Communication 322/2006 - Tsatsu Tsikata v. Republic of Ghana

SUMMARY OF COMPLAINT

Summary of Facts

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat") received the Communication from the Complainant - Tsatsu Tsikata, in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the "African Charter").

2. The author of the present Communication, who is himself the Complainant, submitted the Communication against the Republic of Ghana ("Ghana"), alleging that at the time of submission the latter was in the process of trying him for "wilfully causing financial loss to the State" contrary to Section 179A (3) of the Criminal Code, 1960 (Act 29); an act, which did not constitute an offence at the time of the commission. He alleges that this is contrary to Article 19 (5) of the Constitution of Ghana, which prohibits retroactive criminalization, and Article 7 (2) of the African Charter. He had challenged this in the High Court in Ghana, and his contention was upheld.

3. He further alleges that in the course of his trial, he has been denied the right to a fair trial, in violation of Article 7 (1) of the African Charter. He alleged that he had been summoned "in the name of the President" to appear before a "Fast-Track Court"; and he had challenged the constitutionality of both at the Supreme Court, which claims were upheld on 28th February 2002. However, after the Executive's alleged interference with the decision, and the "questionable" appointment of a new Justice of the Supreme Court, the decision was "reversed" by an 11-member panel of the Supreme Court, including the newly-appointed Justice, on 26th June 2002. The case was further "remitted" to the "Fast-Track Court", which had now been declared Constitutional.

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4. The author also notes that the Chief Justice had prior to the Supreme Court's latter decision, publicly and explicitly stated his determination to have the earlier decision of the case reversed.

5. The author also contends that both the manner of appointment of the new Justice of the Supreme Court and the conduct of the Executive towards the Judiciary in relation to his case constituted a violation of Article 26 of the African Charter, which obliges States to guarantee the independence of the Judiciary.

6. The author stated that on 9th October 2002, he was again charged before the "High Court of Accra" on four counts, including the retroactive charge of "wilfully causing financial loss to the State" (paragraph 2 above); and intentionally misapplying public property contrary to section 1 (2) of the Public Property Decree 1977, (SMCD 140). He alleges that the facts on which the charges were based are the same as those on which he had been charged before three (3) previous courts: a) Circuit Tribunal; b) Fast Track Court; and c) the normal High Court.

7. The author further alleges a violation of his right to fair trial under Article 7(1) of the African Charter when the trial judge of the High Court of Accra overruled his Counsel's submission of "no-case-to-answer", without giving reasons; thereby violating his right to be presumed innocent until proven guilty by a competent court or tribunal, as well as right to have the violations of his fundamental rights redressed.

8. He further alleges that he had appealed to the Court of Appeal, and that in upholding the decision of the lower court, the Court of Appeal had relied on a repealed law, which was neither cited in the charge sheet, nor at any point in the trial proceedings at the High Court, except in response to the submission of "no-case-to-answer". He alleges that the Court of Appeal thereby denied him of his right to defence guaranteed under Article 7 (1)(c) of the African Charter as he could not have

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known before the trial, that a repealed law, which he had no (prior) notice of in the charge sheet or at any point in the trial, would be the basis of his charge. He also alleges a further breach of his right to be presumed innocent until proven guilty by a competent court or tribunal guaranteed by Article 7 (1) (b) of the African Charter.

9. He submits that there is a further violation of Article 7 (2) of the African Charter, and a failure to enforce Articles 19 (5) and (11) of the Constitution of Ghana, which accord him certain fundamental rights as an accused person.

10. He contends that he was further denied the right to defence guaranteed under Article 7 (1) (c) of the African Charter when upon his subpoena, the counsel for the International Finance Commission (IFC) appeared before the Court and argued that the IFC was immune from the court's jurisdiction; and this argument was upheld, even by the Court of Appeal, despite the provision of Article 19 (2) (g) of the Constitution of Ghana, which guarantees the accused's right to call witnesses, and the fact that the statutory provisions on the IFC in Ghana do not grant them the claimed immunity from testifying.

11. He noted that Article 19 (2) (g) of the Constitution of Ghana is similar to the paragraph 2 (e) (iii) of the provisions of the Elaboration of the Right to Fair Trial by the African Commission on Human and Peoples' Rights, meeting at its 11th Ordinary Session in Tunisia, 2-9 May 1992.

12. Lastly, he contended that the continuation of his trial on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage.

The complaint

13. The author of this Communication contends that the charge on which his trial is based constitutes a violation of the right against non-retroactive criminalization under Article 7 (2) of the African Charter.

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14. He also contends that the manners in which the trial has been, and is being carried out violate Article 7 (1) of the African Charter.

Reliefs Sought

15. Complainant does not expressly state the type of ultimate remedy he seeks from the Commission. However from the complaint and the arguments he advances, it appears he seeks that the Commission should find his prosecution on the stated charges and the prescribed manner to be inconsistent with the Charter and should therefore be dropped altogether.

16. Secondly, at the time of submitting the Communication the impugned criminal proceedings were on-going. Accordingly, in the pendency of the outcome of the present Communication, he sought provisional measures under Rule 111 of its Rules of Procedure, requiring the Republic of Ghana to halt his trial until the present Communication has been determined by the African Commission.

PROCEDURE

17. The present Communication was received by the Secretariat of the African Commission on 27th April, 2006.

18. The Secretariat of the Commission acknowledged receipt of the Communication to the Complainants under letter ACHPR/LPROT/COMM/322/2006/RE of 2nd May 2006, providing the references of the Communication and informing the Complainant that the Communication would be scheduled for consideration by the African Commission at its 39th Ordinary Session to be held in May 2006, in Banjul, The Gambia.

19. At its 39th Ordinary Session, held from 11th to 25th May 2006, in Banjul, The Gambia, the Commission decided to be seized of the Communication, but declined to request the Respondent State to take provisional measures in accordance with Rule 111(1) of its Rules of Procedure because the Complainant did not demonstrate

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the irreparable damage that would be caused if the provisional measures were not taken.

20. On 1st June 2006, the Secretariat of the African Commission informed the parties of the above-mentioned decision and asked them to provide it with more information on the admissibility of the Communication, in accordance with Article 56 of the African Charter. It also sent a copy of the Communication to the Respondent State. It requested the parties to send their written observations to the Secretariat within three (3) months after notification of the decision.

21. On 31st August and 5th September 2006, the Secretariat of the Commission received the submissions of the Respondent State by fax & mail, respectively.

22. At its 40th Ordinary Session held from 15th to 29th November 2006 in Banjul, The Gambia, the African Commission considered this Communication on admissibility and declared it inadmissible.

23. By Note Verbale of 5 February 2007 and letter of the same date, both parties to the communication were notified of the Commission's decision.

24. In a letter dated 11 April 2007, the complainant invoked Article 118(2) of the Commission's Rules of Procedure requesting a review of the decision on admissibility.

25. At its 41st Ordinary Session, the African Commission considered the complainant's request for review and granted same and requested the Secretariat to invite both parties to the communication to submit fresh arguments on admissibility at its 42nd session.

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26. By Note Verbale of 25 June 2007 and letter of the same date, both parties were notified of the Commission's decision. The respondent state was also forwarded the complainant's submissions on admissibility.

27. By Note Verbale of 11 September 2007, the Secretariat reminded the respondent state to submit its arguments on admissibility, in response to the complainant's submissions.

28. At its 42nd Ordinary Session held in Brazzaville, Republic of Congo from 15-29 November 2007, the African Commission received the Respondent State's submissions on admissibility, and decided to defer its decision on the matter to allow for deliberations.

29. By Note Verbale of 19 December 2007, the Secretariat acknowledged receipt of the Respondent State's submissions, and by letter of the same date, the Secretariat forwarded the State's submissions to the complainant and informed both parties to the Communication of the Commission's decision to defer the matter.

30. During the 43rd Ordinary Session held from 7-22 May 2008 in Swaziland the Commission further deferred its decision on the application for review of the initial decision on admissibility.

31. The Commission eventually took its decision declaring the Communication admissible during the 44th Ordinary Session held from 10 – 24 November 2008 in Abuja, Nigeria. The parties were notified of the decision by letter and Note Verbal of 5 January 2009, with a request that the parties submit their arguments on the merits.

32. The Communication was subsequently deferred repeatedly awaiting submissions on the merits from both parties.

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33. During the 47th Ordinary Session held from 12 – 26 May 2010 in Accra, Ghana, the Complainant submitted his written arguments on the merits.

