

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

THE MATTER OF
BENEFICIARIES OF LATE NORBERT ZONGO, ABDOULAYE NIKIEMA ALIAS
ABLASSÉ, ERNEST ZONGO, BAISE ILBOUDO AND THE MOUVEMENT
BURKINABE DES DROITS DE L'HOMME ET DES PEUPLES

V.

BURKINA FASO

APPLICATION No. 013/2011

RULING

(PRELIMINARY OBJECTIONS)



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

In the Matter of:

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

represented by:

Advocate Ibrahima KANE, Counsel

Advocate Chidi Anselm ODINKALU, Counsel

v.

Burkina Faso,

represented by:

Advocate Antoinette OUEDRAOGO, Counsel

Advocate Anicet SOME, Counsel

Advocate Paulin BAMBARA, Counsel

Advocate Mathias NIAMBEKOUDOUGOU, Counsel

After deliberations,

Renders, unanimously, on the basis of Article 52.7 of the Rules of Court, the following Ruling:

I. SUBJECT OF THE APPLICATION

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

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

A) The facts of the case

2. According to the Application, the facts date back to the assassination on 13 December 1998, of Norbert Zongo, an investigative journalist, and his above-mentioned companions. Messrs Abdoulaye Nikiema alias Ablassé and Blaise Ilboudo were collaborators of Mr Zongo, while Mr Ernest Zongo was his younger brother.
3. The Applicants state that "the investigative 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 they were travelling in, 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 Inquiry set up by the Government to determine the cause of death of these persons, the Applicants allege that "the murder of the four persons on 13 December 1998 is linked to 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 Ouedraogo, the driver of François Compaoré, the brother of the President of Burkina Faso and Adviser at the Presidency of the Republic".
5. The Applicants state that, "as the driver and employee of François Compaore, David Ouedraogo died on 18 January 1998 at the Health Centre of the Presidency in Burkina Faso, apparently as a result of the ill-treatment inflicted on him by presidential security guards who were investigating a case of money stolen from the wife of François Compaore."
6. The Applicants also claim that "Norbert Zongo devoted a series of very critical articles on the matter, in which he highlighted numerous

irregularities, the refusal of the persons “implicated” to face justice, and more specifically, the attempt to cover-up a very embarrassing matter in which the family of the President’s brother was 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 regards 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 oneself and disseminate his or her opinion), have been violated.
9. Regarding the International Covenant on Civil and Political Rights, (hereinafter referred to as the “ICCPR”), they contend that Article 2(3) (the right to be heard in case of violation of rights); Article 6(1) (the right to life); Article 14 (the right to have one’s cause heard by a competent, independent and impartial Judge); and Article 19(2) (freedom of expression), have been violated.
10. With respect to the Universal Declaration of Human Rights, the Applicants allege that Article 8 (the right to an effective remedy before competent national courts in case of violation of rights), has been violated.
11. On the revised Treaty of the Economic Community of West African States (ECOWAS), they allege that Article 66(2)(c) (the obligation to respect the rights of a journalist), has been violated.
12. The Applicants emphasized in particular that “.... the essential element of the obligation to protect the right to life and ensure 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 added that “instead of complying with that obligation, Burkina Faso manifestly and repeatedly chose to frustrate the efforts of the families of Norbert Zongo and his companions to ensure 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 Norbert Zongo and ensuring that those responsible were identified, prosecuted and convicted, Burkina Faso violated Norbert Zongo's right to life as guaranteed under Article 4 of the Charter on Human and Peoples' Rights; 6(1) of the ICCPR and that of equal protection of the law, as well as Article 3(2) of the Charter".

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..." which guarantee freedom of expression.

II. HANDLING OF THE MATTER AT THE NATIONAL LEVEL

16. At this stage, it is necessary to provide a summary of the manner in which this matter was handled at the national level.

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

- Seizure by the Prosecutor of Faso, of the Dean of the Examining Magistrates of Cabinet No. 1 of the Ouagadougou High Court for investigations to be initiated to ascertain the cause (or causes) of the death of the occupants of Norbert Zongo's car;
- On the instruction of the Judge, post mortem was conducted on the exhumed bodies and forensic analysis done on the items found at the scene of the crime;
- Letter of complaint and filing of civil action by the plaintiffs - 6 January 1999;
- Establishment of an Independent Commission of Enquiry (ICE) charged with "conducting all the investigations to establish the causes of death of the occupants of the 4WD vehicle, registered as 11 J 6485 BF, which occurred on 13 December 1998 on the Ouagadougou highway (Kadiogo Province), and which included the journalist Norbert Zongo" (December 1998); the Commission's report was submitted in May 1999;
- Decision by an extra-ordinary session of the Council of Ministers to transmit the ICE report to the Courts, without delay (May 1999);

- Putting in place of a Committee of the Wise to examine all pending issues of the day, and to make recommendations acceptable to all stakeholders on the national political scene (May 1999); the Report of the Committee of the Wise was submitted in July 1999;
 - Summons of 16 January, 2001, issued by the 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); the indictee was said to be sick and action on the matter had been stayed 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 *Chambre d'accusation* of the Ouagadougou Court of appeal, which dismissed the appeal and upheld the decision to terminate the proceedings, (August 2006).
17. In its Response, the Respondent confirmed the setting up of an ICE and the Committee of the Wise and provided details on their composition, terms of reference and the task they had accomplished.

