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Communication 426/12

Agnès Uwimana-Nkusi & Saidati Mukakibibi (represented by Media Legal Defence Initiative)

v

Rwanda

Adopted by the
African Commission on Human and Peoples' Rights
during the 65th Ordinary Session, from 21 October to 10 November 2019
Banjul, The Gambia

.....
Commissioner Solomon Ayele Dersso
Chairperson of the African Commission
on Human and Peoples' Rights

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT
COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
AU-UA

.....
Ms. Lindiwe Khumalo
Ag. Secretary to the African Commission
on Human and Peoples' Rights

ACHPR

Communication 426/12 – Agnès Uwimana-Nkusi & Saidati Mukakibibi (represented by Media Legal Defence Initiative) v. Rwanda

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a Complaint on 05 October 2012 from the **Media Legal Defence Initiative** acting on behalf of **Agnès Uwimana-Nkusi** (First Complainant) and **Saidati Mukakibibi** (Second Complainant) hereinafter jointly referred to as the Complainants. The Complainants were Rwandan journalists serving jail terms of four (4) and three (3) years respectively, at the time the Complaint was submitted to the African Commission on Human and Peoples' Rights (the Commission). The Complaint is submitted against the Republic of Rwanda, a State Party to the African Charter on Human and Peoples' Rights (the African Charter).

2. The Complainants, who are both journalists for the bi-weekly Kinyarwanda journal, *Umurabyo (*Lightening, in English*)*, allege that they were arrested in July 2010 because of several articles they wrote in the journal. The Complainants claim that they were denied bail and kept in detention until their trial, six months after which they were convicted and sentenced to prison terms of seventeen (17) years and seven (7) years respectively for the First and Second Complainant. The First Complainant was found guilty of defamation of the president, threatening national security, divisionism and genocide denial while the Second Complainant was found guilty of divisionism and threatening national security.

3. The Complainants state that the judgment of the Rwanda High Court (the High Court) was appealed to the Supreme Court of Rwanda (the Supreme Court). On 30 and 31 January 2012, the Supreme Court quashed the convictions for genocide denial and divisionism, reducing the sentences to four (4) and three (3) years for the First and Second Complainant respectively.

4. The Complainants allege that the remaining convictions were based on three articles written for *Umurabyo,* the first of which critically outlined both the achievements made by President Kagame as well as the shortcomings of his Government; the second discussed corruption among high ranking officers of the Rwanda Patriotic Front (RPF), and the third critically discussed a number of social issues including human rights violations in the country and the treatment of the media by the Rwandan Government.

5. According to the Complainants [1], the three articles which underlie the Complainants' convictions by the Supreme Court are the following:

[1] Paragraphs 14 to 17 of the Complainants' submissions on the Merits, and Annexes 2B, 3B and 4B thereto.

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(i) The article *"Kagame in big trouble"*, published in *Umurabyo* on 1 May 2010 and authored by the First Complainant, places Rwanda's contemporary problems into a historical context. It discusses the divisions in the country along ethnic lines and how hatred and violence grew between the various groups as a consequence. It suggests that the *Gacaca* courts were used as a tool of revenge rather than justice and discusses the consequential displacement of Rwandans. The latter half of the article draws on current issues to suggest that Rwanda still suffers from its prior problems.

(ii) The article *"A review of the crimes committed in 16 years"*, published in *Umurabyo* on 17 May 2010 and authored by the First Complainant, discusses corruption in the higher echelons of government and calls into question whether the current leadership is taking adequate action to address the matter.

(iii) The article *"King Kigeli is heading to (the country of) Gasabo"*, published in *Umurabyo* on 5 July 2010 and authored by the Second Complainant, reports on the return of King Kigeli to Rwanda and the possible benefits of this event. The article is critical of the Kagame administration and makes reference to examples of endemic corruption and the increased problems faced by the country before, during and after the genocide.

6. The terms of the laws under which the Complainants were convicted are set out below[2]:

(i) Threatening national security

An offence of threatening national security contrary to Article 166 of the Law No. 21/ 77 is defined as follows:

"Whoever, whether by a speech in a public meeting or public place, whether by writings, printed matter, any images or emblems fly-posted up, displayed, distributed, sold, put up for sale or exposed to the eyes of the public, whether by deliberately spreading false rumours, has or has tried to excite the population against the established power, or has brought citizens to rise up against each other or attempted to do so, or has alarmed the population and sought in this way to bring troubles to the territory of the Republic, will be punished by imprisonment of 2 to 10 years and a fine of 2,000 to 5,000 francs or only one of these punishments, without prejudice of stronger penalties provided for in the present code."

[2] As above, paragraphs 25 and 26.

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(ii) *Defamation*

An offence of defamation contrary to Article 391 of Law No. 21/ 77 is defined as follows:

"Whoever has maliciously and publicly imputed to someone a precise fact whose nature is to undermine the honour or the standing of this person, or to expose them to public contempt will be punished with imprisonment of 8 days to 1 year and a fine of 10,000 francs, or only one of these punishments."

7. The Complainants aver that a request for Presidential Pardon was sent on their behalf to the Office of the President of Rwanda, which was denied.

Articles of the Charter alleged to have been violated

8. The Complainants allege violations of Articles 7 and 9 of the African Charter.

Prayers of the Complainants

9. The Complainants seek the following relief from the Commission:

i. a declaration that the Complainants' criminal convictions and in particular, their prison sentences are in violation of their right to a fair trial as protected under Article 7 of the African Charter;
ii. a declaration that the Complainants' criminal convictions and, in particular, their prison sentences are in violation of their right to freedom of expression as protected under Article 9 of the African Charter;
iii. a declaration that Rwanda's laws on criminal defamation are in violation of the right to freedom of expression as protected by the African Charter, or, alternatively, that the penalty of imprisonment for defamation is in violation of the right to freedom of expression as protected by the African Charter and an order to the Government of Rwanda to amend its laws accordingly;
iv. a declaration that the Rwandan laws on threatening national security are in violation of the right to freedom of expression and an order that the Republic of Rwanda amend its laws accordingly;
v. an order to the Republic of Rwanda to release the First Complainant from prison immediately[3]; and

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[3] Saidati Mukabibi who was convicted of threatening national security was released in June 2013 after serving her sentence of 3 years in jail, while Agnes Uwimana-Nkusi who was convicted of threatening national security and defamation was released in 2014 after serving her 4 years' sentence.

vi. an order to the Republic of Rwanda to make monetary reparations to the Complainants, consisting of, amongst others, lost income, lost profits and compensation for emotional suffering.

Procedure

10. The Complaint was received at the Secretariat on 5 October 2012. The Commission was seized of the Communication during its 52nd Ordinary Session held from 9 - 22 October 2012.

11. By Note Verbale dated 1 November 2012, the Respondent State was informed of the seizure and a copy of the Complaint was transmitted to it. The Complainants were also informed of the seizure on the same date and requested to submit on admissibility in accordance with Rule 105 (1) of the Commission's Rules.

12. On 6 February 2013, the Complainants forwarded submissions on the Admissibility of the Communication to the Secretariat which acknowledged receipt of the same on 8 February 2013, and transmitted the submissions to the Respondent State on the same date, requesting the State to submit its observations in accordance with Rule 105 (2) of the Commission's Rules.

13. Consideration of the Communication was deferred during the 53rd Ordinary Session of the Commission held from 9 - 23 April 2013 due to non-submission of the Respondent State's submissions on Admissibility.

14. By a Note Verbale dated 15 May 2013, the Respondent State was reminded of its non-submission on the Admissibility of the Communication and informed that the Commission would proceed to take a decision on the Admissibility of the Communication on the basis of the information before it. The Complainant was also informed on the same date.

15. The Communication was declared admissible at the 14th Extraordinary Session of the Commission held from 20 - 24 July 2013. Both parties were informed of the decision by correspondence dated 6 August 2013 and the Complainants were requested to submit on the Merits in terms of Rule 108 (1) of the Commission's Rules of Procedure.

16. On 3 October 2013, the submissions of the Complainants on the Merits were received at the Secretariat which acknowledged receipt on 8 October 2013 and transmitted same to the Respondent State for its observations.

17. On 12 February 2014, the observations of the Respondent State were received at the Secretariat which acknowledged receipt by correspondence dated 19 February 2014. On the same date, the observations were transmitted to the Complainants for

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their comments in accordance with Rule 108 (2) of the Commission's Rules of Procedure.

18. The Complainants' comments on the Respondent State's observations were received at the Secretariat on 3 March 2014.

19. On 15 April 2014, the Respondent State requested for an oral hearing on the Merits of the Communication. By correspondence of 22 May 2014, the Commission requested for more information from the Respondent State on the request for Oral Hearing within one month. The information was not received within the stipulated period.

20. On 29 September 2014, the Secretariat received correspondence from the Respondent State in which the Respondent State explained that it had failed to respond to the Commission's request for insights into why it requested an Oral Hearing. The Respondent State alleged that the Note Verbale failed to reach the relevant institution within its own systems on time even though the Secretariat had timeously transmitted the same.

21. On 13 November 2014, the Secretariat received another request from the Respondent State to be given the chance for an Oral Hearing. In this request, the Respondent State indicated that it wished to use the opportunity of an Oral Hearing to provide insights on new information regarding the Communication.

22. The decision to grant the Oral Hearing was reached at the 17th Extra-Ordinary Session of the Commission held from 19 to 28 February 2015, but after a decision on the merits of the Case had already been reached at the Commission's 16th Extra-Ordinary Session held from 20 to 29 July 2014, and both parties had been informed of this decision. In that regard, the Commission decided pursuant to Rule 111(2) of its Rules of Procedure to set aside its original decision on the Merits to allow for an Oral Hearing in the interest of justice.

23. The Oral Hearing was held on 3 August 2015, during the 18th Extra-Ordinary Session of the African Commission on Human and People's Rights held from 26 July to 7 August 2015, in respect of which additional submissions were made by the Parties.

24. At its 26th Extra-Ordinary Session, held from 16 to 30 July 2019, the Commission considered the Merits of the Communication.

The Complainants' Submissions on Admissibility

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25. At the Admissibility stage, the Complainants provide information indicating that all the admissibility requirements under Article 56 of the Charter have been met.

26. With regard to the exhaustion of local remedies in particular, the Complainants submits that they appealed the decision of the High Court of 4 February 2011 to the Supreme Court, which handed down its final decision on 5 April 2012. According to the Complainants, this constituted the final judicial local remedy that they could resort to.

27. The Complainants point out that on 5 June 2012, they submitted a request for Presidential Pardon, the formal rejection of which was transmitted to their Counsel by the High Commissioner of the Republic of Rwanda in London. The Complainants submit that the rejection of the request for pardon demonstrates that they have made every effort to seek redress within the domestic context.

28. However, at this stage, the Respondent State did not make any submissions on admissibility notwithstanding that several correspondences were addressed to it in that regard.

Analysis of the Commission on Admissibility

29. The Admissibility of Communications submitted to the Commission is governed by the requirements contained in Article 56 of the African Charter. Article 56 sets out seven requirements which must be cumulatively complied with for a Communication to be admissible. The Complainants submit that all these requirements have been met.

30. As indicated above, the Respondent State has not submitted its observations on admissibility. In the present circumstances, in accordance with the established practice of the Commission as enunciated in the case of **Institute for Human Rights and Development in Africa v. Republic of Angola,** "in the face of the state's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication in accordance with its Rules of Procedure."[4] Consequently, the

[4]Communication 292/04 - Institute for Human Rights and Development in Africa v. Republic of Angola, para. 34; See also Communication 155/96 Social and Economic Rights Action Center, Center for Economic and Social Rights v. Federal Republic of Nigeria, and 159/96 Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Republic of Angola.

Commission must give due weight to the Complainants' allegations insofar as these have been adequately substantiated.

31. In the absence of any submissions from the Respondent State, the Commission after carefully examining the information provided by the Complainants is convinced that all the requirements under Article 56 have been complied with: the authors have been indicated as the Media Legal Defence Initiative; [5] the Communication is compatible with the provisions of the Charter and the Constitutive act of the African Union as it outlines a *prima facie* case of the violation of Articles 7 and 9 of the Charter;[6] it is not written in disparaging or insulting language[7]; it is not exclusively based on news disseminated through the mass media;[8] local remedies have been exhausted as further outlined below;[9] the Communication was submitted within a reasonable time, six months after local remedies were exhausted;[10] and there is no information to the knowledge of the Commission indicating that the Communication has been settled through other international procedures.[11]

32. The Commission will examine in detail, the compatibility of the Communication with Article 56(5) given its centrality in the consideration of the admissibility of Communications. In that regard, it has been explained by the Complainants, with evidence adduced, that they appealed the decision of the High Court of 4 February 2011 to the Supreme Court of Rwanda, which handed down its final decision on 5 April 2012. It has been pointed out that the Supreme Court of Rwanda is the highest judicial body to which they could have recourse. It has also been explained that a request for Presidential Pardon was made to the President of Rwanda, which request was rejected.

33. The Commission has held that the generally accepted meaning of local remedies, which must be exhausted prior to any Communication/Complaint procedure before the Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.[12] The Commission

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[5] Article 56 (1).
[6] Article 56 (2).
[7] Article 56 (3).
[8] Article 56 (4).
[9] Article 56 (5).
[10] Article 56 (6).
[11] Article 56 (7).
[12] Communication No 242/01 Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme/Islamic Republic of Mauritania* (2004) ACHPR, at para 27.

has also held in **Alfred Cudjoe v Ghana**[13] and reaffirmed in **Good v Botswana**[14] that the internal remedy to which Article 56(5) refers entails a remedy sought from courts of a judicial nature. The Commission has also maintained that such a remedy must not be subordinated to the discretionary power of public authorities.[15]

34. The Commission notes that the Complainants approached all the courts of a judicial nature, including the Supreme Court of Rwanda. Since it is not in dispute that the Supreme Court of Rwanda is the Respondent State's Court of final jurisdiction, the Commission considers that there were no other remedies left to be exhausted. Consequently, the Commission holds that local remedies were duly exhausted.