34. Consideration of the Communication on the merits was further deferred severally on account of submissions on the merits from the Respondent State from the 48th Ordinary Session held in November 2010 to the 54th Ordinary Session held in October to November 2013, at each instance the Respondent State being reminded to submit its written arguments on the merits, and the Complainant being updated accordingly.

35. During the 55th Ordinary Session held from 28 April – 12 May 2014, the Commission decided to consider the Communication and adopt a decision on the merits without the Respondent State's submissions.

LAW

Admissibility

The Complainant's submissions

36. In the case under consideration, the Complainant makes reference to several recourses to the domestic courts for redress of the alleged violations of his rights, but gives no indication of the exhaustion of all available domestic remedies, particularly in view of the alleged on-going violation. From the facts presented, the alleged on-going violation of his rights involves an on-going trial, the legality of which he challenges on the basis of the provisions of the Charter. He however failed to present evidence of the conclusion of this trial, and or to prove that it has been unduly prolonged.

37. The Complainant contended that the continuation of his trial based on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage, but without elaborating how.

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The Respondent State's submission

38. In its response in accordance with Rule 116 of the Rules of Procedure of the African Commission, the Respondent State referred to the provisions of Article 56 (5) of the African Charter which provides for the exhaustion of local remedies as a requirement for the African Commission to rule on the admissibility of Communications, unless it is obvious that this procedure is unduly prolonged. It therefore submitted that since the matter of the Complainant's Communication is still pending in the High Court of Justice, Ghana, with further unexplored rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with Articles 137 & 131 respectively of the Constitution of Ghana, the Communication should be declared inadmissible by the Commission.

39. The Respondent State also recalled that the guidelines for submission of Communications provide that each Communication should particularly indicate that local remedies have been exhausted, and observed that the Complainant failed to provide any evidence of the domestic legal remedies pursued.

40. The Respondent State also argued that the Complainant further failed to meet the requirement of Article 56(5) of the Charter as he could not show in his complaint that the procedure in the High Court of Justice has been protracted or unduly delayed. It further submitted that if indeed any delay has been occasioned, it would be due to the Complainant's own repeated requests for adjournments and interlocutory appeals.

41. The Respondent State also made reference to Article 56(6) of the Charter, which provides for Communications to be submitted "within a reasonable period from the time local remedies are exhausted...", and submitted that the Complainant acted impetuously given that the matter has not been concluded, and time has not begun to run so as to afford the complainant an opportunity to bring his complaint.

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42. Furthermore, the Respondent State noted Article 56(3) of the Charter and the guidelines for submission of Communications which provide that a Communication shall be considered "if it is not written in disparaging or insulting language directed against the State concerned..."; and submitted that the language in paragraphs 15, 16 and 17 of the Complainant's Communication is insulting to Ghana and its Judiciary where lack of integrity, impropriety, bias and prejudice are imputed to the Executive and the Judiciary of the Republic of Ghana. To this effect, the Respondent State cited the Complainant's statement in paragraph 17 of his Communication whereby he stated that: "Far from guaranteeing the independence of the Court in relation to my trial, the Government of Ghana has shown an irrevocable determination to have me found guilty by hook or crook and incarcerated".

The African Commission's decision

43. The admissibility of the Communications submitted before the African Commission is governed by the seven conditions set out in Article 56 of the African Charter.

44. The parties' submissions only relate to the provisions of Articles 56(3) (5) and (6).

45. Article 56(3) specifically stipulates that Communications shall be considered if they "are not written in disparaging or insulting language directed against the State concerned and its institutions..."

46. In respect of the Respondent's State's submission that paragraphs 15, 16 and 17 of the complaint is written in disparaging or insulting language directed against the former, the Commission holds that this is not the case. The Commission notes that these stipulated paragraphs of the complaint are only facts of allegations of Charter violations; and expressions of the complainant's fear in this regard. It is on the basis of these allegations and fear that the Complainant had submitted this Communication. The Commission reiterates that the purpose of its mandate is to

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consider complaints alleging such perceived judicial bias and prejudice, and undue interference by the executive with judicial independence, in accordance with Article 7 of the Charter, its *Resolution on the Respect and the Strengthening on the Independence of the Judiciary (1996)*[1] and other relevant international human rights norms; in accordance with articles 60 and 61 of the Charter.

47. In this light, the Commission wishes to distinguish these paragraphs, for instance, from its decision in the case of ***Ligue Camerounaise des Droits de I'Homme vs. Cameroon* [Comm. 65/92]**, where the Commission condemned the use of words such as "Paul Biya must respond to crimes against humanity"; "30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya"; "regime of torturers"; and "government barbarisms"; as insulting language.

48. In respect of Article 56(5), which stipulates that Communications shall be considered if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...", the Commission notes the importance of this rule as a condition for the admissibility of a claim before an international forum. It notes that the rule is based on the premise that the Respondent State must first have an opportunity to redress by its own means and within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

49. In light of the parties' submissions, the African Commission notes that the Complainant's allegations are in respect of an on-going trial. The information provided by the Complainant himself states that the communication is still pending before the courts of the Republic of Ghana. The Commission further notes that should the on-going trial end against the Complainant's favour, he has further rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with Articles 137 & 131 respectively of the Constitution of Ghana. In this regard, the Commission draws the attention of the parties to the similar case of ***Kenya Human***

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[1] ACHPR/Res. 21(XIX) 96

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***Rights Commission vs. Kenya* [Comm. 135/94]**, where it had held that "...the facts supplied by the Complainants themselves stated that the Communication was pending before the Courts of Kenya,... [and] that the Complainants had therefore not exhausted all available local remedies."

50. Therefore, although the Communication presents a *prima facie* case of a series of violations of the African Charter, a close look at the file and the submissions indicate that the Complainant is yet to exhaust all the local remedies available to him.

51. With regard to Article 56(6) of the Charter which provides that Communications shall be considered if "... they are submitted within a reasonable period of time from the time local remedies are exhausted, or from the date the Commission is seized of the matter", the Commission holds that this is quite related to the principle of the exhaustion of local remedies in accordance with article 56(5). This means that the Commission estimates the timeliness of a Communication from the date that the last available local remedy is exhausted by the Complainant. In the case of unavailability or prolongation of local remedies, it will be from the date of the Complainant's notice thereof.

52. Unlike its Inter-American[2] contemporary, the Commission does not specify a time-period within which Communications must be submitted. However, it advised on the early submission of Communications in the case of ***John K. Modise vs. Botswana [Comm. 97/93].***

53. However, having found that the Complainant has not exhausted local remedies the Commission concurs with the Respondent State's argument that the Complainant had acted impetuously in bringing this Communication. This is because the matter has not been concluded, for which reason time has not begun to run such as to afford the complainant the opportunity to bring this complaint.

[2] Article 32 of the Rules of Procedure of the Inter-American Commission; www.cidh.org

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For these reasons, the African Commission declares the communication *inadmissible* for non-exhaustion of local remedies.

Complainant's request for review of the decision on admissibility

54. At its 41st Ordinary Session held in Accra, Ghana, the Complainant submitted that the Commission erred in declaring the Communication inadmissible, because he had not received the Commission's correspondence requesting him to submit on admissibility, and that the decision was taken based on the submission of the State alone. The Commission granted the Complainant's request for a review and accordingly decided to review the decision, and requested both parties to re-submit on admissibility.

Complainant's submission on admissibility

55. The Complainant submits that the decision of the Commission declaring the Communication inadmissible was made without the Commission having had the benefit of any further information or argument from him, for the simple reason that he did not receive the request from the Commission to submit arguments on admissibility. He added that the Respondent State however, received this information from the Commission and the Attorney-General responded and alleged, among other things, that he had not exhausted local remedies before submitting the communication to the Commission.

56. The Complainant submits that he is seeking a re-consideration of the decision on admissibility in accordance with Rule 118(2) of the Rules of Procedure of the Commission. He argues that his case should be distinguished from the situation the Commission encountered in *Communication 230/99 - Motale Zacharia Sakwe/Cameroon*, where the Commission noted that "on the surface of the complaint it appears that the complainant did not exhaust domestic remedies. The Commission notes further that the parties did not respond to its requests for additional information on the issue of

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exhaustion of local remedies, despite repeated reminders". He said in his case, he did not receive any communication from the Commission, much less reminders.

57. He argues that the decision of the Commission seems to have been based on the consideration that, while making references to "several recourses to domestic courts for redress", he gave "no indication of the exhaustion of all available domestic remedies", adding that "there is no question that had I received the letter dated 1st June 2006 from the Commission, I would have submitted information and made submissions to the Commission on the issue of admissibility within the three month time-frame provided which would have made it clear that I exhausted local remedies".

