AFRICAN UNION

الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

BENEFICIARIES OF LATE NORBERT ZONGO, ABDOULAYE NIKIEMA *ALIAS* ABLASSÉ, ERNEST ZONGO AND BLAISE ILBOUDO & THE BURKINABÈ HUMAN AND PEOPLES' RIGHTS MOVEMENT

V.

BURKINA FASO

APPLICATION NO. 013/2011

JUDGMENT

The Court composed of: Sophia A. B. AKUFFO, President; Bernard M. NGOEPE, Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORE, El Hadji GUISSE, and Kimelabalou ABA - Judges; and Robert ENO - Registrar,

In the matter of

Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo and Blaise Ilboudo & the Burkinabè Human and Peoples' Rights Movement,

represented by:

Advocate Ibrahima KANE, Counsel

and

Advocate Chidi Anselm ODINKALU, Counsel

V.

Burkina Faso,

represented by:

Antoinette OUEDRAOGO, Counsel

and

Anicet SOME, Counsel

After deliberations, *unanimously*

renders the following Judgment:

I. SUBJECT OF THE APPLICATION

1. By letter dated 11 December 2011, the Court was seized of this matter by Ibrahima Kane, claiming to act on behalf of the family and advocates of Late Norbert Zongo.

According to the document titled "Communication/Application" dated 10 December 2011 annexed to the aforesaid letter, the action is brought against Burkina Faso by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo and Blaise Ilboudo and by the Burkinabé Human and Peoples' Rights Movement.

A) The facts of the matter

2. According to the Application, the facts date back to 13 December 1998, when Norbert Zongo, an investigating journalist, and his above-mentioned companions were murdered. The companions, Abdoulaye Nikiema and Blaise Ilboudo, were work colleagues of Mr. Zongo, while Ernest Zongo was his younger brother.

3. The Applicants state that "the investigating journalist and Director of the weekly magazine *L'Indépendant*, Norbert Zongo and his companions, Abdoulaye Nikiema, Ernest Zongo and Blaise Ilboudo, were found burnt in the car in which they were travelling, on 13 December 1998, seven kilometres from Sapouy, on the way to Leo, in the south of Burkina Faso".

4. Relying mainly on the report of the Independent Commission of Enquiry set up by the Government to determine the cause of death of the aforementioned persons, the Applicants allege that "the murder of the four persons on 13 December 1998 is connected with investigations that Norbert Zongo was conducting on various political, economic and social scandals in Burkina Faso during that period, notably the investigation of the death of David Ouédraogo, the chauffeur of François Compaoré, brother of the President of Faso and Adviser at the Presidency of the Republic".

5. The Applicants state that, "as the chauffeur and employee of François Compaoré, David Ouédraogo died on 18 January 1998 at the Health Centre of the Presidency in

Burkina Faso, apparently as a result of the brutal treatment inflicted on him by presidential security guards who were investigating a case of money stolen from the wife of François Compaoré."

6. The Applicants also claim that "Norbert Zongo had written a series of very critical articles on the matter in which he highlighted numerous irregularities, the refusal of the persons "implicated" to appear before justice, and above all the attempt to stifle a very embarrassing matter in which the family of the President's brother is deeply involved".

B) Alleged violations

7. The Applicants allege concurrent violations of the provisions of various international human rights instruments to which Burkina Faso is a party.

8. With regard to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter"), they allege that article 1 (the obligation to take appropriate measures to give effect to the rights enshrined in the Charter); article 3 (equality before the law and equal protection of the law); article 4 (the right to life); article 7 (the right to have one's cause heard by competent national courts); and article 9 (the right to express and disseminate his or her opinion) have been violated.

9. Regarding the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"), they contend that article 2(3) thereof (the right to be heard in case of violation of rights); article 6(1) (the inherent right to life); article 14 (the right to have one's cause heard by a competent, independent and impartial tribunal); and article 19(2) (freedom of expression) have been violated.

10. As regards the Revised Treaty of the Economic Community of West African States (ECOWAS), they allege that article 66.2(c) (the obligation to ensure respect for the rights of journalists) has been violated.

11. With respect to the Universal Declaration of Human Rights, the Applicants allege that article 8 thereof (the right to an effective remedy by the competent national tribunals for

acts violating the fundamental rights granted him by the constitution or by law) has been violated.

12. More specifically, the Applicants emphasize that ".... the crucial element in the obligation to protect the right to life and guarantee the existence of effective remedies when the said right is violated is the duty to investigate the perpetrators of the acts of homicide such as that of Norbert Zongo, identify the suspects and bring them to justice...".

13. They further stress that "instead of fulfilling that obligation, Burkina Faso patently and repeatedly chose to frustrate the efforts of the families of Norbert Zongo and his companions at ensuring that those responsible for the deaths account for their actions".

14. They also contend that "by failing to initiate an effective inquiry to determine the circumstances surrounding the death of Nobert Zongo and ensuring that those responsible are identified, tried and punished, Burkina Faso violated Norbert Zongo's right to life as guaranteed under article 4 of the Charter on Human and Peoples' Rights and article 6(1) of ICCPR, as well as article 3(2) of the Charter on equal protection of the law".

15. Finally, they submit that "these actions for which Burkina Faso is held liable constitute a violation of article 9(2) of the Charter and article 9(1) and (2) of the ICCPR..." both of which guarantee freedom of expression.

II. HANDLING OF THE MATTER AT NATIONAL LEVEL

16. At this juncture, a summary of the manner in which this matter was handled at national level would be appropriate.

According to the narrative of events by the Applicants, both in their Application and in their submissions on the Merits, as well as at the Public Hearing of 28 and 29 November 2013, the matter went through the following main stages:

- Seizure of the Dean of the Examining Magistrates of Cabinet No. 1 of the Ouagadougou High Court, by the State Prosecutor through a formal request dated 24 December 1998

for investigations to be initiated to ascertain the cause (or causes) of the death of the occupants of Norbert Zongo's car;

- On the directive of the aforementioned judge, a *post mortem* examination of the exhumed bodies and forensic analysis of the items found at the scene of the crime, were conducted;

- Letter of complaint and filing for damages by the Applicants - 6 January 1999;

- Creation of an Independent Commission of Enquiry (ICE) charged with "conducting all the necessary investigations to establish the cause of death of the occupants of the 4WD vehicle with plate number 11 J 6485 BF, which occurred on 13 December 1998 on the Ouagadougou highway (Kadiogo Province), including the journalist Norbert Zongo" (December 1998). The Commission submitted its report in May 1999;

- Decision by an extra-ordinary session of the Council of Ministers to forward the ICE report promptly to justice (May 1999);

- Establishment of a Committee of the Wise to examine all issues pending at the time, and to make recommendations acceptable to all stakeholders on the national political scene (May 1999). The Committee of the Wise submitted its report in July 1999;

- Summons issued on 16 January 2001 by a first Investigating Magistrate to François Compaoré who failed to appear;

- Hearing of François Compaoré by a second Investigating Magistrate, after the first Investigating Magistrate who had charged him with murder and concealment of the body, had been withdrawn from the case (January 2001);

- Indictment of one of the suspects previously identified by the ICE (February 2001). As the indictee was said to be ill, action on the matter was frozen for more than five years;

- Order to terminate proceedings against the indictee for lack of evidence, issued by the Investigating Magistrate of the Ouagadougou High Court, after a witness declined to give evidence (July 2006); and

- Appeal against the order to terminate proceedings filed by late Norbert Zongo's family before the Criminal Appeal Chamber of the Ouagadougou Court of Appeal, which dismissed the appeal and upheld the decision to terminate the proceedings (August 2006)

17. In its memorandum of response registering preliminary objections and response on the Merits, the Respondent confirmed the setting up of an ICE (Decree of December 1998 as amended on 7 January 1999) and of the Committee of the Wise (mentioned in the speech of the President of Faso on 21 May 1999 and effectively established on 1 June 1999) and provided details on the composition and mandate of the two structures as well as on the task they had accomplished.

18. Furthermore, the Respondent in particular made reference *to* the following procedures and actions:

- Arrival of the Sapuoy Police at the crime scene on 13 December 1998 at 16.45 hours;

- Arrival of the State Prosecutor of the Ouagadougou High Court at the crime scene on 14 December 1998;

- Identification of the bodies on 15 December 1998 by a physician of the Léo Medical Centre;

- The 24 December 1998 request by the State Prosecutor for investigations to be initiated to determine the cause or causes of the death of the occupants of the car with Registration Number 11 J6485 BF, and for the matter to the referred to Investigating Magistrate of chamber 1 to that effect;

- Submission of the ICE Report on 7 May 1999;

- Forwarding of the ICE Report to justice by the Government;

- Forensic and ballistic reports ordered by the Investigating Magistrate;

- The 21 May 1999 application by the State Prosecutor of Burkina Faso, for investigations to be initiated against X for the murder of Norbert Zongo, Ernest Zongo, Blaise Ilboudo and Abdoulaye Nikiema *alias* Ablassé;

- Examination of the case file by the Investigating Magistrate, followed by the arrest and detention of the principal suspect on 2 February 2001;

- Adversarial procedure between the principal suspect, Warrant Officer Marcel Kafando and the witness Jean Racine Yameogo;

- The suspension on 15 May 2001 of the adversarial procedure between the accused and the witness as a result of the poor state of health of the accused; and resumption of the adversarial procedure on 31 May 2006;

- Definitive directive by the State Prosecutor on 13 July 2006, requiring the abandonment of the proceedings against the sole accused person;

- Order to terminate proceedings issued by the Investigating Magistrate on 18 July 2006;

- Appeal filed by the *parties civiles* (private parties) on 19 July 2006 with the Criminal Appeal Court of Ouagadougou against the Order to terminate proceedings for lack of evidence; and

- Ruling by the Appeal Court on 16 August 2006, confirming the Order to terminate proceedings issued by the Investigating Magistrate.

19. The Court notes that the narration of the facts on the handling of the matter at national level as presented by the Applicants and by the Respondent State was, on the whole, the same and complementary, save on three issues, which were also debated during the Public Hearings of 7 and 8 March and of 28 and 29 March 2013.

Firstly, the Respondent claimed that the matter was handled by a single Investigating Magistrate, thus refuting the Applicant's allegation according to which the first Investigating Judge had been withdrawn from the case. In rebuttal, Counsel for the Applicants provided the names of the two Investigating Magistrates. Finally, during the Public Hearing of 29 November 2013, Counsel for the Applicants admitted that there was only one Investigating Magistrate in the matter of Norbert Zongo and Others ***(infra*, paragraph 129).**

On the second issue, whereas the Applicants contend that Mr. François Compaoré refused to appear before a first Magistrate, but appeared once before a second Magistrate who replaced him when he the Magistrate was withdrawn from the case, the Respondent posited that Mr. François Compaoré appeared at least twice before a single Investigating Magistrate who dealt with the matter.