35. In view of the above, the Commission declares the Communication admissible.

Merits

The Complainants' Submissions on the Merits

36. The Complainants submit that their conviction and sentencing by the Courts of the Respondent State as well as the laws under which they were tried and convicted are incompatible with the provisions of Articles 7 (1) (b), 7 (2) and 9 of the African Charter.

Alleged violation of Article 7 of the Charter

37. The Complainants aver that the conduct of the Respondent State is in violation of Articles 7 (1) (b) and 7 (2) of the Charter.

The right to be presumed innocent

38. Concerning Article 7 (1) (b), the Complainants submit that their right to the presumption of innocence was violated by the Respondent State. To this end, they outline the relevant international legal principles related to this right and cite the jurisprudence of the Commission as well as that of other regional and international

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[13] Communication 221/98 (1998 - 1999) ACHPR para 14.
[14] Communication 313/05 (2010), ACHPR para 88.
[15] Communication 48/90 - *Amnesty International v Sudan*, 50/91 *Comité Loosli Bachelard v Sudan*, 52/91 *Lawyers Committee for Human Rights v Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa v Sudan* (1999) ACHPR, para 31.

human rights mechanisms in support of their case.[16] They submit, amongst others, that the right to be presumed innocent imposes the obligation on the State's prosecutorial authorities to prove the relevant charges beyond reasonable doubt, subject to permissible presumptions of law and fact.

39. The Complainants submit further that contrary to this generally accepted principle that the prosecution must prove the accused's guilt beyond reasonable doubt, the Supreme Court of Rwanda in the present case required the Complainants to prove their innocence in order to avoid conviction. They cite parts of the Supreme Court Judgment which required the Complainants to present evidence justifying that what they wrote were not rumours. [17]

40. The Complainants maintain that an offence of threatening national security, contrary to Article 166 of the Law No. 21/77, requires them to be deliberately spreading false rumours, while the offence of defamation contrary to Article 391 of the Rwandan Penal Code requires a malicious and public imputation of a fact. According to the Complainants, it was the Prosecution's responsibility to prove that they were deliberately publishing false rumours and malicious facts. The Supreme Court however required them to prove that their statements were true, and thereby required them to prove their innocence in order to avoid a conviction. The Complainants aver that such a finding erroneously reversed the burden of proof in a criminal trial and is fundamentally at odds with requiring the Prosecution to prove all elements of the offence.

41. In addition to being contrary to their fair trial rights, the Complainants emphasize the political impossibility of being able to submit the proof required by the Supreme Court. The Complainants note human rights case law which allows for the evidential burden to be placed on an accused in certain circumstances, but maintain that these presumptions must be reasonably proportionate and the accused must have an opportunity to actually make the required showing.

42. They state that in the present case, no clear indication is given by the Supreme Court as to what evidence would have been adequate to prove the allegation. According to them, they possessed abundant evidence to prove their statements. However, given that the Rwandan Government had previously been willing to imprison those who allegedly disagree with the Government's interpretation of genocide, they felt compelled to withhold this line of defence during the trial in order to prevent risk to themselves and their counsel.

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[16] *Annette Pagnoulle (on behalf of Abdoulay e Mazou) v. Cameroon* (1997) ACHPR, para 21
[17] Paras 17, 40 and 72 of the Supreme Court Judgment, Annex 1 B to the Complainants' submissions.

43. They contend that given the burden of proof in criminal proceedings, it was their legitimate expectation that the decision to withhold such evidence would not be held against them when it came to determining whether the burden of proof had been satisfied. Further, they claim that many of the statements in the relevant publications constitute opinions, which could not be empirically demonstrated to be true or false like a factual claim. In the Complainants' words, no individual could have satisfied the Supreme Court's burden; not only was it legally erroneous, it was an impossible standard.

The principle of legal certainty

44. The Complainants submit that the Supreme Court's ruling violated the principle of legality provided for in Article 7 (2), of the Charter, which provides that "[n]o one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed". They aver that in order to constitute a criminal offence, the law prescribing the conduct must be clear and unambiguous, so that the individual is able to meaningfully understand the conduct which she is required to refrain from engaging in, and that in order to ensure such clarity, statutes must be construed narrowly within the possible scope of interpretation.

45. In that regard, they contend that, in its judgement, while the Rwandan Supreme Court stressed the limited scope of the right to freedom of expression, it fell short of determining the parameters in order to allow other journalists to ascertain whether their articles will amount to offences before they publish them. Accordingly, they submit that the Rwandan Supreme Court's interpretation of the applicable law on national security was too broad to understand the types and kinds of statements that would qualify as those that defame or threaten national security, and that it failed to establish how the Complainants' publications threatened national security or qualified as defamation of the government of Rwanda.

46. The Complainants contend that the Supreme Court's reasoning is so opaque that it cannot comply with the principle of legal certainty that is required when interpreting a penal statute.

47. Consequent to the above, the Complainants allege that the Respondent State has violated the Complainants' right to a fair trial under Article 7 of the African Charter on two occasions, in that, not only did the Supreme Court reverse the burden of proof, which violates the right to be presumed innocent, but also that by way of its opaque reasoning, the Supreme Court also failed to respect the principle of legality.

Alleged violation of Article 9

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48. The Complainants submit that their convictions and the subsequent failure of the Rwandan Supreme Court to quash them amount to breaches of their right to freedom of expression under Article 9 of the African Charter. The Complainants' submission that their right to free expression was improperly abrogated by Rwanda is based on the following two grounds:

i. The Rwandan laws under which they were convicted (Articles 166 and 391 of the Rwandan Penal Code) are incompatible with the right to free expression as guaranteed by Article 9 of the African Charter

ii. The interpretation and application of the laws in their case breached their right to free expression as guaranteed by Article 9 of the African Charter.

49. They submit that given the importance of the fundamental rights protected by Article 9 of the African Charter, restrictions of the right must be narrowly construed, and also noted that the Declaration of Principles on Freedom of Expression in Africa (2002) permits the restriction of the right to freedom of expression only if *all* of the following three conditions are satisfied:
(i) the restriction is provided by law;
(ii) the restriction serves a legitimate interest; and
(iii) the restriction is necessary in a democratic society.

50. They contend that these criteria were not met in the present case as the conviction and subsequent prison sentences imposed on the Complainants were not provided by law, served no legitimate interest and were not 'necessary in a democratic society'. As such they allege that their treatment amounts to a breach of Rwanda's obligations under Article 9 of the African Charter.

On Threat to National Security – Article 166

51. Concerning the laws under which they were convicted and sentenced, the Complainants aver that the offence of threatening national security under Article 166 of the Rwandan Penal Code of 1977 is incompatible with Article 9 of the Charter as it is overly broad and fails to meet the criterion of "provided by law".

52. They state that Article 166 permits the restriction of expression beyond that which is permissible under Article 9 of the African Charter. The law is therefore alleged to be imprecise and fails to demarcate the limits of the offence, and individuals are not able to ascertain from this law what expression will be subject to restriction and which will not. The Complainants argue that it is therefore a law without proper restriction or limit, which allows unfettered discretion to those enforcing it, leaving it open to misapplication or abuse.

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53. According to the Complainants, Article 166 fails to provide any readily understandable definition of the offence in such a way that individuals could regulate their conduct to conform with the law and therefore cannot qualify as a restriction of free expression that is "provided by law", as required under international human rights law. Moreover, the Article offers a virtually unlimited discretion to the courts and the prosecution, leaving it open to misapplication or abuse.

54. Regarding the interpretation and application of the above mentioned law, the Complainants claim that the Rwandan Supreme Court erred in its interpretation and application for the following reasons:

i. The Court used its conclusions on the truth or falsity of the contents of the articles to justify its conclusion that the articles threatened national security;
ii. The Court failed to justify or substantiate its conclusions that the articles threatened national security.

55. In the Complainants' view, the Supreme Court, when considering the element of Article 166 that prohibits the proliferation of false rumours should have been guided by principles established under Article 9, as the article does not permit the proscription of statements that are merely deemed to be false unless they meet the criteria for a justifiable restriction. They contend that truthfulness or falsity of a statement is not a factor that can solely be used to justify a restriction of free speech.

56. The Complainants contend that State authorities are under a duty to promote diversity of expression and foster a range of information and ideas and those opinions are covered by this protection including opinions which may be considered false or incorrect. The Complainants affirm that free expression may be restricted if it threatens national security. The threshold to impose such a restriction, however, is a high one. The Complainants allege that Rwandan domestic courts failed to apply this high threshold in their case because it was not shown that the articles published by the Complainants amounted to a real or actual threat to national security. The Complainants claim that the Supreme Court's suggestion that the Article *'may well be a cause of disorder and unrest among the population'* is only an assertion of a hypothetical risk.

57. The Complainants aver that the low threshold applied by the Rwandan Supreme Court is not in compliance with the applicable standards under international human rights law, including the African Charter. According to international human rights law there must be a real risk, or an actual likelihood, of harm before a restriction will be justified.

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58. In that regard, the Complainants cite the decision of the Commission in *Liesbeth Zegveld and Mussie Ephrem v. Eritrea,* [18] wherein the Commission held that restrictions on the right to freedom of expression will be interpreted and applied pursuant to international human rights standards. Accordingly, the Complainants state that limitation of the right to freedom of expression as enshrined in Article 9 of the African Charter is therefore only permissible under strictly defined circumstances which were not met in the present case, given that the conviction and subsequent prison sentences imposed on the Complainants were not provided by law, served no 'legitimate interest' and were not 'necessary in a democratic society'.

59. Furthermore, they contend that imprisoning the Complainants is a 'disproportionate' restriction to their right to freedom of expression.

On Defamation – Article 391

60. The First Complainant also claims that the offence of defamation under Article 391 of the Rwanda Penal Code is incompatible with Article 9 of the African Charter as it is overly broad and does not sufficiently safeguard the right to free expression as it is vulnerable to an unlawfully wide interpretation and application. She claims that Article 391 does not provide the limits and safeguards that protect the right to free speech, as required by international human rights law and the Rwandan Courts retain an unlawfully wide discretion, consequently, it therefore fails to meet the criterion of "provided by law".

61. The First Complainant recalls the provisions of the Commission's Declaration of Principles on Freedom of Expression in Africa (2002) which require States to ensure that their laws relating to defamation conform to certain standards, including that: *(i)* no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances; and *(ii)* public figures shall be required to tolerate a greater degree of criticism; thus prohibiting liability for true statements, opinions and statements regarding public figures, and requiring public figures to tolerate a greater degree of criticism.

62. To this end, the Complainants submit that no such safeguards are visible in the law or the application thereof by the Rwandan Supreme Court. The First Complainant further notes that the ability to criticize those in power is of central importance to a healthy democracy, and that the media's right to freedom of expression is elevated from a basic right to a profoundly important duty. She

[18] Communication 250/2002, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea,* (2003) ACHPR, para 60.

contends that public figures, such as the President, should therefore not only tolerate more criticism as compared to ordinary individuals but also expect and welcome it as a mark of a healthy democratic society.

63. The First Complainant also submits that the Rwandan courts failed to take into account the public figure status of the principal subject of her articles. She asserts that the Rwandan Courts should have considered President Kagame to be a public figure who is required to tolerate a greater degree of criticism than an ordinary individual and should have taken this into account in determining her case.

64. In light of the above, the First Complainant contends that the lack of relevant safeguards in the application of Article 391, as set out in their arguments, has been manifested by the Rwandan Supreme Court, whose conclusion in relation to the offence of defamation was based on its finding that the Complainant had not submitted any evidence of her sources and that therefore her statements were 'false rumours'. She argues that the Supreme Court failed to consider the possibility that her statements were true or that they were mere opinions or reasonable. She further argues that the Supreme Court did not consider the principle that those in elected office should expect greater criticism.

65. On the requirement of 'legitimate interest', the First Complainant submits that even though Rwanda has not argued that there was a legitimate interest to restrict her right to freedom of expression and that the restriction was necessary for the protection of the rights of others, for instance the reputation of President Kagame, the other two parts of the cumulative three-part test have not been met.

66. Finally, the First Complainant submits that the criminal sanctions imposed on her were disproportionate and impermissibly severe. She recalls the clear trend in international law, citing international standards and jurisprudence which consider criminal defamation laws as a serious interference with freedom of expression and an impediment to the role of the media as a watchdog. She argues that although there are limited circumstances under which criminal sanctions would be appropriate and permissible, such circumstances only arise in response to cases of serious human rights abuses, hate speech and/or a serious threat to the enjoyment of the human rights of others.

67. In the present case, the First Complainant submits that despite no such circumstances applying in the present case, she suffered the most serious sanction possible - deprivation of liberty - and that her imprisonment on the grounds of allegedly having defamed one of the most prominent people in public office, therefore exceeds all boundaries of permissible restrictions to the right to freedom of expression, and accordingly fails to meet the criterion that the restriction is "necessary in a democratic society".

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68. The Complainant urges the Commission to take into account the context and background of this specific case in which the impugned statements were uttered against the background of a political debate on a matter of public interest. She argues that the use of criminal law even against an incorrect statement in these circumstances, when a civil sanction is available, can never be considered "necessary" or "proportionate" unless there is clear evidence of a threat to public order.

Respondent State's Submissions on the Merits

69. The Respondent State submits that throughout the trial of the Complainants, due process was observed, both procedurally and substantively and their rights, including under national and international law, were fully respected. It avers that they were fairly treated and had all means of redress they required with the help of a good number of assisting counsels.

70. Concerning the alleged violation of Article 7 (1) (b) of the Charter, the Respondent State points out that it fulfilled its positive obligation to ensure that the Complainants were heard by independent and well-functioning courts necessary to ensure a fair trial. The Respondent State further points out that the Complainants were charged with threatening national security by deliberately spreading false rumours and the Prosecution led evidence of the Complainants' criminal acts within the scope of the offence in accordance with Rwandan legislation.

