *Johnson v Ghana*, Novak argues that the failure by Ghana to implement the views of the HRC entailed that there was a continuation of the violation of Johnson’s rights and also ‘a new and separate harm than that considered by the UN Human Rights Committee.’ This, in his view, should have

8 Rule 39, Rules of Court.

9 Communication 335/2006, *Dabolorivhuwa Patriotic Front v Republic of South Africa* <http://www.worldcourts.com/achpr/eng/decisions/2013.04DPFvSouthAfrica.pdf> (accessed 9 October 2019).

10 <https://www.refworld.org/pdfid/577cd89d4.pdf> (accessed 10 October 2019).

persuaded the Court to distinguish from its earlier jurisprudence and declare the case admissible.

Earlier in this note I pointed out that on a strict reading of the application that was filed, Johnson did not ask the Court to specifically consider the non-implementation of the views of the HRC as a distinct violation of his rights. In my view, therefore, while the failure by Ghana to implement the views of the HRC may have created distinct violations of Johnson's rights and also continued the violation of his rights occasioned by the mandatory sentence of death, the fact of there being continuing and distinct violations did not carve out any exception to the requirement in article 56(7).

The other issue that falls to be determined, however, is the question of the appropriate remedial action, for Johnson, in light of Ghana's conduct. Was Johnson's remedy the commencement of exactly the same action before another forum? Despite Novak's classification of the views of the HRC as non-judicial and non-binding, a point that I address later in this note, I believe Johnson was not at liberty to start shopping for *fora* after the HRC rendered its views. If he was at liberty to forum shop, at what point exactly would a line be drawn limiting him from further inviting courts/tribunals from pronouncing on his grievances? In my view, enforcement of decisions of courts and tribunals is separate from the process of obtaining the orders themselves. This is even more poignant in international relations where the consent and cooperation of states is key to the enforcement of any decision. I doubt that the non-implementation of the views of the HRC by Ghana was down to the fact that the views of the HRC were viewed as non-binding and mere recommendations. In any event, under the ICCPR, and the First Optional Protocol, states have undertaken to take steps to ensure that the ICCPR is implemented including compliance with the decisions of the HRC.¹¹ Even with the views of the HRC, Johnson still had a basis on which he could have engaged with the Ghana for implementation of the views. In my view, it is arguable that even a favourable decision from the Court would not automatically have solved Johnson's problems. He would still have to engage with the Government of Ghana for implementation. Although the Court is built on a different legal platform from the HRC, the implementation of its decisions still requires the cooperation and willingness of states. Again, although the HRC is, technically, not a court, I do not think Johnson's remedy, in light of Ghana's conduct, lay in re-filing exactly the same dispute before another forum. If this is deemed the permissible option, there practically can be no possible limit to the number of *fora* that a litigant could go if his first relief is not implemented.

11 Article 2 of the ICCPR – <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 11 October 2019) and Article 1 Option Protocol to the ICCP – <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx> (accessed 11 October 2019).

4.4 The Court and the precedent in *Gombert v Côte d'Ivoire*

Novak also takes issue with the Court's reliance on *Gombert v Côte d'Ivoire*. In his view, the Court could have distinguished *Johnson v Ghana* while at the same time maintaining the integrity of article 56(7). He points to two features that, supposedly, could have grounded the distinction. First, *Gombert v Côte d'Ivoire* was a final determination by the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice) whereas the views of the HRC are non-binding recommendations. Second, in *Gombert v Côte d'Ivoire* the ECOWAS Court of Justice did not find Côte d'Ivoire to have violated the ECOWAS Treaty or the Charter. I will try to respond to these two points sequentially.

With regard to the alleged non-binding character of the decisions of the HRC, I believe the correct starting point should be General Comment 33 (GC 33) of the HRC.¹² GC 33 is on the obligations of states parties under the First Optional Protocol to the ICCPR. In paragraph 11 of GC 33 it is stated thus:

While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of the Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

In paragraph 13 of the GC, the HRC further stated as follows:

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

GC 33 makes it clear that the HRC is not a judicial body strictly speaking but that its processes and decision-making follows processes akin to judicial decision-making. This, it is argued, makes the HRC very similar to a judicial body and also imbues its findings with the same authority that normally attaches to findings of judicial bodies including *res judicata*. One must be alive to the fact that there are, presently, multiple *loci* for the resolution of disputes internationally and that not all these are referred to as 'courts'. In spite of this, many such bodies are endowed with the authority to resolve disputes with finality. It is this ability to resolve disputes with finality that is key. Since the HRC does have the ability to resolve disputes with finality, there is thus a strong case to be made for the *res judicata* effect of its views. The Court was, therefore, correct to attribute a *res judicata* effect to the views of the HRC.