Furthermore, the Respondent refutes the Applicant's allegation that the hearing of the matter was stayed between 2001 and 2006, and claims that the hearing, including the hearing of witnesses, continued throughout that period.

The Court will have the opportunity to review all the aforesaid allegations when examining the allegation of violation of the right to have one's cause heard by competent national courts.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT[1]

20. The application was received at the Registry of the Court on 11 December 2011.

21. By separate letters dated 11 and 23 January 2012, addressed to the Minister of Foreign Affairs of Burkina Faso, the Registry transmitted the application to the Respondent pursuant to Rule 35 (4) (a) of the Rules of Court and requested that the names and addresses of the representatives of Government be submitted to the Court within thirty (30) days of receipt of the application. The Registry further indicated that the Minister's response to the application should be filed within sixty (60) days as stipulated by Rule 37.

22. By letter dated 13 March 2012, addressed to the Registrar and submitted through a Note Verbale dated 23 March 2012 from the Embassy of Burkina Faso, Permanent Mission to the African Union, the Burkinabé Minister of Communication, Spokesperson of the Government and Interim Minister of Foreign Affairs and Regional Cooperation,

[1]The details of procedure before the Court which culminated in its Ruling of 21 June 2013 on the preliminary objections can be found in paragraphs 20 to 49 of the said Ruling.

submitted the names and addresses of the representatives of the Government of Burkina Faso.

23. By separate correspondence dated 11 April, 25 April, 8 May and 15 May 2012, respectively, the Respondent transmitted to the Court Registry, its response to the application, with observations regarding the admissibility of the application.

24. In its memo in response dated 11 April 2012 received in the Court Registry on 17 April 2012, the Respondent State raised objection regarding the Court's jurisdiction *ratione temporis* and the admissibility of the application, on the grounds that the Applicants failed to exhaust local remedies and had not observed reasonable time prior to submission of the application to the Court.

25. By letters dated 6 and 8 June 2012, respectively, addressed to the Applicants, the Registry forwarded copy of the response of the Respondent.

26. In their memo in reply received in the Court Registry on 22 August 2012, the applicants systematically rejected the preliminary objections raised by the Respondent State.

27. At its 26th Ordinary Session held in Arusha from 17 to 28 September 2012, the Court decided that the written procedure on the preliminary objections was closed, and scheduled a Public Hearing on the said objections for March 2013.

28. The Court effectively held a Public Hearing on 7 and 8 March 2013, following which it went into deliberation on the preliminary objections.

29. By letters dated 12 April 2013 addressed to the parties, the Registrar requested the latter to produce, within fifteen days, all such document as may corroborate the allegations made at the Public Hearing, with specific request to the Respondent to submit all such document as may prove that between 2001 and 2006, treatment of the matter had continued, particularly with the hearing of witnesses.

30. By letter dated 25 April 2013, one of the Counsels to the Respondent State transmitted to the Registrar, a list of documents compiled on 20 July 2006, detailing all the actions

taken in regard to the case from 1999 to 2006, signed as required by law, by the Investigating Registrar of the Court in Ouagadougou, together with nine reports comprising twenty-two pages of hearings, adversarial procedures and submissions, totalling sixty-three procedural acts which form part of the process of addressing the matter between the period of suspension of the hearing of the principal accused and the appeal proceedings.

31. By letter dated 28 April 2013, the Applicants responded to the Registrar's letter mentioned in paragraph 29, reiterating their position that the matter had been stayed between 2001 and 2006, and producing a copy of the definitive directive dated 13 July 2006 by the Prosecutor of Faso to terminate proceedings, as well as a copy of the summons dated 28 April 2006 issued to the Counsel to appear for the hearing of Madam Geneviève Zongo.

32. On 21 June 2013, the Court delivered its ruling, as follows:

"On these grounds,

THE COURT, unanimously,

1. *Upholds* the objection to the Court's jurisdiction *ratione temporis* with respect to the violation of the right to life, based on the 13 December 1998 murder of Norbert Zongo, Abdoulaye Nikiema known as Ablassé, Ernest Zongo and Blaise Ilboudo;
2. *Overrules* the objection to its jurisdiction *rationae temporis* in regard to the allegation of violation of the rights of the Applicants to have their cause heard by a Judge on the basis of the judicial acts and procedures which occurred during treatment of this matter at national level;
3. *Overrules* the objection to the Court's jurisdiction *rationae temporis* on allegations of violations of human rights in regard to the obligation to guarantee respect for human rights, the right to equal protection of the law and equality before the law, and the right to freedom of expression and the protection of journalists as long as these allegations are directly linked to the allegation of violation of the right of the Applicants to have their cause heard by competent national courts.

4. *Declares* that, in the circumstances of the case, the objection to the admissibility of the application on the grounds of failure to exhaust local remedies is not an exclusively preliminary objection and joins the said objection to the substantive case;
5. *Overrules* the objection to the admissibility of the application on the grounds of failure to observe reasonable time in the submission of the application to the Court;
6. *Decides* to consider the merits of the matter;
7. *Directs* the Respondent to submit to the Court its response on the merits of the case within 30 days of the date of this Ruling; and further *directs* the Applicants to submit to the Court their briefs on the merits of the case within 30 days from the date of receipt of the response of the Respondent State".

33. By letters dated 3 July 2013 addressed to the parties, the Registrar served them with a copy of the 21 June 2013 Ruling on the preliminary objections, and informed them that the Public Hearing on the merits of the case would take place on 19 and 20 September 2013 at the Seat of the Court in Arusha.

34. By letter dated 19 July 2013, the Respondent submitted to the Registrar, two copies of its briefs in response, pursuant to the provisions of the 21 June 2013 Ruling of the Court.

35. By letter dated 30 July 2013, the Registrar notified the Applicants of the above mentioned response of the Respondent State, and invited them to submit their reply, if need be, within thirty days from the date of receipt of the notice.

36. By letter dated 27 August 2013 addressed to the Registrar, the Applicants requested an extension of the deadline by thirty days, to enable them collect all the evidence which they would like to annex in support of their reply.

37. By letter dated 3 September 2013, the Registrar informed the Applicants that the Court had decided to extend the deadline for submission of their reply by thirty days effective from 6 September 2013, and that the Public Hearing had therefore been deferred to a date to be announced.

38. The Court further decided that the Public Hearing on the merits of the case would be held during the November-December 2013 Ordinary Session, on dates to be announced. At its 30th Ordinary Session held in Arusha from 16 to 28 September 2013, the Court agreed on 28 and 29 November 2013 as dates for the Public Hearing.

39. By email dated 7 October 2013, received in the Registry on the same date, the Applicants, through their representatives, filed their reply dated 6 October 2013.

40. The Public Hearing was held on 28 and 29 November 2013, at the Seat of the Court in Arusha, and the Court heard the submission of the Parties as follows:

For the Applicants:

- Advocate Benewende Stanislas SANKARA, Counsel

- Advocate Ibrahima KANE, Counsel

- Advocate Chidi Anselm ODINKALU, Counsel

For the Respondent State:

- Dieudonné Désiré SOUGOURI, Director General of Legal and Consular Affairs at the Ministry of Foreign Affairs and Regional Cooperation

- Advocate Antoinette OUEDRAOGO, Counsel

- Advocate Anicet SOME, Counsel

41. During the Public Hearing, the Judges of the Court asked the parties questions and the latter responded.

42. By letter dated 18 December 2013 addressed to the Registrar of the Court, the Respondent, as requested by the Court during the Public Hearing of 29 November 2013, submitted a set of documents intended to establish the fact that hearing on the matter had not been suspended between 2001 and 2006 on grounds of the illness of the accused, Marcel Kafando, and that the hearing followed its normal course.

The documents produced included: letters of assignment of Counsels for the beneficiaries of Norbert Zongo *et al*; letters from the Counsel requesting that some witnesses be heard; warrants for the detention and for extension of the period of detention of the accused; several medical documents on the state of health of the suspect; several summons for witnesses and the suspect; twenty seven (27) reports on the hearings.

43. By letter dated 2 January 2014, the Registrar served these documents on the Applicants.

44. By letter dated 29 January 2014, the Applicants submitted to the Court, following its request at the Public Hearing of 29 November 2013, the written submissions of Maître B. N. Sankara at the Public Hearing, as well as documents annexed to the pleadings. The documents produced were, *inter alia*, the Applicants' complaint in a civil suit; several reports on interrogations and adversarial procedures; exchange of correspondence between the Applicants and the Prosecutor of Faso on the subject of reopening of investigations into the matter, after the 18 July 2006 Order to terminate proceedings.

45. During the written procedure, the parties made the following submissions:

On behalf of the Applicants,

In the application:

"52. In view of the above-mentioned points of fact and the law, without prejudice to elements of fact and of law, and elements of evidence which may later be adduced, as well as the right to amend and supplement this document, the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement, respectfully pray the Court to:

(1) Declare the application admissible;

(2) Declare that the State of Faso has violated the relevant provisions of the Universal Declaration of Human Rights (article 8), the ICCPR [articles 2(3), 6(1) and 19(2)], the Charter [articles 1, 3, 4, 7, 9 and 13] and the Revised ECOWAS Treaty [article 66 (2) (c)];

(3) Order Burkina Faso to pay to the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement, the following damages:

a. Damages for all the losses incurred in terms of family support following the assassination of Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo and Blaise Ilboudo, the burial expenses and loss of the vehicle which they were using at the time of the assassination;
b. General damages for the pain, physical suffering and emotional trauma endured by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement for the entire period of mourning, and the protracted judicial procedure for which the Burkinabè authorities should be held fully responsible;
c. Punitive damages as a deterrent to ensure Burkina Faso does not again engage in such crimes on its territory and to compel it to harmonise its legislation with the principles and standards of judicial procedure applicable at international level.

The complainants submit themselves to the wisdom of the Court to determine the *quantum* of the damages mentioned hereinabove."

In its response to the preliminary objections:

"62. In view of the points of fact and of law as stated above, and without prejudice to elements of fact and of law, the evidence which may later be produced, as well as the right to supplement and amend this document, the beneficiaries of Late Norbert Zongo and his three companions pray the Court to reject the preliminary objections raised by Burkina Faso and to consider their Application admissible".

In their reply on the merits of the case:

"41. As regards the determination of the *quantum* of damages which we are seeking, we submit ourselves to the wisdom of your august Court and request that it take due account of the anguish and mental pressure which the beneficiaries of Norbert Zongo, Ernest Zongo, Blaise Ilboudo, and Ablassé [*sic*] Nikiema *alias* Ablassé have continued to endure as they are yet to know those who murdered their relatives. To the above should be added the financial losses incurred since the disappearance of the persons who substantially provide the daily bread of their families (...).