71. In that regard, the Respondent State argues that it is natural that in these circumstances, the Complainants should have, in their own defence, dismissed the prosecution's evidence by demonstrating that what the prosecution presented to the court as false rumours were in fact not rumours.

72. The Respondent State contends that the Complainants' allegations that they needed to prove their innocence in order to avoid a conviction is a misrepresentation of the fact. It affirms that the burden of proof in all criminal proceedings is on the prosecution, both under Rwandan laws and in international instruments. The Respondent State points out that in the present case, the prosecution proved that the Complainants' conduct constituted a criminal offence punishable under Rwandan criminal law. In the circumstances, the Respondent State maintains that it was therefore the responsibility of the Complainants to demonstrate the contrary. In the face of the Complainants' failure to do so, uncontested evidence presented by the prosecution would prevail.

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73. The Respondent State concludes that the inability of the Complainants to disprove evidence presented by the prosecution cannot be regarded as reversing the burden of proof and amounting to a violation of the right to a fair trial.

74. Regarding the alleged violation of Article 7 (2) of the Charter, the Respondent State outlines that the offence of threatening national security and the offence of defamation were punishable offences at the time the Complainants were charged. The Respondent State points out that the two offences are provided respectively in Article 166 and 391 of Decree No 21 of 18 August 1977. It argues that there was no legal uncertainty as the law clearly defines these offences and determines facts falling within the scope of the offences.

75. Concerning the alleged violation of Article 9 of the Charter, the Respondent state agrees with the Complainants that freedom of expression is a fundamental and indispensable human right in a democratic society. The Respondent State also affirms that the right is not absolute and can be limited by the law if deemed necessary. The Respondent State affirms further that limitations to the right to freedom of expression have to be exercised in a responsible manner in order to meet certain standards and keep the right meaningful.

76. The Respondent State points out that Article 9 of the Charter recognizes that the right of individuals to disseminate opinions has to comply with the laws of the land. It points out further that Article 27 (2) of the Charter imposes duties on the beneficiaries of rights to exercise these rights with due regard to the rights of others, collective security, morality and the common interest.

77. In view of the above, the Respondent State contends that the challenged Supreme Court decision clearly shows that the Complainants exercised their right to freedom of expression in infringement of the restrictions set out in the Penal Code. It avers that the Court did not only base its decision on domestic criminal law but also on international law, particularly Article 19 (3) of the International Covenant on Civil and Political Rights (ICCPR).

78. According to the Respondent State, although journalists have the right and freedom to disseminate their opinions, the guarantee of this right does not allow any propaganda of war, advocacy of national, racial or religious hatred that constitute incitement to discrimination, hostility or violence. It maintains that the Supreme Court found that as journalists, the applicants did not uphold their duties and responsibilities within the spirit of Article 9 of the Charter, and that in reaching its conclusions, the Court fairly analysed the matter by also noting the legal limits, duties and obligations that come along with those rights, whether one is a journalist or not.

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79. The Respondent State points out that Rwanda has been a victim of violence throughout its history; violence which culminated in the genocide in 1994. It emphasizes that the media was among the enablers of this horrible crime and it is therefore important that when guaranteeing the right to freedom of expression, the specific context and environment of Rwanda must be borne in mind. It emphasizes further that the limitation of this right is not particular to Rwanda and that each country sets limitations to rights with due regard to its history, context and environment, and that failure to justifiably limit this right would lead to chaos and circle of violence which will ultimately violate others' rights.

80. Finally, the Respondent State submits that the limitations are within the scope of Article 9 of the Charter and therefore not in violation of Article 9.

Complainants' Observations on the Respondent State's submissions

81. The Complainants argue that the Respondent State's submissions on Article 7 (1) (b) and 7 (2) misinterpret and/or misunderstand the substance of their submissions. The Complainants, in respect of Article 7(1) (b), reiterate that the Respondent State has failed to include any reference to the requisite standard of proof that must be met by the prosecution. In doing so, it incorrectly reverses the legal burden and determines that "it was therefore the applicants' obligation and responsibility to demonstrate the contrary as a defence.

82. They contend that it is implicit in the principle of presumption of innocence that there remains no obligation on an accused to adduce evidence in order for an acquittal to be found. Should the Prosecution fail to adduce evidence that proves the guilt of an accused beyond a reasonable doubt, then an acquittal would be required.

83. Regarding Article 7 (2) of the Charter, the Complainants argue that whilst the offences in question are proscribed in articles 166 and 391 of Law 21/77, both were the subject of judicial interpretation by the Supreme Court. However, the reasoning applied by the Supreme Court is alleged to be lacking, as it was for the Supreme Court to determine the types and kinds of statements that would qualify as those that defame or threaten national security. The Supreme Court's position in this regard was allegedly never apparent.

84. Concerning Article 9 of the Charter, the Complainants maintain that the Respondent State's submissions fail to address their submission that the laws under which the Complainants were convicted violate the right to freedom of expression. The Complainants maintain that the laws under which they were convicted do not meet the requisite standard of precision and that while the protection of national security and the rights of others are legitimate aims for

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restricting the right to freedom of expression in principle, reference to these aims does not give the State carte blanche to restrict all expression it does not approve of under the guise of protecting those interests.

85. The Complainants also contend that the Respondent State has failed to specifically address their submissions on the merits which argue that the Complainants' convictions, and especially the criminal sanctions imposed on them, violate the principles of necessity and proportionality.

Oral Hearing

86. The Oral Hearing gave both parties a chance to expound on the application of the domestic legislation to the Complainants' case, and to evaluate the extent to which the domestic courts' interpretation of the law was in conformity with the Charter.

Oral submissions from the Respondent State:

Article 7

87. In respect of Article 7 (1) (b), the Respondent State maintains its arguments in its submissions on the Merits and argues that it fulfilled its positive obligations to ensure that the Complainants were heard by independent and well-functioning Courts necessary to ensure a fair trial, both in the High Court and on appeal in the Supreme Court.

88. It asserts that the Prosecution sufficiently proved in accordance with the Penal Code that what the Complainants did as described in the indictment and judgment, constituted a criminal offence punishable by Rwandan criminal law. It also reiterates that, although the Prosecution gave evidence of criminal acts falling within the scope of the offence as provided for by the law, the Complainants failed to counter the Prosecution's evidence inter-alia by demonstrating that what the Prosecution presented to the Court as criminalized false rumours were in fact not false rumours. It concludes that, in the absence of evidence to the contrary, the uncontested evidence presented by the Prosecution prevailed.

89. In this regard, the Respondent State highlighted the following paragraphs from the articles published by the Complainants: which were shown to and considered by the Court; which were identified as dangerous and prohibited statements in light of the Penal Code; in respect of which the material element, criminal intent and legal elements were made by the Prosecution; and in respect of which the complainants did not deny that they made such statements nor sufficiently demonstrate that such statements were true;

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"Rwandans also affirm that Habyarimana should not have been replaced by a person like Paul Kagame. When the later assumed power, killings increased instead of being stopped, insecurity crossed boarders, Rwanda became an enemy to the neighbors, racial discrimination continued to divide Rwandans, collapse of the economy and many other things to the extent that the Government of FPR is killing people in addition to Genocide survivors". (Umurabyo n0 29 of 05-19 July 2010*)*

"There are four ways in 2010, it is your choice: between imprisonment, to flee the Country, die and survive"..."Gacaca courts were established as a tool for revenge, one's neighbor has become his or her enemy, agony between a parent and a child, a person who was not able to run and flee the Country had to keep silent, it was not pleasing to anyone but there was no choice". (Umurabyo n0 21 of 01-15 May 2010).

90. As regards the offence of defamation, it submits that the Complainants have not contested it, at any stage of the proceedings that, they have maliciously and publicly imputed to the President facts that are meant to undermine his honour or standing and expose him to public contempt, by publishing in their article Umurabyo , n0 23 of 17-31 May 2010 that: *"It has always been said that President KAGAME falsely defends him in the performance of his day to day mistakes, which means that he works for him so as to share the money that the later steals from Nyabugogo drivers".*

91. The State also submits in respect of Article 7 (2) that this right is not only guaranteed by the Charter and other international instruments but is also guaranteed by the Rwandan Constitution, pursuant to which a punishable conduct must be clearly known to the offender when acting or committing the offense, and to this end, avers that the Complainants knew before acting that their conduct was prescribed by law and very well knew penalties along with such a conduct, consequent to which what was punished was deliberate infringement of the law in force. It submits that these two offences are respectively and clearly provided in article 166 and 391 of the Decree- Law n0 21/77 of 18 August 1977. Yet the Complainants were accused of offences they committed during the year 2009-2010.

92. Furthermore, it contends that if the Complainants find the provisions were ambiguous or unclear, they could have seized the Supreme Court sitting in constitutional matters or the Parliament in order for these competent institutions to clarify or correct such provisions and make them consistent with article 20 of the Constitution, but that this was not done, and therefore cannot be raised at the stage of this Communication.

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Article 9

93. In respect of Article 9, the Respondent State maintains its argument that Articles 166 and 391 of the Penal Code set the limitations in the exercise of freedoms of speech and information guaranteed by the Constitution. It also argues that the limitations established by these provisions are read within the spirit of the Constitution. The Respondent State argues that the issue whether these limitations were inconsistent with the Constitution or any other international instrument including the Charter has never been contested by the Complainants through competent domestic institutions.

94. Further, the Respondent State argues that the statements made by the Complainants were indeed inflammatory, in particular when the Complainants in their articles stated that "*the Gacaca Courts were established as a tool for revenge; once neighbor has become his/her enemy, agony between a parent and a child, a person who was not able to run and flee the Country had to keep silent. It was not pleasing to anyone but there was no choice.*" The Respondent State argues that this statement was deliberately made to incite people against the established power and to bring citizens to rise up against each other or to attempt to do so to and to bring trouble to the territory of Rwanda. The Respondent State argues that the Prosecution demonstrated the capacity of these words to disturb the peace and the Complainants' defence was not enough to dispel this assertion.

95. It concluded that the judgment of the Supreme Court clearly reveals that journalists like other citizens enjoy the rights herein discussed as an individual and/or professional, while expressly recalling that no one is permitted to such enjoyment at the expense of others and in violation of established legal norms. It therefore invites the Commission to view and understand the restrictions on the rights and freedoms under Articles 9 of the Charter in light of permitted legal restrictions thereto, and requests the Commission to reject the communication because its purpose and aim is baseless and intends to promote the culture of impunity, foster and encourage the violation of legal rules and rights of those affected by the criminal acts of the Complainants.

Oral Submissions from the Complainants

96. The Complainants maintained the argument that in terms of the domestic law, to be convicted of threatening national security, the prosecution must prove that the Complainants had deliberately spread false rumours, key being proof that the statements made were rumours and false. In order to convict the First Complainant of defamation, the prosecution also had to prove a malicious and public imputation of facts. The Complainants assert that simply alleging or producing minimal evidence suggesting that a crime has been committed is not enough; a case must be proven beyond reasonable doubt.

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97. They state that, the Supreme Court of Rwanda in its judgement repeatedly stated that the Complainants did not provide any evidence for what they wrote rather than focusing on whether or not the prosecution had convincingly established that what the Complaints wrote was false or defamatory. In the Complainants' view, this focus on what the Complainants did or did not prove, is incorrect because requiring the Complainants to prove that what they wrote is true, instead of requiring the prosecution to demonstrate how it is false or defamatory, is a reversal of the burden of proof. The Complainants argue that this reversal has left the Complainants guilty until proven innocent which violates their fundamental right to be presumed innocent under Article 7 of the Charter.

98. The Complainants again, argue that in its judgment, the Supreme Court failed to respect the principle of legal certainty, one of the fundamental aspects of the rule of law explicitly recognized in the African Charter as part of the right to fair trial. The principle of legal certainty requires, in essence, that the law must provide those subject to it with the ability to regulate their conduct. What is or is not an offence must be clearly understandable by those who are subject to the law. To assert that threatening national security and criminal defamation were punishable offences under the Rwandan Law only addresses one aspect of the principle of legal certainty. These laws must be clear and able to be narrowly construed by the Courts. In practice, this requires not only that there are laws in books or that these laws are clearly worded but also that the decisions of Courts are definite and clear.

99. The Complainants argue that the judgment of the Rwandan Supreme Court is anything but clear. They also argue that the right to freedom of expression is not absolute, and that like other rights it may be subject to limitations and that determining the parameters of the right to freedom of expression is important. However, they also state that these parameters must be exercised in a clear and unambiguous manner in order for individuals to be able to regulate their conduct accordingly. The Complainants argue that the Supreme Court's approach failed to provide clarity on the limits of the right to freedom of expression which runs contrary to the principle of legal certainty and that this violated their right to fair trial under Article 7 of the Charter.

100. The Complainants restate that in international law restrictions on freedom of expression must be provided by law, serve a legitimate aim and be necessary in a democratic society. In arguing that the restrictions are not provided by law, the Complainants state that these provisions are overly broad. They argue that "provided by law" does not mean as the Respondent State appears to assert that they simply need to enact the restriction in order for it to be legitimate, as that would allow any State basically to unilaterally opt out of any international obligation it would take on by signing on to an international human rights treaties such as the Charter or ICCPR. Rather, they assert that "Provided by law" means

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that the law in question should be of sufficient quality and precision to allow citizens to regulate their conduct and this would also then minimize the possibility for abuse by authorities.

101. The Complainants also argue that the Respondent State insufficiently demonstrated that there was a legitimate aim in restricting the Complainants' Rights under Article 9 of the Charter. They state that for the conviction on grounds of defamation, no legitimate aim has been argued at all and for the alleged threatening of national security, the Respondent State has failed to demonstrate that there was an actual concrete threat posed by the Complainants' 'publications. In the Complainants' view, a claim that a statement is a threat to national security cannot be made on grounds of fictitious hypothetical threats, there has to be a real risk of harm and a close causal link between the expression and the harm and such risk was not demonstrated by the Respondent State.