58. He submits further that the present submission for reconsideration does not seek so much to present "new facts", but rather to "clarify the content of my communication of 23rd April 2006 and to provide further elaboration of how I had exhausted local remedies in respect of the matters I complained of to the Commission".

59. The Complainant further submits that it is clear from paragraphs 2 and 3 of his complaint that the issue he is complaining of (which is before the Commission) is the violation, by the Respondent State, of Articles 7.1 and 7.2 of the African Charter on Human and People's Rights, in connection with criminal proceedings brought against him. (The issue still pending before the High Court of Ghana is the criminal proceedings, and matters regarding those proceedings are not before this Commission because they are still before the courts).

60. He drew the Commission's attention to paragraphs 4 to 17 of his complaint in which a history of the initiation of proceedings against him, going back to a Circuit Tribunal and including proceedings in the Supreme Court, when he challenged the constitutionality of a so-called "Fast Track Court" before which he had been summoned "In the name of the President".

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61. After a decision of the Supreme Court upholding his challenge of the constitutionality of the Fast-Track Court, he was brought before a "normal High Court", as stated in paragraphs 7 to 9 of his complaint. He said his counsel objected to the charge brought against him on the basis that it infringed Article 19(5) of the Constitution which expresses the same principle as Article 7(2) of the African Charter and reads: "A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence."

62. According to the Complainant, the objection was upheld in the High Court. The High Court judge indicated that the provision in the Constitution of Ghana was clear in its terms and he did not have to refer the matter to the Supreme Court for interpretation and enforcement. He added that, "through the brazen interference by the Executive with the Judiciary, contrary to both the Constitution of Ghana and Article 26 of the African Charter, the Supreme Court decision in his favour was overturned by an enlarged panel of the Supreme Court".

63. He argues that by going all the way to the Supreme Court of Ghana with the issues, inter alia, of retro-active criminalization and right to fair trial which should have been enforced by the judge in the High Court upon the submission of no case, he exhausted local remedies in respect of those issues and there is no further domestic recourse available to him, hence his recourse to the Commission.

64. He notes that the issues he has put before the Commission concerning the use of legislation amending the criminal code retroactively to charge him with a criminal offence and the denial to him of the right to fair trial have been presented to the High Court, the Court of Appeal and the Supreme Court of Ghana. The wrongful failure of the "Fast Track Court" judge, unlike the judge of the "normal High Court", to enforce his right not to be tried on the basis of an act which at the time done was not an offence, and the decision, without even giving reasons, that he has a case to

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answer in respect of charges based on such retroactive criminalization and without any evidence to rebut the presumption of innocence in his favour, are the essence of his complaint before the Commission. That he had recourse to the Court of Appeal and the Supreme Court, the highest court of the land, which upheld the decision of the "Fast Track Court".

65. The Complainant emphasised that within the hierarchy of the courts of Ghana, having gone up all the way to the Supreme Court to seek enforcement of the rights that he is asking the Commission to pronounce in his favour against the Republic of Ghana, there is no further local remedy available to him. He cited the Commission's decision in *Communication 211/98 - Legal Resources Foundation/Zambia*, where the Communication was accepted as admissible because the matter had been put before, and determined by, the Zambian Supreme Court.

66. He also claims that the Attorney-General of Ghana was aware that he had taken the matter all the way to the Supreme Court but appears not to have acknowledged this to the Commission in the submission he sent, adding that "He obviously misled the Commission on the issue of exhaustion of local remedies".

67. He concluded that the claim by the Attorney-General (as referred to in paragraph 24 of the decision of the Commission), that "the matter of the Complainant's Communication is still pending before the High Court of Justice, Ghana...", is wholly incorrect, noting that what is pending before the High Court currently is not the matter of his Communication but the determination of matters arising after the final determination by the Supreme Court of the issues that he has now put before the Commission.

68. He said the issues before the High Court are not by way of seeking further local remedy as the trial judge is obviously not a higher forum than the Supreme Court. He said he is not challenging the decisions of the Supreme Court in these further proceedings, nor is he able to do so. He said these ongoing proceedings

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cannot, therefore, be used to claim that he has not exhausted local remedies before resorting to the Commission.

69. He said in his complaint, (paragraphs 29 to 34), he recited the further proceedings after the Supreme Court decisions largely in the context of his request for provisional measures and also to show a systematic and continuing pattern of violation of his rights from when he was initially summoned to the Fast Track Court. He said the continuing violations after the Supreme Court decisions, in his view, underlined the importance of his recourse to the Commission to protect his rights as an African against the actions of a Government that has been acting in a very calculated manner to deny him those rights.

Complainant's submissions

70. The Respondent State submits that the Complainant has taken long to respond to the Commission's request for additional information on the question of admissibility. Citing Rule 117 of the Commission's Rules of Procedure, the Respondent State argues that if the new facts submitted by the Complainant were submitted after three months of the Commission's request, they should not be considered, noting that accepting the new facts would 'offend against the letter and spirit of Rule 117(1) and (4), in order to avoid the issue dragging on for too long. The State argues that the three months period under Rule 117 (4), required of States to submit additional information, should also apply to complainants. The State thus argues that if the complainant submitted the additional information after August 10, 2007, then the complainant is out of time.

71. The State goes further to argue that the complainant's submission on the reconsideration of the Commission's decision on admissibility is convoluted and confusing, adding that the State has identified two main issues and several minor issues. The main issues, according to the State are the complainant's allegations that his rights under Article 7 (1) and (2) of the Charter have been violated; and on the

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minor issues, the complainant submits that they consist of a series of half-truths and selective recollection of facts 'which we do not intend to respond to at this stage'.

72. The Respondent State then proceeds to explain how the complainant's rights under Article 7(1) and (2) have not been violated as alleged. The State submits that there is no doubt that the case involving the complainant is pending before the Supreme Court, adding that the last time it was heard in the Supreme Court was on 30 October 2007. The State submits that the complainant has not been found guilty by any court in Ghana, adding that complainant's argument on exhaustion of local remedies amounts to 'splitting of hairs'. The State notes that exhaustion of local remedies means that all issues relating to a particular matter has been adjudicated upon in the highest tribunal and determined. According to the State, it means there is 'finality in the decision and there are no longer any local opportunities to have the matter reviewed'. The State concluded in this regard that 'the determination of interlocutory applications can never and must never form the basis of an allegation that all local remedies have been exhausted'.

73. The State argues that for there to be exhaustion of local remedies in the instant case, judgment on the merits should be given in the High Court, and any aggrieved party if so minded may appeal to the Court of Appeal, and a further appeal may be made to the Supreme Court, adding that the decision of the Supreme Court is also subject to review in exceptional circumstances. The State concludes that it is only after this that one can say local remedies have been exhausted, and since this has not been done, 'we submit that the Communication is inadmissible'.

The African Commission's decision on admissibility

74. The present Communication was declared inadmissible by the African Commission on the grounds that the complainant had not exhausted local remedies in accordance with Article 56 (5) of the African Charter. The complainant invoked Rule 118 (2) requesting the Commission to review its decision on admissibility.

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75. At its 41st Ordinary Session held in Accra, Ghana from 16-30 May 2007, the Commission considered the request for review from the complainant and decided to reopen the Communication, and requested both parties to re-submit on admissibility.

76. The complainant's submission on admissibility was forwarded to the Respondent State and at the Commission 42nd Ordinary session held in Brazzaville, Republic of Congo, the Respondent State also submitted its arguments on admissibility, which were forwarded to the complainant.

77. In his submission, the complainant argues that there are two separate matters contained in his Communication to the African Commission. The one is the allegations brought against him by the State of 'wilfully causing financial loss to the State contrary to section 179 (A)(3) (a) of the Criminal Code 1960 Act 29 of the Laws of the Republic of Ghana', and the other, the one for which he is seeking the Commission's intervention, is the allegations of violation of his rights to be presumed innocent until proven guilty under Article 7(1) (b) of the Charter, and the right not to be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed, under Article 7 (2) of the Charter.

78. The complainant does not dispute the fact that the charge of 'wilfully causing financial loss to the State contrary to section 179 (A)(3) (a) of the Criminal Code 1960 Act 29 of the Laws of the Republic of Ghana is still before the Courts in Ghana. However, he submits that, that is not the issue for which he has come before the Commission. He submits that the issue before the Commission is in respect to the alleged violation of his rights under Article 7 (1) (b) and (2).