42. [We pray the Court to]... grant the request for payment of damages be they general, special or punitive".

On behalf of the Respondent,

In its response with respect to the preliminary objections:

"89. In consequence of the aforesaid, the Government of Burkina Faso respectfully prays the African Court on Human and Peoples' Rights to declare inadmissible Communication No. 013/2011 of 11 December 2011 filed against Burkina Faso, by the beneficiaries of Late Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo, Blaise Ilboudo and Norbert Zongo and the Burkinabè Human and Peoples' Rights Movement *(MBDHP)*".

In its response on the merits:

"103. Consequently, it prays the Court",

On the procedure,

To declare,

Communication/Complaint No. 013/2011 of 11 December 2011 inadmissible for having failed to exhaust local remedies (article 56 (5) of the African Charter on Human and Peoples' Rights and Rule 40.5 of the African Court on Human and Peoples Rights), firstly because, the highest court in Burkina Faso, the "Cour de cassation" was not seized of the matter by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé,

Ernest Zongo and Blaise Zongo and by the Burkinabè Human and Peoples' Rights Movement (MBDHP) before it was brought before the African Court on Human and Peoples' Rights; and secondly, because the procedure before the domestic courts had not been unduly protracted.

On the merits

If the Communication/Complaint was to be declared admissible, it should be rejected as unfounded and, as a consequence, all claims for damages be it general, special or punitive, brought by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablassé, Ernest Zongo and Blaise Zongo and by the Burkinabè Human and Peoples' Rights Movement (MBDHP) should be dismissed".

46. At the Public Hearing of 28 and 29 November 2013, the Applicants stood by their submissions while the Respondent maintained its position.

IV. COMPETENCE OF THE COURT

47. Rule 39 (1) of the Rules of Court provides that "The Court shall conduct preliminary examination of its jurisdiction...."

48. Regarding its material jurisdiction, article 3(1) of the Protocol establishing the Court (the Protocol) provides that "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

In the instant case, the Applicants allege violation, by the Respondent State, of the provisions of the Charter, of the ICCPR[2], as well as a provision of the Revised ECOWAS Treaty which guarantees the rights of journalists. **(*supra,* paragraph 7 to 11).**

Consequently, the Court does have the material jurisdiction to consider the said allegations.

49. As regards the personal jurisdiction of the Court, the Protocol first requires that the State against which action is brought should not only have ratified the Protocol and the other human rights instruments mentioned (article 3(1) above, but also, in relation to applications from individuals, must have made the declaration accepting the competence of the Court to receive such applications as provided for in article 34.6. In the instant case, records show that Burkina Faso became a Party to the Charter on 21 October 1986, and the ICCPR on 4 April 1999, ratified the Revised ECOWAS Treaty on 24 June 1994, and also made the declaration as required under article 34(6) on 28 July 1998.

The Protocol provides that "the Court may entitle Non-Governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with article 34(6) of the Protocol". In the instant case, the beneficiaries of Norbert Zongo and others are individuals, and, as the records indicate, the Burkinabé Human and Peoples' Rights Movement *(MBDHP)* is an NGO with observer status before the African Commission on Human and Peoples Rights (The Commission)[3].

In view of the foregoing, the Court notes that it also has personal jurisdiction to hear the case based on the submissions of the Applicants and those of the Respondent State.

50. As regards the Court's jurisdiction *rationae temporis*, it should be noted that the Court had already issued a ruling on the preliminary objections raised by the Respondent State in that regard.

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[2] The Applicants also allege violation of the Universal Declaration of Human Rights, which is not a Treaty.

[3] Observer status was granted to this organization by the African Commission during its 6th ordinary session held in Banjul, The Gambia from 23 October to 4 November, 1989. Vide www.achpr.org.

In its ruling of 21 June 2013 on this issue, the Court sustained the objection to its jurisdiction *rationae temporis* on the allegation of the violation of the right to life but overruled the objection to its jurisdiction *rationae temporis* on the allegation of violation of the rights of the Applicants to have their cause heard by a judge, as well as the allegations of violation of human rights in relation to the obligation to guarantee respect for human rights, the right to equal protection of the law and equality before the law and the right to freedom of expression and protection of journalists *(supra*, paragraph 32).

51. It emerges from the foregoing considerations, that the Court does have jurisdiction to hear all allegations of human rights violations made by the Applicants save the allegation on violation of the right to life.

V. ADMISSIBILITY OF THE APPLICATION

52. Rule 39 of the Rules of Court provides that "The Court shall conduct preliminary examination of its jurisdiction and the admissibility of the application in accordance with articles 50 and 56 of the Charter, and Rule 40 of these Rules".

Article 6(2) of the Protocol for its part provides that "The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter".

Rule 40 of the Rules of Court which essentially refers to the provisions of article 56 of the Charter, states that:

"Pursuant to the provisions of article 56 of the Charter to which article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issue previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

A) Admissibility requirements not canvassed by the parties

53. Requirements in respect of the identity of Applicants, the compatibility of the application with the Constitutive Act of the African Union and the Charter, the language used in the application, the nature of evidence and the principle of *non bis in idem*, (paragraphs 1, 2, 3, 4 and 7 of Rule 40 of the Rules) have not been raised by the parties.

For its part, the Court equally notes that there is no suggestion in the pleadings submitted to it by the parties that any of these conditions has not been met.

Consequently, the Court is of the opinion that the requirements under consideration herein have been fully met in the instant case.

B) Requirements relating to seizure of the Court

54. In its preliminary objections, the Respondent State had raised an objection to the admissibility of the application on the grounds that reasonable time had not been observed in submitting the application to the Court (Rule 40(6).

However, in its Ruling of 21 June 2013, the Court dismissed that objection. **(*supra*, paragraph 32).**

Consequently, the requirement regarding the time for submitting the case to the Court by the Applicants has equally been met.

C) Objection to the admissibility of the application due to failure to exhaust local remedies

55. In its preliminary objections, the Respondent also raised an objection to the admissibility of the application on the grounds of non-exhaustion of local remedies (Rule 40 (5).

However, in its Ruling of 21 June 2013, the Court had declared that this objection was not of an exclusively preliminary nature and had to join it with the merits, pursuant to Rule 52 (3) of the Rules of Court **(*supra*, paragraph 32).**

At this juncture of consideration of the matter, the Court will now rule on the said objection.

56. An examination of the pleadings establishes that there was no dispute over the fact that the individual Applicants had not exhausted all the local remedies available to them under the Burkinabè judicial system. It had been clearly established that they had decided not to go on appeal.

The issue in contention here between the parties is, first, one of determining whether the fact that the individual Applicants did not resort to the Court of Final Appeal (*Cour de Cassation)* was effective or not. The other issue is one of ascertaining whether litigation of these cases had been unduly prolonged within the meaning of article 56(5) of the Charter.

Moreover, it will be necessary to treat separately the issue as to whether or not the Burkinabè Human and Peoples' Rights Movement *(MBDHP)* was, for its part, also required to exhaust local remedies.

1) The issue of the effectiveness of the Appeal to the "Cour de Cassation" (Court of Final Appeal*)*

57. In its response dated 13 April 2012, the Respondent noted that the highest judicial institution in Burkina Faso, the "Cour de cassation", had not been seized of the matter before it was brought before the African Court on Human and Peoples' Rights.

58. It stated that whereas that option was available to them, the Applicants failed to have recourse to the "Court of Final Appeal" and therefore "[had] not exhausted all the local remedies available".

59. The Respondent further stressed that ".....the Court of Final Appeal was in the position to give them satisfaction because, according to article 605 of the Criminal Procedure Code, 'when it annuls a ruling or a judgement, the Criminal Bench of the Court of Final Appeal refers a case and the parties back to a court of the same level and jurisdiction as the one which issued the impugned decision or, if necessary, before the same court but differently constituted".

60. This position was reiterated by the Respondent State during the Public Hearing of 7 and 8 March 2013, by emphasising that even though the decisions of the 'Cour de cassation' were not subject to any deadline, recourse to that jurisdiction was easy to initiate and was useful, efficient and sufficient, and "may have resulted in a decision different from that of the Investigating Magistrate and of the 'Chambre d'accusation' (Court of Criminal Appeal)".

61. In its response on the merits of the matter, the Respondent again submitted that since the Applicants themselves had refused to make use of the "Cour de Cassation", even though that remedy was available, easy and accessible, and could have resulted in the reversal of the ruling of 16 August 2006, they could no longer accuse Burkinabè courts of being inefficient or unable to investigate, identify and act with diligence in bringing to justice those responsible for the assassination of Norbert Zongo.

62. In their application, the Applicants indicated that "in Burkinabè law, there is the possibility of appeal to the 'Cour de Cassation' under article 575 of the Criminal Procedure Code", and that "the family of Norbert Zongo deliberately decided not to use that procedure and, instead, to go to the African Court because the judicial remedies it had sought for 9 years had proved to be inefficient and unsatisfactory, and seizure of the "Cour de Cassation" would have been a waste of time".

63. They stressed that "having recourse to the "Cour de Cassation" would have been futile as it was common knowledge that the supreme jurisdiction took about five years, after it has been seized, to rule on the least of matters".

64. In their reply to the preliminary objections, the Applicants stated in the main that "an Applicant was not bound to go to an inefficient or insufficient jurisdiction, that is, a

jurisdiction which may not provide the remedy to the allegations of human rights violations".

65. At the Public Hearing of 7 March 2013, Counsel for the Applicants restated this same position, insisting on the ineffectiveness of this "Cour de Cassation", which in his view "did not provide the possibility to change the substance of the decisions that had been taken".

66. The Court observes that under the Burkinabè judicial system, appeals to the "Cour de Cassation" were intended to annul a final judgement or ruling for violation of the law (Criminal Procedure Code of 21 February 1968, articles 567 and *et seq*).

67. As has just been seen, according to the Respondent, the "Cour de Cassation" was an absolutely effective judicial remedy which allows the highest court in the land to redress violations of the law by lower courts.

The Applicants however argue that, in the instant case, this remedy would not have yielded any effect as the "Cour de Cassation" was limited to censuring violations of the law without delving into the merits of the matter *per se*.

68. In ordinary language, being effective refers to "that which produces the expected result" (*Le Petit Robert,* 2011, p. 824). On the issue under consideration, the effectiveness of a remedy is therefore measured in terms of its ability to solve the problem raised by the Applicant.

69. In the instant case, no doubt has been cast *à priori* on the ability of the "Cour de Cassation" to bring about a change in the situation of the Applicants on the merits of the matter, where it notices any violations of the law in the treatment of the matter by the Court whose ruling has been impugned.