Furthermore, it made reference *inter alia*, to the following procedures and actions:

- Arrival of the Sapuoy Police at the scene of the crime on 13 December 1998 at 16.45 hours;
- Arrival at the scene of the State Prosecutor of the Ouagadougou High Court on 14 December 1998;
- Identification of the bodies on 15 December 1998 by a Physician of the Leo Medical Centre;

- Request on 24 December 1998, by the Prosecutor of Faso, to initiate investigations so as to determine the cause or causes of death of the occupants of the car registered under No.11 J6485 BF and to refer the matter to Investigating Magistrate No. 1;
- Submission on 7 May 1999 of the ICE Report;
- Forwarding on 10 May, 1999, of the ICE Report to the Courts by the Government;
- The Forensic and ballistic reports ordered by the investigating Magistrate;
- Request on 21 May 1999 by the Prosecutor of Faso, to initiate investigations against unknown persons for the murder of Norbert Zongo, Ernest Zongo, Blaise Ilboudo and Abdoulaye Nikiema alias Ablassé;
- Examination of the file by the investigating magistrate, followed by the arrest and detention of the main suspect in February 2001;
- Face-off on 15 May 2001 between the main suspect, Warrant Officer, Marcel Kafando and the witness Jean Racine Yameogo;
- The postponement in May 2001 of the face-off between the accused and the witness, due to the state of health of the accused; resumption of the face-off on 31 May 2006;
- Final request by the Prosecutor on 13 July 2006, requesting that proceedings against the sole accused person be abandoned;
- Order to abandon proceedings (*nolle prosequi*) issued by the Investigating Magistrate on 18 July 2006;
- Appeal of 19 July 2006 to the Criminal Appeal Court of Ouagadougou, filed by the *parties civiles* against the Order to abandon proceedings; and
- Ruling by the Appeal Court on 16 August 2006, confirming the Order to abandon proceedings, issued by the Investigating Magistrate.

19. The Court notes that, on the whole, the description of the facts on the handling of the matter at the national level by the Applicants and the

Respondent is the same and complementary, save on two issues, also argued during the Public Hearings of 7 and 8 March and of 28 and 29 March 2013. First, the Respondent indicated that the matter was handled by a single Investigating Magistrate, thus refuting the Applicant's allegation that a first Investigating Judge was withdrawn from the case. In rebuttal, one of the Counsels for the Applicants provided the names of the two Investigating Magistrates. Furthermore, the Respondent refutes the Applicants' allegation that the hearing of the matter was stayed between 2001 and 2006, and claims that the hearing, including the interrogation of witnesses, continued during that period.

III. PROCEDURE BEFORE THE COURT

20. The Application was received at the Registry of the Court on 11 December 2011.
21. By separate letters dated 13 and 21 December 2011, the Registry acknowledged receipt of the Application, and forwarded to the parties a copy of the Charter, the Protocol establishing the Court, as well as the Rules of Court (hereinafter referred to as "the Rules").
22. By separate letters dated 11 and 23 January 2012, addressed to the Foreign Ministry of Burkina Faso, the Registry forwarded the Application to the Respondent, pursuant to Rule 35(4)(a) of the Rules with a request that the names and addresses of the Respondent's representatives be submitted to the Court within thirty (30) days; and further, pursuant to Rule 37 of the said Rules, that a response to the Application be provided within sixty (60) days. A copy of the Rules of Court was also attached.
23. By letter dated 20 January 2012, addressed to the Chairperson of the African Union Commission, the Registrar informed him of the filing of the Application and submitted to him a copy of this Application as well as the Rules of Court. Through the Chairperson, he also informed the Executive Council of the African Union and all States Parties to the Protocol, of the Application pursuant to Rule 35(3) of the Rules.
24. By letter dated 27 February 2012 addressed to the Registrar, the Acting Legal Counsel of the African Union Commission acknowledged receipt of the letter mentioned in the preceding paragraph and provided every assurance that the Commission had taken the necessary measures to inform the Executive Council and other States Parties to the Protocol, of the said Application.

25. By letter dated 29 February 2012, addressed to the Acting Legal Counsel of the African Union Commission, the Registry acknowledged receipt of the letter mentioned in the previous paragraph.
26. By letter dated 13 March 2012, addressed to the Registrar, by way of a *Note Verbale* from the Embassy of Burkina Faso Permanent Mission to the African Union and dated 23 March 2012, the Minister of Communication and Government Spokesperson, sitting in for the Minister of Foreign Affairs and Regional Cooperation of Burkina Faso, submitted the names and addresses of the representatives of the Government of Burkina Faso and gave assurances that the Government of Burkina Faso would cooperate with the Court to establish the truth of this matter.
27. By *Note Verbale* dated 26 March 2012 sent to the Embassy of Burkina Faso in Addis Ababa and Permanent Mission of that country to the African Union, the Registry of the Court acknowledged receipt of the letter from the Government of Burkina Faso mentioned in the paragraph above.
28. Through successive letters dated 11 April, 25 April, 8 May and 15 May 2012, the Respondent submitted to the Registry of the Court its response setting out its observations on the admissibility of the Application.
29. Through successive letters dated 17 April, 2 May, 15 May and 24 May 2012, the Registrar of the Court acknowledged receipt of the response of the Respondent.
30. Through successive letters dated 12 April, 15 May and 19 July 2012, the Registrar requested Counsel for the Applicants to produce the Powers of Attorney showing that they had been authorised to represent the Applicants before the Court.
31. Through successive letters dated 8 May, 6 June and 8 June 2012, the Registrar acknowledged receipt of the Power-of-Attorney submitted by Counsel for the Applicants.
32. Through successive communications dated 8 May and 6 June 2012, the Registry forwarded to the Respondent copies of the Powers of Attorney received.
33. By *Note Verbale* dated 12 June 2012, the Embassy of Burkina Faso in Addis Ababa and Permanent Mission of that country to the African Union acknowledged receipt of the letter from the Court forwarding the Powers-of-Attorney.