79. According to the complainant, if the main charge of 'wilfully causing financial loss to the State...' were to continue against him, it will constitute a violation of his right to be presumed innocent and not to be tried for an offence that did not

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constitute a crime at the time it was committed, rights guaranteed under Article 7 (1)(b) and (2) would be violated.

80. According to the complainant, for the purpose of protecting these rights, he has exhausted all local remedies - he has been to the Fast Track Court, the High Court, the Court of Appeal and the Supreme Court. In February 2002, the complainant was summoned to a Fast-Track Court to answer charges of 'wilfully causing financial loss to the State...'. The complainant challenged the constitutionality of both the Fast-tract Court and the summons in the Supreme Court. On 28 February 2002, the Supreme Court ruled in his favour. A day after the Supreme Court ruling, the complainant was again charged before the High Court with the same charge that had been brought against him in the Fast-Track Court, that is, 'wilfully causing financial loss to the State...'. The complainant argued in the High Court that the charge brought against him would violate his rights under Section 19 (5) of the Constitution of Ghana which provides that "A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence", and Article 7 (2) of the African Charter.

81. In March 2002, the Superior Court of Judicature, the High Court of Justice ruled in his favour and the judge concluded that 'the charge sheet having crumpled down, so must the whole prosecution of the accused. I discharged the accused person" (See Attachment A).

82. According to the complainant, on 11 March 2002, the President of Ghana appointed a new judge to the Supreme Court for the purpose of reviewing the decision of the Supreme Court (See Attachment F). The complainant submits that on 26 June 2002, an eleven member panel of the Supreme Court (including the newly elected member) reversed its decision of 28 February 2008 by a 6-5 ruling and declared the Fast-Track Court constitutional.

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83. He concluded that he has been to the highest court of the land that is, the Supreme Court, as within the hierarchy of the courts of Ghana, having gone up all the way to the Supreme Court, there is no further local remedy available to him.

84. The State on its part argues that the matter is pending before the Supreme Court, adding that the last time it was heard in the Supreme Court was on 30 October 2007. The State submits that the complainant has not been found guilty by any court in Ghana, adding that complainant's argument on exhaustion of local remedies amounts to 'splitting of hairs'. The State notes that exhaustion of local remedies means that all issues relating to a particular matter has been adjudicated upon in the highest tribunal and determined. According to the State, it means there is 'finality in the decision and there are no longer any local opportunities to have the matter reviewed'.

85. The State argues that for there to be exhaustion of local remedies in the instant case, judgment on the merits should be given in the High Court, and any aggrieved party if so minded may appeal to the Court of Appeal, and a further appeal may be made to the Supreme Court, adding that the decision of the Supreme Court is also subject to review in exceptional circumstances. The State concludes that it is only after this that one can say local remedies have been exhausted, and since this has not been done, 'we submit that the Communication is inadmissible'.

86. The State is of the view that 'the determination of **interlocutory** applications can never and must never form the basis of an allegation that all local remedies have been exhausted'.

87. An interlocutory application, according to **Black's Law Dictionary,**[3] is an application which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits.

[3] HC Black, sixth ed. 1990.

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88. The controversy in the present matter is the charge brought against the complainant for wilfully causing financial loss to the State, while the interlocutory application is with respect to the human rights issues - presumption of innocence and non-retroactivity of the law - that he sought to challenge in the Courts of Ghana. The complainant in effect is saying that the case brought against him is a violation of both the constitution of Ghana and the African Charter. To the extent of pursuing this human rights challenge, the complainant has been to the Fast-Tract Court, the High Court, the Supreme Court. While he succeeded in these courts, according to him, an enlarge Supreme Court established to review his case, reversed the decision of the Supreme Court. He accordingly argues that, to the extent that he has been to the full bench of the Supreme Court, he has exhausted local remedies with respect to the interlocutory matter which is before the Commission.

89. From the submissions of both parties, the only area of contention seems to be that the complainant has not exhausted local remedies. The Commission will thus assume that the other requirements under Article 56 have been met.

90. The fact in issue regarding the present Communication is the alleged violation of the complainant's right to be presumed innocent until proven guilty and not to be tried for an act which did not constitute an offence when it was committed, rights guaranteed under Article 7(1)(b) and (2) of the African Charter. With respect to challenging the alleged violations of these rights, the complainant has been to four Courts of competent jurisdiction in the Respondent State, that is, the Fast-Track Court, the Court of Appeal, the Supreme Court and an enlarged Supreme Court. For the purpose of this Communication and to the extent of the matters before the African Commission, the complainant has been to the highest court in the Respondent State.

91. lt should be noted that the Commission is currently at the admissibility stage, which is to determine whether the Communication meets all the requirements under

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Article 56 of the Charter. Having considered the submissions from both parties and measuring these submissions against the admissibility requirements under Article 56, this Commission is satisfied that, to the extent of determining whether the case brought against the complainant was a violation of his right under Article 7(1)(b) and (2), the complainant has duly exhausted local remedies.

92. The African Commission thus declared the Communication admissible.[4]

Merits

93. The Commission would like to begin by lamenting the failure of the Respondent State to submit observations on the merits, despite numerous reminders sent to it. Regrettably, the Commission's persistence to secure the Respondent State's submissions has resulted in a much inordinate delay in the disposal of this Communication. Inevitably some of the issues, if not all, might have become moot with the passage of time. Indeed as at the time of adopting this decision, the status of the impugned domestic proceedings is unknown to the Commission. Equally important, by failing to submit on the merits, the Respondent State has denied the Commission the valuable advantage of a balanced version of both facts and legal arguments which would have greatly assisted in the fair and timely disposal of this Communication.

94. Nevertheless, the Commission has endeavoured to adopt its decision on the available information, to a great extent taking the Complainants averments as granted,[5] except to the extents that: there may be contradictions or inconsistences in the stated facts, in which case the Commission reviews the evidence provided;[6] or domestic courts already settled such facts contrary to the Complainant's version

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[4] Adopted at the 44th Ordinary Session of the African Commission on Human and Peoples' Rights, 10- 24 November 2008, Abuja, Nigeria

[5] See Communication 251/2002 - *Lawyers for Human Rights v Swaziland* (2005) ACHPR, para. 41; Communication 292/2004 - *Institute for Human Rights and Development in Africa v Republic of Angola* (2008) ACHPR; Communications 25/89, 47/90, 56/91, 100/93 - *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire* (1995) ACHPR, para. 40.

[6] Communication 251/2002 - *Lawyers for Human Rights v Swaziland*, n5 above, para.42.

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before the Commission[7]; or a particular factual allegation is so serious that it requires supporting evidence for the Commission to take it as granted. Further, given the circumstances, the Commission has taken into account the Respondent State's submissions on admissibility to the extent that they address the merits of the Communication.

Complainant's Submissions on the Merits

95. The Complainant's arguments on the merits are contained in the seizure letter dated 23rd April 2006; his submissions on application for review of the inadmissibility decision; and his submissions on the merits. The latter two are substantially mere recapitulations of the arguments contained in the seizure letter. The Complainant raises violations of Articles 7(1) (b), (c), 7(2) and 26 of the African Charter.

96. In respect of Article 7(1) of the African Charter, the Complainant states that after his previous arraignments before three different courts (Circuit Court, Fast Track Court, and the "normal" High Court), he was arraigned for the fourth time before a Fast Track High Court on three counts of "wilfully causing financial loss to the state", and a fourth count of "misapplication of public property". At the close of the prosecution's case before that court, he submitted that he had no case to answer, among other reasons, because ***firstly*** the charges were based on acts which did not constitute a known offence at the time he performed them. In that regard he invoked section 19(5) of the Constitution of the Republic of Ghana which prohibits retroactive criminalisation. ***Secondly***, he contended that the prosecution had not proved its case "beyond reasonable doubt" to require him to open his defence. The Fast Track High Court dismissed his submissions entirely without giving reasons.

97. Complainant states that when he appealed against that ruling to the Court of Appeal, his appeal was dismissed. In dismissing his argument on retrospectivity, the Court of Appeal referred to a repealed law to justify the offence for which he was

[7] Communication 390/1990 - *Bernard Lubuto v Zambia* (1995) HCR

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being tried before the Fast Track High Court. Complainant states that the repealed law was cited for the first time before the Court of Appeal. For that reason he contends that he had no prior notice that the charges were partly based on the repealed law and this denied him the opportunity to prepare his defence. Accordingly, he submits that this impaired his right to defence guaranteed under Article 7(1) (c) of the African Charter.

