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Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws

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I. INTRODUCTION

¶1 Rwanda is widely considered a poster child for post conflict development. Since the 1994 genocide, in which an estimated 800,000 people lost their lives,[1] the country has gone through a rapid process of socio-economic development. In the last 10 years, Rwanda's GDP growth has averaged 7.4 %, nearly double the regional average.[2] Rwanda is the only country in Sub-Saharan Africa that is on track to meet its health related millennium development goals[3] and the only country in the world where women hold a majority of seats in the national legislature.[4] When it comes to the general markers of a free and democratic society, such as a free press and a free and open election process, however, Rwanda scores considerably lower. Rwanda ranks 161st of 179 in Reporters Without Borders' 2013 World Press Freedom Index[5] and Freedom House has said in its 2013 country report that "Rwanda is not an electoral democracy" as the ruling party, the Rwandan Patriotic Front, maintains tight control of elections.[6] This case study seeks to

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[1] Rwanda: How The Genocide Happened, BBC News (May 7, 2011), http://www.bbc.co.uk/news/world-africa-13431486.

[2] Rwanda Country Data, The World Bank, http://www.data.worldbank.org/country/rwanda.

[3] Paul E. Farmer, Reduced Premature Mortality in Rwanda: lessons from success, BMJ (Jan. 24, 2013), www.bmj.com/content/346/bmj.f534.

[4] Women in National Parliaments, Inter-Parliamentary Union, (Jan. 1, 2013), http://www.ipu.org/wmn-e/classif.htm. The Rwandan Constitution guarantees seats for women in the Parliament. Const. of the Republic of Rwanda, May 26, 2003, art. 9 (Rwanda) [hereinafter The Constitution] ("The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof: [. . .] equality of all Rwandans and between women and men reflected by ensuring that women are granted at least thirty per cent of posts in decision making organs.").

[5] World Press Freedom Index 2013, Reporters Without Borders, http://www.en.rsf.org/press-freedom-index-2013,1054.html.

[6] Freedom in the World: Rwanda, Freedom House, http://www.freedomhouse.org/report/freedom-world/2013.rwanda.

address a specific aspect of Rwanda's oppressive political climate: the use of criminal prosecutions under the country's genocide denial laws to restrict free expression.

¶2 Rwanda has enacted a number of laws proscribing "genocide ideology", "genocide minimisation" and "negationism."[7] These laws are ostensibly intended to prevent a repetition of the events of 1994. The existence of such laws in Rwanda is not unique: similar legislation exists in a number of European countries[8] and at the level of the European Union.[9] What makes Rwanda's laws of interest is the manner in which these laws have been used to restrict a free and open debate on matters of public interest in the country and especially the restrictive effect the laws have had on free speech in the media.

¶3 This article will focus on a recent case in which one of the genocide denial laws[10] was used in the prosecution of two female Rwandan journalists. The conviction and sentence to 10 years' imprisonment of one of the journalists for having allegedly minimized the genocide in an article published in a biweekly Kinyarwanda-language newspaper was quashed on appeal by the Supreme Court of Rwanda in April 2012.[11] In its judgment, the Court held that article 4 of the Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes[12] (the "2003 Law"), under which the genocide minimization charges were brought, does not clearly explain what constitutes "genocide minimisation".[13] This appears to be a clear signal that at least this provision of the 2003 Law is in violation of Rwanda's obligations under international law to provide for sufficiently precise legislation to curtail free speech. This obligation also follows from

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[7] The Constitution, supra note 4; Law No. 33bis/2003, Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, art. 9, Official Gazette of Rwanda, Nov. 1, 2003 [hereinafter the 2003 Law]; Law No. 18/2008, Relating to the Punishment of the Crime of Genocide Ideology, Official Gazette of Rwanda, Oct. 15, 2008 [hereinafter the 2008 Law].

[8] See, e.g., Verbotsgesetz 1947 [National Socialism Prohibition Law] (amended in 1992) (Austria); Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale [Negationism Law] of Mar. 30, 1995, June 25, 1999 (Belg.); Law Against Support and Dissemination of Movements Oppressing Human Rights and Freedoms (2001) (Czech); La Loi 90-615 du 13 Juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe [Law No. 90-615 to Repress Acts of Racism, Anti-Semitism and Xenophobia], July 13, 1990 (Fr.); Strafprozessordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, as amended, § 130 (Ger.); 2005, Büntető Törvénykönyv (Article 269/C of the Criminal Code) (Hung.); Denial of Holocaust Law, 5746-1986 (Isr.); Code Criminal [StGB] § 283 (Liech.); 170 straipsnis. Viešas pritarimas tarptautiniams nusikaltimams, SSRS ar nacistinės Vokietijos nusikaltimams Lietuvos Respublikai ar jos gyventojams, jų neigimas ar šiurkštus menkinimas [Law 170(2) Publicly Condoning International Crimes, Crimes of the USSR or Nazi Germany Against the Republic of Lithuania and Her Inhabitants, Denial or Belittling of such Crimes] (Lith.); Code Criminal, art. 457-3 (Lux.); Ustawa z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej — Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [Act of 18 December 1998 on the Institute of National Remembrance — Commission for Prosecution of Crimes against the Polish Nation] (Pol.); Código Penal [Criminal Code], art. 240 (Port.); Ordonanța de urgență a Guvernului nr. 31/2002 [Emergency Ordinance No. 31 of Mar. 13, 2002] (Rom.); Zivilgesetzbuch [Criminal Code], art. 261 (Switz.).

[9] Council Framework Decision 2008/913/JHA, Combating Racism and Xenophobia, 2008 O.J. (L328) 6.12 (which came into effect in 2008).

[10] The 2003 Law, supra note 7.

[11] Le Ministère Public v. Uwimana Nkusi and Mukakibibi, Case No. RPA 0061/11/CS (S.C. Apr. 4, 2012) (Rwanda) (unpublished opinion on file with author) [hereinafter the 2012 Judgment].

[12] The 2003 Law, supra note 7.

[13] The 2012 Judgment, supra note 11, ¶ 48.