34. By letters dated 6 and 8 June 2012 addressed respectively to both Counsel for the Applicants, the Registrar forwarded a copy of the response of the Respondent.
35. By email dated 8 August 2012, Counsel for the Applicants sought from the Registrar a 10 (ten) day extension of the time limit for the submission of the Applicants' reply to allow them to resolve issues related to the compilation of documents to be attached to their submissions.
36. By email dated 21 August 2012, the representatives of the Applicants submitted their response to the Court which only dealt with preliminary objections raised by the Respondent.
37. By an Order dated 23 August 2012, the Court accepted the Applicants' request for an extension of the time limit and fixed the date for submission of their response for 21 August 2012, the date on which the Registry received this document.
38. By letter dated 23 August 2012, addressed to the Applicants, the Registry acknowledged receipt of their reply.
39. At its 26th Ordinary Session in Arusha from 17 to 28 September 2012, the Court decided that the written procedure on preliminary objections were closed and that it would hold a public hearing on the preliminary objections at its March 2013 Ordinary Session.
40. By letter dated 24 September 2012, the Registrar informed the parties of the holding of the public hearing on dates to be announced in due course.
41. At its 27th Ordinary Session held from 26 November - 7 December 2012, the Court decided that the public hearing on the preliminary objections will take place on 7 and 8 March, 2013.
42. By separate letters dated 20 December 2012, the Registry notified both parties of the dates of the public hearing, requesting them to confirm their availability within thirty (30) days.
43. By letter dated 18 January 2013, the Respondent informed the Court that it will be present at the public hearing of 7 and 8 March, 2013.
44. By an email dated 7 February 2013, the Applicants acknowledged receipt of the notification of the date of the public hearing and confirmed their availability for the public hearing on the dates proposed.

45. The public hearing took place on the set dates at the seat of the Court in Arusha, and the Court heard the oral arguments of the parties:

Representing the Respondent which raised the preliminary objections were:

- Barrister Antoinette OUEDRAOGO, Counsel
- Barrister Anicet SOME, Counsel
- Mr Paulin BAMBARA, Counsel
- Mr Mathias NIAMBEKOUDOU, Counsel

Representing the Applicants were:

- Barrister Ibrahima KANE, Counsel
- Barrister Chidi Anselm ODINKALU, Counsel

46. At the public hearing, the Judges of the Court posed questions to the parties and the latter responded.
47. By separate letters dated 12 April 2013, the Registrar requested the parties to submit, within fifteen (15) days, any documents which may corroborate the allegations they made during the public hearing. He, in particular, requested the Respondent to submit any document which may prove that between 2001 and 2006, hearing on the matter continued, notably, the interrogation of witnesses.
48. By letter dated 28 April 2013, the Applicants responded to the letter of the Registrar mentioned in the paragraph above and reiterated their position, according to which hearing on the matter was stayed between 2001 and 2006, and produced a copy of the final Decision of dismissal for want of evidence handed down by the State Prosecutor of Burkina Faso dated 13 July 2006, as well as a copy of the summons to Mrs Geneviève Zongo, dated 28 April 2006, for her to be heard.
49. By letter dated 25 April 2013, the Respondent forwarded to the Registrar an inventory of items compiled on 20 July 2006, listing all the action taken during the investigations from 1999 to 2006, and signed as required by law, by the Examining Magistrate. It also contained nine case reports and 22 pages of hearings, interface and testimony, out of a total of 63 acts performed during the investigations between the period of suspension of the hearing of the main suspect and appellate proceedings.
50. In its response dated 13 April 2012, the Respondent raised an objection to the *ratione temporis* jurisdiction of the Court and on the admissibility of the

Application, as a result of the failure to exhaust local remedies or to observe reasonable time limit in submitting the Application to the Court.

Pursuant to Rules 39(1) and 52(7) of the Rules of Court, the Court will now consider these preliminary objections.

IV. LACK OF *RATIONE TEMPORIS* JURISDICTION OF THE COURT

A) Submissions of the Respondent

51. In its response to the Application dated 13 April 2012, the Respondent raised a preliminary objection to the lack of *ratione temporis* jurisdiction of the Court. It noted that the alleged human rights violations following the 13 December 1998 incident, even if confirmed, occurred, in the case of Burkina Faso, before the entry into force of the Protocol establishing the Court on 25 January 2004; the Rules of Court on 20 June 2008; and the International Covenant on Civil and Political Rights on 4 April 1999.
52. It concluded that "... given that these facts took place before the entry into force of the Protocol establishing the African Court on Human and Peoples' Rights, Application No. 013/2011 of 11 December 2011 - beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo, and the Burkinabé Movement on Human and Peoples' Rights (BMHPR) against Burkina Faso, cannot be heard by a Court which was established after the incident took place, because of the cardinal principle of the non-retroactivity of the law".
53. The Respondent argued further that "the provisions of the International Covenant on Civil and Political Rights could also not be invoked against Burkina Faso because the alleged violations took place before the country acceded to this instrument" and that "once again the principle of non-retroactivity of the law applies in this case".
54. At the public hearing of 7 March 2013, the Respondent reiterated this position, adding that: "... death is an instantaneous act recognised as such by the Applicants and accepted as such by the Respondent. Based on this principle, an instantaneous act remains instantaneous; it can be circumscribed in space and time".
55. Regarding the allegation made by the Applicants that the incident in question constitutes continuous violations of the provisions of relevant international human rights instruments, the Respondent argues that "this assertion would not hold if we were to consider the actions taken by the

government and the judicial processes undertaken”, adding that:

“in a bid to ensure an effective handling of the case, an Examining Magistrate was specifically assigned, an autonomous unit of the judicial police was placed at his disposal and the required funds were given to him by the government. The Examining Magistrate conducted investigations and organised hearings for periods beyond the entry into force of the Protocol establishing the African Court on Human and Peoples’ Rights”.