102. Lastly the Complainants argue that the imprisonment of the First Complainant for the publication was disproportionate and therefore cannot be considered as necessary in a democratic society. They state that it is the consistent case law of international human rights tribunals, including this Commission, that when a right is restricted, the least invasive measure should be applied. They cited the decision of the African Court on Human and Peoples' Rights in ***Konate vs. Burkina Faso***[19] that custodial sentences cannot be used to sanction speech except in serious and very exceptional circumstances such as incitement to international crimes, public hatred, discrimination or violence. They argue that the Complainants' publications addressing matters of public interest in a journalistic manner do not fall into any of those categories.

Additional Facts and Arguments on Admissibility

103. The Respondent State also indicates that its understanding of Rule 99(2) and (3) of the Commission's Rules of Procedure is that it gives an opportunity to either party to present new or additional facts or arguments concerning all issues relating to the cases, and in this regard, 'present[s] additional facts and arguments pertaining to the admissibility of the Communication'. To this end, the Respondent State indicates that it had not been given the opportunity to challenge the Admissibility of the Communication, and requests the Commission to re-open the case on Admissibility, on the grounds that the Complaint did not satisfy the requirements of Articles 56(2) and (7) of the Charter.

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[19] Lohe Issa Konate v Burkina Faso Application No 004/2013 AfCHPR.

104. Regarding Article 56(2), the Respondent State argues that the Complaint is incompatible with the Charter because it attempts to make the Commission sit as an "appellate court" and review Rwandan Courts' decisions. The Respondent State also argues that the African Charter and the Constitutive Act of the African Union do not allow the Commission to operate as an "appellate court" to review national Courts' decisions. It asserts that the intention of the African Union members was rather to give the Commission power to examine whether any of the guarantees stated in the African Charter were not observed by national Courts.

105. In respect of Article 56 (7) the Respondent State argues that the Complainants failed to mention to the Commission that before submitting their Communication to the Commission, they had a case pending before the UNESCO Committee on Conventions and Recommendations; in violation of Article 56 (7) of the Charter. The Respondent State argues that had the Complainants disclosed this detail, the Communication would not have been found admissible. It concludes that the Communication is therefore inadmissible as it is incompatible with these instruments to which Rwanda has voluntarily subscribed.

106. The Complainants however argue that there is no basis for reopening the Communication on Admissibility for two reasons. First, the Complainants state that the Rules of Procedure in particular Rule 107(4), provide that only a decision by the Commission to declare a Communication inadmissible maybe reviewed at a later date upon the submission of new evidence. The Complainants argue that the Respondent State's request does not meet this test for two reasons: (1) the Communication was not declared inadmissible but admissible and (2) there is no "new evidence" to be considered by the Commission. The Complainants cite the Commission's decision in **Communication 409/12-Luke Munyandu Tembani v Angola and 14 Others**;[20] where the Commission stated that "under its operative Rules of Procedure, it can only review a decision of inadmissibility".

107. The second reason why the Complainants argue that the matter should not be reopened is that, reconsideration of the Communication will lead to the same conclusion, namely, that the Communication is admissible. The Complainants state that the "new evidence" that the Respondent State refers to concerns a communication that was filed with UNESCO's Executive Committee on 11 June 2012 by another representative unbeknown to the representatives before the Commission. The Representatives of the Complainants were unaware of the UNESCO Proceedings and therefore were not in a position to inform the Commission about this.

[20] Communication 409/12-Luke Munyandu Tembani v Angola and 14 Others (ACHPR) 2014.

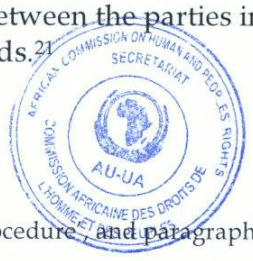
108. The Complainants acquiesced that they did mention another procedure before the UN Working Group on Arbitrary Detention which they were aware of. They argued however that notwithstanding these two proceedings, which commenced more than three years before the Oral Hearing, and more than four months before the Respondent State would have been notified of the filing of this Communication before the Commission, the Respondent State in its own submissions confirmed that it was actively engaged with the UNESCO procedure from the point when it started. In other words, the Respondent State had the opportunity to raise this point before the Commission from the very beginning, almost three years ago and chose not to, hence it cannot speak of any "*new evidence*" that has come about. The Complainants' view is that the Respondent State neglected to do so at the time when it would have been appropriate and cannot now use this to stall the progression of this Communication.

109. The Complainants further argue that even if the Respondent State had made the arguments that the UNESCO complaint rendered this Communication inadmissible, it would not have succeeded because the UNESCO proceedings do not constitute an international mechanism that settles disputes in the sense of Article 56(7) of the Charter. UNESCO's Executive Committee is a non-judicial body, it cannot issue binding decisions and it cannot as Article 56 says "*settle disputes*" as it does not have the required mandate.

110. The Complainants also address the Respondent State's argument that the Communication would be inadmissible due to incompatibility with Article 56(2) of the Charter and argue that the Respondent State's assertion that the Commission is being used as an "appellate court" is unsubstantiated and incorrect. The Complainants assert that the Commission is being asked to exercise its proper mandate, namely to pronounce itself on whether the Respondent State acted in violation of its obligations under the African Charter.

The Commission's decision on the Additional Facts and Arguments on Admissibility

111. The decision on the Admissibility of this Communication was a default decision, that is, that the decision only took into account the submissions from the Complainant because the Respondent State had failed to submit, following due exchange of pleadings between the parties in line with the Commission's Rules of Procedures and its records.[21]



[21] See paragraph 14 above, under 'Procedure', and paragraphs 29-31.

112. Consequently, the Respondent State had the opportunity to address itself to questions of Admissibility at the Admissibility stage of the Communication, and the Commission's decision was validly reached by the Commission in line with its established practice and jurisprudence.[22]

113. In this regard, the Commission notes that under its operative Rules of Procedure, it can only review a decision of inadmissibility.[23] Furthermore, it notes that Rule 103(1) of its Rules of Procedure which provides for the raising and determination of a preliminary objection at the stage of Admissibility or before the Commission takes a decision on the Merits of the Communication, requires a party who intends to raise such objection to do so 'not later than thirty (30) days after receiving notification to submit on admissibility or on the merits.

114. To this end, the Commission observes that both parties to this Communication were informed of the Admissibility decision by correspondence dated 6 August 2013, and the observations of the Respondent State on the Merits of the case was received by the Secretariat of the Commission on 12 February 2014, which did not contain any arguments on why the case should not have been declared Admissible.

115. The Commission further notes that the information, upon which the Respondent State wishes to have this Communication re-opened under Article 56(7), has been known to the Respondent State since the Respondent State was invited to submit its observations on Admissibility about two (2) years before these additional submissions. This information is not new to the Respondent State and hence cannot form good and compelling reasons why this case should be reopened.

116. Nevertheless, and without prejudice to the foregoing, the Commission wishes to restate, in line with its Rules of Procedure and established jurisprudence, that 'settled' under Article 56(7) means that the case 'must no longer be under consideration under an international dispute-settlement procedure';[24] the other international body must have decided the case on the merits and there is a 'final settlement' by that body;[25] it must have 'taken a decision which addresses the concerns, including the relief being sought by the Complainant. It is not enough

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[22] See, paragraph 29 above.

[23] See Rule 107 of the African Commission's Rules of Procedure and Communication 409/12 (n20 above).

[24] Communication 409/12 (as above), para 112. Communication 361/08: J.E Zitha & P.J.L.Zitha (represented by Prof. Dr. Liesbeth Zegveld) v Mozambique (2011) ACHPR, para 115. Communication 375/09 – Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya, (2011) ACHPR, para 145.

[25] Communication 260/02: Bakweri Land Claims Committee v Cameroon, 4 December 2004, para 52 and 53.

for the matter to simply be discussed by these bodies';[26] and if a State is to contest Admissibility under Article 56(7), it must show the 'nature of remedies or relief granted by the international mechanism, such as to render the complaints *res judicata*, and the African Commission's intervention unnecessary'.[27]

117. Regarding the contestation pertaining to Article 56(2) of the Charter and without prejudice to its finding as to why this Communication cannot be reopened on Admissibility, the Commission also wishes to restate its position as clearly elucidated in its jurisprudence that in line with the principle of subsidiarity and Article 56(5) of the Charter which requires exhaustion of domestic remedies as a prerequisite for filing Communications, it does not serve as an 'appellate body' over national courts, and that "in assessing the compatibility of the ruling of a national court with the African Charter, the African Commission does not act as an appellate body with powers to overrule the decisions of national courts, but simply discharges its mandate of ensuring compliance by a State Party, with the provisions of the African Charter in its interpretation and application of the law."[28]

118. Consequently, the Commission in this particular case does not intend to examine whether the national courts applied its national laws correctly to the facts, but rather, what the Commission would determine is whether the law in itself and the procedure of the court in its application of the law is consistent with the African Charter.

Commission's Decision on the Merits

119. The Commission is called upon to determine whether the Respondent State's actions in convicting and sentencing the Complainants and the laws under which they were convicted, violate their right to presumption of innocence under Article 7 (1) (b), the principle of legality under Article 7 (2), and the right to freedom of expression under Article 9 of the African Charter.

Alleged violation of Article 7 (1) (b)

120. Article 7 (1) (b) of the Charter provides as follows:

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[26] Communication 301/05 – Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v Ethiopia, 12 October 2013, para 117.
[27] Communication 279/03-296/05: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 103.
[28] Communication 375/09 (n24 above), para 36.

Every individual shall have the right to have his cause heard. This comprises… the right to be presumed innocent until proven guilty by a competent court or tribunal

121. The Commission notes from the onset that the competence of the Respondent State's courts before which the Complainants were tried and convicted is not at issue in the present Communication, and the Commission's analysis will therefore be confined to the issue of the presumption of innocence as raised by the Complainants.

122. The Commission observes that presumption of innocence is a fundamental facet of fair trial rights which requires, *inter alia*, that when trying an accused person, the court should not start with the preconceived idea that the accused has committed the offence for which he/she is charged. The burden of proving the accused's guilt beyond any reasonable doubt generally lies with the prosecution, and any doubt must benefit the accused. The accused must be treated as not having committed any offence until the State, through the prosecuting authorities, adduces sufficient evidence to satisfy an independent and impartial tribunal that he or she is guilty.[29]

123. The Commission recalls that the importance of this principle lies in the fact that it gives society assurance that people innocent of a crime shall not be convicted. It also gives individuals the confidence that the government, with its enormous power and resources, cannot adjudge them guilty of a criminal offence without convincing an impartial court of their individual guilt with utmost certainty.[30]

124. In the present Communication, the Complainants have submitted that their right to be presumed innocent was violated on account of the fact that the burden of proof was reversed. They submit that the crime of threatening national security for which they were convicted requires the prosecution to prove that they were deliberately spreading false rumours; rather than for the Rwandan Supreme Court to require them to prove the truth of their statements. They maintain that this is an erroneous reversal of the burden of proof in a criminal trial.

125. The Respondent State on the other hand submits that it followed due process and the Complainants were convicted on the basis of uncontested evidence adduced by the prosecution to prove that the Complainants' conduct constituted a criminal

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[29] See the Commission's decision in Communication 301/05 - Haregewoin Gebre-Sellaise & IHRDA v. Ethiopia, (2011), ACHPR para. 190; see also the decision of the ECHR in Barberà, Messegué and Jabardo v. Spain, A146 (1989) para 77, and the Human Rights Committee General Comment No 13 on the Right to a Fair Trial.

[30] See V Wilson 'Shifting Burdens in Criminal Law: A Burden on Due Process' (1981) 8 Hastings Constitutional LQ 731. 732 – 3.

offence, including by making the necessary linkages between relevant paragraphs of the articles concerned and the required *actus reus* and *mens rea* under the Penal Code. The Respondent State has maintained that the failure of the Complainants to enter a defence and rebut the evidence of the prosecution cannot constitute a reversal of the legal burden of proof.

126. The Commission notes that the decision of the High Court of Kigali convicting the Complainants of the crimes for which they were charged was appealed on a number of grounds including the prosecution's failure to prove the elements necessary to establish that the crime of threatening state security had been committed by the Complainants. The Second Complainant had contended in this regard that the "High Court ignored that what she wrote is not rumours and that she had no intention of endangering state security"[31]

127. The Commission also observes that in the ordinary course of a trial and in keeping with the principle of presumption of innocence, the Prosecution has the burden of proving the charge beyond reasonable doubt,[32] the accused has the benefit of doubt such that in the event of a reasonable doubt, no conviction should follow,[33] and the burden of proof never shifts to the accused.[34] The presumption of innocence is thus primarily an evidentiary rule, providing the basis for the standard and burden of proof, and it follows from the latter that the court must be impartial and acquit in the event of doubt. The presumption of innocence is also a non-derogable right.[35]

128. Nonetheless, it notes that while the accused has the right not to be compelled to testify against him or herself or to confess guilt, as well as that his/her silence may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent[36], and where the Prosecution makes a prima facie case, the accused, in this case, the Complainants, have the right to file

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[31] Paragraph 14, SC Judgement.

[32] "Right to be Presumed Innocent and Privilege against Self-Incrimination", Chapter Five, Legal Digest of International Fair Trial Rights, published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), Warsaw, Poland (2012), available at https://www.osce.org/odihr/94214. p. 89.

[33] As above, p. 91 & 92.

[34] As above.

[35] Paragraph R, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; General Comment 29 on Article 4 of the ICCPR.