I note, however, that Novak is willing to concede the 'finality' of the decisions of the HRC to the extent that there is a reciprocity of

12 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f33&Lang=en (accessed 9 October 2019).

application of the principle of *res judicata* as between the Court and the HRC. My point, however, is that over and above the reciprocity in the application of the principle of *res judicata*, it must be acknowledged that the views of the HRC do have binding effect. In practice, states have complied, with these views and used them to guide their conduct accordingly. It is rather disingenuous to argue that these views are not binding simply by picking one instance in which there was a failure to comply with the views. It cannot be that the views of the HRC, if complied with should be accepted as being binding and deemed non-binding recommendations when they have not been complied with.

Additionally, does it matter that *Gombert v Côte d'Ivoire* followed from a finding of no violation by the ECOWAS Court of Justice? My understanding of the argument by Novak on this point is that this matters since, in Johnson's case, the finding of a violation and a failure by Ghana to implement the views of the HRC meant that Ghana had an obligation to take steps to implement the terms of the judgment. The contrast with *Gombert v Côte d'Ivoire* is that the final order of the ECOWAS Court of Justice did not require the respondent state to take steps to implement the order of the Court. In my view, especially for purposes of establishing *res judicata*, the finding of a violation or lack thereof is not determinative. What is key is the existence of a decision on the merits of the case by a competent body.

It is also important to note that the decision in *Johnson v Ghana* did not solely turn on the Court's application of *Gombert v Côte d'Ivoire*. In attempting to ascertain the precise parameters for the application of the requirement in article 56(7), the Court drew inspiration from decisions by the Commission.¹³ The fact that 'settlement' of a dispute in international law comports with the three conditions highlighted by Court finds resonance in the Commission's jurisprudence on the same point. The Commission, it must be recalled, is the only entity whose mandate primarily revolves around the interpretation and application of the Charter. It is also notable, in my view, that Novak does not seem to take issue explicitly with the Court's position about the three conditions that must be fulfilled in order for settlement to be established.

4.5 The proliferation of international dispute resolution mechanisms and *res judicata*

I prefer to address Novak's treatment of *res judicata* and *non bis in idem* within the broader context of the proliferation of international dispute resolution mechanisms. I start by conceding that there is nothing wrong with his restatement of the principles. As Novak correctly states, *non bis in idem* operates to prevent double jeopardy and also establish the *res judicata* effect of judicial decisions. I should add, and agree with Conway, that *ne bis in idem* is the criminal law

13 *Johnson* (n 2) para 48.

manifestation of a broader principle aimed at protecting the finality of judgments encapsulated in the doctrine of *res judicata*.¹⁴

It is important to note that any current survey of international law will reveal the proliferation of third party dispute resolution mechanisms. This proliferation evokes conflicting responses.¹⁵ On the one hand are those that view it as a positive development, while on the other hand, are those who perceive it as a harmful development. On the harmful side, the proliferation, it is argued, creates a risk of conflicting jurisprudence on the same norms. The presence of multiple institutions with overlapping jurisdiction, therefore, presents a danger to the unity of international law. On the positive side, it is argued, the proliferation has resulted in a quantitative increase in the number of dispute settlement mechanisms. This increase can be seen as a vote of confidence in the peaceful settlement of disputes envisaged under the Charter of the United Nations. The result is that, contrasted to the situation about sixty years ago, international dispute settlement mechanisms are no longer the preserve of states.

In relation to *res judicata* as a legal doctrine, it is clear that its importance and applicability is beyond contest.¹⁶ Two reasons are often flagged as justifying *res judicata*.¹⁷ First, as a matter of public policy, litigation must always have an end. Second, as a matter of private justice, no one should be proceeded against twice in respect of the same cause. Whether approached as a norm of customary international law or a general principle, *res judicata* speaks to the finality of judicial decisions. The crux of the principle stipulates that once a competent body has settled a dispute with finality, and appellate avenues have been exhausted, the parties are bound by the final decision and may not re-litigate the same issues.¹⁸

I sense that Novak raises two objections to the Court's application of *non bis in idem* and *res judicata*. First, he contends that 'the *non bis in idem* principle as originally conceived only applies to criminal offences and not to disciplinary or administrative measures.' Following this reasoning, he further contends that the Court should have treated the findings of the HRC differently since these are 'non-binding and not a judgment of a court of law.' Second, he argues that legal systems

14 G Conway 'Ne bis in idem in international law' (2003) 3 *International Criminal Law Review* 217.

15 K Oellers-Frahm 'Multiplication of international courts and tribunals and conflicting jurisdiction – problems and possible solutions' https://www.mpil.de/files/pdf1/mpunyb_oellers_frahm_5.pdf (accessed 12 October 2019).