56. At the public hearing of 7 and 8 March 2013, the Respondent argued that the notion of continuous violation is a jurisprudential creation attached to precise facts which have not been alleged in this case, that is, detentions, abductions and disappearances. It added that the notion often concerns inaction on the part of judicial authorities and that in this case the State cannot be blamed for any inaction whatsoever, considering the exemplary rapidity with which the authorities handled the matter, as proven by the short time within which the investigations were carried out, the judicial inquiry opened and an Independent Commission of Inquiry and a Committee of the Wise established. It declared that when in 2006 no charges were brought against the accused, the authorities simply complied with the decision of the Judge, and that in any case, if those guilty were not found, innocent people should not be punished to satisfy the beneficiaries, with the risk of violating the principle of presumption of innocence.

B) Arguments of the Applicants

57. The Applicants for their part stated that although the alleged violations started even before the entry into force of the Protocol establishing the Court, they “continued thereafter and thereby constitute continuous violations of the Charter and other applicable instruments to the extent that the Application is within the temporal jurisdiction of the Court.”
58. In their response, relying extensively on the works of the International Law Commission and International Jurisprudence, the Applicants concluded as follows:

“If the murder of Norbert ZONGO and his companions may be construed as an ‘instantaneous’ act beyond the *ratione temporis* jurisdiction of your Court because of the date of its occurrence, the entire process of identifying and bringing charges against the authors of these violations which took place after the entry into force of the Protocol establishing the Court, that is, after 24 January 2004, in turn fall within the purview of your temporal jurisdiction. The Burkinabé

authorities themselves admit that judicial procedures which started timidly in May 1999 with the commencement of investigations against unknown persons only became effective in May 2006, with the interface before the investigating Judge of the main suspect and the witness in the matter”.

59. They argued that in this matter “there is a case of continuous or persistent violation which stretches throughout the period during which the acts continued and are inconsistent with the international obligation of Burkina Faso”.
60. During the public hearing of 7 and 8 March 2013, the Applicants reiterated this position and added that their action was aimed at highlighting the international responsibility of Burkina Faso for failing to seriously investigate, charge and try the persons responsible for the death of Norbert Zongo and his three companions.

C) Analysis of the Court

i. Preliminary observations

61. Article 3(1) of the Protocol establishing the Court 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”.

Article 3(2) of the same Protocol also provides that, “in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide”. (See also Rule 26(2) of the Rules of Court).

62. The Court notes in the first place that in the instant case, the relevant dates regarding its *ratione temporis* jurisdiction are those of the entry into force of the Charter (21 October 1986), the Protocol (25 January 2004) as well as that of the deposit at the Secretariat of the Organization of African Unity by Burkina Faso of the declaration accepting the jurisdiction of the Court to receive Applications from individuals, (28 July 1998).
63. The Court further notes that the Application of the principle of non-retroactivity of treaties contained in Article 28¹ of the Vienna Convention on

A) _____

¹ Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

the Law of Treaties of 23 May 1969 is not contested by the parties. The issue here is to know whether the different violations alleged by the Applicants would, if proven, constitute instantaneous or continuous violations of the international obligations of Burkina Faso in the area of human rights.

Consequently, the Court is of the opinion that to treat this issue in relation to the different alleged violations, it will be necessary, as suggested by the parties, to distinguish, between alleged “instantaneous” and alleged “continuous” violations of the international obligations of the Respondent.

64. Based on these observations, the Court will deal with its jurisdiction *ratione temporis* by making the distinction between alleged violations of the right to life, the right to be heard by competent national Courts and other violations alleged by the Applicants.

ii. Allegations of the violation of the right to life

65. The first allegation of violation of human rights submitted by the Applicants concerns the right to life and is based on the assassination which took place on 13 December 1998, of Norbert Zongo, Abdoulaye Nikiema, also known as Ablasse, Ernest Zongo and Blaise Ilboudo. In that regard, the Applicants alleged the violation of Article 4 of the Charter and Article 6(1) of the ICCPR. As indicated earlier, the parties agreed to consider that the assassination of these persons was an “instantaneous” act occurring outside the temporal jurisdiction of the Court. (*Supra*, paragraphs 52 and 58).
66. The notion of “instantaneous” or “complete” violation is recognized in international law. According to Article 14(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001: “the breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue”. In its commentary on this Article, the Commission stated that “an act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues.”
67. The Court notes that the murder of the four individuals herein concerned took place after Burkina Faso had ratified the Charter on 21 October 1986, but before it became bound by the ICCPR (4 April 1999) and the Protocol establishing the Court (25 January 2004).
68. The Court is of the opinion that although Burkina Faso had already ratified the Charter at the time of the alleged crime, the Court lacks *ratione temporis*

jurisdiction to consider the alleged violation of the right to life resulting from the murder of Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Ilboudo, because, in the case of Burkina Faso, “this instantaneous and completed incident” occurred before the entry into force of the instrument, that is, the Protocol, which gives the Court jurisdiction to hear, *inter alia*, the alleged violations of the Charter.

On the declaration submitted by Burkina Faso to the Organization of African Unity before the incident (28 July 1998) accepting the jurisdiction of the Court to receive Applications from individuals and non-governmental organizations under Article 34(6) of the Protocol establishing the Court, before the incident (28 July 1998), it is clear that, in the case of the State in question, it could not have had any legal effect before the entry into force of the main legal instrument from which it is derived.