[36] See paras 6 (a), (d)(ii) & (f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, available at http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf. See also, as above.

a defence disproving the State's case.[37] In this case, a *prima facie* case would mean that the Prosecution should have proven what the Complainants wrote were rumours as well as their intention to endanger state security or at the very least, real risk of their statements threatening national security.[38]

129. Notwithstanding and without prejudice to the foregoing, it is the Commission's view that the starting point that the accused person does not bear the burden of proof should be qualified as, for instance, an accused person could be asked to explain something in more detail of substantiate his/her reliance on a defence, in which case he/she then then bears the evidential burden of proof, which in practice comes down to sowing doubt. This must be distinguished from the legal burden of proof on the prosecution whereby the judge(s) must be convinced 'beyond reasonable doubt' that the accused person is guilty. The presumption of innocence therefore stipulates that the legal burden is upon the prosecution.[39]

130. Notably, the European Court of Human Rights has also accepted that the right of an accused to silence is not absolute so that, in situations that clearly call for an explanation to be given by an accused, the accused's silence can be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution and/or the credibility of an explanation later given by the accused.[40] What is impermissible, is, to base the conviction of an accused solely or mainly on the accused's silence or on her/his refusal to answer questions or give evidence during the trial.[41]

131. With regard to the case at hand, the Commission notes that, as it does not serve as an appellate body over the findings of national courts, its role is limited to ascertaining whether in reaching its decision, the Supreme Court of Rwanda indeed shifted the burden of proof to the Complainants as alleged in this Communication, in contravention of Article 7(1)(b) of the Charter, and its analysis of the proceedings before the Supreme Court will only be for this purpose.

132. On the basis of the above legal principles, and from its review of the decision of the Supreme Court, the Commission observes that the Supreme Court, in considering the Complainants' appeal and in particular, contention as regards the establishment of the *mens rea* and *actus reus* of the offence of violating the state

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[37] As above.

[38] Para 18, Supreme Court's Decision.

[39] Elies Van Sliedregt, A Contemporary Reflection on the Presumption of Innocence, 2009/1 Vol. 80, p. 247 to 267, at p. 260, available at https://www.cairn.info/revue-internationale-de-droit-penal-2009-1-page-247.htm#.

[40] (n32 above), p. 102.

[41] As above, p. 101.

security, not only alluded to the arguments of the Prosecution,[42] but further proceeded to analyze the submissions before it, including the arguments and evidence provided by the Complainants in contestation of the allegations as well as records of the trial courts, indicating, *inter alia*, that it "...must consider whether the words made public by the appellants through the newspaper *Umurabyo* correspond to what is provided by the section of the law mentioned in this paragraph so that they can be convicted for violating the safety of the State", following which it reached a conclusion in the affirmative.[43] The same analysis was done with respect to the charge of defamation, following which the Court found that what the First Complainant wrote 'corresponds' to the offence of defamation as defined in Article 391 of the Penal Code.[44]

133. The Commission further observes that the First Complainant, for instance, provided contrary arguments and evidence in an attempt to disprove the some of the allegations of the State, including showing motives that indicate that the contents of her articles do not evince the intention to threaten national security, and as well, with respect to the charge of defamation, to demonstrate that the contents of her article was based on a radio broadcast or a survey and she had published the same "...in the scope of 'reporting', 'analysis by a journalist', 'opinion', 'recording', etc...", thus attempting, unsuccessfully, to establish the factual basis for the said 'opinion', 'journalistic analysis' or 'reporting' as they were described. Some of these arguments and evidence by the Complainant were upon evaluation accepted by the Court, while some were not.[45]

134. Consequently, the Commission notes from the decision of the Supreme Court that based on the Court's analysis of the arguments and evidence before it and following its examination of two other articles by the First Complainant, that is, "Regarding Umurenge SACCO" and "Regarding the article about how the recruitment of state officials is done", the Court had upheld the First

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[42] Paras 15 and 34, Supreme Court's Decision

[43] See e.g., paras 15 to 20, paras 32 to 36, Supreme Court Decision

[44] Para 69-75, Supreme Court Decision.

[45] Paras 38, paras 69-75 of the Supreme Court Decision. See also paras 25 and 41. The jurisprudence of the ECHR which addresses the distinction between facts and value judgements in defamation cases, while finding that value judgments or statements of opinion are not capable of being proven, however requires that value judgments should be founded on a sufficient factual basis, such that the complete absence of proof for a statement of fact or of any factual basis for a value judgment has often led the Court to find in favor of the right to reputation of the plaintiff. *See, e.g., Pedersen*, App. No. 49017/99, Falter Zeitschriften GmbH v. Austria (dec.), App. No. 13540/04.

Complainant's grounds of appeal in that these articles were not intended to undermine the security of the State.[46]

135. All the above are indicative that the Court conducted its independent analysis of each of the issues set out before it.

136. Accordingly, the Commission notes that the cited references by the Supreme Court in some parts of its decision, that the failure of the Complainants to indicate what they relied on for their articles and to give evidence to establish its truth led the Court to find that they have written are only rumors knowingly spread by them[47], were made in the context of the overall analyses of the submissions and evidence placed before the Court, and would thus, not amount to a reversal of the burden of proof requiring the Complainants to prove that their statements were true, and thereby prove their innocence in order to avoid a conviction. Rather, the inference was that in the absence of any contrary evidence by the Complainants and considering the State's submission and the Court's analysis, no other conclusion was possible.[48] Notably, it is not the Commission's prerogative to interrogate the evaluation of evidence by the Supreme Court, but to assess the compatibility of its conduct with the applicable standards under the Charter and relevant international human rights law.

137. In view of the foregoing, the Commission finds that there was no reversal of the legal burden of proof on the prosecution, and accordingly finds no violation of the Complainants' right to be presumed innocent as provided for under Article 7 (1) (b) of the Charter.

Alleged violation of Article 7 (2)

138. Article 7 (2) of the Charter provides as follows:

> *No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.*

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[46] Para 25, Supreme Court's Decision.

[47] See e.g. paras 17, 22, 23, 30 and 72, as above.

[48] See ECHR, 28 October 1994 (*Murray v. United Kingdom)*, Series A no. 300-A (1995), p. 54, where the ECHR ruled that attaching adverse inferences to the accused person's silence did not result in a reversal of the burden of proof, in a situation where there was already a *prima facie* case without 'adverse inferences', as, according to the ECHR, value was attached to the *prima facie* case already made, and the adverse inferences were necessary, in the sense that no other conclusion was possible.

139. Article 7(2) of the Charter guarantees what is commonly known as the principle of legality; whose effect is that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently specific sanction was attached.

140. Embodied in the principle of legality is the requirement of certainty which serves to ensure that criminal conduct is defined in such a manner that the individual knows from the wording of the definition of the criminal conduct, which acts or omissions are prohibited.

141. As recently confirmed by the African Court on Human and Peoples' Rights in the case of *Konaté v. Burkina Faso,* to be considered as 'law', norms must be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and have to be made accessible to the public. The law cannot give persons in charge of its application unlimited powers of decision on the restrictions of freedom of expression.[49]

142. The principle of legality is designed to protect citizens against State arbitrariness and the exigencies of power. It provides individuals with foreseeability and calculability in the exercise of their rights. This protection is crucial within the realm of criminal law because this body of law expresses the highest legal condemnation of acts in a society and provides for the highest legal sanctions.[50]

143. The Complainants submit that the Supreme Court's interpretation of the law on national security was too broad and did not enable them to understand the kinds of statements that would qualify as threatening national security. They maintain that the Supreme Court's reasoning does not comply with the principle of legal certainty required when interpreting the statute.

144. The Respondent State on the other hand argues that the offences for which the Complainants were convicted were punishable offences even before the time they were charged with committing them. It argues that the principle of legality was not violated given that the law clearly defines the offences and determines facts falling within their scope as well as the punishment.

145. The Commission notes that the offences in question are proscribed in Articles 166 and 391 of Law 21/77. Article 166 of the Law No. 21/ 77 provides that:

> *"Whoever, whether by a speech in a public meeting or public place, whether by writings, printed matter, any images or emblems fly-posted up, displayed,*

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[49] See *Konaté v. Burkina Faso,* (f19 above), par. 128.

[50] Permanent Court of International Justice, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City [Advisory Opinion of 4 December 1935]* 56).

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distributed, sold, put up for sale or exposed to the eyes of the public, whether by deliberately spreading false rumours, has or has tried to excite the population against the established power, or has brought citizens to rise up against each other or attempted to do so, or has alarmed the population and sought in this way to bring troubles to the territory of the Republic, will be punished by imprisonment of 2 to 10 years and a fine of 2,000 to 5,000 francs or only one of these punishments, without prejudice of stronger penalties provided for in the present code."

Article 391 of Law No. 21/ 77 provides that:

"Whoever has maliciously and publicly imputed to someone a precise fact whose nature is to undermine the honour or the standing of this person, or to expose them to public contempt will be punished with imprisonment of 8 days to 1 year and a fine of 10,000 francs, or only one of these punishments."

146. The Commission also notes that the offences in question are indeed provided by law and define with sufficient clarity the kinds of conduct proscribed, and as well that the laws were in force before the Complainants' conviction. The existence and certainty of the law is therefore not in issue. What the Complainants query is the interpretation of the law by the Court which according to them did not determine the kinds of statements that would qualify as those that defame or threaten national security.

147. What the Commission is tasked with, is to assess whether the judicial interpretation of the law in question spelled out the kinds of actions that would constitute relevant crimes with such precision as to remove doubt in the minds of citizens as to what those actions are.

148. The Commission notes that the progressive development of criminal law through judicial interpretation is a balancing act between certainty and the risk of stagnation and rigidity. Although progressive development must be reasonably foreseeable and consistent with the essence of the offence, the Commission considers that it cannot be reasonably expected of the courts to interpret the law to the level of precision demanded by the Complainants since this will lead to unnecessary stagnation and rigidity.

149. The important thing is whether the Complainants' conducts could reasonably be situated within the confines of the laws under which they were charged. There is no doubt that this was the finding of the national courts in the present

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Communication, based on its analysis of the law and the facts before it[51]. Consequently, in the present circumstances, the Commission cannot find a violation of Article 7 (2) of the Charter.

Alleged violation of Article 9 of the Charter

150. It is the Complainants' contention that the interpretation and application of the laws of Rwanda on national security and defamation was in violation of the right to freedom of expression protected under Article 9 of the Charter. The Complainants also maintain that the Respondent State's laws on national security and defamation are not in conformity with Article 9 of the Charter. Article 9 provides as follows:

> *(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.*

151. From the facts of the case, it is evident that the parties' contentions essentially concern Article 9 (2) of the Charter and the Commission's assessment will as a consequence be limited to that provision of the Charter.

152. The Commission notes that the conformity of the Respondent State's laws on freedom of expression to international norms as well as the interpretation and application of the said laws by the Respondent State's courts have been placed before this Commission for its determination.

153. In summing up the case before it, the Supreme Court stated;

> *"Uwimana Nkusi Agnes and Mukakibibi Saidati appealed to the Supreme Court saying that the High Court has violated laws of the country and international conventions that give them the right to freely express their ideas."*

It is clear that what the Complainants challenged in domestic courts was the interpretation of the laws and their compatibility with international norms.

154. The Complainants argue that Article 166 of the Rwanda Penal Code 1977 is incompatible with Article 9 of the Charter because it is overly broad, imprecise and fails to demarcate the limits of the offence. In their view this law does not provide

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[51] See e.g. paras 15 to 20, paras 32 to 36, paras 74-75, Supreme Court Decision, Exhibit 1B to the Complainant's petition. e.g. para 15, indicates that "[t]he Court must whether the words made public by the appellants through the newspaper Umurabyo, correspond to what is provided by the section of the law mentioned in this paragraph so that they can be convicted for violating the safety of the State."

a readily understandable definition of the offences that individuals could regulate their conduct by to conform to the law. They also argue that the law gives its enforcers unfettered discretion and could punish all forms of expression including private speech in a "public place." They also point out that the law does not differentiate between fact and opinion and would hence render incorrect opinion vulnerable to proscription. Article 391 is also contended to be overly broad and lacking the relevant safeguards for the freedom of expression.

155. Regarding the interpretation given by the Supreme Court, the Complainants argue that the approach of the Respondent State in the interpretation of its laws on national security and defamation was contrary to the spirit of Article 9 of the Charter, including by failing to apply the required threshold for imposing restrictions on the rights under Article 9 as well as by imposing restrictions that served no 'legitimate interest' and were not 'necessary in a democratic society'.

156. The Respondent State on the other hand, does not dispute the fact that the Complainants' right to freedom of expression was interfered with or limited by its actions but rather contends that the interferences or limitations are provided by law, in line with limitations permitted under international law, including Article 9 of the Charter, and that the Complainants exercised their right to freedom of expression in infringement of these restrictions. The Respondent State also underscored the context within which the restrictions were imposed.

157. The Commission is called upon to determine whether the Complainants' right to freedom of expression was unjustifiably limited by the actions of the Respondent State.

158. The Commission recalls that freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.[52] It has also been held by the Commission to be 'vital to an individual's personal development and political consciousness''.[53]

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[52] See Principle 1 (1) of the Declaration of Principles on Freedom of Expression and Access to Information in Africa (Declaration on Freedom of Expression). The Declaration is an authoritative interpretation of Article 9 of the Charter adopted by the Commission at its 65th Ordinary Session, held from 21 October to 10 November 2019, replacing the Declaration of Principles on Freedom of Expression in Africa (2002), adopted at its 32nd Ordinary Session. The relevant provisions have however remained the same in so far as the issues raised in this Communication are concerned.

[53] Communication 140/94-141/94-145/95: *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* (1999) ACHPR, para 36

159. Despite recognition of its fundamental importance, the Commission recognizes that the exercise of this right carries with it special duties and responsibilities, on account of which the right may be legitimately restricted or limited by State Parties to the Charter. In particular, it is noted that Article 9(2) in itself stipulates that freedom of expression shall be exercised ''within the law''. However, this does not give leeway for open-ended qualifications to freedom of expression, as the Commission has curtailed undue restrictions and the exercise of unfettered discretion or attempts by States to avoid their article 1 obligations.[54] Hence, the Commission has acknowledged that:[55]

> *"Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase 'within the law', under article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation."*

160. The above resonates with the Commission's Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019) (Declaration on Freedom of Expression) that any restrictions on freedom of expression must be provided by law, serve a legitimate interest and be necessary in a democratic society.[56]

161. Furthermore, based on the Commission's evolutionary jurisprudence on the nature of duties imposed by the African Charter, article 27(2) has become the general limitation clause of the Charter.[57] Article 27(2) permits restrictions on the rights and freedoms guaranteed in the Charter, including the freedom of expression, when necessary to protect the ''rights of others, collective security, morality and common interest''.