On that score, it should even be noted that in terms of article 605 of the Criminal Procedure Code of Burkina Faso "...if the judgment or ruling on appeal is reversed [anew] for the same reasons as the first, the judicial chamber will apply the provisions of the law to the facts deemed established by the Judges of the lower court"; which means that, in the final analysis, the lower court itself will rule on the merits of the matter.

Furthermore, in terms of article 18 of the Organic Law No. 013-2000/AN of 9 May 2000, on the organisation, jurisdiction and functioning of the "Cour de Cassation" and its procedure "...where the referral is ordered by the combined chambers of the "Cour de Cassation", the lower court to which the matter is referred has to comply with the decision of the combined chambers on the points of law addressed by the latter.

Finally, in terms of article 19 of the same law, "[the 'Cour de Cassation] in reversing a decision without referral may put an end to litigation when the facts of the matter are such that they allow for application of the appropriate law.

70. It is therefore clear that appeal at the Cour de Cassation is not a waste of time and it can in certain circumstances lead to a change or change the substance of a decision; and without making such an appeal, one may not know what the Court would have decided.

As the European Court of Human Rights noted, in a matter concerning France which belongs to the same legal family as Burkina Faso: "the Cour de Cassation" is among the local remedies to be exhausted in principle to comply with article 35 of the Convention[4]."

From the foregoing, it is evident that the appeal provided by the Burkinabè judicial system is an effective remedy, which the individual applicants should have accessed so as to comply with the rule of exhaustion of local remedies required under article 56(5) of the Charter and Rule 40(5) of the Rules.

71. It is understood that this conclusion does not in any way prejudge the distinct issue as to whether the procedure relating to a given remedy is unduly prolonged. This issue will now be addressed by the Court.

2) The issue of unduly prolonged procedure

72. In its preliminary objections and response to the Applicants' submission regarding the unduly prolonged nature of the procedures, the Respondent argues, firstly, that "the unduly prolonged nature of the procedure ...is determined only in cases where available

[4] Matter of *Civet versus France,* ruling of 28 September 1999, paragraph 41. See also the jurisprudence cited in the same vein and paragraph 43. See further the Matter of *Yahaoui v. France*, 20 January 2000 ruling, paragraph 32.

and effective remedies do exist but have not been utilised and not in the entire procedure" adding that "the unduly prolonged nature of the procedure does not apply in matters where remedy is available (such) as the 'Cour de Cassation' in the instant case, but not utilised whereas it could have been accessed by the Applicants without the least impediment".

73. The Respondent further argues that "the unduly prolonged concept is also not considered where available and accessible remedies are ineffective as they afford litigants the opportunity to cure the alleged violation"; and then goes on to note that:

"Ironically, the five (5) years which they didn't want to "loose" before the 'Cour de Cassation', were spent idling, before the matter was referred to the African Court on Human and Peoples' Rights (...) whereas the African Commission on Human and Peoples Rights was functional to hear the alleged violations..."

74. The Respondent further argues, based on the jurisprudence of the African Commission on Human and Peoples' Rights, "that it is up to the complainant seeking a waiver "to prove the veracity of the facts alleged either by trying to seize the national courts or by presenting a specific case where actions in court were finally proven to be ineffective..." and that in the instant case "the Applicants do not present any evidence as to the veracity of the facts which they are alleging".

75. Lastly, the Respondent State argues that "the duration of the handling of the Norbert Zongo case cannot be referred to as one in which local remedies have been unduly prolonged" and that "this duration is tied to the complexity of the dossier, the absence of formal evidence concerning identification of the culprits and the need for the Courts to respect the principle of presumption of innocence".

76. In its response on the merits of the matter, the Respondent invoking the jurisprudence of the European Court of Human Rights, argues that "the reasonableness of the duration of a procedure is determined on the basis of the circumstances of the case and more specifically on grounds of the complexity of the matter, the comportment of the Applicant and of the competent authorities".

77. On this score, the Respondent once again sought to show how complex the matter had been (murder in open countryside; absence of eye witnesses; vehicle and corpses burnt to ashes; x-rays and forensic reports carried out by experts in Burkina Faso and abroad; hearing of hundreds of witnesses) and concluded that "the more complex the matter, the more protracted the investigations would be".

78. The Respondent then added that the comportment of the Applicants' advocates could have caused an extension of the duration of the hearing. As proof in support, the Respondent refers to the fact that the representative of *Reporters Without Borders* and a certain Mr. Moise Ouédraogo claimed to be in possession of information useful for the investigation without submitting such information to the State Prosecutor of Burkina Faso at the time of the investigation, and waited until the end of the case to make mention of it. Further reference was made to the fact that the representative of Burkinabè Human and Peoples' Rights Movement who had presided over the Independent Commission of Enquiry "had not reported these facts to the State Prosecutor of Faso, facts of which he could not have been unaware".

79. The Respondent finally pleads that "it cannot be accused of the laxity or inaction on the part of the political, administrative and judicial authorities" (creation of the ICE which included national and international journalists and the *MBDHP* which was both a member and the chair of the ICE; seizure of the Court on the basis of ICE report). It further states that "it can also not be blamed for not providing effective and efficient local remedies to the beneficiaries of Norbert Zongo and his companions" (opening of the investigations against X; allocation of significant financial and material resources to the Investigating Magistrate; conduct of autopsy and forensic examination on the objects found in the vehicle and on the arms and ammunition similar to those found at the scene of the incident, photographs, transportation to the scene of the incident, hearing of dozens of witnesses; arrest and detention of Marcel Kafando on 2 February 2001). It concludes that "the investigating magistrate cannot be blamed for having waited for two years before questioning the prime suspects, as if he had not initiated any preliminary procedure (hearing of witnesses, request for forensic evidence, etc....) from the time he was seized of the matter".

80. As regards the period between 2001 and 2006, again relying on the jurisprudence of the European Court of Human Rights, the Respondent explains that even the slowdown of investigations which could have been caused (but not proven) by the five (5) year suspension of adversarial procedure between of Marcel Kafando and Racine Yameogo cannot be blamed on the State, given that "it has been deemed on several occasions that the State cannot be blamed for prolongation of the duration of the proceedings for reasons of the illness of a suspect".

81. On the determination of the period of reasonable time, the Respondent is of the view that the *dies a quo* should be the day when Marcel Kafando was arrested (2 February 2001) and the *dies ad quiem* the day on which the ruling became final, as no appeal was logged with the "Cour de Cassation" (31 August 2006), that is, five years, six months and 29 days.

82. The Respondent concludes that "in view of the complex nature of the matter and the comportment of the Applicants and their advocates, as stated earlier, one could conclude that the duration of the investigation was normal, thanks to the effectiveness of the Investigating Magistrate and the substantial contribution made by the political and administrative authorities of Burkina Faso" and that "the said duration meets the requirements of reasonable time as set out in community and international instruments, violations of which are being wrongly attributed to Burkina Faso".

83. In their submission, the Applicants recall that the judicial remedies they had resorted to lasted 9 years and would have again been prolonged for five more years if the "Cour de Cassation" had been seized.

84. They explain that "...in the instant case, it is probable that given the bad faith on the part of the political authorities, this delay could have been prolonged at will". They assert that "article 56(5) of the Charter provides that an Applicant before the Court was not bound to exhaust local remedies where the judicial process is unduly prolonged" (sic).

85. In their reply to the preliminary objections, the Applicants noted that in this matter "they had to wait...for close to two years for the brother of the President of Faso, who seems to be at the centre of this case of murder of the journalist and his companions, to

be heard by an Investigating Magistrate", adding that: "some other strange occurrence in this case is the fact that the matter was frozen for over five years because of the illness of the principal accused, who later would be discharged for lack of evidence upon resumption of the hearing by the Investigating Magistrate before his demise".

86. The Applicants further cite as example the case of Thomas Sankara, former President of Faso, in which they allege that, "the Sankara family, for fifteen (15) good years, had unsuccessfully requested the Burkinabè judicial system to identify those responsible for the murder of the former President and in particular to show them where he was buried".

87. In their correspondence to the Court dated 28 April 2013, submitted upon request by the Court to the parties to submit all such documents as may corroborate the allegations they made during the Public Hearing of 7 and 8 March 2013, the Applicants maintained their position according to which the handling of the matter was interrupted between 2001 and 2006, adding that "....the judicial machine really came alive in this case only in May 2006 with the real face off before the Investigating Magistrate Wenceslas H. Ilboudo, between the principal suspect, Staff Sergeant Marcel KAFANDO and a witness in the matter, Jean Racine YAMEOGO".

The Applicants explain that "....it was only on 4 May 2006 that the same Investigating Judge heard, for the first time, the widow of Norbert ZONGO as party to the civil suit".

The Applicants conclude by emphasizing that "in all the minutes of the hearings which closed Norbert ZONGO's case, unless the State provides proof to the contrary, no mention was made of the hearings, adversarial procedures or other acts carried out by the Investigating Magistrate between 16 May 2001 and 30 May 2006".

88. The Court would like, at this juncture, to recall that articles 56(5) of the Charter and Rule 40 of the Rules provide that there is an exception to the exhaustion of local remedies where "it is obvious that this procedure is unduly prolonged".

a) *The concept of remedy proceedings*

89. On the above issue, there is first a divergence of views between the parties on the exact meaning of the concept of "remedy procedure". Whereas for the Respondent State,

the length of the procedure should be determined in terms of the single remedy which was not utilised, for the Applicants, it should be judged in terms of the entirety of the procedure conducted at national level.

90. In the opinion of the Court, the unduly prolonged nature of a procedure as addressed in article 56(5) of the Charter applies to local remedies in their entirety as utilised or likely to be utilised by those concerned. The wording of this article which refers to exhaustion of "local remedies" and the procedure for "such remedies" is quite clear and does not contain any provision limiting the criteria for unduly prolonged procedure solely to remedies which have not yet been utilised. Besides, it would be difficult to determine the length of the procedure for a remedy which has not even been utilised.

b) The duration of the remedy procedure

91. The Respondent further argues (as we have seen) that the duration of investigations into the matter simply depends on the complexity of the case, the absence of formal evidence as to the identity of the culprits, the concern of the courts to respect the presumption of innocence, the comportment of the Applicants themselves, and that of the Respondent's own institutions. It rejects in particular the Applicants' allegation according to which this matter had been frozen between 2001 and 2006, indicating that "during the period of illness of the principal accused, other acts of investigation, such as hearing of witnesses, were performed".

For their part, the Applicants maintain that the procedure had been unduly prolonged, considering, in particular, that they had to wait for two years for the brother of the President of Faso to be heard by an Investigating Magistrate and furthermore that investigations were subsequently frozen for more than five years due to the illness of the principal accused.

92. The Court is of the opinion that determination as to whether the duration of the procedure in respect of local remedies has been normal or abnormal should be carried out on a case-by-case basis depending on the circumstances of each case.