Rwanda's Constitution, which declares that Rwanda's obligations under international law trump its national laws.[14]

¶4 While precise statistics are difficult to obtain, it is clear that over the past years a great number of cases related to "genocide ideology" and "genocide revisionism" have been brought in Rwanda, possibly approaching 2,000.[15] Some of these cases were brought even before the relevant legislation had been enacted.[16] Given the frequent prosecutions related to this particular crime, which is codified under a law that lacks precision, one might have expected that an explicit statement by the country's highest court regarding the law's vague provisions would have had some effect. However, in the months following the Supreme Court judgment, matters have only become less transparent. Rather than taking a cue from the Supreme Court's focus on the element of intent, the public prosecutor in the district of Muhanga decided to prosecute a radio presenter on grounds of genocide denial for misspeaking while reading the news.[17] To complicate matters further, the Supreme Court itself, in an interim judgment in the prosecution of opposition politician Victoire Ingabire, stated that the 2008 Law Related to the Punishment of Genocide Ideology (the "2008 Law")[18] was not in violation of Rwanda's Constitution,[19] a ruling seemingly inconsistent with its earlier findings in April 2012.

¶5 This has led to even greater uncertainty as to what the crime of "genocide denial" or "genocide minimisation" entails. One particular point of concern is that the current state of affairs leaves open the possibility for almost anyone to exploit these laws to their advantage. A reform process of the genocide denial laws was set in motion in 2010 by the National Law Reform Commission.[20] The reform effort gained traction in July 2013 with the National Assembly passing a draft revision of the 2008 Law, which was passed by a joint National Assembly and Senate committee in August, just before the closure of Parliament.[21] Despite the praise the 2013 Law received from the national press,[22] the

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[14] The Constitution, supra note 4, art. 190.

[15] Amnesty Int'l, Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism' (2010), http://www.amnesty.org/en/library/asset/AFR47/005/2010 [hereinafter Safer to Stay Silent]. The report cites government statistics showing the "genocide ideology" cases before courts of first instance numbered 792 in 2007, 618 in 2008, and 435 in 2009. The government statistics do not specify the law under which charges were brought, nor do they provide data on convictions, acquittals, and sentences. The Genocide in Rwanda: The Difficulty of Trying to Stop it from Happening Ever Again, The Economist, (Apr. 8, 2009), http://www.economist.com/node/13447279.

[16] Safer to Stay Silent, supra note 15, at 19.

[17] Le Ministere Public v. Habarugira, Judgment No. CE 30/07/2012 (Muhanga First Instance Ct. Aug. 22, 2012) (unpublished opinion on file with author).

[18] The 2008 Law, supra note 7.

[19] Le Ministère Public v. Ingabire, Judgment No. RP 0081-0110/10/HC/KIG (High Ct. of Kigali Oct. 20 2012) [hereinafter the Ingabire Judgment].

[20] Rwanda: Senate Endorses Law Reform Commission, All Africa (Nov. 11, 2009), http://www.allafrica.com/stories/200911110004.html ("The Commission will be in charge of scrutinizing laws to avail room for proposals to concerned authorities that can amend and ratify the laws," quotes a parliamentary statement).

[21] The National Assembly passed the 2013 bill on Genocide Ideology and Related Offences on July 15, 2013. The bill passed the Senate on August 13, 2013 (copy of the law on file with the author).

[22] James Karuhanga, MPs Discuss Evictions of Rwandans, The New Times, (Aug. 14, 2013), http://www.newtimes.co.rw/news/index.php?a=69529&i=15449.

revisions the law brings do not seem adequate to counter the aforementioned concerns,[23] which leaves open the question if this process should be given further impetus, and what measures can be taken in the meantime to prevent unjustified prosecutions.

¶6 This article begins with a brief description of the genocide denial laws and their legislative history in Section II, followed in Section III by a discussion of the case against the two female Rwandan journalists, Agnès Uwimana-Nkusi and Saidati Mukakibibi, and the resulting Supreme Court judgment. Section IV offers reflections on the Supreme Court's 2012 ruling and its aftermath, and Section V discusses possible avenues of reform. Section VI highlights developments since the Supreme Court ruling and Section VII concludes by raising the question whether the current situation is sustainable.

II. RWANDA'S GENOCIDE DENIAL LAWS

¶7 In 2003 and 2008, Rwanda passed laws nominally aimed at curbing the crimes of genocide and genocide ideology respectively. The 2003 law went beyond the Parliament's stated intention of codifying international commitments. The law made it criminal to minimize, negate, or justify the genocide. The 2008 law outlines the crime of genocide ideology. Both laws have been criticized for their vague terminology, which fails to describe in precise terms what behavior does and does not incur criminal liability.

¶8 Rwanda's genocide denial laws cannot be isolated from their historical backdrop; the killing in 1994 of an estimated 800,000 Tutsi and so-called "moderate" Hutu has cast a long shadow that can still be sensed in Rwanda today. The genocide took place alongside the armed conflict between the Rwandan government forces and the Rwandan Patriotic Front (RPF), a conflict that lasted from October 1990 until July 1994.[24] To understand the context in which the genocide ideology laws came into existence, it is important to note the crucial role the media played in the 1994 genocide, both before and during the killings. A 2009 study by the Harvard Kennedy School of Government estimates that 10% of the perpetrators, an estimated 51,000 people, participated in the violence as a direct result of propaganda transmitted by the infamous Radio Télévision Libre des Mille Collines.[25] Formal judicial recognition of the role of the media in the killings had already come in 2003, in the so-called "Media Trial," when the International Criminal Tribunal for Rwanda convicted Ferdinand Nahimana and Jean Bosco Barayagwiza, who were in charge of Radio Télévision Libre des Mille Collines, and Hassan Ngeze, the director and editor of the newspaper Kangura, of genocide, incitement to genocide, and crimes against humanity.[26] The loss of faith in the media due to the

[23] Human Rights Watch has welcomed some amendments in the draft laws proposed in the last two years, including reductions in sentences and a more precise definition of some offenses, but has criticized the retention of vague language which the organization calls "ripe for abuse." Hum. Rts. Watch, World Report 2012: Rwanda (2012), http://www.hrw.org/world-report-2012/world-report-2012-rwanda.

