

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**

**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.

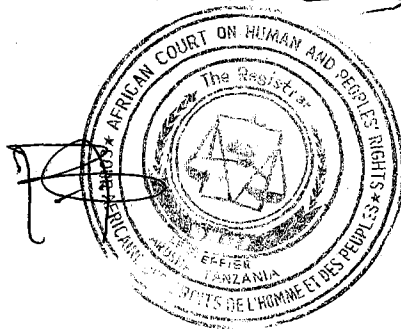
Gérard Niyungeko
Judge

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.