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Dexter Eddie Johnson v. Ghana

Application No. 016/2017

Dissenting Opinion

Judge Blaise Tchikaya

Introduction

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

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

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

II. The decision taken is a setback for human rights development

A. Lost opportunity of expected control

B. The *Dexter* case has peculiarities which are not found in the *Jean-Claude Roger Gombert* case of 2018.

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). A violation of the right to life

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 imposed, he brought the matter before the Human Rights Committee.

5. In its Communication in Communication No. 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 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

[1] The Optional Protocol entered into force in Ghana on 7 December 2000.
[2] HRC, Communication No. 2177/2012, *Dexter Eddie Johnson v. Ghana*, 28 March 2014, § 9 *et seq*.

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 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.

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[3] AfCHPR, *Dexter Edddie Johnson v. Ghana*, 30 March 2019, § 59.

[4] Article 14, paragraph 7 of the International Covenant on Civil and Political Rights; Article 4 of the European Convention on Human Rights, § 1 of Additional Protocol No. 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".

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

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

[5] ECHR, Grand Chamber, *A and B. v. Norway*, 15 November 2016, § 79.
[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 Articles 4, 5 and 7 of the Charter, 6(1), 7, 14(1) and 14(5) of the ICVPR and 3, 5 and 10 of the UDHR. b) Find that the Respondent State has violated Article 1 of

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 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.

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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. Chill*, (Preliminary objections, substance, reparations, fees and costs), 26 September 2006, § 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." § 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 ; *I.L.M.*, 1989, p.294.

[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 fulfil its legal obligations.» § 7.3.

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 her 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 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

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

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

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 it 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 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.

[14] See the analyses of Ibáñez (R. Juana M.), *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.

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.

C. 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 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

[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 No. 277/2003, *Spilg and Others v. Botswana* (hereinafter referred to as «*Spilg v. Botswana*»), § 96 and ACHPR, Communication No. 334/06, *Egyptian Initiative for Personal Rights and Interights v. Egypt* (hereinafter referred to as « *Egyptian Initiative v. Egypt*»), § 80.
[17] The Court upheld the preliminary objection of inadmissibility under Article 56(7) of the Charter, § 25.
[18] HRC, *Dexter Eddie Johnson Communication, supra*, § 10.

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.

Blaise Tchikaya,
Judge
22 March 2019

[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.