[24] For an extensive discussion of the abuses committed by the parties to the Rwandan Civil War, see Organization for African Unity, Rwanda: The Preventable Genocide (2000), http://www.refworld.org/pdfid/4d1da8752.pdf.

[25] David Yanagizawa-Drott, Propaganda and Conflict (2009), http://www.hks.harvard.edu/fs/dyanagi/Research/RwandaDYD.pdf.

[26] Prosecutor v. Nahima, Barayagwiza, & Ngeze, Case No. ICTR-99-52-T, Judgment and Sentence, (Int'l Crim. Trib. for Rwanda Dec. 3, 2003).

culpability of key media outlets has led to an environment conducive to strict regulation of freedom of expression.[27]

¶9 After the genocide, as part of an effort to demarcate itself from the policies of its predecessor and prevent a recurrence of ethnic violence, the new Rwandan government encouraged Rwandans to abandon their ethnic affiliation by means of speeches and the establishment of a special commission.[28] It also sought to root its new vision of an ethnicity-neutral state in law. The first step was Law No. 47/2001 on Sectarianism,[29] a 2001 law that proscribed acts of discrimination and "sectarianism" by prohibiting "the use of any speech, written statement or action that divides people, that is likely to spark conflicts among people, or that causes an uprising which might degenerate into strife among people based on discrimination."[30] The law has led to a considerable restriction of expression, going as far as a *de facto* criminalization of the use of the words "Hutu" or "Tutsi," the two predominant ethnic identities in Rwanda.[31]

¶10 Two years later the effort to reduce ethnic "divisions" was revisited. The Constitution of Rwanda, which was enacted in 2003, lists the fighting of "genocide ideology" as an explicit goal in its preambular paragraphs and "fundamental principles."[32] The Constitution's Preamble states that the People of Rwanda are "resolved to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions," while article 9, part of the chapter on "Fundamental Principles," states that:

> The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof
>
> 1. fighting the ideology of genocide and all its manifestations;
> 2. eradication of ethnic, regional and other divisions and promotion of national unity.

¶11 Article 13 of the Constitution states that "[r]evisionism, negationism and trivialisation of genocide are punishable by the law"[33] and article 33 says that the same applies to "propagation of ethnic, regional, racial or discrimination or any other form of division."[34] Succinct and decisive as these statements may seem, they do not make clear what "genocide ideology" or "negationism" entails or what the implications are of the "mission statement" outlined in the Constitution's preamble.

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[27] Rwanda ranks 161 of 179 countries in the 2013 Reporters Without Borders' World Press Freedom Index. Reporters Without Borders, supra note 5. Independent of the 2003 and 2008 laws, Rwanda's media regulations have been criticized. The latest media law, Law N°02/2013 on regulating media, for example, has been critiqued by the human rights group Article 19 for its lack of clarity, failure to protect sources, content restrictions, and continuation of centralized control of media outlets.

[28] Lars Waldorf, Revisiting Hotel Rwanda: Genocide Ideology, Reconciliation, and Rescuers, 11 J. of Genocide Research 101, 103 (2009).

[29] Law No. 47/2001, Instituting Punishment for the Offences of Discrimination and Sectarianism, Official Gazette of Rwanda, Dec. 18, 2001 [hereinafter the 2001 Law].

[30] Id. art. 1(2).

[31] Waldorf, supra note 28, at 103.

[32] The Constitution, supra note 4, Preamble, art. 9.

[33] Id. art. 13.

[34] Id. art. 33.

¶12 The Constitution's propensity to inhibit freedom of expression has been widely condemned by numerous authors and NGOs[35] and contradicts other provisions of the Constitution that explicitly guarantee freedom of expression (see Section IV). Peter Uvin, an expert on conflict and human rights in Africa who has published extensively on Rwanda and Burundi, asserted at the time the Constitution was drafted that the effective suppression of organized political dissent and the centralized control of the judiciary "guaranteed a continuation of the current regime in power" and that limitations on free speech provided "enormous opportunities for abuse."[36] A European Union mission team warned that provisions of the Constitution "limit the freedoms of expression and association, as well as party political activities."[37] These identified shortcomings have left few constitutional barriers to laws impeding free speech.

¶13 The first law addressing genocide to follow the Constitution was Law No. 33 bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes. It was adopted a few months after the Constitution in 2003.[38] The 2003 Law was intended to provide sanctions for crimes related to those listed in a number of international conventions Rwanda became party to, including the 1948 Genocide Convention.[39] However, the law goes much further than a mere prohibition of the crime of genocide:[40] Article 4 creates a penalty of 10 to 20 years for any person who: will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence. [41]

¶14 This wording itself is very broad, covering an endless variety of imaginable acts. Article 17(3) of the law casts a wider net still by making also unsuccessful attempts to incite others to commit any crime under the law punishable as though the crime had actually been committed.[42] So not only is denying the genocide an offense, "incitement, by way of speech, image or writing, to commit . . . such a crime, even where not followed by an execution"[43] is as well. However, it is not clear how incitement to deny the genocide can be proven when the person allegedly incited did not eventually display any signs of "genocide denial". Nor is it clear what "rudely minimising" the genocide entails. Even the judiciary has found the law difficult to interpret. One judge told Amnesty

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[35] See, e.g., Peter Uvin, Rwanda's Draft Constitution: Some Personal Reflections On Democracy and Conflict and the Role of the International Community (2003), http://repositories.lib.utexas.edu/bitstream/handle/2152/5305/2601.pdf?sequence=1; Casey Dalporto, Genocide Ideology Laws: Violations of Rwandan Peoples' 'Peoples' Rights'?, 20 Cardozo J. Int'l & Comp. L. 875 (2012); Hum. Rts. Watch, Law and reality, Progress in Judicial Reform in Rwanda (2008), http://www.hrw.org/reports/2008/rwanda0708/rwanda0708webwcover.pdf [hereinafter the Human Rights Watch Report]. See also Filip Reyntjens, Rwanda, Ten Years On, 103 African Affairs 177 (2004).

[36] Uvin, supra note 36, at 1, 5.

[37] Reyntjens, supra note 36, at 185 (as translated from French by Rentjens).