93. On the alleged complexity of the case, the Respondent State does not show how this case is more complicated than other cases of murder committed in the absence of eye witnesses. In particular, it does not provide the reasons which could have prevented the Police and the judiciary from apprehending the culprits, nor does it indicate the special insurmountable obstacles that would have been faced by the officials in that regard.

94. On the absence of formal evidence in respect of identification of the culprits, it is indeed the responsibility of the Respondent to deploy all the means at its disposal to find the presumed assassins, even where the said assassins were initially unknown.

95. As for the well-founded concern of respecting the presumption of innocence of the accused, this does not absolve the Respondent State from proceeding reasonably with the procedure which had already been initiated. In the instant case, one does not see how the procedural guarantees that must be accorded to accused persons could really have delayed the procedure.

96. On the comportment of the Applicants, the latter clearly had no interest in delaying the procedure, and could not be held responsible for the comportment of witnesses (the representative of *Reporters without Borders* and Moise Ouédraogo) who did not submit the information in their possession to the Burkinabè judicial authorities in a timely manner. Furthermore, the requests by the said witnesses to be heard by the judicial authorities could not have delayed procedure which lasted till August 2006, because the requests in question were made in 2006, after legal proceedings on the matter had been closed.

97. On the diligence with which the State authorities acted, this issue applies rather to the merits and will be examined in relation with the allegation of violation of the right for one's cause to be heard by competent national courts **(*infra*, para. 141 to 156).**

98. On the hearing of witness François Compaoré in January 2001, the Court is of the opinion that this did not cause unreasonable delay in the investigation given that other procedures related to the investigations were carried out by the Respondent's authorities between the date of the assassinations and that of the said hearing **(*supra*, paragraph 16).**

99. Lastly, there is the issue of ascertaining whether, as affirmed by the Applicants, handling of the matter had been frozen for over five years between 2001 and 2006. In answer to a question from a member of the Court on this issue during the Public Hearing of 8 March 2013, Counsel to the Respondent refuted the allegation and indicated that acts of investigation, especially the hearing of witnesses, did take place during that period.

100. As mentioned earlier, by letter dated 25 April 2013, the Respondent State submitted to the Court Registry, *inter alia,* nine (9) reports of hearings, adversarial procedure and submissions as part of the investigations of the case during the period of suspension of hearing of the principal suspect **(*supra*, paragraph 30).**

101. Following the Public Hearing of 29 November 2013, the Respondent further submitted to the Court, by letter dated 18 December 2013, additional documents, including a number of other minutes of hearings of witnesses or of the civil suit **(*supra,* paragraph 42).**

102. Consideration of all the documents submitted to the Court and, in particular, the minutes of hearings, indicate that between 15 May 2001 (date of the first adversarial procedure between the principal accused and the main witness) and 31 May 2006 (date of the second and last adversarial procedure between these two same persons), there was indeed a number of hearings of witnesses or of the parties to the civil suit. The hearing of witnesses accordingly took place on the following dates: 30 May 2001 (one) ; 2 November 2001 (two); 18 December 2003 (one); 19 December 2003 (one); 26 December 2003 (three); 22 April 2004 (one); 23 April 2004 (one); 5 May 2004 (two); 6 May 2004 (one); 5 January 2005 (one); 9 May 2006 (one). As for the hearing of the parties in the civil suit, this occurred on the following dates: 22 February 2006 (three); 4 May 2006 (one); and 4 May 2006 (one).

103. It is therefore clear that although the adversarial procedure between the principal accused and the main witness was indeed suspended between 2001 and 2006 for reasons of illness, investigations however, continued during that period especially with the hearing of witnesses. The Respondent cannot therefore be accused of having suspended investigations during the period.

104. On the question as to when the local remedy procedure is to be deemed to have started, it should first be stated that, contrary to the Respondent's assertions **(*supra* paragraph 81),** the procedure at issue here is not that of the prosecution and trial of the principal suspect in the matter, but rather that of the search for, trial and judgment of the assassins of Late Norbert Zongo and his companions, because it is the beneficiaries of the latter who have brought the action before the Court, in pursuit of the right to have their cause heard by competent national courts. That being the understanding, the date of commencement would therefore be that on which the Respondent's judicial system started dealing with the matter. Consideration of the case reveals that the Police embarked on routine investigations at the scene of the crime on the very day the murder was committed, that is, 13 December 1998. **(*supra,* paragraph 18).** It is therefore from that date that the Burkinabè judicial outfit initiated proceedings, and it is from that date that the length of the local remedy procedure, under consideration, should be determined.

105. Since the local judicial procedure was closed with the expiry of the deadline for appeals to the "Cour de Cassation", that is, 21 August 2006[5], the duration of the entire procedure should be considered in relation to that date. In total, local remedies procedure therefore lasted from 13 December 1998 to 21 August 2006, that is, seven (7) years, eight (8) months and ten (10) days.

106. In light of all the foregoing considerations, and although investigations were not frozen between 2001 and 2006, the Court is of the opinion that the procedure in the domestic courts on the matter from 1998 and 2006, or nearly eight years, was unduly prolonged in terms of article 56(5) of the Charter.

Moreover, the procedure would have been further prolonged if the matter had been brought to the "Cour de Cassation" by the Applicants regardless of the despatch with which the "Cour de Cassation" would have disposed of the matter.

[5] See on this same case, the Ruling of the Court on Preliminary Objections dated 21 June 2013, paragraph 118.

Consequently, the Court concludes that in the circumstances, the individual Applicants did no longer need to exhaust the other local remedies under Burkinabè judicial system.

2) On the issue of the Burkinabè Human and Peoples' Rights Movement

107. In formulating the objection to admissibility on grounds of non-exhaustion of local remedies, the Respondent did not make any distinction between the steps taken by individual Applicants on the one hand, and those taken by the Burkinabè Human and Peoples' Rights Movement, on the other.

108. In response to a question from a member of the Court during the Public Hearing of 8 March 2013, Counsel for the Applicants explained that under Burkinabè law, only victims may bring cases before criminal courts. The Counsel cited, in that regard, article 2 of the Criminal Procedure Code of Burkina Faso which provides that: "civil action for damages caused by a crime, an offence or a contravention shall be brought by all those who have suffered personally from the damage directly caused", and explained that the Burkinabé Human and Peoples' Rights Movement was not a direct victim in this matter, and could not therefore bring the case before Burkinabè courts.

109. According to the afore-cited article 56(5) of the Charter, the Applicant is required to exhaust local remedies only in so far as such remedies "exist" in his case.

110. In the instant case, it would appear, in light of the aforesaid, that the Burkinabè Human and Peoples' Rights Movement is not entitled to bring action in this matter before the courts in Burkina Faso.

111. Consequently, the Respondent cannot object to the admissibility of the application on grounds of non-exhaustion of local remedies because one of the Applicants, the Burkinabé Human and Peoples' Rights Movement did not exhaust the said remedies.

112. In light of all the above considerations, the Court concludes that the Respondent's objection to the admissibility of the application on the grounds of failure to exhaust local remedies should be overruled both in regard to the case of the individual Applicants and in regard to that of the Burkinabé Human and Peoples' Rights Movement.

113. The Court, having considered all the requirements relating to admissibility of the application pursuant to article 56(5) of the Charter and Rule 40(5) of the Rules, concludes that the application is admissible.

VI. THE MERITS OF THE MATTER

A) Allegations of violation of the rights of the Applicants to have their cause heard by competent national courts

114. The right to have one's cause heard by competent national courts is guaranteed under article 7(1) of the Charter and articles 2(3) and 14 of the ICCPR. This right is also enshrined in article 8 of the Universal Declaration of Human Rights.

115. According to article 7 of the Charter:

"1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force...".

116. According to article 2(3) of the ICCPR:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted".

Article 14 of the Covenant for its part provides that:

"1. ...Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..." which shall rule either on the validity of any criminal accusation brought against him or on disputes regarding his civil rights and obligations...

117. As for article 8 of the Universal Declaration of Human Rights, it provides that:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

118. The Court shall consider the allegation of violation of the right to have one's cause heard by competent national courts, first in light of article 7 of the Charter, and then, if need be, in regard to the provisions of other international instruments invoked by the parties.

119. The right to have one's cause heard by competent national courts has several aspects. In the instant case, the aspects raised and discussed by the parties are as follows: duration of the proceedings in the local courts; the role of the Prosecutor in the judicial system of the Respondent State; the issue of withdrawal of an Investigating Magistrate; the issue of a witness failing to appear; the involvement of parties in the civil suit, and the question of the despatch with which the Respondent guaranteed this right in the instant case.

1) Duration of local remedies

120. It is understood that procedure in a case wherein a party is involved has to take place within reasonable time.

In the instant case, after consideration of the pleadings of the parties in regard to the rule on exhaustion of local remedies, the Court concludes that the procedure in the local courts on the matter of the individual Applicants has been unduly prolonged **(*supra*, paragraph 106)**.

On the allegation of violation of the right to have one's cause heard by competent national courts guaranteed under article 7 of the Charter, the Court is obliged to conclude, for the same reasons, that the case brought by the Applicants was not addressed within reasonable time.

2) Role of the Prosecutor in the legal system of the Respondent State

121. In their response on the merits, the Applicants sought to show that justice had been impeded by the Executive through the Prosecutor of Faso. In that regard, they emphasize the fact that "the Prosecutor of Faso, as a judicial officer 'comes under' the supervision and control of his hierarchical superiors and under the authority of the Minister of Justice, a situation which imposes on him the obligation to be loyal to his superiors".

122. They added that "the observed delay in the handling of the case of Norbert Zongo and his companions can be explained by Executive interference in the functioning of the judicial machine, notably through the Prosecutor of Faso ... who interfered in the choice of those to be heard and in the deployment of judicial staff during that period, thus making it possible for the real accomplices of the suspects identified by the Independent Commission of Enquiry to escape from the strong arms of the law".

123. At the Public Hearing of 28 and 29 November 2013, the Applicants reiterated the position according to which the role played by the Prosecutor in Burkinabè judicial system was a violation of the letter and spirit of the Charter particularly because he was hierarchically subordinate to the Minister of Justice.

124. At the Public Hearing on 28 November 2013, Counsel for the Respondent retorted, in regard to the role of the Prosecutor in the Burkinabè judicial system, that Burkinabè is not "a strange entity in law" and that "it was part of the romano-germanic system of law", like many other countries. The Respondent explained that the Prosecutor was first and foremost a judicial officer who has sworn to work independently and with dignity.

125. Article 7 of the Charter speaks of the right to have one's cause heard by competent *national courts* (italics added). What is important under this article is the independence of the *judge* seized of the matter.