16 *Trail Smelter Arbitration [United States v Canada]* (1941) III RIAA 1950 and *Laguna del Desierto [Argentina v Chile]* 113 ILR 1 paragraph 68. While the applicability of *res judicata* is often beyond doubt, its application is not always free of controversy – N Ridi 'Precarious finality? reflections on *res judicata* and the question of the delimitation of the Continental Shelf case' (2018) 31 *Leiden Journal of International Law* 383 at 385.

17 W Dodge, *res judicata*, in *Oxford Public International Law, Max Planck Encyclopedia of Public International Law*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778726 (accessed 20 August 2019).

18 Y Shany *The competing jurisdictions of international courts and tribunals* (2003) 245.

across the world differ in the manner in which they apply *res judicata* especially whether they apply it to ‘offences’ or ‘facts’. In his view, the Court should have adopted a broader understanding of *non bis in idem* and *res judicata* which would have led it to conclude that the actual violation alleged by Johnson was not simply the death sentence from 2008 but Ghana’s subsequent failure to implement the views of the HRC.

First, it is not in doubt that article 57(7) embodies *non bis in idem* and *res judicata*. Although the origins of the *non bis in idem* principle may indeed lie in criminal law, it is not correct to say that its applicability, especially in so far as it establishes the *res judicata* effect of decisions, is limited to criminal law. While the hazards of re-litigating the same issue(s) may be especially grave at the personal level, this should not be read to imply that the principle applies only to criminal proceedings. The rationale for *res judicata*, as briefly explored above, applies both in criminal and civil proceedings. Concededly, the criminal law justification for *non bis in idem* may not apply wholesale to civil matters but the rationale underlying the principle, which speaks to finality of decisions, is very much the same.¹⁹ As a matter of fact, from an international law perspective, key jurisprudential developments in respect of *res judicata* have emerged from arbitration proceedings which are, arguably, civil in nature.

Second, while indeed there are variations in the manner in which *non bis in idem* and *res judicata* are conceptualised and applied across different legal systems,²⁰ the Court, in *Johnson v Ghana* was not confronted with a choice of adopting the conceptualisation of the principles from any one legal system. If anything, the Court was faced with establishing an interpretation of *res judicata* from an international law perspective which would then inform its construction of article 56(7). It is thus important to keep in mind that, given the nuanced variation to *non bis in idem* and *res judicata*, across legal systems, and also in international law, the Court’s key role was to establish an interpretation of the requirement as contained in article 56(7).

In my view, therefore, given the facts of *Johnson v Ghana*, and the framing of article 56(7), the Court took a reasonable and well-grounded approach. I earlier conceded that decisions of the HRC are, indeed, technically not judgments but that nevertheless they do have *res judicata* effect. Among other reasons, this is especially because, presently, there are many *loci* for dispute resolution in international law. Since there is, generally, no direct and hierarchical relationship between these adjudicatory bodies, and also not to undermine the unity of international law, the adjudicatory bodies ought to be aware of developments from other tribunals/courts. This awareness should be particularly acute where such bodies are involved in the interpretation and enforcement of similar norms. In the context of the present discussion, it is fair for the Court to pay attention to what the HRC

19 See Conway (n 14) 222-223.

20 As above, 221.

pronounces even if the Court itself is not, technically, bound to follow the views of the HRC.

5 CONCLUSION

Under the adjudicatory mechanism created by the Charter and the Protocol, just as is the case with many other *fora*, the Court does not proceed to pronounce itself on the merits of a case if the same is found to be inadmissible. The requirements that an application must fulfil before it can be declared admissible are circumscribed by article 56 of the Charter and repeated in Rule 40 of the Rules. Among these requirements is the requirement that any case before the Court must not have been already resolved by another competent mechanism in line with the principles of the Charter or the United Nations Charter. In resolving the admissibility of applications, however, the Court does not consider the potential merits or de-merits of the application and merely applies the conditions as outlined in article 56 of the Charter. It is acutely important to bear in mind the fact that the admissibility requirements before the Court are, strictly, as stipulated in article 56 of the Charter. Given the facts in *Johnson v Ghana*, especially as pleaded before the Court, it is fair to say that there was no opportunity that the Court missed so far as pronouncing itself on the death penalty is concerned. At an appropriate time, faced with the appropriate facts, I am of the view that the Court will, certainly, pronounce itself on the death penalty or the mandatory death penalty under the Charter. However, if the Court had proceeded to find *Johnson v Ghana* admissible, the Court would have been guilty of ignoring its own precedent about the meaning of 'settlement' within the context of article 56(7) when no compelling reasons for such a position existed. In my view, underlying Novak's argument is the assumption that had the Court proceeded to deal with the merits of the case, only one possible outcome was feasible, which is, to declare the mandatory death penalty in Ghana, and by implication in Africa, against the Charter. In fairness, the matter is slightly more nuanced and complicated than this assumption would let us believe.