[38] The 2003 Law, supra note 7.

[39] Rwanda acceded on Apr. 16, 1975.

[40] The 2003 Law, supra note 7, art. 1.

[41] Id. art. 4.

[42] "Without prejudice to the provisions of the Penal Code relating to the attempt and criminal participation, the following acts shall be punished by penalties provided for by this law: 1° an order, even where not followed by an execution, to commit one of the crimes referred to by this law; 2° a proposal or an offer to commit such a crime and the acceptance of such a proposal or offer." Id. art 17.

[43] Id.

International that the definitions in the 2003 Law were "broad" and "not scientific," although he ultimately defended the law's use.[44] A retired judge complained of difficulties in applying the law because of the abstract nature of the language used.[45] This underlines an important problem of the genocide denial laws: judges have been left with broad discretion in implementing abstract concepts in an important piece of legislation. This will be further highlighted by the case study discussed below.

¶15 The 2003 Law was critically received. Human Rights Watch criticized its passage and reported that "[n]either the constitution nor the 2003 law provided specific definitions of the terms 'revisionism,' 'denial' or 'gross minimization.'" The report went on to say "[w]hen asked to define 'divisionism,' not one judge interviewed by Human Rights Watch researchers was able to do so."[46] On the other side of the debate, however, were people such as Rwanda's Prosecutor General Martin Ngoga, who strongly defended the law and stressed that many European countries had similar laws on their books.[47] In spite of the international criticism, the laws were positively received in the pro-government Rwandan press.[48]

¶16 Several years later, Law No. 18/2008 Relating to the Punishment of the Crime of Genocide Ideology was introduced.[49] It defines "genocide ideology" in article 2 as "an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war."[50] Article 3 outlines what type of behavior "characterises" the crime of genocide ideology:

1. threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred;
2. marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading, creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;
3. killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.[51]

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[44] Safer to Stay Silent, supra note 15, at 18.
[45] Id.
[46] Id.; Human Rights Watch Report, supra note 35.
[47] Martin Ngoga, Why Rwanda Needs the Law Repressing Genocide Ideology, Umuvugizi (June 4, 2011), http://www.http://umuvugizi.wordpress.com/2011/06/04/why-rwanda-needs-the-law-repressing-genocide-denial-and-ideology/. Zachary Pall has written on this point, contrasting the much more restrained use of parallel legislation in Germany with the scale of prosecutions seen in Rwanda. Zachary Pall, Light Shining Darkly: Comparing Post-Conflict Constitutional Structures Concerning Speech and Association in Germany and Rwanda, 42 Colum. Hum. Rts. L. Rev. 5 (2011).
[48] See, e.g., Ignatius Ssuuna & James Buyinza, New Law to Fight Genocide Ideology, The New Times (Mar. 23, 2008), http://www.newtimes.co.rw/news/index.php?i=13478&a=1021.
[49] The 2003 Law, supra note 7.
[50] Id. art. 2.
[51] Id. art. 3.

¶17 These broadly defined activities could lead to imprisonment of anywhere between 10 and 25 years and there is a considerable fine as well.[52] If the "genocide ideology" was spread "through documents, speeches, pictures, media or any other means," the minimum penalty starts at 20 years, going up to 25.[53] In other words, genocide ideology committed by the media or politicians incurs heavier punishment as a matter of course.

¶18 This law, like the 2003 Law, was very critically received. Amnesty International reported "[t]he [2008] law constitutes an impermissible restriction on freedom of expression under international law," warning that the law "criminalizes dissenting voices" and has been used against leaders of opposition political parties.[54] The report also documented cases where the law was used to settle personal vendettas, including by students to discredit teachers and by individuals to gain the upper hand in property disputes.[55] Human Rights Watch expressed similar concerns, citing interviews with jurists who asserted that the law was frequently used to serve political and personal interests.[56] A high-profile example of this practice is the prosecution of Victoire Ingabire. Returning to Rwanda from exile after 16 years, she had hoped to stand against President Kagame in the 2010 elections. However, shortly after she set foot in the country, Ms. Ingabire was criminally prosecuted for, amongst other things, genocide ideology charges under the 2008 Law. The charges were based on her call for the prosecution of war crimes committed by RPF members during the 1994 genocide. Her party was refused registration, which made it impossible to participate in the elections. Ultimately, Kagame went on to obtain 93.08% of the vote.[57]

¶19 Though the 2003 and 2008 laws were enacted consecutively, there are good arguments to consider them as interconnected. Both laws—together with the Constitution—try to grapple with the genocide legacy by creating a framework in which a repeat of the events of 1994 can be prevented and the memory of the genocide is dealt with in a respectful manner. The 2003 and 2008 Law have both sought to clarify the mandate set in the Constitution, with the 2008 Law trying to fill the gaps left by the 2003 Law. The April 2012 judgment of the Rwandan Supreme Court also makes a link between the 2003 and 2008 laws, as will be discussed in the following Section.

¶20 A more disconcerting feature that the 2003 and 2008 laws and the Constitution share is a clear lack of specificity: it is manifestly unclear on the face of the text of the laws what type of behavior does and does not fall within their scope. As will be discussed in Section IV, the almost unfettered discretion this leaves for the State to prosecute under these laws is in clear violation of Rwanda's obligation under international law. René Lemarchand, a French US-based political scientist who is known for his research on ethnic conflict and genocide in Rwanda, Burundi, and Darfur, has said of the 2003 Law, "So vague and all-embracing is the language of the law as to give the courts

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[52] Id. art. 4.

[53] Id. art. 8 (Penalties for disseminating genocide ideology: any person who disseminates genocide ideology in public through documents, speeches, pictures, media or any other means shall be sentenced to an imprisonment from twenty (20) years to twenty-five (25) years and a fine of two million (2.000.000) to five million (5.000.000) Rwandan francs.).

[54] Safer to Stay Silent, supra note 15, at 20.

[55] Id. at 24.

[56] Human Rights Watch Report, supra note 35, at 40.