However, on the case filed before the Court, no evidence has been adduced to show that in the Burkinabè judicial system, the Judge is bound to follow the position of the Prosecutor when he or she rules on a given matter. On the contrary, articles 129 and 130 of the Burkinabè Constitution provide, respectively, that "the judiciary is independent" and that "sitting Magistrates are subject only to the authority of the law in the exercise of their duties [and] are irremovable".

Only the specific conduct by a Prosecutor in a given matter, as in the cases cited by the Applicants (***infra*, paragraph 127 *et seq*),** could eventually be construed - if proven - as interference with the independence of the judge.

126. Consequently, it cannot be said that the institution and profile of the Prosecutor in the Burkinabè judicial system, was in itself and by its nature at variance with article 7 of the Charter, as long as the existence of these institutions does not affect the independence of the relevant jurisdictions.

3) The issue of withdrawal of an Investigating Magistrate

127. In their reply on the merits, the Applicants claim that, at the initiative of the Prosecutor and in violation of the law, a judge was replaced with another who "managed to ensure that François Compaoré was not heard ...".They conclude that the interference in this procedure "by the Prosecutor of Faso, the hatchet man of the Minister of Justice, can be regarded as an obstruction to the normal course of justice and as an attempt to reassign the case to more trusted persons".

128. At the Public Hearing of 28 November 2013, a Counsel for the Applicants reiterated this allegation.

129. At the Public Hearing of 29 November 2013, however, in answer to a question by the Court, a Counsel for the Applicants finally declared that it was a mix up with another case (that of David Ouédraogo) which had brought about the confusion; he admitted that

there was no withdrawal of any judge, and that it was a single Investigating Magistrate that handled the matter of Zongo and others, from the beginning to the end.

130. At the Public Hearing of 28 November 2013, the Counsels to the Respondent State had clearly explained that there had never been the removal of any judge whatsoever and that only one judge dealt with the case from the start to the finish.

131. The Applicants having themselves admitted that they had been mistaken in asserting that a judge had been withdrawn in a manner that undermined the independence of the judiciary, the Court is of the opinion that there was never any such withdrawal and that the matter had been considered by only one judge.

Consequently, the Respondent cannot be blamed for interfering with the independence of the judiciary in this regard.

4) The issue of non-appearance of a witness

132. On the accusation of obstruction of the normal course of justice brought against the Respondent State, the Applicants further stated in their reply on the merits that everything was done to ensure that François Compaoré was not heard by the court.

133. At the Public Hearing of 28 November 2013, the Respondent State noted that the Applicants were contradicting themselves by making such an allegation, whereas they themselves had at the same time indicated in their Application that he was heard on 16 January 2001 **(*supra,* paragraph 16).** They explained that the person in question was heard as a witness at least twice.

134. At the Public Hearing of 29 November 2013, in answer to a question by the Court, Counsel for the Respondent State confirmed that François Compaoré had been heard at least twice.

135. It emerges from all the minutes of the hearings produced by the Respondent through its letters dated 25 April 2013 and 18 December 2013, that François Compaoré was heard by the same Investigating Magistrate as a witness in the matter of Zongo and others, on two occasions, that is, on 17 January 2001 and 19 May 2006.

Consequently, the allegation made by the Applicants according to which François Compaoré was never heard by the court is unfounded. The Respondent State cannot therefore be accused of having obstructed justice in that regard.

5) The issue of involvement of civil parties[6] in the procedure

136. Counsel for the Applicants explained in response to a question from the Court at the Public Hearing on 29 November 2013, and or purposes of fairness of the proceedings, that between 2001 and 2006, the parties claiming damages had not been informed about the proceedings, were not involved in investigations before 2006, and had never been party to any adversarial procedures involving them.

137. In its letter dated 18 December 2013 forwarding the documents requested by the Court at the Public Hearing of 29 November 2013, the Respondent State explained that under the Burkina Faso Criminal Procedure Code [articles 111 and 118], adversarial procedures "were required only if the Investigating Magistrate believes that they may lead to the discovery of the truth". It added that "in the instant case, although the Investigating Magistrate was of the view that confrontation between Marcel Kafando (the suspect) and Jean Racine Yameogo (the witness) was necessary for the truth to be established, he did not however deem it necessary to confront the suspect with the parties in the civil suit as they were all beneficiaries and were not eye witnesses to the crime". It concludes by pleading that in any case "the Investigating Magistrate never refused to organize adversarial proceedings between the suspect and the parties in the civil suit, which proceedings could have been sought by the Applicants, yet neither they nor their numerous Counsel did so".

138. Examination of the documents produced by the Respondent, as earlier indicated, does show, on the one hand, that no adversarial procedure had occurred between the suspect and the civil suit parties, and on the other, that the civil parties were heard by the Investigating Magistrate on 22 February 2006 and 4 May 2006, respectively.

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[6] In the civil law system, a civil party is an individual who has personally suffered damages directly caused by an offence, who brings against the author of such damage a civil action in reparation for the harm caused by the offence (Legal vocabulary, Gérard CORNU, ed., 8 ed., 2009, p. 664.

139. On the hearing of the civil parties, even if they had been heard towards the end of the procedure, the hearings actually took place before the Magistrate rendered his decision and it is this latter consideration that matters when looking at the issue of fairness of the procedure. Consequently, it is the opinion of the Court that the Respondent cannot be accused of violating the principle of fair trial in this regard.

140. On the absence of adversarial procedure between the suspect and the civil parties, it lies with the national judge to determine whether this is necessary and useful based on the specific circumstances of each case. In the instant case, the Applicants have not shown whether adversarial procedure was useful and necessary and have not provided any proof of a request for that purpose to which the Investigating Magistrate had failed to respond. Consequently, the Respondent cannot be accused of violating the principle of fair trial in this specific area.

6) The issue of the despatch with which the Respondent provided remedy in the instant case

141. In their submission, the Applicants assert, citing the jurisprudence of the African Commission on Human and Peoples' Rights, that "...Burkina Faso was bound by article 7 of the Charter, to guarantee available, efficient, accessible and satisfactory remedies for violation of the rights which it guarantees".

142. As noted earlier, the Applicants maintain that the Respondent State had, *inter alia*, the obligation to carry out investigations on those responsible for the murder of Norbert Zongo and his companions and to try them. Instead of doing so, however, the State chose to obstruct efforts in that regard by the families of the victims.

143. In their reply to the preliminary objections, the Applicants maintain that "the ineffectiveness of the remedies initiated was compounded by the shortcomings on the part of the national authorities who did nothing to ensure that the assassins of Norbert Zongo and his companions were actually arrested".

144. In a letter dated 28 April 2013 filed in Court following a request by the Court at the Public Hearing of 7 and 8 March 2013, the Applicants again explained that "... it was

only... on 4 May 2006, that the same Investigating Magistrate heard the widow of Norbert Zongo as part of the civil suit for the first time".

145. At the Public Hearing of 29 November 2013, the Applicants maintained that when murder is committed in the territory of a State, the State in question has the responsibility to ensure that investigations are conducted. Such investigation must be independent, efficient and capable of apportioning responsibility for the murder. It must be conducted with reasonable speed, accessible and appropriate, particularly for the victims and for the sake of protection of the society. Taking issues with the absence of an independent investigation and the length of the procedure, the Applicants submitted that none of those responsible was identified, that of the six suspects identified by the enquiry, five were never prosecuted; and the remedies were not adequate for the victims and for protection of the society.

146. In its response on the merits, the Respondent State, after criticising the Applicants for being vague on the question of the right to seek recourse to a judge which was breached in this case, expressed the view that what "the State of Burkina Faso is being criticized for seems to boil down to its violating the right of everyone to be heard by competent national courts within reasonable time".

147. As noted earlier, the Respondent maintained that it could not be held responsible for laxity or inaction on the part of its political, administrative and judicial organs.

It further asserted that "the rights of the Applicants had been brought before competent, impartial and independent national courts, and this, within reasonable time and that they had benefited from an effective and efficient remedy".

148. At the Public Hearing of 28 November 2013, the Respondent State noted that the Independent Commission of Enquiry chaired by the representative of the *MBDHP*, which is party to the instant case, concentrated on a single approach, which was to carry out investigations within Government circles , whereas, there were other avenues that could have been explored, such as the conflicts between Norbert Zongo and livestock graziers

and poachers in his ranch, or the fact that he had been poisoned a few weeks prior to his assassination.

149. At the Public Hearing of 29 November 2013, a Counsel for the Respondent, in replying to a question from the Court as to why the Burkinabè authorities had not explored the other avenues of investigation raised in the ICE report, stated that the Investigating Magistrate had relied on the findings of the Independent Commission of Enquiry which had focused, in a rather biased manner, on the sole target of members of the presidential guard and had failed to identify any poacher, grazier or bandit who could have been investigated - all issues which an Investigating Magistrate could not afford to ignore".

150. The Respondent is compelled under article 7 of the Charter, which guarantees the right to have one's cause heard by competent national courts, to make all necessary efforts to search, prosecute and bring to trial the perpetrators of crimes such as the murder of Norbert Zongo and his companions. The question therefore is, whether the Respondent had fully complied with that obligation, and more specifically, whether it had acted with due diligence.

151. All in all, it must be acknowledged that in the case of Zongo and others, the Respondent had continuously embarked on a number of actions intended to seek out the suspected assassins, including investigations at the scene of the crime; *post mortem* examinations; forensic evidence; preliminary investigations; referral to an Investigating Magistrate; arrest of a suspect; adversarial procedure between the suspect and a prosecution witness; hearing of witnesses; hearing of civil parties; and trial of the suspect.

152. However, a review of the case does reveal that there had been discrepancies in the treatment of the matter by the local courts.

Firstly, from the Court's own findings, it is clear that the first case of discrepancy lay in the protracted duration of the proceedings, which stood at slightly less than eight years, given the fact that the initial investigations started on the day of the assassination in December 1998 right up to the Order to terminate proceedings in August 2006. The Respondent State was unable to convince the Court that that duration was reasonable in the peculiar circumstances surrounding the matter, and given the possible resources available to the

State to deal with such a matter. Due diligence obliges the State concerned to act and react with the dispatch required to ensure the effectiveness of available remedies.

153. The second area of laxity lies in the fact that the authorities concerned never sought to explore other areas of investigation particularly those mentioned by the Independent Commission of Enquiry in May 1999, such as the conflicts between Norbert Zongo and the poachers and graziers in his ranch or the fact of his poisoning shortly before his assassination.

In that regard, the Respondent's explanation that failure on the part of the authorities to explore other areas of investigation due to the fact that the findings of the said Commission had excluded the aforesaid avenues of investigation **(*supra,* paragraph 149),** is not convincing. Firstly, the work of the Commission, and hence possibly its own shortcomings, call to question the international responsibility of the Respondent State, as it is the State that set up the Commission, which was operating on its behalf. Moreover, the Respondent State had failed to establish that under Burkinabè law or other legal instruments creating and organizing the ICE, the Police and the Ministry of Justice of that country were bound by the findings of the Commission. On the contrary, under the Burkinabè Criminal Procedure Code, the said institutions, particularly the Ministry of Justice, does have extensive powers of investigation. As a matter of fact, article 40 of the Code clearly provides that the "Prosecutor of Faso shall direct or cause to be directed that all the necessary action be taken to seek out and prosecute any offences against the Penal Code".