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[54] Communication 224/98, *Media Rights Agenda & Others v Nigeria* (2000) ACHPR, paras 78-82; Communication 87/93, *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (1995) ACHPR; Communication 211/98, *Legal Resources Foundation v Zambia* (2001) ACHPR paras 70, 71.

[55] *Kenneth Good v Botswana* (2010) (ACHPR 2010) para 188; Communications 105/93, 128/94, 130/94 and 152/96) - *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, (1998) ACHPR.

[56] Principle 9 (1) of the Declaration on Freedom of Expression (n52 above).

[57] C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 679 692, cited in AO Salau 'The right of access to information and national security in the African regional human rights system' (2017) 17 *African Human Rights Law Journal* 367-389 http://dx.doi.org/10.17159/1996-2096/2017/v17n2a2. See also AO Salau (as above) in general, on the analysis of the freedom of expression and its restriction in relation to national security under the African Charter.

162. Consequently, the totality of the Commission's jurisprudence and elaborations regarding restrictions to Article 9 is to the effect that a restriction must be prescribed by 'law', serve a 'legitimate' public interest; and be strictly 'necessary' to achieve that legitimate interest. These are similar to those found in international human rights law and jurisprudence, including that of the African Court on Human and Peoples' Rights.[58]

163. In view of the above, the Commission will now analyse each requirement in detail, in order to determine whether the restrictions imposed by the Respondent State on the freedom of expression of the Complainants in terms of the provisions and application of Articles 166 and 391 of the Rwandan Penal Code, are: (i) provided by law, (ii) serve a legitimate interest and (iii) necessary in a democratic society.

*(i) **The restriction must be provided by law; 'within the law' (the principle of legality)***

164. Based on it jurisprudence, as well as applicable international law and jurisprudence, the Commission is of the view that the phrase 'within the law' in article 9(2) accommodates only national laws that are drafted with sufficient clarity, of general application[59] and which conform with international standards and does not allow States to evade Charter obligations[60] or adopt laws inconsistent with binding international laws.[61] The Commission has set standards to the effect that competent authorities should not override constitutional provisions nor undermine fundamental rights guaranteed by the constitution and international human rights standards.[62]

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[58] See e.g. Konate v Burkina Faso (f19 above), and Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) paras 4-6

[59] Communication 255/02: *Garreth Anver Prince v. South Africa (the Prince case)* (2004) ACHPR, para 44.

[60] *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (n54 above) para 11 concerned the Civil Disturbances (Special Tribunal) Decree, part IV, sec 8(1); *Civil Liberties Organisation (in respect of Bar Association) v Nigeria (*1995) ACHPR, para 10, concerned the Legal Practitioners' (Amendment) Decree 21 of 1993, sec 23A(1); and *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) concerned the Constitution (Suspension and Modification) Decree 107 of 1993 and the Political Parties (Dissolution) Decree 114 of 1993, sec 13(1). In these decisions in respect of Nigeria, the African Commission found that relevant laws with ouster clauses that allowed the executive branch to operate without judicial check violated arts 7
and 26 of the African Charter.

[61] Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98: *Malawi African Association & Others v Mauritania* (2000) (ACHPR, para 102 (affirming that 'within the law' relate to FOE limitations permitted under international norms); *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003) paras 37, 42-53, 56-67 (acknowledging Sudan's legitimate security concerns, but declaring Sudan's National Security Act 1994 claim to primacy and eroding of the core of internationally-protected rights as inconsistent with the Charter).

[62] *Media Rights Agenda* (n 53 above) para 15.

165. In Communication 140/94-141/94-145/95: *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria (Constitutional Rights Project case)*, the Commission stated as follows:

> *"According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making".* [63]

166. The African Court has adopted the same position including in the ***Konate Case***[64], where it stated that the expression **"within the law"** not only refers to the provision of such limitations in domestic law but also that the limitations must be interpreted within the scope of international norms which set out the parameters or provide grounds upon which freedom of expression can be limited.[65]

167. In light of all the above and with regard to the requirements of clarity and general application, the Commission reiterates its finding as set out in paragraph 146 above, that the crimes of threat to national security and defamation are indeed provided by law as they are part of the Rwandan Penal Code, and are also drafted with sufficient clarity to enable an individual adapt his/her conduct to the Rules and to enable those in charge of applying them determine what forms of expression are legitimately restricted.

168. Notwithstanding the above, the Commission's assessment of whether the crimes of threat to national security and defamation are provided for within the law will not be limited to the wordings of Articles 166 and 391 of the Rwandan Penal Code, but would, in line with the above-stated criteria include an analysis of whether these laws as interpreted, within the context of international norms, stand the test of legitimacy, necessity and proportionality to the outcome sought, which analysis is set out immediately below.

(ii) ***The restriction must serve a legitimate interest or purpose (principle of legitimacy)***

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[63] As above, para 40

[64] Konate v Burkina Faso (f19 above).

[65] Para 129, relying on Communication 54/91 etc. (n62 above), para 102.

169. To be legitimate, a restriction must apply in clearly-established circumstances and uphold a public interest. In this regard, the Commission has set out in its jurisprudence that "*the reasons for possible limitations must be based on legitimate public interests and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained*" [66], and as well that "*a limitation may never have as a consequence that the right itself becomes illusory*"[67].

170. Furthermore, the condition of ''legitimate interest'' has been interpreted as strictly limited to the conditions prescribed under Article 27 (2) of the African Charter, in that "*the only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest.*"[68] This position is in line with relevant international law principles on this subject[69] and has also been adopted by the African Court.[70]

171. The Commission observes that in the instant case, the Respondent State has explained that the restriction on the Complainants 'right to freedom of expression as provided in Articles 166 and 391 of the Rwandan Penal Code was meant to serve the interest of national security and the protection of the reputation of others. Indeed, the State underscored the specific context of Rwanda, which has been a victim of violence throughout its history - the violence which culminated in the genocide in 1994.

172. The Commission is of the view that the grounds given for the restrictions are legitimate objectives within the purview of Article 27(2) of the Charter, and accordingly that the restrictions thus imposed on the right to freedom of expression in Articles 166 and 391 of the Rwandan Penal Code are consistent with international standards in this area.[71]

173. Having reached the conclusion that the restrictions on freedom of expression under Articles 166 and 391 of the Rwandan Penal Code are provided within the

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[66] Media Rights Agenda, (n53 above), para 69.

[67] *Legal Resources Foundation* (n54 above) para 72.

[68] See *The Prince Case* (n60 above), para 43; Communication 15/96: *Social and Economic Rights Action Centre & Another v Nigeria*, (2001) ACHPR, para 165.

[69] See e.g. Art. 10(2) of the European Convention on Human Rights and Fundamental Freedoms, Art. 13 of the American Convention on Human Rights, which stipulate similar limitations.

[70] See the Konate Case (n19 above), paras 132-134.

[71] See also Ingabire Victoire Umuhoza v. Republic of Rwanda, App. No. 003/2014 AfCHPR, para 141, where the African Court held that the crimes for which the Applicant was convicted "were serious in nature with potential grave repercussions on State security and public order" and consequently, that "the restrictions made [by the Respondent State] on the Applicant's freedom of expression served the legitimate interests of protecting national security and public order."

law and also respond to legitimate purposes, the Commission must now examine if these restrictions are necessary to achieve the referenced legitimate purposes. In that regard, while appreciating that the national authorities understand the local realities and context better, the Commission must not simply defer to their reasoning but must ensure that the same is in conformity with the international standards enshrined in the Charter.

174. This brings to fore the third aspect of the test.

(iii). The restriction must be necessary to achieve the legitimate purpose (the principle of necessity)

175. 'Necessity' relates to the concern for proportionality between the extent of the limitation measured against the nature of right involved and aims to prevent unreasonably excessive limitations.[72] In determining the element of necessity, the Commission had stated in *the Constitutional Rights Project's case* that " [t]he justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory."[73] Even where a limitation is found to be necessary, a State Party has a duty take the least intrusive or erosive measure available,[74] and any limitation must be rationally related to its purpose.[75]

176. The Commission further recalls its decision in the case of *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*[76], wherein it held that "in law, the principle of proportionality or proportional justice is used to describe the idea that the punishment for a particular offence should be proportionate to the gravity of the offense itself. The principle of proportionality seeks to determine whether, by State action, there has been a balance between protecting the rights and freedom of the individual and the interest of the society as a whole. Thus, in order to determine that an action is proportional, a number of questions should be asked, such as: Are there sufficient reasons to justify the action? Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the Charter?"[77]

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[72] Communication 297/05: *Scanlen & Holderness v. Zimbabwe* (2009) ACHPR, paras 94-98
[73] (n53 above), para 42.
[74] See Comm. 279/03-296/05 (n27 above); Communication 242/2001: *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne Des Droits De L'homme v. Mauritania* (2004) ACHPR.
[75] Comm. 242 (as above), paras 64-75.
[76] Communication 284/03, Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Zimbabwe.
[77] As above, para 176.

177. As well, in its Declaration on Freedom of Expression, the Commission has also laid down the rule that "sanctions should never be so severe as to interfere with the exercise of the right to freedom of expression."[78]

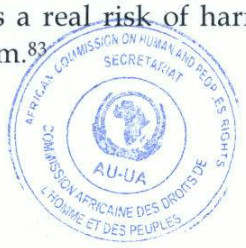
178. The Commission also notes that the European Court of Human Rights (European Court), in *The Observer and The Guardian v. United Kingdom (Observer and Guardian case)*, described necessity as ''not synonymous with 'indispensable' or as flexible as 'reasonable' or 'desirable,' but [as]... [implying] the existence of a pressing social need''.[79]

179. Also, in elucidating on the principles that are essential to a democratic society European Court, in *Handyside v. the United Kingdom (Handyside case)* identified pluralism, tolerance and broadmindedness as characterizing a democratic society, [80] a position which was similarly adopted by the Commission in *Communication 313/05: Kenneth Good v. Republic of Botswana*, wherein the Commission referred to the same principles to support its stance that there needed to be a higher degree of tolerance for political speech.[81]

180. Any limitation on freedom of expression must be therefore be adjudged in light of its importance to democracy and the impact such a limitation would have on the principles considered as fundamental to a democratic society. This sets a high threshold, ensuring that States exercise limitations only under exceptional circumstances.

(a) <u>On Threat to National Security</u>[82]

181. The Commission has stipulated in its jurisprudence and elaborations on Article 9 that freedom of expression may only be restricted on the grounds of national security where there is a real risk of harm and a close causal link between the expression and the harm.[83]



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[78] (n52above), Principle 21 (1) (c).
[79] *The Observer and The Guardian v. United Kingdom* (1991) ECHR (Application No. 13585/88) para 71.
[80] *Handyside v. the United Kingdom* (1976) ECHR (Application No. 5493/72) para 49.
[81] (n55 above).
[82] See generally, AO Salau 'The right of access to information and national security in the African regional human rights system' (n57 above).
[83] Principle 22 (5) of its Declaration on Freedom of Expression (n52 above); Principle 6 of its Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

182. In that regard, the Commission has, in its jurisprudence, illustrated that the failure of a State Party to justify in explicit terms the relationship between the imposition of limitations and public order or national security interests, would amount to a violation of Article 9, and that State Parties have tended to make general statements linking national security and limitations. For instance, in the *Constitutional Rights Project* case, the Commission concluded that Nigeria had failed to produce sufficient evidence to demonstrate that its limitation of the freedom of expression was in the interest of national security or public order, and in the *Kenneth Good* case, it held that "[t]he lack of any tangible response from the State on how the article poses a threat to the State or Government leaves the Commission with no choice but to concur with the Complainants''.[84]

183. The Commission also observes that the jurisprudence of the Human Rights Committee (HRC) is in the same direction, the HRC has ruled against the Republic of South Korea, in Communication 518/1992 - *Jong-Kyu Sohn v. Republic of Korea* (1995) HRC and Communication 926/2000 - *Shin v. Republic of Korea* (2004), primarily for its failure to demonstrate the specific nature of the threat presented by the expression in question and the threat posed. The HRCs findings are consistent with its General Comment, which states that ''[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat...in particular by establishing a direct and immediate connection between the expression and the threat''.[85]

184. As well, the Inter-American Commission has also indicated, in line with international jurisprudence, that the imposition of sanctions for abuse of freedom of expression on charges of incitement to violence (understood as incitement to commit crimes, the threat to public order or national security) has to be based on the actual demonstration that the person was not simply expressing an opinion (even if harsh, unjust or provocative) but also that had the clear intention of inciting violence, as well as the current, real and effective possibility to achieve his objectives,[86] and the European Court has taken the view that "it is necessary to

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[84] (n55 above), para 200.

[85] General Comment 34 "Article 19: Freedoms of opinion and expression" HRC, (1998) para 35.

[86] Posenato, Naiara. (2016). THE PROTECTION OF THE RIGHT TO FREEDOM OF EXPRESSION: A PANORAMA OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS CASE LAW / A PROTEÇÃO DO DIREITO À LIBERDADE DE EXPRESSÃO: UM PANORAMA DA JURISPRUDÊNCIA DA CORTE INTERAMERICANA DE DIREITOS HUMANOS. Espaço Jurídico: Journal of Law [EJJL] - Qualis A2. 16. 51. 10.18593/ejjl.v16i3.9770, p.60, available at https://www.researchgate.net/publication/295244849_THE_PROTECTION_OF_THE_RIGHT_TO_FREEDOM_OF_EXPRESSION_A_PANORAMA_OF_THE_INTER-

demonstrate that the concept of "order" is not authoritarian, but a democratic one, understood as the existence of structural conditions for all people, without discrimination, to exercise their rights in freedom, with vigour and without fear of being punished for it. If this concept is invoked as a ground for limiting human rights, it must be strictly interpreted, taking into account the balance between the different interests at stake and the need to preserve the object and purpose of the Convention.[87]"

185. On what constitutes 'national security', the Commission, in Communication 279/03-296/05: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan,* defined the same as "how the State protects the physical integrity of its citizens from external threats, such as invasion, terrorism, and bio-security risks to human health"[88], which interpretation would extend to the prohibition of any propaganda of war, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as established by international human rights law and jurisprudence.