[57] Election Data, National Electoral Commission of Rwanda, http://www.nec.gov.rw/detials/?tx_ttnews[tt_news]=49&cHash=7990f6c09f43eeeafb70dcb38a2dbd56.

extraordinary latitude to indict suspects on the flimsiest grounds."[58] The use of "genocide denial" charges even before the relevant laws were enacted[59] to prosecute and jail an alarmingly large number of people[60] makes it difficult not to draw the conclusion that this concern is justified and that these laws are sometimes used to serve an entirely different agenda than officially suggested.

III. The Cases Against Agnès Uwimana-Nkusi and Saidati Mukakibibi

A. The Case at First Instance

¶21 Agnès Uwimana-Nkusi and Saidati Mukakibibi were arrested in July 2010. They both wrote for the biweekly publication Umurabyo, a Kinyarwanda-language newspaper with a circulation estimated at 100-150 copies per issue, of which Ms. Uwimana-Nkusi also was the editor. In the course of 2010, Ms. Uwimana-Nkusi and Ms. Mukakibibi had published a number of articles raising critical questions about, amongst other things, the government's agricultural policies, its handling of corruption by high-ranking government officials, and human rights violations in the country. Prior to her arrest and detention in 2010, Ms. Uwimana-Nkusi had been imprisoned in 2007 for publishing material critical of the government.[61] In that year, she was still working for Umuseso, a Kinyarwanda-language weekly newspaper. Underlying her 2007 conviction was the publication of an anonymous letter that had allegedly been written by a former member of the RPF.[62] Without the assistance of legal counsel, Ms. Uwimana-Nkusi pled guilty to charges of defamation and divisionism. In exchange for this plea bargain she served one year in prison instead of five.[63] She was released in January 2008.[64]

¶22 In early July 2010, Ms. Uwimana-Nkusi was arrested without warning, when she was on her way to visit family members.[65] When hearing about the arrest one day later, Ms. Mukakibibi went to the police station in Kigali to offer assistance. When she arrived at the station, she was arrested on the spot.[66] Both journalists were held for a week without being informed of the charges against them.[67] Another Umurabyo contributor,

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[58] René Lemarchand, Genocide, Memory and Ethnic Reconciliation in Rwanda 25 (2006), http://www.ua.ac.be/objs/00178894.pdf.

[59] These charges are in violation of Rwanda's Constitution. The Constitution, supra note 7, art. 20 (Nobody shall be punished for acts or omissions that did not constitute an offence under national or international law at the time of commission or omission. Neither shall any person be punished with a penalty which is heavier than the one that was applicable under the law at the time when the offence was committed.).

[60] See Safer to Stay Silent, supra note 15, for a discussion of the number of cases.

[61] In Rwanda, Newspaper Director Jailed for Publishing Critical Letter, Comm. to Protect Journalists (Jan. 16, 2007), http://cpj.org/2007/01/in-rwanda-newspaper-director-jailed-for-publishing.php.

[62] Id.

[63] In Rwanda, Publication of a Letter Draws a Prison Term, Comm. to Protect Journalists (Apr. 20, 2007), http://cpj.org/2007/04/in-rwanda-publication-of-a-letter-draws-a-prison-t.php; Newspaper Editor Freed After She Completes One-year Prison Sentence, Reporters Without Borders (Jan. 1, 2008), http://archives.rsf.org/print.php3?id_article=25133.

[64] Id.

[65] This information was conveyed to the author through personal conversations with Ms. Uwimana-Nkusi and Ms. Mukakibibi.

[66] See text accompanying footnote 66.

[67] See text accompanying footnote 66.

who was a graphic designer, was initially arrested as well in connection with an image that appeared with one of the articles for which the other two journalists had been arrested, portraying President Kagame with a large swastika looming over him.[68] He was released after explaining that the image in question had not been manipulated in any way: the photo had in fact been taken during a visit by President Kagame to Jerusalem's Holocaust History Museum at Yad Vashem in 2008.[69]

¶23 The journalists were denied bail twice due to the serious nature of the charges against them[70] and tried before the High Court of Kigali. Ms. Uwimana-Nkusi was charged and convicted for four separate charges, on the basis of four articles she wrote for Umurabyo: threatening national security (on grounds of article 166 of the Rwandan Penal Code),[71] genocide minimization (article 4 of the 2003 Law),[72] defamation of the President (article 391 of the Rwanda Penal Code),[73] and divisionism (article 1 of the 2001 Law on Sectarianism).[74] Ms. Mukakibibi was charged and convicted for threatening national security on the basis of one article published in Umurabyo.[75] She was acquitted of the divisionism charge that had also been brought against her on the basis of the same article.[76]

¶24 The conviction for genocide minimization was related to an article Ms. Uwimana-Nkusi had written for Issue Number 21 of Umurabyo, published in May 2010.[77] In the article, she described the division between ethnic groups within Rwandan society since the distinction between Hutu, Tutsi, and Twa was introduced by the colonial power, and the subsequent favoritism for a different group by each presidential administration. Ms. Uwimana-Nkusi pointed out that there was not only "ethnicism" in the country, but also "regionalism." She then wrote that "Rwandans lived for a long time with this hatred until they ended up killing each other after [former President] Kinani [Habyarimana]'s death."[78]

¶25 It was the "killing each other" wording that was considered as minimizing the genocide. In its judgment, the High Court first discussed Ms. Uwimana-Nkusi's defense. She had argued that the Prosecution had not taken into account the full article and that her words had to be understood in their proper context.[79] Ms. Uwimana-Nkusi further stressed that she had no intention of minimizing the genocide; rather, she fully acknowledged it had taken place and had written as much in a number of articles published in Umurabyo.[80] The High Court alleged that Ms. Uwimana-Nkusi's defense