69. As a result of the foregoing, the Court concludes that it does not have *ratione temporis* jurisdiction to hear the allegation of violation of the right to life based on the ‘completed’ act of murder of the four persons here-in concerned, which occurred on 13 December 1998.
70. The Court would however like to note that it is making a clear distinction here between the “instantaneous” act of assassination which is beyond its jurisdiction, and the other acts alleged by the Applicants, which are the consequence of this act, and which may constitute separate violations of other rights of persons concerned or their beneficiaries, as guaranteed by relevant human rights instruments. As the Court has already indicated, (*supra*, paragraph 63), it will determine its *ratione temporis* jurisdiction in relation to these other acts depending on whether they themselves are “instantaneous” or “continuous”.

B) Alleged violation of the right to be heard by competent national courts

71. The second allegation of violation of human rights submitted by the Applicants concerns the right to be heard by competent national Courts. On that score, the Applicants alleged the violation of Article 7 of the Charter and Article 6(1) of the ICCPR.
72. As indicated earlier, whereas the Applicants allege that the Respondent had not done all in its power to find, arrest, try and punish the perpetrators of the assassination of Norbert Zongo and his companions, and that this was tantamount to a continuous violation of the provisions mentioned in the preceding paragraph, the Respondent maintains that there had been no violation of the rights of the Applicants to be heard because the judicial authorities had fulfilled their responsibility in this matter.

73. The notion of continuous violation of an obligation is also recognised in international law. Article 14(2) of the abovementioned Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001 by the International Law Commission provides that “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international Obligation”. In its commentary on this Article, the Commission declared that “a continuing wrongful act is one which has been commenced but has not been completed at the relevant time”.
74. In the present case, the alleged act which is continuous is the behaviour of the Respondent concerning the investigation, arrest, trial and punishment of those responsible for the assassination of Norbert Zongo and his companions; the moment considered is the date of the entry into force of the Protocol establishing the Court, that is, 25 January 2004.
75. It is noted that, following the murder of the four persons on 13 December 1998, police investigation and judicial procedures which started immediately after the murder, continued until 2006, and ended with a decision by the Court of Appeal of Ouagadougou dismissing the matter for lack of evidence, in favour of the only accused person in this matter. It is further submitted that since that decision, to date, no investigation or charges have been brought against any suspects by the Burkinabè authorities.
76. In the opinion of the Court, were this situation to be interpreted as inaction on the part of the Respondent, a matter yet to be determined, it is evident that it will constitute, an “act” which is not yet “complete”, and which therefore is “continuous”.
77. As a consequence, considering that this situation started before the entry into force of the Protocol establishing the Court, with regard to the Respondent on 25 January 2004, and continued after this critical date, the Court has *ratione temporis* jurisdiction to hear the allegation of violation against the Respondent.

C) Other allegations of human rights violations

78. As stated earlier, (*supra* paragraphs 8 to 11), in addition to allegations of violations of the right to life and the right to be heard by competent national Courts, the Applicants also allege the violation by the Respondent of its obligation to adopt legislative and other measures to ensure the respect of rights guaranteed under the Charter; the right of equality before the law and

of equal protection of the law; and the right to express one's opinion.

79. The Respondent for its part did not specifically address the issue of *ratione temporis* jurisdiction of the Court to hear allegations of the violation of these other rights. In its response, as we saw earlier, the Respondent stated in general terms that the alleged violations of human rights after the assassination of 13 December 1998, even if proven, took place before the crucial dates to determine the *ratione temporis* jurisdiction of the Court.
80. For their part, the Applicants did not emphasize the issue of whether these allegations fall within the ambit of the temporal jurisdiction of the Court or not. However, they indicated that by failing to carry out effective investigations to determine the circumstances surrounding the assassination of Norbert Zongo and ensuring that the perpetrators were identified, arrested, tried and punished, Burkina Faso violated the right to equal protection of the law enshrined in paragraph 2 of Article 3 of the Charter. Similarly, at the public hearing of 8 March 2013, the Applicants argued that in relation to the rights of journalists to physical protection under Article 66(2)(c) of the revised ECOWAS Treaty, the violation of this right was continuous as long as the issue of the rights of Norbert Zongo to have his cause heard by Burkinabè Courts had not been effectively addressed.
81. The Court notes that in reality, the parties rather focused on its temporal jurisdiction in relation to allegations of violation of the right to life and the right to be heard by a Judge in case of violation of this right. The Court also notes that the Applicants alleged that other rights had been violated, not really separately, but in relation to what they considered as violations of rights already alluded to above.
82. Under such circumstances, and considering earlier conclusions on the *ratione temporis* jurisdiction in relation to allegations of violation of the right to life and the right to be heard by a Judge in case of violation of these rights, (*supra*, paragraphs 69 and 77), the Court is of the opinion that it does not have the jurisdiction to hear the allegations of violation of the other rights mentioned above, except where these allegations were directly linked to the allegation of the violation of the right to be heard by competent national Courts.
83. Based on the foregoing, the Court concludes as follows:
 - It does not have *ratione temporis* jurisdiction to decide on the allegation of the violation of the right to life of Norbert Zongo, Abdoulaye Nikiema, alias Ablasse, Ernest Zongo and Blaise Ilboudo;
 - It has *ratione temporis* jurisdiction to deal with the allegations of violation

- of the rights of the Applicants to be heard by competent national Courts;
- It has *ratione temporis* jurisdiction to deal with the allegations of violations 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 the protection of journalists, only when these allegations are directly linked to the violation of the right to be heard by competent national Courts.