98. Further, when he appealed further to the Supreme Court, his appeal was once again dismissed. In dismissing the appeal, the Supreme Court held, among others, that the standard of "proof beyond reasonable doubt" is applicable only at the end of the entire trial, and not at the close of the prosecution's case as had been advanced by the Complainant (appellant in those proceedings). Complainant contends that in holding so, the Supreme Court violated his right to be presumed innocent guaranteed under Article 7(1)(b) of the African Charter.

99. Furthermore, he states that when the Fast Track High Court continued with the hearing, he obtained an order requiring the International Finance Company (IFC, an international organisation) to testify and produce some documents. However, the IFC claimed immunity from court process, with which the Attorney General agreed. The Fast Track High Court upheld the IFC immunity claim and rescinded the earlier order. Complainant contends that this decision was a violation of his fair trial right to defence guaranteed under Article 7(1) (c) of the African Charter.

100. Regarding Article 7(2) of the African Charter, the Complainant contends raises issue with two measures: ***firstly*** the Supreme Court's decision ultimately upholding the Fast Track High Court's decision that he had a case to answer; and ***secondly***, the actual trial itself before the Fast Track High Court. He contends that the Supreme Court failed to enforce the prohibition against retroactive criminalisation under Article 19(5) of the Constitution of the Republic of Ghana, and thus violated the same prohibition under Article 7(2) of the African Charter. Regarding the trial itself, he avers that the charges are based on acts or omissions which did not constitute a known offence at the time they occurred. He avers that

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this also amounts to a violation of the prohibition against retroactive criminalisation under Article 7(2) of the Charter.

101. Lastly, the Complainant avers that the Respondent State breached its duty to guarantee the independence of courts. In this regard he raises five measures undertaken in escalation by the Respondent State following the Supreme Court's decision declaring the first Fast Track Court unconstitutional. ***Firstly***, the Attorney General accompanied by several ministers held a press conference where he announced that he would be applying for a review of the Supreme Court's decision. ***Secondly***, the President of the Republic of Ghana through his spokesperson commented that the Supreme Court's decision was strange and instructions had since been given to use all legal means to have it reversed. ***Thirdly***, the Office of the Minister for Presidential Affairs issued a press release indicating that for purposes of reviewing the Supreme Court's decision, the President had on request by the Chief Justice nominated a new Justice of Appeal. ***Fourthly***, on the occasion of swearing in the new Justice of Appeal, the president made statements, by way of advice, which compromised the independence and impartiality of the judiciary before which his case, the review of the Supreme Court's decision, was intended to be filed. ***Fifthly***, the Chief Justice who was set to be part of the bench hearing the intended review explicitly expressed his determination through a radio call-in program to have the earlier decision of the Supreme Court reversed.

102. He further states that by a 6-5 majority decision the Supreme Court eventually predictably reversed its earlier decision thereby finding the Fast Track Court to be constitutional and remitting the case against him to that court. It is in respect of the trial before this court that the Complainant complains of violations of Article 7(1) (b), (c), and 7(2) of the African Charter.

103. The Complainant contends that the measures enumerated at paragraph 101 above, which produced the result mentioned at paragraph 102 above, are inconsistent with the duty to guarantee the independence of courts. The

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Complainant thus submits that the Respondent State breached its duty under Article 26 of the African Charter.

The Respondent State's Arguments on the Merits

104. As stated above, the Respondent State did not file any merit submissions properly so called. As stated above, the Commission has had to consider the written submissions on review of the inadmissibility decision to the extent that these addressed the merits of the Communication.

105. In those submissions, the Respondent State argues, ***first,*** that the refusal by its courts to apply the standard of "proof beyond reasonable doubt" at the close of the prosecution's case against the Complainant is not inconsistent with the presumption of innocence. It states that the procedure at that stage of trial is governed by sections 173 and 174(1) of its *Criminal and Other Offences (Procedure) Act*, 1960 (Act 30 of the Laws of Ghana).

106. Section 173 of Act 30 of the Laws of Ghana provides that:-

> Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require the accused to make a defence, the Court shall, as to that particular charge acquit the accused.

107. Section 174(1) of the same Act provides that:-

> At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused sufficiently to require the accused to make a defence, the Court shall call on the accused to make a defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence on oath or to make a statement.

108. The Respondent State avers that in practice for purposes of assessing whether or not a sufficient case has been made out to require the accused person to open his or her defence, courts adopt a standard of proof which is lower than proof "beyond

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reasonable doubt". The latter standard is applied when all the evidence including that produced by the accused has been received by the Court. The Respondent State further states that a finding that a case has been sufficiently made out to require the accused should open his or her defence does not lead to a presumption of guilty. Accordingly, the refusal by its courts to apply the standard of "proof beyond reasonable doubt" did not and does not violate the presumption of innocence guaranteed under Article 7(1) (b) of the Charter.

109. *Secondly*, the Respondent State states that Article 7(2) of the Charter is also guaranteed under Article 19(5) of its Constitution and observed in practice. In this regard it states that the accused was charged with "wilfully causing financial loss to the state" before the High Court. The arraigned acts were stated in the particulars of the offence to have occurred in or about February 1993, when section 179A (3(a) of the *Criminal Code* came into force subsequently in July 1993. When the High Court struck out the charges against the Complainant for retrospectivity, the Respondent State did not contest the court's decision.

110. However since the Complainant had not been acquitted but merely discharged, it was open for fresh charges which were consistent with Article 19(5) of its Constitution to be commenced. Thus three of the four counts on which the Complainant was being tried before the Fast Track High Court alleged acts which occurred in October, November and December 2006 after section 179A(3)(a) of the *Criminal Code* had since come into force. The Respondent State submits that in this regard the Complainant's prosecution before the Fast Track High Court did not amount to retrospective application of section 179A(3)(a) of the *Criminal Code* and therefore did not violated Article 7(2) of the African Charter.

111. Apart from the above, the Respondent State does not advance any other argument on the merits of the Communication.

TheCommission's Analysis on the Mertis

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112. The present Communication alleges violations of Article 7(1)(b), (c), 7(2) and 26 of the African Charter. Article 7 of the African Charter provides in the material parts as follows

> (1) Every individual shall have the right to have his cause heard. This comprises:
>
> (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> (c) the right to defence… ;
>
> (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on

113. Article 26 of the African Charter provides for states' duty to guarantee the independence of courts, among other things.

114. The Commission will consider the alleged violation of the above provisions in turn.

Alleged violation of the right to be presumed innocent, Article 7(1) (b) of the Charter

115. The right to be presumed innocent until properly proven guilty is a fundamental human right that ensures the protection of persons facing criminal charges against being treated as guilty before a proper judicial decision to that effect is made.[8] The content of the right is as plain as the language of Article 7(1) (b) of the African Charter: until a competent court or tribunal pronounces the accused person guilty of the offence charged he or she must, with respect to whether he or she has

[8] Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria* (2001) ACHPR para. 41, citing *Krause v Switzerland* (1978) ECHR (Application No. 7986/77)

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committed the offence, be treated as innocent as any other person gallivanting on the street against whom there is no suspicion that he or she has committed an offence.

116. Primarily, the right to be presumed innocent imposes a range of obligations on the State. The State has the **duty to respect** the innocence of the accused person. The duty to respect entails that state officials should desist from making any statements or taking any measures that would amount to treating the accused person as already guilty or imputing that such person is guilty, before a competent and impartial court has properly pronounced as such.[9] The duty also requires the State to ensure, through law or other means that others, such as the media, do not undermine the presumption of innocence of accused persons through adverse news coverage that leaves no other conclusion than the guilty of the accused person.

117. During trial, the right to be presumed innocent imposes the obligation on the State's prosecutorial authorities to prove the relevant charges beyond reasonable doubt[10], subject to permissible presumptions of law and fact. This duty is often expressed as a burden or onus of proof. The standard of 'proof beyond reasonable doubt' in turn ensures that the accused has the benefit of doubt. The doubt in question is about whether the accused is guilty as charged. It is not doubt about the whether the accused person is innocent as this is already presumed at law in favour of the accused.