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[68] Le Ministère Public v. Uwimana Nkusi and Mukakibibi, Case No. RP 0082/10/HC/KIG, ¶ 48 (High Court of Rwanda, Jan. 4, 2011) (unpublished case on file with author) [hereinafter the High Court Case].
[69] Id. (The graphic designer was released without charge and Ms. Uwimana-Nkusi was acquitted of this charge by the High Court).
[70] See text accompanying footnote 66.
[71] Code Pénal du Rwanda [Penal Code], art. 166 (1977).
[72] The 2003 Law, supra note 7.
[73] Code Pénal du Rwanda [Penal Code], art. 391 (1977).
[74] The 2001 Law, supra note 29.
[75] Code Pénal du Rwanda [Penal Code], art. 166 (1977); Saidati Mukakibibi, King Kigeli is the Solution, Umurabyo (Jul. 19, 2010).
[76] The High Court Case, supra note 68, ¶¶ 72-77.
[77] Agnès Uwimana-Nkusi, Kagame in Difficult Times, Umurabyo (May 15, 2010).
[78] Id.
[79] The High Court Case, supra note 68, at ¶ 43.
[80] Id.

was that her article intended to show that when the Tutsi were attacked, they fought back to defend themselves, "leading to both sides engaging in fighting and killing."[81] The High Court disagreed with this point of view and stated:

¶26 Uwimana-Nkusi Agnes claims that hatred between Rwandans grew, which led to them killing each other. The High Court has found that here she has shown that it was hatred that caused the killings, and this is not true as there was an intention of exterminating the Tutsis. The defendant intentionally minimises the genocide in her article, since before the Court she admitted that genocide took place against the Tutsis and that killings did not occur from both sides.[82]

¶27 After citing the judgment of the International Criminal Tribunal for Rwanda ("ICTR") in the Media Trial[83] to illustrate what was intended by "the crime of genocide"—namely, "committing atrocities against Tutsis with the intent to exterminate them"[84]—the Court found Ms. Uwimana-Nkusi guilty of genocide minimization, adding to its motives to do so that "she knew that, on publishing the article, it would reach many Rwandans, as her newspaper *Umurabyo* is published biweekly."[85] The fact that circulation of the newspaper was only around 100 to 150 per edition was not mentioned by the Court.

¶28 For the genocide minimization charge, Ms. Uwimana-Nkusi was convicted to 10 years' imprisonment and a fine. She further received a five-year prison sentence for threatening national security, a one-year sentence and a fine for divisionism, and a one-year sentence for defaming the President.[86] In total, she was sentenced to 17 years of imprisonment, to be served consecutively.[87] Ms. Mukakibibi received a sentence of seven years of imprisonment for having threatened national security.[88]

B. The April 2012 Supreme Court Ruling

¶29 An appeal was lodged with the Supreme Court of Rwanda, which heard the case on January 30 and 31, 2012. The case received wide attention from both the national and international media and various NGOs.[89] The journalists were represented in court by an international team of lawyers, who argued points of Rwandan law as well as comparative

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[81] Id.
[82] Id. ¶ 44.
[83] See Prosecutor v. Nahima, Barayagwiza, & Ngeze, supra note 26.
[84] The High Court Case, supra note 68, ¶ 45.
[85] Id.
[86] Id. ¶ 85.
[87] Id. The Court saw no reason to hand down a lighter penalty due to Ms. Uwimana-Nkusi's ill health or the fact that the Media High Council which also brought proceedings against her had come to a settlement with her. Id. ¶¶ 79-84.
[88] Id. ¶ 90.
[89] See, e.g., Rwanda Journalists Jailed for Genocide Denial Launch Supreme Court Appeal, The Guardian (Jan. 29, 2012), http://www.guardian.co.uk/world/2012/jan/29/rwanda-journalists-genocide-denial-appeal; Procès en appel de Deux Journalistes Condamnées pour Avoir Nié le Genocide, RFI (Jan. 30, 2012), http://www.rfi.fr/afrique/20120130-proces-appel-deux-journalistes-condamnees-avoir-nie-le-genocide; Jailed Rwanda Journalists' Prison Terms Cut, Associated Free Press (Apr. 5, 2012), http://www.google.com/hostednews/afp/article/ALeqM5i5kUIbrZWI-cs1LB4d2SSur-PVyQ?docId=CNG.ece3e53648ded978749d9b29e939c905.4f1. In a landmark decision, the court allowed amicus curiae submissions from Article 19 and Avocats Sans Frontières.

law standards from the region, generally accepted norms of international criminal law, and international human rights law.

¶30 When considering the appeal against the genocide minimization conviction, the Supreme Court in its judgment first focused on the meaning of the Kinyarwanda word "gutemagurana". According to Ms. Uwimana-Nkusi, the term should be read as meaning "killing each other with machetes." The Prosecution, however, insisted that the term implied that a "civil war" had occurred, rather than genocide.[90] The Court first quoted article 4 of the 2003 Law[91] and then continued:

> This article does not explain clearly the acts constituting the crime of genocide minimisation. It only shows the denial of genocide can be punished when it is made public either through speech, writing, image or photo or any other way. The Supreme Court has never taken a decision in a trial explaining what it means to minimise the genocide. The Rwandan dictionary also does not give an explanation of what is 'the minimisation of genocide.'[92]

¶31 The Court then reflected on the concept of genocide minimization, present in both the 2003 Law and the 2008 Law:

> However, in the current language of Kinyarwanda 'gupfobya' means giving something minimal worth it does not deserve. This idea is developed in the law project on the criminalisation of genocide ideology in which it says: 'The minimisation of genocide is any behaviour exhibited publicly and intentionally in order to reduce the weight or consequences of the genocide against Tutsis, minimise how the genocide was committed, alter the truth about the genocide against the Tutsis in order to hide the truth from the people; asserting that there were two genocides in Rwanda: one committed against the Tutsis and the other against Hutus.[93]

¶32 The Court then turned towards the Holocaust, and cited examples of instances where asserting that there had been acts of mutual killing in that context was considered genocide denial.[94] According to the Supreme Court, this was what the Prosecution relied upon when bringing the charge in question against Ms. Uwimana-Nkusi and, according to the Court, it had been right in doing so:

> On this, the court finds that the Prosecution is correct in stating that presenting the genocide against Tutsis as an act of 'gutemagurana' between Rwandans is an act of genocide minimisation, because the word 'gutemagurana' minimises the horrible programme that the government had in place in 1994 to definitively exterminate Tutsis in Rwanda. In fact,

[90] The 2012 Judgment, supra note 11, ¶¶ 43-46.
[91] The 2003 Law, supra note 7.
[92] The 2012 Judgment, supra note 11, ¶ 48.
[93] Id. ¶ 48.
[94] Id. ¶ 49.