186. Specifically, the Commission observes that the European Court has through interpretation prohibited incitement to violence and hatred, amongst others, by relying on Article 17 of the European Convention on Human Rights, which prohibits acts that destroy the rights or freedoms enshrined in the Convention[89]. Notably, in the case of *Gündüz v. Turkey*[90], the European Court stressed in particular that statements which may be held to amount to hate speech or glorification of or incitement to violence, cannot be regarded as compatible with the notion of tolerance and run counter to the fundamental values of justice and peace set forth in the Preamble to the Convention. Consequently, it held that the provision of deterrent penalties in domestic law may be necessary where conduct reaches such level of expression and becomes intolerable, negating principles of a pluralist democracy.

187. Also, the European Court has in its jurisprudence recognized a Respondent State's historical experience as a "weighty factor" in determining the legality of

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[87] Posenato, Naiara. (as above), p.65.

[88] (n27 above), para 174. See also Provision 30 of the Commission's Model Law on Access to Information in Africa.

[89] See e.g. *Roj TV A/S v. Denmark* judgement of 17 April 2018; *Sürek (no. 1) v. Turkey,* judgement of 8 July 1999; *Garaudy v. France* Judgement of 24 June 2003; *M'Bala M'Bala v. France*, judgement of 20 October 2015

[90] Judgement of 13 November 2003.

limitations on free speech[91] – a position which has equally been taken by the African Court in the case of *Ingabire v. Rwanda*.[92]

188. The Commission is equally mindful that the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (American Convention) also explicitly prohibit hate speech under Article 20 and Article 13 (5) respectively.

189. Based on the foregoing legal principles, jurisprudence and arguments before it, it is the Commission's considered view that freedom of expression constitutes one of the essential foundations of a democratic society, a basic condition for the progress of society and development of every person. Freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population", in line with principles of pluralism, tolerance and broadmindedness, without which there is no 'democratic society'[93]. On the other hand, the Commission is also mindful that, "as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance ..., provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued"[94].

190. Against this background, the Commission has reviewed Article 166 of Law No. 21/77 of Rwanda, which defines the offence of threatening national security, and observes that it seeks to prevent expressions which have the effect of or are capable of exciting the population against the established power, bringing citizens to rise up against each other or alarming the population and seeking in this way to cause disorder in the territory of the Republic of Rwanda. The Commission is of the view that such restrictions are compatible with the Charter provisions and international law standards set out above, and that the imposition of deterrent penalties in domestic law may be necessary and proportionate to the legitimate aims of ensuring national security and public order. The historical context of Rwanda, as set out in this Communication, is equally a weighty factor in making this finding on the legality of the limitations on freedom of expression imposed by Article 166 of the Penal Code.

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[91] *Case of Perinçek V. Switzerland* (2015) ECHR, Application No. 27510/08, para 242.
[92] (n 71 above), para 158.
[93] *Handyside v. the United Kingdom* (n80 above).
[94] *Erbakan v. Turkey* judgment of 6 July 2006, at para 56.

191. With regard to the application of the law to the Complainants by the State and its agents and whether this meets the requirement of necessity and proportionality, the Commission observes that the relevant paragraphs of the articles published by the Complainants and identified as dangerous and prohibited include the following[95]:

"Rwandans also affirm that Habyarimana should not have been replaced by a person like Paul Kagame. When the later assumed power, killings increased instead of being stopped, insecurity crossed boarders, Rwanda became an enemy to the neighbors, racial discrimination continued to divide Rwandans, collapse of the economy and many other things to the extent that the Government of FPR is killing people in addition to Genocide survivors". (Umurabyo n0 29 of 05-19 July 2010).[96]

"There are four ways in 2010, it is your choice: between imprisonment, to flee the Country, die and survive".[97] (*Umurabyo* n0 23 of 17-31 May 2010).

"Gacaca courts were established as a tool for revenge, one's neighbor has become his or her enemy, agony between a parent and a child, a person who was not able to run and flee the Country had to keep silent, it was not pleasing to anyone but there was no choice". (Umurabyo n0 21 of 01-15 May 2010).[98]

192. The Commission understands that the Gacaca courts were set up as a method of transitional justice, designed to promote communal healing and to rebuild Rwanda in the wake of the Genocide of 1994. It understands that the Respondent State has focused on community rebuilding and fostering social cohesion since the tragic occurrence of the genocide, and is in that regard, mindful, that the issue of the Gacaca courts is critical for national cohesion and inter-ethnic peaceful coexistence. The Gacaca courts are also important to the interests of victims of the genocide, whose rights to justice and reparation have been affirmed through public acknowledgement of their suffering.

193. To that end, the Commission recognizes that there is need for journalistic articles on the Rwandan genocide to pay due regard to the sensitivity of the issue and to avoid reigniting inter-ethnic acrimony. It therefore does not endorse the disregard

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[95] Paras 31 and 34 of the Respondent State's submission on Oral Hearing.

[96] This reflects the content of paragraphs 13 and 14 of Annex 4B to the Complainants' petition before the Commission.

[97] The translation from the Complainants read "There are four choices for the year 2010: prison, exile, death and survival. See para 10, Umurabyo no. 21 in Annex 2B to the Complainants' petition before the Commission.

[98] This reflects the content of para 32 of the Supreme Court Judgement and See para 8, Umurabyo no. 21 in Annex 2B to the Complainants' petition before the Commission. The referenced article was however not provided to the Commission.

or even belittling of the suffering of the genocide victims, who received justice through the Gacaca courts. The Commission is cognizant that a lack of such sensitivity and due care has the potential to result in the provocation of acrimony that is capable of disrupting peace and denigrating the dignity of victims of the Rwandan genocide.

194. Consequently, the Commission considers that statements on genocide in the particular historical and political context of Rwanda, if not articulated in a sensitive manner, could have the real potential to threaten national security. The European Court has also articulated this in respect of a similarly catastrophic occurrence, the Jewish Holocaust, that denial of the holocaust is not a form of protected expression under Article 10 of the European Convention on Human Rights.[99]

195. In the present case, in their submissions, the Complainants admit to the intention of the article titled 'Kagame in big trouble', 21st edition of Umurabyo, 1 May 2010 and state that:

> *"This article was authored by the First Complainant and places Rwanda's contemporary problems into a historical context. It discusses the divisions in the country along ethnic lines and how hatred and violence grew between the various groups as a consequence. It suggests that the Gacaca courts were used as a tool of revenge rather than justice and discusses the consequential displacement of Rwandans. The latter half of the article draws on modern problems to suggest that Rwanda still suffers from its prior problems and that the up-coming elections may lead to a re-surfacing of these problems."*

196. In its case-law, the European Court has paid specific attention to the original intention of the author of the statement, including whether it was intended to spread racist or intolerant ideas through the use of hate speech or whether there was an attempt to inform the public about an issue of general interest. This in turn may determine whether the impugned speech falls within the scope of Article 10, or is so destructive of the fundamental values of the Convention system that it is excluded from the protection of the Convention on the basis of Article 17.[100]

197. In making its determination on the intention of the author, the Court undertakes a holistic construction of the information or information item in question. For

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[99]Garaudy vs France (n89 above); Hans-Jürgen Witzsch vs Germany, European Court of Human Rights, Application no. 7485/03.

[100] Jersild v Denmark, judgment of 23 September 1994, Application No 15890/89 para 35. See also Garaudy v France (n89 above).

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example, in the case of *Jersild v. Denmark*[101], the Court held that: "[a]n important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas[102]; and in *Sürek v. Turkey*,[103] the Court held that "[i]n exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made".

198. The content of the speech therefore also constitutes one of the key *foci* of the court's deliberations and is a critical element of incitement. Content analysis may include a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance struck between arguments deployed, etc. The European Court has emphasized the importance of distinguishing between publications that exhort the use of violence and those that simply offer a genuine critique on a matter of public interest[104] and the Inter-American Court has expressed the view that political speech or speech involving matters of public interest deserves special protection.[105]

199. The Commission also recognizes that where a legitimate objective can be identified (such as "historical research, the dissemination of news and information, and the public accountability of government authorities") for an expression, other than to incite to discrimination, hostility or violence, then the speech should fall short of the threshold.[106]

200. Also, in his Report to the General Assembly on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, the former United Nations High Commissioner for Human Rights had also recognized six elements in identifying the juncture at which expression traverses into hate speech as follows: (i) *Context:* the social and political setting prevalent at the time of the speech, the historical background to the matter may also be relevant; (ii) *Speaker:*

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[101]22 August 1994, Application No. 15890/89.

[102] Para. 31. Cited in Toby Mendel, Study on International Standards Relating to Incitement to genocide or Racial Hatred, a study for the UN Special Advisor on the prevention of Genocide, April 2006, available at http://www.concernedhistorians.org/content_files/file/TO/239.pdf. See also, *The Faurisson v. France* U.N. Doc. CCPR/C/58/D/550/1993(1996), paras. 9.6-9.7.

[103] (No. 4) Application no. 24762/94, Judgement of 8 July 1999, paras 54(iii) & 58.

[104] *Ergin v Turkey* (No 6), judgment of 4 May 2006, Application No 47533/99 at para 34. *Otto-Preminger-Institut v Austria* judgment of 20 September 1994, Application No 13470/87, para 49.

[105] Posenato, Naiara. (n86 above), p.57.

[106] Analogy to analysis of Media Cases at the ICTR in Gregory S. Gordon, *"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 150 (2004-2005). Cited in Mendel, Op cit., 2006

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the status or position of the speaker, or the sway that the speaker exercises over the audience (iii) *Intent:* awareness of the speaker about the nature of his speech; (iv) *Content and form:* the actual content of the speech and the manner of delivery; (v) *Extent of the speech act:* the potential reach of the speech (vi) *Likelihood/Imminence*: the risk of harm but not the actual occurrence of harm;[107] all of which may also inform the assessment of whether an expression constitutes a threat to national security or public order.

201. The foregoing analysis of relevant judicial approaches and standards reveal an emphasis on a holistic construction of the information concerned and the relevance of intention – an approach which the Commission is inclined to take in this case, both in light of Article 60 of the African Charter and the facts before it, while mindful and cautious that indeed, in the absence of such intention, words can, in certain contexts have the effect of causing acrimony, including as a result of their long-term effect. As noted by the United Nations Special Adviser on Genocide Prevention, words were precursors to events such as the Holocaust in Europe. [108] Hence, there is a need to carefully balance the right to freedom of expression against the duties it carries, taking into account the peculiarities of each context that comes before the Commission.

202. Consequent to the above, the Commission will now apply a holistic approach to construing the articles concerned. Having reviewed the article in *Umurabyo* n0 21 of 01-15 May 2010 from which the Complainants' quote has been extracted, it is the Commission's view that although the Complainants reference to the Gacaca courts as "tools for revenge" could be seen as offensive and in itself, potentially inflammatory, this statement, as can be seen from the overall tenor of the Complainants' remarks however, it does not lead to a conclusion that the Complainants meant to incite violence. The article in question not only critiques the use of the Gacaca courts and their effectiveness in addressing the fissures created by the genocide, but also highlights the many achievements under the leadership of President Kagame, including as follows:

> *"Kagame is facing tough times. There are many achievements under his leadership for which Rwandans will remember him as long as he is still the President. These include water and electricity, IT development, communication tailored to*

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[107]Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, annexed to the Annual report of the United Nations High Commissioner for Human Rights (2013), United Nations General Assembly Doc. A/HRC/22/17/Add.4, available at https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

[108] See Adama Dieng, United Nations Special Adviser on genocide prevention, "Words kill as bullets", available at https://www.facebook.com/unitednations/posts/we-have-to-bear-in-mind-that-words-kill-words-kill-as-bullets-united-nations-spe/10157572276280820/.

everyone's need, security of people and goods, clean city, large number of women in government institutions... There is also elimination of writing peoples' ethnic group IDs. But he has also failed in some areas..."

203. In the Commission's opinion, the Complainants' statements, read as a whole and taken in their immediate and wider context, could not be seen as a call for hatred, violence or intolerance towards the Gacaca courts. Rather, the statements, construed as a whole, concerned a matter of public interest, which is whether the objective for which the courts were created was met.

204. The Commission takes the same view regarding the other quoted offensive text in the same article. *"There are four ways in 2010, it is your choice: between imprisonment, to flee the Country, die and survive"* [109], *which should be read together with other* contents of the article. The Commission however notes that such expressions may be considered reckless, particularly bearing in mind the higher duty on the media, but nonetheless finds that this is a threshold lower than intent, and which is insufficient to demonstrate incitement or intention to threaten national security in any manner.

205. Furthermore, it is the Commission's view that the above position would also hold for the referenced quotes from *(Umurabyo* n0 29 of 05-19 July 2010*),* as the same article also state that: *"...It is wrong to trivialize the genocide perpetrated against Rwandans..."; "...Rwandans deserve a break (so that) they can live in peace..."; "...In order to achieve real victory, we must agree that we are the same, we should shun those dividing us..."; and "Any Rwandan, Tutsi or Hutu, whether he lived in Uganda, Congo, France, America and elsewhere, they are all Rwandans. The media that is free should play a big role...".* Thus, containing elements which advocate reconciliation, unity, peace and stability in Rwanda, all of which, taken together, are incompatible with an intention to threaten national security.