118. On the part of courts, the presumption operates to ensure that Courts do not surmise or prejudge the guilty of the accused before the offence is proved beyond

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[9] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Guidelines) p.16 para.(e)(2); Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* (1998) ACHPR para. 96; Communications 222/98 and 229/99, *Law Office of Ghazi Suleiman v Sudan* (2003) ACHPR para. 56; Communication 218/98 - *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v. Nigeria*, n 8 above, para. 41; *Communication 224/98, Media Rights Agenda v Nigeria* (2000) ACHPR para. 47 and 48; General Comment 32 "Article 14: Right to equality before courts and tribunals and to a fair trial" HRC (2007); Communication No. 770/1997 - *Gridin v. Russian Federation*(2000) HRC paras. 3.5 and 8.3

[10] Fair Trial Guidelines n 9 above, p. 16, para (e)(1)

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reasonable doubt.[11] In this regard, the Commission is inspired by the view of the European Court that "the presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. [For this purpose] it suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty."[12]

119. Thus, Courts must throughout the trial entertain doubt as to the guilt of the accused person until all the evidence that bears on the charges is received. It is only when the totality of the evidence vitiates all reasonable doubt that the accused is guilty, that the court can conclude that the accused is indeed guilty. The evidence in question for this purpose must as of necessity include that in favour of or produced by the accused, for therein is likely to be the ultimate basis for reasonable doubt which would be resolved in favour of the accused.

120. In the present Communication, the Complainant contends, ***first***, that Fast Track High Court violated his right to be presumed innocent when it dismissed his submission that he had no case to answer, without giving reasons. ***Secondly***, he argues that the Supreme Court also violated the same right when it held that the standard of proof for determining whether a case has been sufficiently made out to proceed to defence is lower than 'proof beyond reasonable doubt'. In the Complainant's view, for the state to respect his right to be presumed innocent, the court had to be satisfied beyond reasonable doubt before calling upon him to open his defence.

121. Notably, the Complainant does not explain how the Fast track High Court's ruling entailed that the court would no longer presume him innocent, which would have amounted to a violation of the presumption of his innocence. The Commission is unable to accept that the mere fact that the Fast Track High Court did not give reasons for its ruling entailed a violation of the Complainant's right to be presumed

[11] *Minelli v Switzerland* [1983] ECHR (Application No. 8660/78) para. 37
[12] *Allenet de ribemont v. France* [1995] ECHR (Application No. 15175/89) para. 35

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innocent. As a matter of practicality, it is the articulation of detailed reasons at such a preliminary stage of a trial that would risk the court pronouncing findings of fact based on evidence from one side, and indeed expressing some opinion on the guilt of the accused based on those facts which would be inconsistent with the presumption of innocence.[13]

122. More importantly, the Complainant's submission of no case to answer was mainly premised on the argument that the case amounted to retrospective application of section 179A (3) (a) of the *Criminal Code*. The dismissal of this argument meant that the Fast Track High Court held the contrary view, albeit without expressing it. The Complainant appealed to the Court of Appeal, and subsequently to the Supreme Court. The Commission has had occasioned to peruse the rulings of the Court of Appeal and the Supreme Court as produced by the parties for purposes of assessing whether domestic courts complied with the Charter obligations.

123. From those rulings it is apparent that the Court of Appeal furnished reasons for upholding the decision of the Fast Track High Court, including on whether the case amounted to retrospective application of the relevant law. If the Complainant's grievance is about the lack of reasons supporting the Fast Track High Court's summary decision, then this was remedied on appeal by the Court of Appeal and eventually the Supreme Court which upheld the lower court's decision. The remediation was done before this Communication was submitted to the Commission. In this regard, there is no more valid basis for a finding that the Complainant's right to be presumed innocent was violated by the failure of the Fast Track High Court to give reasons for its decision.[14]

124. Regarding the ruling of the Supreme Court on the applicable standard of proof, the Commission is equally unable to agree with the Complainant. From the

[13] *Ibid.*
[14] See Communication 906/2000 - *Vargas-Machuca v. Peru* (2002) HRC para. 7.3; Communication 387/1989 - *Karttunen v. Finland* (1992) HRC para. 7.3

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Respondent State's submissions on the point, it appears that the decision as to whether a sufficient case has been made out at the close of the prosecution's case is merely procedural. As the Commission understands the procedure, the Court is not making a finding of guilty at that stage of trial. The court cannot employ the standard of proof "beyond reasonable doubt" at that stage. It should be recalled that 'standard of proof' is a term of art which marks a point in the spectrum between pure conjecture on one end and absolute certainty on the other regarding whether a given allegation is valid. Proving a case entails producing evidence that moves the allegation from one point to the next towards absolute certainty. For purposes of criminal guilt, "proof beyond reasonable" means the totality of evidence must push the allegation past the point below which it would reasonably be doubted if the accused is indeed guilty. Once the evidence surpasses that point, guilt will have been established. Thus if, as the Complainant would have it, the court employed proof beyond reasonable doubt at the close of the prosecution's case, and found that guilty has been made out beyond reasonable doubt, the accused would then be making his or her defence to a court which is already convinced beyond reasonable doubt that he or she is guilty. With such a firm view of the accused person's guilty, the court cannot reasonably be expected to presume the accused innocent as trial proceeds to defence. This would be contrary to the requirement that an accused person must be presumed innocent during the course of trial until the totality of evidence leaves no reasonable doubt that he or she is indeed guilty. The standard of proof beyond reasonable doubt would accordingly be inappropriate at the close of prosecution's case.

125. Rather, as adopted by the Respondent State's courts, a lower standard of proof suffices for purposes of deciding whether the case will proceed to defence. In the Commission's view, the lower standard ensures that the court does not form any firm view about guilty at that stage of trial. In turn that ensures that the accused enjoys the benefit of doubt as the case proceeds to defence. In practical terms, despite the evidence produced by the close of the prosecution's case, the court still entertains doubt as to the accused person's guilt and proceeds to hear evidence that

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would make out that doubt to be reasonable enough as to absolve the accused from guilt.

126. The Commission does not find any merit in the Complainant's submission that the Respondent State's Supreme Court violated his right to be presumed innocent when it held that the standard of proof at the close of the prosecution's case is lower than 'proof beyond reasonable doubt'. Accordingly there was no violation of the right to be presumed innocent.

127. Thus in summary, the Commission does not find the decision of the Fast Track High Court dismissing the Complainant's submission that he had no case to answer to be inconsistent with the presumption of innocence in the circumstances of this Communication. It also finds that even if it held otherwise, the violation was remedied by the domestic courts before the Complainant submitted the present Communication. Similarly, the Commission does not find the Supreme Court's ruling that the applicable standard of proof at the close of the prosecution's case is lower than proof beyond reasonable doubt to be inconsistent with the presumption of innocence.

Alleged breach of the prohibition of retrospective application of criminal law, Article 7(2) of the Charter

128. As stated in Communication 147/95-149/96 - Sir Dawda K. Jawara v. The Gambia (2000) ACHPR para. 63 Article 7(2) of the Charter is an embodiment of the general prohibition against retrospective application of laws. It is a clear and well-established principle recognised by the comity of civilised nations both at the international level and within national legal systems.[15] The prohibition under Article 7(2) of the Charter ensures that subjects are not prosecuted and punished for acts or

[15] In respect of international recognition of the principle, see Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR); Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 9 of the Inter-American Convention on Human Rights; Article 29, Vienna Convention on the Law of Treaties (VCLT) adopted 23 May 1969; and *Island of Palmas* (Netherlands/United States of America) , UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928).

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omissions which at the time of occurrence did not constitute known offences. As the Latin maxim would have it, *nullum crimen, nulla poena sine previa lege poenali* – 'no punishment without the law'.

129. In the present Communication the Complainant's grievance on this point can be stated as follows: he was being tried, among others, on three counts of "wilfully causing financial loss to the state" under section 179A (3)(a) of the *Criminal Code*, 1960 (Act 29) of the Laws of the Republic of Ghana. From the court rulings produced by both parties, it appears section 179A (3)(a) was inserted in the *Criminal Code* by *Amendment Act 458* and came into force in July 1993.

130. According to the Complainant, the relevant facts occurred prior to July 1993. It appears the Complainant is referring to particulars of the charge that was dismissed by the regular High Court for retrospectivity. The relevant particulars are captured in the Respondent State's submissions on review of the inadmissibility decision. They are to the effect that in or about February 1993 as a Chairperson and Chief Executive of the Ghana National Petroleum Company (GNPC), a state corporation, wilfully caused GNPC to guarantee a loan of a stated sum of money from a French enterprise to a private Ghanaian company. When the latter company default, GNPC as guarantor had to repay the loan in 1996.

131. Complainant maintains that the charges in respect of which he was being tried by the Fast Track High Court at the time of submitting the present Communication relate to his authorising the guarantee in February 1993 and thus prior to July 1993 (the critical date) when section 179A(3)(a) of the *Criminal Code* came into force. To that extent, he submits, section 179A (3)9a) of the *Criminal Code* was applied to him retrospectively.