> the genocide in Rwanda against Tutsis in 1994 does not merit generating discussion in Rwanda particularly given that this is no longer a subject of debate at the international level since the International Criminal Tribunal for Rwanda (ICTR) has made a decision on various cases.[95]

¶33 While the Court found that the use of the word "gutemagurana" in effect minimized the genocide, it continued by stating that, in using it, Ms. Uwimana-Nkusi needed to have intended it as such:

> [F]or the crime of genocide minimisation like all other crimes, a person may be convicted for the crime when it is proven that he intended to commit it; this means that by using the word 'gutemagurana', she intended to say that the genocide committed against Tutsis has not occurred, that there were no acts to exterminate the Tutsis, that rather Rwandans of all ethnicities were killing each other with each ethnic group having the intention of eliminating the other.[96]

¶34 Looking at the article in question, as well as others written by Ms. Uwimana-Nkusi, the Supreme Court came to the conclusion that such intent was absent. It cited extensively from these other publications, which referred to the genocide as the killing of Tutsis as intended by the regime.[97] Finally, the Court concluded its considerations as follows:

> [T]he Supreme Court finds that the use of the word 'gutemagurana' in the sense of the genocide committed against Tutsis is effectively a proposition that minimises the genocide. The use of this word is like so many others often used inappropriately to justify the genocide committed against Tutsis, notably the following statements: this happened during the war, the tragedy known in Rwanda, sectarian conflict . . . are about the minimisation of the genocide that people should avoid using as they can in the future grow to devalue the genocide against Tutsis. However, what the use of this terminology may be, in order for those who used it to be punishable under Article 33bis/2003 Law of the law against genocide, crimes against humanity and war crimes, there must be evidence proving that he who committed it recognises and had the intention to convince others that he does not acknowledge the genocide committed against Tutsis. Having said that, Uwimana-Nkusi Agnes did not have this intention as has been explained. The court therefore acquits her on this count.[98]

¶35 The Supreme Court judgment points to what has been described as the "one truth" concept: only a certain version of events can be considered as "true" when it comes to the

[95] Id. ¶ 50.
[96] Id. ¶ 51.
[97] Id. ¶¶ 52-55.
[98] Id. ¶ 56.

genocide.[99] The Court's findings unfortunately leave important points unresolved. While the Court starts by acknowledging that the 2003 Law is unclear in defining the exact meaning of genocide minimization, the Court then fails to clarify the law's meaning in even general terms, even though the Court itself points out this lacuna in its case law so far. This was a missed opportunity to better shape the contours of a legal concept that is highly opaque.

¶36 The Court does make clear that there has to be intent on the part of the accused, and the decision in Ms. Uwimana-Nkusi's case seems to imply that even the use of "wrong" terminology can fall outside the realm of the 2003 Law. Given the link the Supreme Court makes in its judgment between the 2003 and 2008 Law by discussing the concept of genocide minimization, which is present in both laws, in general terms, this arguably applies to the 2008 Law as well. The Court's considerations on this point would also be in conformity with the generally recognized legal principle requiring *mens rea* for criminal liability.[100]

¶37 So while the Supreme Court's reasoning is not very clear overall, it does provide guidance on two points. First, the Court's judgment is an authoritative statement that acknowledges that the concept of genocide minimization, and in particular the wording of the 2003 Law, lacks precision. Second, the Court clearly stated that intent has to be proven to find someone guilty of genocide minimization. A less explicit point the judgment makes, which is implied by the Court's considerations and supported by the legislative history of the laws,[101] is that the 2003 and 2008 laws are interlinked. Arguably, the Supreme Court's findings on lack of specificity in the 2003 Law as well as the necessity for the element of intent to establish culpability stretch to the 2008 Law as well. The recently adopted changes to the 2008 Law appear to support this (see Section V).

¶38 The Supreme Court judgment resulted in an acquittal for Ms. Uwimana-Nkusi on the charges of genocide minimization and divisionism[102] and a reduction of her sentence for threatening national security from five to three years.[103] Her conviction for defaming the President remained standing.[104] In total, Ms. Uwimana-Nkusi was left with four years to serve instead of 17, with a deduction of time served. Ms. Mukakibibi's sentence was reduced from seven to three years; the Court found that, since both journalists were

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[99] Human Rights Watch Report, supra note 35, at 36.

[100] The Supreme Court came to similar conclusions in the case against Deo Mushayidi. Mr. Mushayidi was the former head of the Association of Rwandan Journalists (ARJ) and Chairman of the Pact for People's Defence (PDP), a political party that was founded in Belgium and was active with Rwandans living abroad. After co-authoring a book, Secrets du Génocide Rwandais - Enquête Sur Les Mystères d'un Président" (The Secrets of the Rwandan Genocide - Investigation of the Mysteries of a President), he was accused of genocide revisionism and ideology. In September 2010, the High Court found Mr. Mushayidi guilty of threatening state security through means of war, spreading propaganda and using a forged passport. He was, however acquitted of promoting genocide revisionism because the element of intent was missing. See Le Ministère Public v. Mushayidi, Case No. 0040/10/HC/KIG (H.C. Sept. 17, 2010), http://www.judiciary.gov.rw/uploads/tx_publications/Microsoft_Word_-_MUSHAYIDI_Deo_Last.pdf. The Supreme Court upheld the High Court's decision in February 2012. See Le Ministère Public v. Mushayidi, Case No. 0298/10/CS (S.C. Feb. 28, 2012), http://www.judiciary.gov.rw/en/cases/judgements/?subcat=153.

[101] See Section II supra.

[102] The 2012 Judgment, supra note 11, ¶¶ 57-67.

[103] Id. ¶ 77

[104] Id. ¶ 78.

charged for the same crime in the same trial, namely threatening national security under article 166 of the Penal Code, each should receive the same penalty.[105] Ms. Mukakibibi's remaining term was also reduced by time served.[106] Ms. Mukakibibi was released in June 2013, while Ms. Uwimana-Nkusi's release is scheduled for the summer of 2014.