206. Furthermore, and without prejudice to the findings above, the Commission notes that in reaching its decision on the aspect of the statements posing a threat to national security, the Supreme Court of the Respondent State stated as follows:

> *"...what Uwimana Agnes wrote in her article on the Gacaca has no link in common with what she wanted to demonstrate. Rather* ***her article does demonstrate that the purpose of creating the Gacaca courts was vengeance, opposing people against one another and causing conflicts between parents and children.*** *Those words of Agnes Uwimana Nkusi* ***may be*** *the source of disorder within the*

[109] The translation from the Complainants read "There are four choices for the year 2010: prison, exile, death and survival. See para 10, Umurabyo no. 21 in Annex 2B to the Complainants' petition before the Commission.

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population. What she has written are just rumours that had the purpose of inciting people to rise up against those in power."

207. While it acknowledges that international human rights law, including the African Charter, dictates generally that there must be a real risk, or an actual likelihood, of harm before a restriction on the exercise of freedom of expression is deemed justifiable in the interest of national security, it is the Commission's view, that consideration should be had not only the immediate risk of violence but also to impact of expressions in a country with a history of ethnic conflict and mass atrocities. The Commission agrees with the UN Special Advisor on the Prevention of Genocide that the Holocaust did not start with the gas chambers. Accordingly, following the conclusion of the European Court that denial of the Holocaust is not protected under freedom of expression; the Commission holds that in Rwanda as well expressions that entail denial of the genocide against the Tutsi cannot be protected under Article 9 of the African Charter.

208. In the case at hand, while it does not dismiss the Supreme Court's view that the article 'may well be a cause of disorder and unrest among the population' as being merely hypothetical in the particular context of Rwanda, the Commission however observes and concludes that the reasoning of the authorities in the present Communication fails to meet the required threshold above, for failure to sufficiently demonstrate how the articles published by the Complainants taken together in their entirety could 'cause disaster or unrest among the population' or amount to denial of genocide or a threat to national security.

209. For the above reasons, the Commission finds that the restrictions imposed on the freedom of expression of the Complainants for the protection of national security were not necessary in a democratic society that has the particular history and context of Rwanda.

(b) On Defamation

210. Regarding the necessity of the restriction on the First Complainant's expression on grounds of protecting the reputation of others, the Commission recalls Principle 21 of its Declaration on Freedom of Expression which provides as follow:

> *"States should ensure that their laws relating to defamation conform to the following standards:*
> *No one shall be found liable for true statements, opinions or statements regarding public figures which is reasonable to make in the circumstances;*
> *Public figures shall be required to tolerate a greater degree of criticism."*

211. This principle has been upheld in the Commission's jurisprudence, which has limited criminal penalties for defamation to the State interest in protection of security and public order, as it has made clear that "[i]t is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security" rather than "merely an insult towards [the government] or the Head of State." [110] The Commission explained its decision in part by stating that "[p]eople who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens, otherwise public debate may be stifled altogether."[111] More recently, the African Commission found that "[a] higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials."[112]

212. Relying on the above reasoning and more recently in the Konate Case,[113] the African Court, in assessing the need for restrictions on freedom of expression by the Respondent State to protect the honour and reputation of others, deemed it necessary to consider the function of the person whose rights are to be protected, that is, whether the person is a public figure or not, and expressed the view that "freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures"[114], and also that "[g]iven that a higher degree of tolerance is expected of him or her, the laws of States Parties to the Charter and the Covenant with respect to dishonouring or tarnishing the reputation of public figures, such as the members of the judiciary, should therefore not provide more severe sanctions than those relating to offenses against the honour or reputation of an ordinary individual."[115]

213. The jurisprudence of the Inter-American Court and the European Court is in the same direction,[116] thus establishing that international human rights law accords greater protection to speech criticizing public officials and other public figures,

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[110] Communications 105/93 etc. (n55 above), para 74.
[111] As above.
[112] *Kenneth Good v. Botswana*, (n 55 above), *para 200.*
[113] (n19 above). See also the Ingabire Case (n71 above), para 161.
[114] As above, para 155.
[115] As above, para 156.
[116] See e.g. IACtHR, *Case of Herrera-Ulloa v Costa Rica*, Ser. C No. 107 (2004), par. 129; ECtHR, *Lingens v. Austria*, App. 9815/82 (1986), par. 42. See also in general, Prof. Dr. Dirk Voorhoof, Freedom of Expression and Information and the Case Law of the European Court of Human Rights and the Court of Justice of the European Union: Overview and Highlights, Conference Paper, Justice for Free Expression in 2014, 10 May 2015, available at https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/05/EUROPE2014.VOORHOOF.11MAY15.Final_.pdf

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and requires a careful balancing of the protection of reputation with interests of open debate in a democratic society including the role of the press as a public watchdog. Thus requiring a State, in the instance of defamation in such a context, to establish a pressing social need for putting the protection of the person over and above the right to freedom of expression. [117] Any interference with political expression must therefore be placed under intense scrutiny, and in assessing the need for restrictions on freedom of expression to protect the honour and reputation of others, State Parties must assess the function of persons whose reputation or honour has allegedly been affected against the severity of the restriction and the sentence imposed.

214. Public officials must tolerate a higher degree of scrutiny of their actions and must be willing to accept criticism from the press, particularly in the context of political debate, as without such criticism, the public would have no way of holding them accountable and there would be no limits to the exigencies of public officials' powers. Also, while limitations on the exercise of Article 9 of the Charter seek to protect the reputation of all individuals including public officials, the requirements of such protection have to be weighed against the interests of debate on issues of public interest.

215. In the Konate case, the African Court held that "apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences".[118] It further noted that "other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality, which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments." [119]

216. In a separate opinion in the same case, it was further noted that indeed, "once a so-called criminal defamation amounts to say hate speech or incitement, it is no longer criminal defamation; it mutates into one of the already existing and well known specific crimes such as sedition or high treason and there would be no talk of criminal defamation". In essence, although sedition and high treason may be recognized as crimes in the domestic laws of many State Parties to the African Charter, these two issues are separate and distinct from defamation. In this regard,

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[117] See e.g. Lingens v. Austria, ECHR Appl No. 9815/82, at 26; Axel Springer AG v. Germany (No. 2), ECHR Appl. No. 48311/10 and Brosa v. Germany, ECHR, Appl. No. 5709/09.
[118] As above, para 165.
[119] As above, para 166.

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the separate opinion further stated that Article 27(2) of the Charter "cannot justify the criminalization of expression of speech by way of criminal defamation laws of any kind, whether punishable by incarceration or not".

217. Bearing in mind its elaborations over the years on the relationship between defamation and Article 9 of the Charter, the Commission aligns itself to the above position that Article 27(2) is not a justification for the imposition of criminal sanctions for defamation. The Commission has recognized the serious abuses perpetrated under the colour of the criminal defamation laws and has called for their repeal, concluding that criminal defamation laws are an affront to the right to freedom of expression. This position is consistent with international jurisprudence and reflects the growing recognition that laws imposing criminal penalties for defaming or insulting public figures reflect the policy of governments to stifle opposition and limit public debate. It is the Commission's view that criminal defamation and insult laws not only violate Article 9 of the African Charter but impede development in open and democratic societies. As such, laws of such a nature, *inter alia*, constitute a serious interference with freedom of expression, impeding the public's right to access information, and the role of the media as a watchdog, preventing journalists and media practitioners from practicing their profession in good faith, without fear or censorship.[120]

218. Against this normative and jurisprudential framework, the Commission notes that Article 391 of the Rwandan Penal Code provides that defamation occurs when someone:

> *"...maliciously and publicly imputes a precise fact which undermines the honour or the standing of a person or exposes them to public contempt."*

219. The Commission also observes from the submissions before it that the First Complainant argues that her statements were mere opinions, and that from the record of Appeal before the Supreme Court, she had attempted, unsuccessfully, to establish the factual basis for the said 'opinion', 'journalistic analysis' or 'reporting' as they were described, following which the Supreme Court concluded that they were statements of fact and false rumours, and also that they undermined the honour and esteem of the Head of State, thus forming the basis of the conviction for the offence of defamation.[121]

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[120] Resolution 169: Resolution on Repealing Criminal Defamation Laws in Africa, ACHPR/Res.169 (XVIII)10. See also Inter-American Commission on Human Rights, *Inter-American declaration of principles on freedom of expression* (19 October 2000), available at http://www.cidh.oas.org/declaration.htm.

[121] Paras 69 – 75, Supreme Court Decision. According to the records, the First Complainant had provided contradictory indications that the Article was based on a radio broadcast, on an interview and on a survey that she had conducted.

220. Given that the issue of whether the statement is a fact or an opinion has been dealt under the Commission's analysis on the alleged violation of Article 7(1)(b) pertaining to the procedural and evidentiary burden, the role of the Commission at this point is to examine whether the restriction of the First Complainant's freedom of expression on grounds of the protection of the reputation of another within the purview of Article 391 of the Rwandan Penal Code, satisfies the foregoing proportionality requirements under international human rights law.

221. Construing the article published by the First Complainant as a whole, the Commission observes that it relates to an issue of public interest, as it is a critical review of the Kagame administration, which refers to examples of endemic corruption and the increased problems faced by the country before, during and after the genocide. The article notably recognizes the achievements of the Rwandan Patriotic Front (RPF), while noting that some of their acts did not please the people. The Commission takes the view that such a journalistic article is necessary in a democratic society, and protected in terms of Article 9 of the Charter and Principle 2 of the Declaration on Freedom of Expression. [122]

222. Furthermore, the Commission finds that the context within which these statements were made and the person against whom they were directed should also have been taken into consideration by the national courts. There is no doubt in the Commission's view that the impugned statements were directed at the President or that the President of the Republic of Rwanda is a public figure. Given his role and position, he is more exposed than an ordinary individual and is subject to many and more severe criticisms. Given that a higher degree of tolerance is expected of him, the law that relates to dishonouring or tarnishing his reputation should not provide for more severe sanctions than those relating to ordinary members of society. In any case, civil proceedings in defamation should always be preferred to criminal proceedings.

223. The Commission recalls that the article in question related to the President's aptitude in addressing Rwanda's difficult past and fostering national unity. These issues are issues of general public concern which ought to be openly debated. Given that the President is a public figure, a greater degree of criticism ought to be allowed in order to guarantee public debate.

224. The Commission observes that the First Complainant was sentenced to a prison term as punishment for the crime of defamation. While the Commission notes the historical context of the Respondent State and the role that hate speech couched as

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[122] (n52 above).

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freedom of expression played in activating the genocide giving rise to the need to put in place laws to ensure that freedom of expression is exercised responsibly, it recalls that the article under consideration does not deal with a case of hate speech, or propaganda for war or incitement to hatred, which in any event transcend the scope of defamation and for which a severe punishment such as imprisonment would have been necessary and proportionate, as opposed to the criticism of a public official.

225. The Commission also recalls that the Complainant as a journalist ought to be offered a high level of protection under Article 9 of the Charter given the important contribution of journalists to public debate on matters of general public interest in a democratic society. [123] The Commission considers as a consequence that sentencing the First Complainant to a prison term was in the circumstances very severe and disproportionate.

226. In view of the above, the Commission considers that the stipulation of custodial sentences for defamation in the Rwandan Penal Code violates the requirement of Article 9 of the African Charter as the State failed to show how a penalty of imprisonment is a necessary limitation to freedom of expression in other to protect the reputation of others, and as well that its application to the First Complainant, including her sentencing amounts to a disproportionate and unjustifiable limitation of her right to freedom of expression, in violation of Article 9 (2) of the Charter.

227. Finally, in relation to its foregoing conclusion, the Commission is aware that the relevant penal code of Rwanda has since been amended to exclude a general provision on criminal defamation as was provided in Article 391 of Law No. 21/77 which is being contested in this Communication.[124] It therefore wishes to make two observations in this regard: (i) the Commission has always treated Communications by ruling on the alleged facts at the time of submission of the Communication[125]; and (ii) the revised law still retains custodial sentences for "insults or defamation against the President of the Republic"[126] which is relevant, for purposes of the Commission formulating its recommendations as regards its conclusion on criminal defamation. The new law also contains other provisions that criminalize insults.[127]

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[123] See ECHR case of *Bladet Tromsø and Stensaas v. Norway*, Appl. no. 21980/03.

[124] See Law N°68/2018 of 30/08/2018 Determining Offences and Penalties in General, Rwandan Official Gazette No. Special of 27/09/2018.

[125] See Communications 27/89, 46/91 and 99/93 – Organisation Mondiale Contre la Torture et al v. Rwanda (1996) ACHPR; and Communications 222/98 and 229/99 – Law Office of Ghazi Suleiman v. Sudan, (2003) ACHPR.

[126] Article 236 (n124 above).

[127] See Articles 161 and 218 (n124 above).

Findings

228. Based on the above, the African Commission on Human and Peoples':

i. Finds that the Republic of Rwanda has violated Article 9(2) of the African Charter on Human and Peoples' Rights;

ii. Finds no violation of Articles 7(1) (b) and Article 7(2) of the African Charter on Human and Peoples Rights; and

iii. Finds that Rwanda's current laws which criminalize and stipulate custodial sentences for defamation and insults are in violation of the right to freedom of expression as protected by the African Charter;

iv. Requests the Republic of Rwanda to:

a) Amend its laws on defamation and insult to bring them in compliance with Article 9 of the African Charter on Human and Peoples Rights by repealing custodial sentences for acts of defamation and insults, and ensuring that sanctions against defamation are necessary and proportionate to the legitimate aim served as guided by principles of the African Charter on Human and Peoples' Rights, including reflecting the higher standard imposed in relation to public officials;

b) Pay adequate monetary compensation to the Complainants in accordance with the applicable domestic law for the violation of their rights as found by the Commission in paragraphs 209, 226 and 228 (i) and (ii) above; and

c) Inform the Commission of all measures taken to implement this decision within 180 days in line with Rule 112 (2) of the Commission's Rules of Procedure.

Done in Banjul, Republic of The Gambia, at the 65th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21 October - 10 November 2019