132. It may be apposite to restate the Respondent State's argument on this point. Simply put, the Respondent State maintains that the Complainant was being tried in respect of acts which occurred in October, November, and December of 1996. This is confirmed by a copy of the relevant charge sheet produced to the Commission by the

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Respondent State as an exhibit to its submissions on review of the inadmissibility decision.

133. It is important to reiterate at this point that the Commission is not a court of appeal. Accordingly, the recount of the evidence that was before domestic courts should not be misunderstood to mean that the Commission is reviewing the decisions of the local courts, as would be the case on an appeal. Rather, the Commission's mandate is to determine whether, as alleged by the Complainant, domestic courts proceeded to try him for acts which did not constitute known offences under the laws of the Respondent State at the time those acts were performed. It is merely incidental that the Respondent State has a provision in its Constitution which is in *pari materia* with Article 7(2) of the Charter, and accordingly the issue that domestic courts had to determine on the point happens to be the same issue that falls for determination by the Commission.

134. Further, it should be recalled that it is not for the Commission to decide what conduct constitutes a criminal offence. This is the preserve of the domestic legal systems. Thus in the present Communication, it is not for the Commission to decide whether what the Complainant did in 1991, or in February 1993, or in 1996, or indeed any other such date, constitute criminal offences separately or together. The only question the Commission is called upon to determine is whether domestic courts failed to live up the undertaking the Respondent State made under Article 7(2) of the Charter. This as of necessity will require the Commission to examine whether the charges against the Complainant before the Fast Track High Court amount to retrospective application of section 179A(3)(a) of the *Criminal Code.*

135. On the material available, the Commission is unable to agree with Complainant. The particulars of the charge of 'wilfully causing financial loss to the State' as produced to the Commission by the Respondent State allege facts which occurred in October, November and December of 1996, and not in February 1993. Clearly this was after section 179A (3)(a) of the *Criminal Code* had come into force. Whether indeed those acts constitute the charged offence is for the domestic law to

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provide and municipal courts to decide. For its part, the Commission is satisfied that the domestic courts proceeded with trial based on charges whose particulars alleged acts which occurred after the relevant law was in force, and thus the relevant offence was known.

136. It will be important to recall that the charges before the Fast Track High Court followed the striking out by the 'normal High Court' of a similar charge which was however based on acts which were performed prior to the critical date. The Respondent State did not contest the normal High Court decision in that regard. Instead it framed fresh charges exclusively based on acts performed in 1996 even though the genesis might have been in 1993 or an earlier date. To the extent that the trial complained of was based on charges which focussed exclusively on acts performed in 1996, the trial cannot be held to have breached the prohibition against retrospective application of criminal laws.

137. Even if, as appears to be the Complainant's case, the acts he performed in 1996 were a result of the guarantee he caused GNPC to provide prior to the critical date so that the offence were of a continuing nature[16], the Respondent State did not still breach Article 7(2) of the Charter so long as acts which occurred in 1996 exclusively constitute a known criminal offence and the trial focussed only on those acts[17]. The Commission has already stated that the question whether the acts performed in 1996 exclusively constitute a criminal offence is for the domestic law to provide, and domestic courts to decide. In the circumstances, the Commission is not convinced that the courts of the Respondent State violated the prohibition against retrospective application of criminal law by trying the Complainant on the charges in question.

Alleged violation of the right to defence, Article 7(1)(c) of the African Charter

138. The right to defence entails a range of related rights working together toward ensuring that the accused person is afforded a fair chance to present his or her

[16] *Puhk v Estonia* [2004] ECHR 69, para. 30; and *Veeber (No 2) v Estonia* [2003] ECHR para. 35
[17] *Ecer and Zeyrek v Turkey* [2001] ECHR 107, para 35;

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defence to the charges. Among others, it entails that the State must clearly outline the arraigned acts and the law under which the accused person is being charged. These are very critical in enabling the accused person to prepare the appropriate defence to the charges. It also entails that the accused must be permitted by law and in practice to call the necessary witnesses and produce relevant documents or other evidence to advance his or her defence. Together, these and other related rights constitute the right of an accused person to be heard before being condemned, which is recognised by the comity of civilised nations.

139. In the present Communication, the Complainant raises two measures undertaken by courts of the Respondent State as constituting a violation of the right to defence. *Firstly*, he states that when he appealed against the ruling of the Fast Track High Court, the Court of Appeal referred to a repealed law to justify that the charges were based on a known offence at the time of commission. He contends that to the extent that the repealed law was being mentioned for the first time on appeal as the basis of the charges, he was denied the opportunity to know the charge preferred against him so that he could prepare his defence. Accordingly, he argues, the Court of Appeal denied him the right to defence guaranteed under Article 7(1)(c) of the African Charter.

140. *Secondly*, he states that in the course of trial, the Fast Track High Court rescinded an order it had earlier granted him requiring a representative of International Finance Company to appear before the court to testify and produce some documents to further his defence. The basis for the rescission of the order was that IFC appeared by counsel who argued, and the court accepted that it was immune from court process. The Complainant argues that this was contrary to the domestic law under which the IFC is not immune.

141. With regard to the Court of Appeal's reference to a repealed law, the Commission is again unable to agree with the Complainant. Clearly, from the ruling he provided to the Commission, the Court of Appeal did not substitute section 179A

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(3)(a) of the *Criminal Code* with the relevant predecessor in the repealed law. As stated by the Supreme Court on his further appeal, the Court of Appeal merely referred to the repealed law as a historical fact the offence of 'wilfully causing financial loss to the State' existed at the time of commencement of the acts he was being tried for. Indeed the Complainant does not suggest that when trial eventually continued before the Fast Track High Court, section 179A(3)(a) of the *Criminal Code* had been transposed with its predecessor under the repealed law.

142. Moreover, even if for some reason it might be held that the Court of Appeal acted in contravention of the right to defence, that was subsequently remedied by the Supreme Court which clarified the point as stated above. Plainly, this argument is unsustainable. The Commission accordingly declines to find that there was a denial of the right to defence in that regard.

143. As for the rescission of the order requiring IFC to testify and produce documents, the Complainant's case amounts to stating that the Court's decision was not based on the correct interpretation of the domestic law relating to immunity of international organisations from court process. That would amount to reviewing, by way of appeal, the decision of the domestic court based on domestic law, a role which the Commission cannot perform as it is not a court of appeal.

144. Further, it is important to note that the right to call witnesses is not absolute and may be subject to limitations recognised by law consistent with international law. The right to defence does not provide an unlimited right to call any witness on the mere basis that such witness has been requested by the accused.[18] Immunity from the jurisdiction of domestic courts is one possible limitation of the right to call witnesses. The most obvious example would be a person accused before a court of one State attempting to call under order of a court as a witness, a Head of State of another State. Beyond such obvious example, immunity is accorded to different persons and entities by domestic authorities under domestic law.

[18] General Comment No 32 "Article 14: Right to equality before courts and tribunals and to a fair trial" (2007) HRC para.39

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145. Thus, whether the relevant law and by extension the decision of the Court of Appeal constitute an unjustifiable limitation of the right to call witnesses and thus the right to defence under Article 7(1)(c) of the Charter, would depend on whether the immunity in question is of the type that is generally accepted as customary international law by the comity of nations, in which case it would constitute a recognised limitation of the right in question. Unfortunately in the present Communication, there is no material presented by the Complainant beyond the bare allegation that immunity of IFC denied was a denial of his right to call witnesses and thus to defence. The Commission lacks the material on the basis of which it would examine whether the immunity accorded to IFC is a justifiable limitation. The Commission is accordingly unable to make any finding on this point.

Alleged breach of the duty to guarantee the independence of courts, Article 26 of the Charter

146. The duty to guarantee the independence of courts is inextricably linked to and a pillar of the right to fair trial.[19] The right to have one's cause heard entails the right to have such cause heard by a court or tribunal that is independent of external, especially executive,[20] influence. In turn independence has implications for the actual or apparent impartiality of the court or tribunal. The right to have one's cause heard by an independent and impartial court or tribunal is an absolute right that is not subject to exceptions.[21]

147. As interpreted by the Human Rights Committee in *General Comment No. 32*,

> The requirement of independence refers, in particular, to the *procedure and qualifications for the appointment* of judges, and guarantees relating to their *security of tenure* until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing *promotion, transfer, suspension and cessation of their functions*, and the *actual independence*

[19]

[20] See Communication 281/2003 - *Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo* (2008) ACHPR para. 79

[21] Communication 263/1987 - *Gonzalez del Rio v. Peru* (1992) HRC para. 5.2.

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of the judiciary from *political interference* by the executive branch and legislature.