154. The third weakness is the late hearing of the suit in respect of damages. As stated earlier, it was only in May 2006, close to eight years after the incident and only a few months before the end of court proceedings, that the civil suit was heard for the first time by the Investigating Magistrate **(*supra*, paragraph 102),** whereas the civil parties had complained and sought damages as early as 6 January 1999 **(*supra,* paragraph 16)**. Diligence would certainly have required that they be heard at the early stages of the investigation regardless of the outcome.

155. The fourth weakness in this case is that after the Order to terminate proceedings against the principal accused in August 2006, the Respondent State pursued no further investigation, as if the matter had come to an end, whereas no suspect had been placed on trial and found guilty, and whereas in its own words, public action on the case would expire only in 2016. Due diligence would also have required that the Respondent should not abandon the search for those who murdered Norbert Zongo and his companions.

156. In view of all the aforementioned discrepancies, the Court finds that the Respondent had not acted with due diligence in seeking out, prosecuting and placing on trial those responsible for the murder of Norbert Zongo and his three companions. The Court notes, in consequence, that in that aspect, the Respondent State had violated the rights of the Applicants to have their case heard by competent national courts as guaranteed under article 7 of the Charter.

157. The Court, having made the finding that the Respondent has violated article 7 of the Charter, does not need to consider the allegations made in the same vein by the Applicants pursuant to articles 2(3) and 14(1) of the ICCPR, or article 8 of the Universal Declaration of Human Rights.

B) Allegation on the violation of the right to equal protection of the law and to equality before the law

158. The right to equal protection of the law and to equality before the law is guaranteed under article 3 of the Charter, which states that:

"1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law".

159. In their application, the Applicants assert that by failing to undertake an effective investigation to prosecute and sentence those responsible for the assassination of Norbert Zongo, "Burkina Faso had violated the right ... to equal protection of the law as provided for in paragraph 2, article 3 of the Charter".

160. In their response on the merits, the Applicants stated in this regard as follows: "Because trial has always been a catalyst for and an expression of justice, the right to fair trial has always been considered as a right 'crucial to the protection of all other basic rights and freedoms'...because it allows for effective and *equal* access to justice. In the instant case, neither one nor the other was possible..." (Italics added).

161. Referring to a provision of article 14 of the ICCPR ["All persons shall be equal before the courts and tribunals"], the Applicants maintained that "Burkinabè tribunals did not, in managing the Norbert Zongo case, as in many other cases with serious political overtones, demonstrate the same diligence as they do in criminal matters".

162. The Applicants complain in particular that Burkinabè justice did not act expeditiously in its treatment of the case of Zongo and others, whereas it did act and dispose of another contemporary matter - the case of David Ouédraogo - with exemplary swiftness.

After establishing a link on this issue, between the Zongo case and another case where the procedure was equally slow - the case of Thomas Sankara-, the Applicants came to the conclusion that "such practices by Burkinabè courts therefore constituted a violation of the right to equality inherent in article 7 of the African Charter ...and article 14 (1) of the ICCPR".

163. At the Public Hearing of 28 November 2013, the Applicants restated that position.

164. At the Public Hearing of 28 November 2013, the Respondent State argued that the Zongo case was more complex and could not be compared to that of David Ouédraogo because in the latter case, those responsible for the assassination were known and preliminary investigations were not required to identify them.

The Respondent insisted on this point by declaring that: "...what the Court should note is that these are cases that should not be compared. David Ouédraogo was detained and

tortured by people who were well known; he was kept for a period of time with individuals who were known and he died in their hands. Therefore, there was nothing complex in that case, unlike that of Norbert Zongo".

165. In its 21 June 2013 Ruling, the Court declared itself competent to hear the allegations of violation of the right to equal protection of the law and equality before the law "provided these allegations were directly linked to the allegation of violation of the right to have one's cause heard by competent national Courts".

166. All in all, the Applicants contend that by treating the case of Zongo and others far less expeditiously than other cases particularly that of David Ouédraogo, the Respondent had violated the right to equality of individuals before the law in Burkina Faso. It was in response to that contention that the Respondent indicated that the two cases could not be compared in terms of the complexity of the investigations.

167. The Court is of the opinion that the principle of equality before the law, implicit in the principle of equal protection of the law and equality before the law, does not necessarily mean that all cases will have to be disposed of within the same length of time by judicial institutions. The duration of the treatment of a matter could indeed depend on the specific circumstances of each matter, particularly its relative complexity.

168. In the instant case, the Court notes that in view of the elements contained in the case file, the case of Zongo and others and that of the David Ouédraogo were not of the same complexity and could not have been disposed of within the same length of time.

169. Consequently, as far as the treatment of the Zongo and others case is concerned, the Respondent has not violated the right of Applicants to equality before the law as set forth in article 3 of the Charter.

170. In substance, Article 14 (1) of the ICCPR guarantees in the same manner as article 3 of the Charter the right to equality, especially before Courts and tribunals. The Court having ruled on the alleged violation in relation to article 3 of the Charter, does not deem it necessary to make a ruling on the same allegation in relation to article 14 (1) of the ICCPR.

C) Allegation of violation of the obligation to respect the rights of journalists and the right to freedom of expression

171. The obligation to respect the rights of journalists as far as this matter is concerned, is enshrined in article 66(2)(c) of the Revised ECOWAS Treaty, which provides that:

"2 [... Member States of ECOWAS] undertake (c) to ensure respect for the rights of journalists".

Regarding the right to freedom of expression, this right is guaranteed under article 9 of the Charter and article 19(2) of the ICCPR.

According to Article 9 of the Charter:

"1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law".

For its part, article 19 (2) of the ICCPR provides that:

"2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

172. In their application, the Applicants allege violation of all the aforementioned provisions. They state that "in more specific terms, the murder of Norbert Zongo and his companions is a violation of paragraph 2(c) of article 66 of the Revised ECOWAS Treaty, according to which Zongo had the right to be protected against unlawful acts of aggression, resulting from, or relating to the free exercise of his profession as a journalist and to benefit from effective remedies in case such rights were violated".

173. They conclude by maintaining that, "the passive attitude of Burkina Faso in relation to the horrible assassination of which Norbert Zongo, an active journalist, was victim, and the fact that the State had refrained from ensuring, failed and refused to ensure that those responsible were identified and held accountable for their acts, is a source of anguish in exercising the right to freedom of expression in this country and the rights of its citizens to participate effectively in their own governance".

174. In their reply on the merits of the matter, the Applicants first insist on "the dual nature of freedom of expression which is both the individual right of a person (...) and the right of the public to receive information and ideas..."

They went on to stress that the State is accountable for two types of obligations, namely, the obligation to refrain from any interference which may affect the freedom of speech of journalists, and the positive obligation to protect the free flow of information and ideas.

175. In the instant case, the Applicants argue that Late Norbert Zongo had complained on several occasions in his articles, of being threatened and of attempts to abduct him. The Respondent ought to have protected him by carrying out an effective investigation of the acts of violence about which he was complaining.

176. At the Public Hearing of 28 November 2013, the Applicants again underscored the fact that freedom of speech implied that media professionals could work without fear, apprehension or intimidation, thus enabling the public to access information and the truth.

The Applicants concluded that the State did not only have to prevent attacks against journalists in the exercise of their duties, but had to strive to quickly find those responsible for such attacks whenever they occur; and that in view of the impunity that those responsible for the assassination of Norbert Zongo had employed, the Respondent State had violated his right as a journalist, owner of a media outlet, and as an advocate of the truth, as well as his right to disseminate information and the truth.

177. In its submission on the merits, the Respondent citing various clauses of the Constitution and the Information Code of Burkina Faso, noted that "no .journalist has ever been prevented from exercising his profession since the adoption of the Constitution of 2

June 1991, except where they contravened the ethics of the profession as set out in the Information Code"; that Norbert Zongo 'whose pen was rather sharp against the Government, had never been subjected to any disciplinary or legal action'; and that the Weekly *"L'Indépendant"* of which he was Director of Publication, and its newspapers had never been closed down or seized by Government officials".

178. The Respondent concluded that, in view of the foregoing observations, the allegations, specifically those regarding violations of article 9(1) and (2) of the Charter, article 19 (2) of the ICCPR and article 66(2)(c) of the Revised ECOWAS Treaty, were unfounded.

179. At the Public Hearing of 28 November 2013, Respondent State further argues that since Norbert Zongo had never complained to the courts about the death threats against him, he was not entitled to special protection by the State, given the principle of equality of all citizens before the law.

180. The Court is of the view that in the instant case, article 66(2)(c) of the Revised ECOWAS Treaty and article 9 of the Charter on the alleged violation should be read jointly. Whereas the first deals with the rights of journalists in general, the second guarantees their freedom of expression in particular. Against this background, according to the allegations made by the Applicants, the rights of journalists which should be guaranteed by the Respondent State are specifically the right to life and the right to freedom of expression.

181. Regarding the right to life, the Applicants allege that the Respondent had failed in its obligation to prevent and to protect Norbert Zongo against the death threats which he stated he had received.

182. However, the Court had, in its Ruling of 21 June 2013 on the preliminary objections, already recognized that it does not have jurisdiction *rationae temporis* to hear the allegation of "violation of the right to life based on the assassination on 13 December

1988 of Norbert Zongo, Abdoulaye Nikiema, known as Ablasse, Ernest Zongo and Blaise Ilboudou **(*supra,* paragraph 32).**

Consequently, the Court will not examine the said allegation.

183. Regarding allegation of violation of the right to freedom of expression the Court in its Ruling of 21 June 2013, had declared that it had jurisdiction to hear the case, on condition that it is directly linked "to the allegation of violation of the right (of everyone) to have his cause heard by competent national courts".

184. In the instant case, the Applicants maintain essentially in that respect, that the very fact that the Respondent failed to expeditiously and efficiently identify, apprehend and try the assassins of the investigative journalist Norbert Zongo, constitutes a violation of the freedom of expression of journalists in general, given that they run the risk of working under fear, apprehension and intimidation. To this, the Respondent State replies that since 1991, no journalist has been disturbed by the authorities in the exercise of his profession.

185. Viewed from this perspective, the Court observes that the allegation relates to the right to freedom of expression of the media in general (and not that of Norbert Zongo in particular), and that it does not concern the specific rights of individual Applicants in this case, who are not journalists. The Court observes, on the contrary, that such allegation could be of interest to the other Applicants in this case, namely, the Burkinabè Human and Peoples' Rights Movement.