V. INADMISSIBILITY OF THE APPLICATION AS A RESULT OF FAILURE TO EXHAUST LOCAL REMEDIES

84. Under Article 6(2) of the Protocol establishing the Court, “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

Article 56(5) of the Charter provides that, to be admissible, Applications must be submitted if they “are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”. (See also Rule 40 of the Rules of Court).

A) Arguments of the Respondent State

85. In its response, the Respondent raised a preliminary objection of failure to exhaust local remedies. It pointed out that the highest Court in Burkina Faso, the *Cour de Cassation*, was not seized before the matter was brought before the African Court on Human and Peoples’ Rights.
86. It stated that even though they had a possibility to do so, the Applicants chose not to go to the *Cour de Cassation* and “the *certificat de non pourvoi* of 31 August 2006 shows that the *parties civile* did not make use of this jurisdiction. They did not therefore exhaust all available local remedies”.
87. On the argument canvassed by the Applicants regarding the unduly prolonged judicial procedure, the Respondent maintains firstly that the notion of “unduly prolonged procedure...should be considered solely in light of available and effective remedies that had not been resorted to and not in relation to the entire procedure, adding that “this notion should be set aside where remedies are available, and in this case, the *Cour de Cassation* was not utilised, whereas Applicants had unimpeded access to such remedy”.
88. It further argued that, “unduly prolonged procedure is also set aside where an available and accessible remedy is effective and offers plaintiffs the option of seeking redress to an alleged violation”, observing further that:

“it is clear, the Applicants have not shown the imperfection of the nature of remedies placed at their disposal. Paradoxically, the five years they did not want to ‘loose’ before the *Cour de Cassation*, have been used to wait patiently before seizing the African Court on Human and Peoples’ Rights... whereas the African Commission on Human and Peoples’ Rights was functional to deal with the alleged violations...”.

89. The Respondent argues further that, based on the jurisprudence of the African Commission on Human and Peoples’ Rights “it is incumbent on the Applicant who invokes a waiver, ‘to substantiate the veracity of the facts alleged either through attempts to seize national Courts or through the presentation of similar cases where actions of the Court were proven to be ineffective...’, and that in the instant case, the Applicants do not show any proof of the facts they are alleging”.
90. Finally, the Respondent argues that “the period of the prosecution of the Norbert Zongo matter cannot be referred to as unduly prolonged” and that “this duration is linked to the complexity of the case, the absence of formal proof concerning the identification of the perpetrators and the desire of the Courts to respect the presumption of innocence”.
91. The Respondent reiterated this position at the public hearing of 7 and 8 March 2013, emphasising that even though the decision of the *Cour de Cassation* had set no deadline, litigation before it is easy to initiate, useful, effective and sufficient and “may lead to a decision which is different from that of an Investigating Magistrate and/or of the *Chambre d’accusation*”. They therefore called on the Court to declare the Application inadmissible.

B) The Applicants’ arguments

92. In their Application, the Applicants pointed out that “in terms of the law in Burkina Faso, there is indeed the possibility of going to the *Cour de Cassation* provided for in Article 575 of the Criminal Code”, but that “the family of Norbert Zongo decided deliberately not to use it and to seize [the African Court] because the judicial remedies which they have followed for 9 years have proven to be ineffective and unsatisfactory, and the seizure of the *Cour de Cassation* was inefficient”.
93. They argue that “litigation before the *Cour de Cassation* would have been of no use as it is common knowledge that the highest Court takes about 5 years to decide on any matter after it is seized”.
94. They emphasized that, “...in the instant case, it was probable that in view of

the bad faith exhibited by political authorities, such time limit could have been deliberately extended” and added that “Article 56(5) of the Charter provided specifically that an Applicant before the Court was not bound to comply where a judicial procedure was ‘unduly prolonged’”.

95. In their response, the Applicants stated basically that “an Applicant is not obliged to utilise an ineffective or inadequate remedy, that is, a remedy that will not lead to a resolution of the allegations of human rights violations”.
96. They noted that in the instant case, “they had to wait for nearly two years for the brother of the President of Burkina Faso, who seems to be at the very core of the murder of the journalist and his companions, to be heard by an investigating judge”, adding that “another bizarre aspect of the case is the suspension of proceedings for more than five years as a result of the illness of the main accused who would later be discharged before his death shortly after the resumption of proceedings by the investigating magistrate”.
97. The Applicants further cite the case of Thomas Sankara, former President of Burkina Faso, in which according to them, “the Sankara family, for fifteen (15) good years requested the government of Burkina Faso, without success, to identify those responsible for the murder of the former President, and especially to show them where he was buried”.
98. Finally, the Applicants argue that “in addition to the ineffectiveness of the remedies, one could add a list of national authorities who have done nothing to ensure that the perpetrators of the murder of Nibert Zongo and his companions were apprehended”.
99. At the public hearing of 7 March 2013, the Applicants reiterated this position by insisting on the ineffective nature of the *Cour de Cassation*, which according to them, did not “have the ability to change in essence the decisions which had already been taken”.

C) Analysis by the Court

100. The fact that Applicants have not exhausted all local remedies available to them under the Burkinabè legal system cannot be contested. It is in fact clearly established that they decided not to go to the *Cour de Cassation*.
101. What however is at issue here between the parties is first of all to know whether in this matter the procedure was unduly prolonged within the meaning of Article 56(5) of the Charter. The next question will be to determine whether or not the option of appeal to the “*Cour de Cassation*,” which the Applicants did not resort to, was in itself an effective remedy.