States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them[22]

148. In the present Communication, the Complainant maintains that the Respondent State violated Article 26 of the African Charter which enjoins states to guarantee the independence of courts. In this regard he points out five measures that were undertaken by the Respondent State after the Fast Track Court was declared unconstitutional. The measures are outlined at paragraph 101 above. ***Firstly***, taken alone, the allegation that the Attorney General announced the intention to seek a review of the Supreme Court's decision does not raise any breach of the duty to guarantee the independence of courts.

149. ***Secondly***, the statement by the spokesperson of the President of the Republic of Ghana to the effect that the ruling of the Supreme Court was "strange" and that 'all legal means' would be used to have it reversed does not engage the breach of the independence of courts.

150. ***Thirdly***, the Complainant states that the Office of the Minister for Presidential Affairs issued a press release "stating that at the *request of the Chief Justice* the President had nominated a new Justice of the Supreme Court "**for the purpose of the review**" in my case." The press review in question is produced to the

[22] GC No. 32, n 18 above, para. 19, emphasis in italics supplied. See also Communication 281/2003 - *Marcel Wetsh'okonda Koso and Others v DRC* n 19 above, para.79; and UN Basic Principles on the Independence of the Judiciary, UNGA Resolutions 40/32 and 40/146, adopted in 1985; and ACHPR "Resolution on the Respect and the Strengthening on the Independence of the Judiciary" adopted in March 1992

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Commission by the Complainant. It states that "the President … acting on the advice of the Judicial Council (and not 'the Chief Justice' as suggested by the Complainant) after consultation with the "Council of the State" has submitted the name of Mr. Justice Kwame Afreh J.A. to Parliament for approval prior to his appointment as Supreme Court Judge."

151. The press release goes further to state that the nominated Judge was "the most senior member of the bar sitting on the Court of Appeal", and that "in the event of a review" of the Fast Track High Court decision (constitutionality), "his appointment would enable the Chief Justice to meet the requirement to empanel eleven members, a larger bench than the nine members who heard the original case."

152. It is important to note a few points that are illuminating. *Firstly*, it is apparent from the press release that the president did not directly appoint the new Justice of Appeal. The process involved vetting or approval by parliament, which entailed that Parliament, was at liberty to decline the candidate, unless the Complainant's case is that the Parliament was merely going to rubberstamp the candidate. The Complainant has not advanced such a case. *Secondly*, it appears that it was a requirement for purposes of reviewing the Supreme Court's decision that the bench had to be constituted of eleven Justices of Appeal, unlike the nine that made the first decision. *Thirdly*, the Complainant sought review of the Supreme Court decisions twice: one in respect of the decision which declared the Fast Track Court unconstitutional; and the second on the decision confirming the decision of the Court of Appeal which confirmed the decision of the Fast Track High Court dismissing his submission of no case to answer. The press release contemplates the review of the first decision of the Supreme Court.

153. These points are important in that they indicate a somewhat different nature of the process of appointment of the new Justice of Appeal from the one painted by the Complainant. Thus, it was not given that the candidate Justice of Appeal was going to be approved as the process entailed vetting by parliament, a third branch of the State performing its role of checks and balances. It appears the appointment was

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also to meet a requirement to empanel an enlarged bench of the Supreme Court. The subject matter of the review - constitutionality of a Court – likely entailed broader interests than the immediate interests canvassed by the Complainant's case.

154. Further, the ***fourth*** and ***fifth*** measures enumerated at paragraph 101 above allege that the President of the Respondent State made some statements during the swearing in of the new Justice of Appeal which were prejudicial to his case; and that the Chief Justice made a statement to a radio call-in program expressing his determination to have the earlier decision reversed. The Complainant does not disclose the alleged prejudicial statements made by the President. Similarly, apart from making a bare allegation, he does not produce anything, audio recording or some print newspaper or a transcript or indeed any other form of evidence to substantiate the claim that the Chief Justice expressed determination to reverse the earlier decision. The Commission is unable to treat the Complainant's bare allegations as granted in this regard.

155. However, when the measures are considered together as a series of concerted and escalated actions towards a desired outcome on the review of the decision that rendered the Fast Track Court unconstitutional, the result is different. Those measures constitute tacit escalated interference with the independence of courts by the executive through what appears to have been targeted appointment of a Justice of Appeal and a strategic reconstitution of the Supreme Court bench that would determine the application for review. Indeed the press release issued by the Office of the Minister for Presidential Affairs even contemplated the review.

156. What is more is that when the review was heard, the Complainant's apprehensions seemed to have been confirmed. The court reversed its decision by a 6-5 simple majority, compared to a 5-4 majority initial decision. Thus the initial of bench of nine was increased by two extra Justices of Appeal. The first of the two Justices of Appeal is the one whose nomination had been announced through the press release. The Complainant states that the second Justice of Appeal had already reached retirement age, but was allowed to sit on the review, and soon after the

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review decision he was given another appointment by the President. The Complainant's argument in this regard appears to be that this new appointment was a token of appreciation for being part of the review decision which turned against him.

157. Unfortunately, as lamented earlier, the Respondent State did not seize the unprecedented opportunity granted to it to respond to these allegations. As held by the European Court of Human Rights, "in determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case … -, [regard must be had] to the *manner of appointment* of its members and the duration of their term of office, the existence of guarantees against outside pressures and *the question whether the body presents an appearance of independence* altogether.[23]

158. It must be noted that the mere fact that appointments to the judiciary are done by the executive does not engage the breach of the duty to guarantee the independence of courts. However when an appointment is made in contemplation of a specific case which would be lodged by the appointing authority or its agent to the court to which such an appointment is made, the appearance of independence of such a court is seriously impaired. In such a case, the ordinary citizen, and the Complainant in this Communication, would reasonably view the appointment as a targeted measure to secure an anticipated outcome.[24]

159. The Commission is convinced that cumulatively the conduct of the Respondent State regarding the review of the Supreme Court's decision declaring the Fast Track Court unconstitutional, and in particular the manner of reconstituting the Supreme Court's panel constitute tacit interference with the independence of that court. That court cannot be regarded to have had the appearance of independence, let alone impartiality. As it happened, the outcome of the review appears to be exactly what the Respondent State calculated to achieve. This was all in breach of the

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[23] *Campbell and Fell v the United Kingdom* [1984] ECHR (Application No. 7819/77; 7878/77) para 78; See also *Communication 281/2003 - Marcel Wetsh'okonda Koso and Others v DRC* n 19 above, para.79

[24] *Belilos v Switzerland* [1998] ECHR (Application no. 10328/83) para 67

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solemn duty undertaken by the Respondent State under Article 26 of the Charter. Accordingly, the Commission finds that the Respondent State breached its duty to guarantee the independence of the Supreme Court when it reviewed its earlier decision declaring the Fast Track Court unconstitutional.

160. Thus, in totality, the Commission finds that there was no violation of Article 7(1)(b), (c), and 7(2) of the African Charter. But it finds that the Respondent State breached its duty under Article 26 of the African Charter regarding the independence of the Supreme Court of Appeal when it reviewed its earlier decision declaring the Fast Track Court unconstitutional.

The Appropriate Remedy

161. In terms of the remedy for the breach of Article 26, the Commission notes that the tacit interference related to the case of the constitutionality of the Fast Track Court. The implications for the Complainant were that he eventually had to be tried before the Fast Track High Court which was eventually declared to be constitutional. The Complainant does not state, suggest or produce any material indicating that that court itself lacked independence or the appearance thereof. Neither does he state that there was any tacit interference in the constitution of the bench of the Fast Track High Court. Thus the independence of the Fast Track High Court itself before which he was eventually tried was not impaired by any measures at the instance of the Respondent State.

162. In the circumstances, the Commission considers that a finding of breach of Article 26 of the Charter and a necessary recommendation to the Respondent State for future purposes suffice as remedies for the breach.

The Commission's Decision

163. In light of the foregoing, the Commission:-

(a) Holds that there was no violation of Article 7(1)(b), (c), and 7(2) of the African Charter.

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(b) That the Respondent State breached its duty to guarantee the independence of courts as required under Article 26 of the African Charter.

(c) That (b) above constitute a sufficient remedy for the breach so found.

(d) Calls upon the Respondent State to live up to its solemn undertaking under Article 26 of the Charter to guarantee the independence of courts, by among others, desisting from any measures or tactics such as in the appointment of judicial officers that would undermine the independence of, and public confidence in, courts.

Done in Luanda, Angola during the 55th Ordinary Session of the African Commission on Human and Peoples Rights, 28 April to 12 May 2014

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