186. In the circumstances, the Court is of the opinion that even though the Respondent State's failure to identify and apprehend Norbert Zongo's assassins could potentially cause fear and anxiety in media circles, in the instant case, however, the Applicants have not shown proof that the Burkinabè media had not been able to exercise freedom of expression.

187. In the circumstances, the Respondent State cannot be accused of directly violating the freedom of expression of journalists as guaranteed under article 9 of the Charter, read together with article 66(2)(c) of the Revised ECOWAS Treaty, merely because it had not

acted with diligence and efficiency in identifying and bringing to trial the assassins of Norbert Zongo.

188. The Court, having thus decided on the alleged violation of the freedom of expression on the basis of article 9 of the Charter, it does not find necessary to rule on the same allegation on the basis of article 19 (2) of the ICCPR.

D) Allegation of violation of the obligation to guarantee respect for human rights

189. The obligation to guarantee respect for human rights is contained in article 1 of the Charter which provides as follows:

"The Member States of the Organisation of the African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".

190. In their application, the Applicants allege that the State had violated its obligation to protect human rights as provided for in article 1 of the Charter.

They thus assert that applied to the instant case, this article would imply that Burkina Faso was bound, under article 7 of the Charter, to guarantee remedies in case of violation of the rights that it guarantees.

The Applicants argue, relying on the jurisprudence of the African Commission, that the obligation set forth in article 1 of the Charter is one of result and that the State had the choice as to the means to deploy, as far as legislative or other measures are concerned.

191. At the Public Hearing of 29 November 2013, the Applicants underscored that "when a State ratifies a Treaty, it commits itself to ensure that the provisions of the Treaty are domesticated in its national laws and, by so doing, the State conforms to the prescriptions of the Treaty in question". The Applicants maintained that the Respondent State had violated this obligation because the legislative measures it had adopted, particularly *via* the Criminal Procedure Code, were at variance, notably with article 7 of the Charter. The Applicants referred once again to the provisions according to which the Prosecutor could

receive instructions from the Minster of Justice, or, according to which the Investigating Magistrate was not bound to conduct adversarial procedure during investigations.

192. In its Response on the merits of the matter, the Respondent State started by observing that the Applicants "had concluded that Burkina Faso had violated article 1 of the African Charter, without stating which "legislative or other measures" had not been adopted by Burkina Faso which made it unable to "guarantee available, effective, accessible and satisfactory remedies".

The Respondent State rejects the allegation and argues, on the contrary, that it had not only ratified key international human rights conventions, but had also at domestic level adopted the Constitution of 2 June 1991 and a long list of legislative instruments and regulations. The Respondent then concluded that:

"...in claiming that the State of Burkina Faso had violated article 1 of the African Charter, thereby leaving the impression that no internal measures had been taken by the State to ensure protection of the human rights and liberties guaranteed by the said Charter, the Applicants were making a completely baseless and gratuitous assertion".

193. At the Public Hearing of 28 November 2013, the Respondent State reiterated this position and asked the other party to at least indicate the measures which the Respondent State was yet to take to comply with article 1 of the Charter.

194. In its Ruling of 21 June 2013, the Court recognised its competence to hear the allegation of violation of human rights by the Respondent State, "in as much as the said allegations were directly linked to the allegation of violation of the right of Applicants to have their cause heard by competent national courts". **(*supra,* paragraph 32).**

195. In that regard, the Applicants allege the violation of article 1 of the Charter in the sense that the Respondent State had not taken the necessary steps to ensure respect for the right to have their cause heard by competent national courts, as guaranteed by article 7 of the Charter, and because some measures it had adopted were at variance with the same article 7. For its part, the Respondent argued that it had adopted all the

constitutional, legislative and regulatory measures required in its judicial system to ensure compliance with the provisions of article 7 of the Charter.

1. The issue of legislative measures

196. On the allegation of violation by the Respondent State of its obligation to take legislative measures, the argument of the parties centred on compliance with the Charter, of the legislative or regulatory measures adopted by the Respondent to guarantee the rights of all persons for their cause to be heard by competent national courts, pursuant to article 7 of the Charter.

197. In that regard, the Court observes, from the records of the case, that the Respondent had adopted a number of legal measures to guarantee the right to have one's cause heard by an independent and impartial judge. As mentioned earlier, the Constitution of Burkina Faso, in its articles 129 and 130, does guarantee the independence of the judiciary **(*supra*, paragraph 125).** Furthermore, article 125 of this same Constitution holds up the judiciary as the custodian of the rights and freedoms which it defines.

It is therefore clear that the Respondent State cannot be blamed for not having taken such measures, and for having violated article 1 of the Charter with respect to legislative measures.

2) The issue of other measures other than legislative measures

198. On the allegation of violation by the Respondent State of its obligation to take other measures in terms of article 1 of the Charter, the argument between the parties centered on whether or not, by failing to seek out, prosecute and put to trial the assassins of Norbert Zongo and his companions, the Respondent failed in its obligation to take measures, other than legislative, to ensure respect for the rights of the Applicants' cause to be heard by competent national courts.

199. In this regard, the Court has already found that the Respondent State violated article 7 of the Charter, as it had not shown due diligence to seek out, investigate, prosecute and put to trial the killers of Norbert Zongo and his companions ***(supra,* paragraph 156).**

The Court notes that, by so doing, the Respondent State simultaneously violated article 1 of the Charter, by failing to take appropriate legal measures to guarantee respect for the rights of the Applicants in terms of article 7 of the Charter.

E) The issue of damages

200. In their written submissions, the Applicants prayed the Court to hold the Respondent liable to a series of damages to be quantified by the Court itself **(*supra,* paragraph 45).**

201. In its Response on the merits and during the Public Hearing of 28 and 29 November 2014, the Respondent State, for its part, prayed the Court to reject all the claims for damages filed by the Applicants **(*supra,* paragraph 45).**

202. Before taking a decision on the prayers in respect of damages, the Court had opted, in application of Rule 63 of its Rules, to first rule on the various allegations of violation of the Charter made by the Applicants.

The Court, having now ruled on all said allegations, shall decide on the damages at a later stage in the proceedings, after having heard the parties more extensively.

203. *In view of the foregoing,*

THE COURT, unanimously

1. *Declares that it has jurisdiction* to hear the application, except in relation to the allegation of violation of the right to life;
2. *Overrules* the Respondent's objection to the admissibility of the application on the grounds of failure to exhaust local remedies; and *declares* the application admissible;
3. *Finds* that the Respondent State has violated article 7 of the Charter as well as article 1 of the Charter, concerning the obligation to adopt measures, other than legislative measures;

4. *Finds that the Respondent has not violated article 3 of the Charter, and that it has not violated article 1 of the Charter concerning the obligation to adopt legislative measures;*

By majority of five to four, Judges Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, El Hadji GUISSE and Kimelabalou ABA dissenting :

5. Finds that the Respondent State has violated article 9(2) of the Charter, read together with article 66 (2) (c) of the Revised ECOWAS Treaty;

Unanimously:

6. *Defers* its ruling on the issue of damages;
7. *Orders* the Applicants to submit to the Court their brief on damages within thirty days from the date of this ruling; and also *Orders* the Respondent State to submit to the Court its response on the damages within thirty days after receiving the response of the Applicants.

Signed:

Sophia A. B. AKUFFO, President

Bernard M. NGOEPE, Vice- President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge

Sylvain ORE, Judge

El Hadji GUISSE, Judge

Kimelabalou ABA, Judge; and

Robert ENO, Registrar

Done at Arusha, this Twenty-Eighth day of the month of March in the year Two Thousand and Fourteen, in English and French, the French text being authoritative.

Pursuant to Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the Joint Declaration of Justices Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, El Hadji GUISSÉ and Kimelabalou ABA, is appended to this Judgment.

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo & The Burkinabé Movement on Human and Peoples' Rights *v.* Burkina Faso

(Application No. 013/2011)

Joint Declaration of Judges Gérard Niyungeko, Fatsah Ouguergouz, El Hadji Guisse and Kimelabalou Aba

1. In paragraph 5 of the operative part of this judgment, the Court finds that "the Respondent State has violated Article 9 (2) of the Charter, read together with Article 66 (2) (c) of the Revised ECOWAS Treaty".

2. The Court indeed considered that "the Respondent State's failure to identify and send for trial the assassins of Norbert Zongo has provoked fear and anxiety within the media circles" (paragraph 186), and that for this reason, "the Respondent State has violated the right to freedom of expression of journalists" as guaranteed by the two above-mentioned provisions (paragraph 187 of the judgment).

3. We do admit that this failure by the Respondent State could have indeed generated a certain degree of fear and anxiety within the media profession in general, and somehow produced an "intimidating effect" on the freedom of expression of journalists (see paragraphs 173 and 176).

4. We are also of the view that when it comes to facts of a "psychological" nature, which are generally difficult to prove, the Court did not have to insist on getting convincing evidence. We are in favour, especially in the area of the protection of human rights, of an adjustment of the standard of proof relating to the establishment of the violation of certain rights guaranteed under the Charter or any other applicable legal instruments, and in particular, regarding evidence of the possible "intimidating effect" of a behaviour by a Respondent State which would be contrary to its international obligations.

5. Besides, in international judicial practice, it is generally acknowledged that, when circumstances which are not attributable to a party are such that evidence required from it is difficult or impossible to obtain, the Judge may be inclined to be convinced more easily than in normal circumstances.[1]

6. In the instant case, however, the issue is that the Applicants content themselves with making a general allegation, without substantiating it with precise facts which could concretely reflect this fear and anxiety and thus establish *prima facie*, the merits of the said allegation. While the Respondent State argued that the treatment of the Zongo case at the national level had no negative impact whatsoever on the freedom of expression of journalists (paragraph 177), the Applicants, on their part, did not submit the slightest evidence to move the Court to make a determination on the existence of such an "intimidating effect" which could affect the rights guaranteed under the above-mentioned provisions. They gave no indication on the fact that, since the beginning of the Zongo case, the media in Burkina Faso would no longer have been able to express itself freely. In the absence of precise facts or a minimum of evidence, and considering that the Respondent State challenged the allegation, the Court being a judicial body, ought not to have concluded in favour of such a violation.

7. It is for this reason that we could not subscribe to the decision of the majority of the Court in paragraph 5 of the operative part of this judgment, as quoted above.

Gérard Niyungeko
Judge

Fatsah Ouguergouz
Judge

El Hadji Guisse
Judge

Kimelabalou Aba
Judge

Robert Eno,
Registrar

[1] On this practice, see Gérard NIYUNGEKO, «*La preuve devant les juridictions internationales*», Bruylant, Éditions de l'Université de Bruxelles, 2005, pp. 418- 424.