102. The Court notes at this stage that the issue is to determine if it is allowed to rule on whether the procedure in the case of local remedies was unduly prolonged or not, and whether such remedies were effective or not, without prejudice to its position on the merits of the Applicants' allegation of violation of their right to be heard by competent local Courts. The right to be heard by competent national Courts implies, *inter alia*, that available remedies are both effective and adequate in resolving matters within a reasonable time.
103. In the circumstances, the Court is of the opinion that on the allegation of violation of the right to be heard by competent local Courts, the inadmissibility arising from the non-exhaustion of local remedies is not entirely preliminary, and should be joined to the substantive case in accordance with Rules 52.3 of the Rules.

VI. INADMISSIBILITY AS A RESULT OF FAILURE TO FILE THE APPLICATION WITHIN A REASONABLE TIME

104. Article 56(6) of the Charter, similarly with Article 6(2) of the Protocol establishing the Court provides that to be admissible Applications must "be submitted within a reasonable time from the time local remedies are exhausted or from the date [the Court] is seized with the mater" (see also Rule 40(6) of the Rules).

A) The arguments of the Respondent

105. In its response, the Respondent raised the issue of the inadmissibility of the Application based in its view, on the failure to file it within a reasonable time.
106. The Respondent argues that, if one takes as the starting time, the date of the last judicial decision rendered in this matter (16 August 2006) or that of the issuing of the *certificat de non pourvoi* to the Applicants (31 August 2006), over five years have elapsed before 11 December 2011, when the Applicants decided to seize the Court.

It notes further that if one were to consider as the starting date, the date of entry into force of the Interim Rules of Court (20 June 2008), over three years would have elapsed before they decided to seize the Court.

The Respondent is of the opinion that the time limit in which the Court had been seized was not reasonable.

107. The Respondent argues that reasonable time is "a time span situated within

a fair average or which is convenient". It argues that the objectives of the requirement to seize a Court within reasonable time includes, *inter alia*:

"Guaranteeing the integrity of the judicial system, by ensuring that the authorities and other concerned persons are not kept in a situation of uncertainty for a protracted period;

- availing the Applicant sufficient time to reflect on whether or not to bring the matter to court and, if necessary;
- to determine the specific cause of action and arguments to be raised...."

108. It added that "seizure of the Court within reasonable time allows for the facts of the matter to be established because, over time, it becomes difficult for an international Court seized with the matter to be able to consider the issues raised in a fair manner". The Respondent concludes that, "obviously, the Applicants had no intention to pursue the objectives mentioned above; otherwise, they would not have waited for five (5) years before seizing the African Court on Human and Peoples' Rights".

109. The Respondent notes finally that the African Commission on Human and Peoples' Rights, which has always made its decision on a case-by-case basis on the question of reasonable time, has, in some cases, considered that delays much shorter than that of the present case were not reasonable.

110. This position was reaffirmed by the Respondent at the public hearing of 7 and 8 May 2013, where it further submitted that the time of seizure of the Court should have commenced from the date of the last ruling delivered by the national Judge (on 16 August 2006), before concluding that: "...in the matter before you, it is manifestly obvious that the time taken by the Applicants is excessive and unreasonable, and on those basis, the Application before you should be declared inadmissible, plain and simple".

B) The argument of the Applicants

111. In their response, the Applicants noted that "contrary to what the government of Burkina Faso has stated, the African Commission on Human and Peoples' Rights has no fixed jurisprudence on the issue", and that it has indeed dealt with this issue on a case-by-case basis.

112. They point out that in the instant case, "the Application was filed when the Applicants were informed by this Court itself during a sensitization visit to Burkina Faso in July 2011", and that "the visit made it possible for the MBDHP to obtain all the necessary information on the procedure of

submitting Applications which were not available to it earlier”.

113. At the public hearing of 7 March 2013, the Applicants claim that they had waited for five years before seizing the Court in order to give the Respondent sufficient time to fulfil its obligation of finding, charging, prosecuting and punishing the perpetrators of the murder of Norbert Zongo and his companions. At the public hearing of 8 March 2013, they emphasised that for them, the deadline for seizure of the Court had not started running since the violations continued, and as confirmed by the Respondent, the matter is still pending before the domestic judicial system.

C) Analysis by the Court

114. The issue here is to know whether the time limit within which the Applicant seized the Court is reasonable, pursuant to Article 56(6) of the Charter.

To deal with this issue adequately, it will be necessary to first of all establish the date from which this time should be calculated and considered.

i. The commencement of reasonable time

115. As indicated above, (paragraphs 110 and 113), whereas the Respondent is of the view that the time for seizure of the Court should begin from 16 August 2006, “the date on which the last Ruling was delivered by a domestic Court” (the Ruling of the Court of Appeal of Ouagadougou); for the Applicants, that time had not started because the alleged violations continued and the matter was yet to be resolved at the domestic level.
116. The Court is of the opinion that it is necessary to immediately dispose of the argument, according to which time for seizure of the Court had not started on the ground that the matter was still pending before national courts. That argument is not acceptable because it would mean that in all cases where the Applicants had not exhausted local remedies (because they are not effective or because the procedure is unduly prolonged), the time of seizure of the Court would never begin. Furthermore, this argument is fundamentally at variance with that of the Applicants, according to which there would no longer be anything to expect from the national judicial system. The Applicants cannot at the same time put forward this argument and benefit from its consequence, that the reasonable time of seizure of the Court will only begin when the national judicial system which they did not want to use will have settled the matter.
117. That having been clarified, Article 56(6) of the Charter cited above provides that reasonable time, which is the issue here, begins “from the time local

remedies are exhausted or from the date the [Court] is seized with the matter”.

118. In the instant case, where all local remedies have not been exhausted on the ground of unduly prolonged procedure, the date that should be considered is that of the expiry of the right to appeal not exercised under national law. In that regard, the parties submitted that the period of appeal was five days from the date of delivery of the ruling on the appeal. As the ruling at issue was delivered on 16 August 2006 (*supra*, paragraph 18), the date of commencement of the seizure of the African Court would be 22 August 2006.
119. As for Applications filed in its early years of existence, the Court should inevitably take into account the fact that it did not start its judicial activities upon its establishment in July 2006. More specifically, in compliance with Article 33 of the Protocol establishing the Court, it had to draft its own Rules which set out precisely, the terms and conditions of seizure by institutions and persons qualified to do so.
120. It would not therefore be reasonable for the time limit for seizure of the Court to start running from a date prior to the entry into force of the Interim Rules of Court, that is, 20 June 2008. In the instant case, the Court is of the opinion that it is this latter date that is relevant as it is from that date that all potential Applicants were considered to have been apprised of the purport of the Rules and thus assumed to have been in a position to refer matters to the Court.

ii. Reasonableness of the time frame for seizure of the Court

121. The Court will now consider whether or not the time limit of seizure between 20 June 2008 and 11 December 2011, that is, about three years and five months, is reasonable time. In the opinion of the Court, the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis.
122. In the instant case, with the rather recent establishment and effective entry into operation of the judicial activities of the Court mentioned above, (paragraph 119) – any circumstances unknown to the Applicants work in favour of some consideration in the assessment of the nature of reasonable time for seizure.
123. Furthermore, if we consider the reasonableness of the time frame of about three years, taking into account the objectives of the time of seizure as presented by the Respondent itself (*supra*, paragraph 107), we must notice

first of all that the judicial integrity of the Respondent is not at stake in this matter because, as it indicated itself, the case of the murder of Norbert Zongo and his companions is not yet over and investigations may be reopened and may continue until August 2016. Furthermore, the Applicants may have needed more time to reflect on the suitability of submitting an Application and specifying the complaints and arguments to be raised with the Court. Lastly, this three-year time frame will not affect the ability of the Court to establish the relevant facts relating to the matter which for the most part are not contested by either of the parties.

124. For all these reasons, the Court concludes that the time within which it had been seized of the present matter, that is, 11 December 2011, computed as from the date of the coming into effect of the Interim Rules of the Court on the 20th of June 2008, is reasonable time within the meaning of Article 56(6) of the African Charter on Human and Peoples' Rights.

125. *For the above reasons,*

THE COURT, unanimously,

1. *Upholds* the *ratione temporis* objection to the jurisdiction of the Court, in regard to the violation of the right to life, based on the 13 December 1998 murder of Norbert Zongo, Abdoulaye Nikiema known as Ablasse, Ernest Zongo and Blaise Ilboudo ;
2. *Overrules* the *ratione temporis* objection to its jurisdiction in regard to the allegation of violation of the rights of the Applicants to have their cause heard by a Judge based on the judicial acts and procedures which occurred during the treatment of this matter at the national level;
3. *Overrules* the *ratione temporis* objection to the jurisdiction of the Court 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 this case, the objection to the admissibility of the Application based on the failure to exhaust local remedies is not an exclusively preliminary objection and is joined to the substantive case;

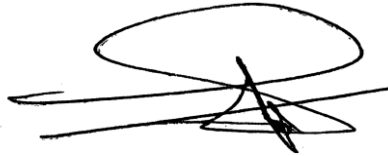
5. *Overrules* the objection to the admissibility of the Application based on the failure to observe reasonable time in the submission of the Application to the Court;

Hereby decides to consider the matter on its merits;

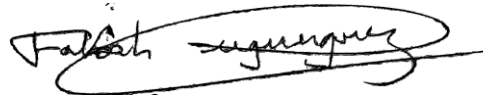
Directs the Respondent to submit to the Court its Response on the merits of the case within 30 days of the date of this Ruling; further Directs the Applicants to submit to the Court their Brief on the merits of the case within 30 days from the date of receipt of the Response of the Respondent State.

Signed:

Sophia A.B, AKUFFO, President



Fatsah OUGUERGOUZ, Vice-President



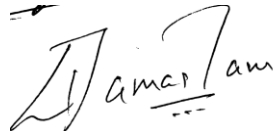
Bernard M. NGOEPE, Judge



Gérard NIYUNGEKO, Judge



Augustino S.L. RAMADHANI, Judge



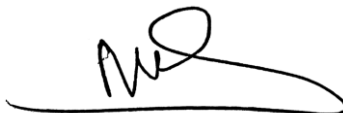
Duncan TAMBALA, Judge



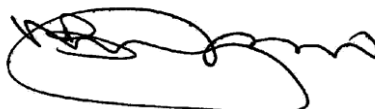
Elsie N. THOMPSON, Judge



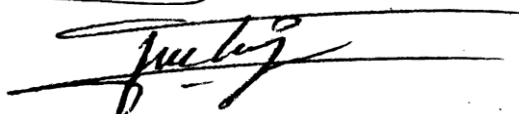
Sylvain ORE, Judge



Ben KIOKO, Judge



Kimelabalou ABA, Judge; and



Robert ENO, Registrar.



Done in Arusha, this Twenty-First day of June in the year Two Thousand and Thirteen, in English and French, the French text being authentic.

In accordance with articles 28.7 of the Protocol and 60.5 of the Rules of Procedure of the Court, the joint separate opinion of Judges Sophia A.B. AKUFFO and Elsie N. THOMPSON is attached to this Ruling.