¶39 The journalists have since appealed to the African Commission on Human and Peoples' Rights, arguing a violation of their fair trial rights and challenging the convictions upheld by the Supreme Court, which they contend violate their right to freedom of expression.[107]

IV. The Shortcomings of the Genocide Denial Laws and the Supreme Court Ruling

¶40 As discussed in the previous section, the Supreme Court's April 2012 judgment showed that the concept of "genocide minimisation" under Rwandan law is not clear. It also confirmed that the judiciary had not yet clarified the concept and that the Supreme Court refrained from filling this void. The judgment also made clear that mere use of certain words or terminology could be considered a constitutive element of the offense. However, in order to qualify as a crime under the 2003 Law, the element of intent was required to find someone guilty of having committed the act. This section will discuss the shortcomings of the genocide denial laws, as confirmed by the Supreme Court ruling and as measured by the standard of Rwanda's obligations under international law. Section V will discuss the options for remedying these shortcomings, after which the developments after the 2012 Supreme Court decision will be highlighted in Section VI.

¶41 As previously mentioned, the reasoning of the Supreme Court is not entirely clear and leaves some important questions unanswered. However, the Court's statement that the genocide minimization concept lacks precision and the emphasis it placed on the element of intent are significant findings that can be taken as markers for the manner in which the genocide denial laws should be applied. It also raises the question of whether the laws' continued existence in their current form is sustainable.

¶42 The lack of precision of the genocide denial laws, as confirmed by the Supreme Court judgment, is relevant to the obligations regarding freedom of expression that Rwanda has under its own Constitution. It is also linked to the obligations Rwanda incurs under the international human rights treaties it has ratified, upon which the Constitution confers supremacy over Rwanda's national laws. The most relevant treaties in this regard are the African Charter on Human and Peoples' Rights (the "African Charter")[108] and the International Covenant on Civil and Political Rights (the "ICCPR").[109]

¶43 The Rwandan Constitution guarantees the right to freedom of expression in articles 33 and 34:

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[105] Code Pénal du Rwanda [Penal Code], art. 166 (1977).
[106] The 2012 Judgment, supra note 11, ¶ 80.
[107] African Comm'n on Hum. And Peoples' Rts., Comm'n No. 426 (2012) (as yet unpublished since the case is currently ongoing).
[108] African Charter on Hum. and Peoples' Rts., Jun. 27, 1981, 21 I.L.M. 58 (1982) [hereinafter African Charter].
[109] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

> Article 33
>
> Freedom of thought, opinion, conscience, religion, worship and the public manifestation thereof is guaranteed by the State in accordance with conditions determined by law.
>
> Propagation of ethnic, regional, racial or discrimination or any other form of division is punishable by law.
>
> Article 34
>
> Freedom of the press and freedom of information are recognized and guaranteed by the State.
>
> Freedom of speech and freedom of information shall not prejudice public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life. It is also guaranteed so long as it does not prejudice the protection of the youth and minors.
>
> The conditions for exercising such freedoms are determined by law.[110]

¶44 The second sentence of article 33, making the propagation of discrimination punishable by law, can be considered an implementation of Rwanda's obligation under article 20 of the ICCPR,[111] while the second and third sentences of article 34, protecting public order, good morals, reputation, and privacy can be taken as an enactment of the restrictions to free expression allowed under article 19(3) ICCPR.[112] These permissible restrictions on the right to free expression will be discussed below.

¶45 In the Preamble of its Constitution, Rwanda reaffirms its adherence to the principles enshrined in the international treaties it is party to.[113] These include the African Charter and the ICCPR, both of which protect free expression. Expression, clearly, is what the genocide denial laws try to regulate. In Title X of the Constitution, which deals with international treaties and agreements, the supremacy of these treaties over Rwanda's own organic laws is codified in article 190:

> Article 190
>
> Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of parties.[114]

¶46 The implication of this constitutional provision is that Rwanda should adhere to the protection the African Charter and the ICCPR offer to free expression. Article 19 of the ICCPR clearly sets out the conditions under which free expression may be limited. These

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[110] The Constitution, supra note 7, arts. 33, 34.

[111] "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." ICCPR, supra note 110, art. 20.

[112] "1. Everyone shall have the right to hold opinions without interference." ICCPR, supra note 110, art. 19.

[113] "(b) For the protection of national security or of public order (ordre public), or of public health or morals." The Constitution, supra note 4, Preamble.

[114] Id. art. 190.

conditions are equally applicable under article 9 of the African Charter.[115] Limitations to the right to freedom of expression are only permitted if they are 1) prescribed by law; 2) necessary in a democratic society; and 3) serve a legitimate aim, which can be the protection of public morals, reputation, or national security. All three conditions have to be met or a limitation on free expression is not allowed. It is also important to mention in this context that articles 19(3) and 20 of the ICCPR, the latter of which places an obligation upon States Parties to proscribe hate speech in national legislation, are complementary.[116] Article 20 legislation should still meet the three-part test under article 19(3).[117]

¶47 The requirement that a restriction of free expression should be "prescribed by law" means that, first of all, there has to be legislation concerning the restriction, and second, that the law in question must have a sufficient level of precision. It should be sufficiently clear and precise to allow an individual to regulate his or her behavior; in other words it must be clear what is and is not allowed under the law.[118]

¶48 As shown in the discussion of the laws above in Section II, and as was confirmed by the Rwandan Supreme Court in its April 2012 ruling (Section III), the concept of "genocide minimisation" lacks the requisite level of precision. This is not to say that genocide denial laws as such cannot conform to the obligations set forth in article 19 ICCPR,[119] but rather that the laws must be drafted with appropriate clarity. If no one, not even the supreme judicial body in the country, can determine what exactly constitutes the offense, the conclusion is easily drawn that the genocide denial laws do not meet the "prescribed by law" criterion. This means that they constitute an impermissible restriction of free expression under the African Charter, the ICCPR, and also Rwanda's Constitution.

V. Possible Scenarios to Address the Genocide Denial Laws' Shortcomings

¶49 What are the options of moving forward with a law that is flawed, or, in fact, incompatible with a country's obligations under international law? The most obvious and solid remedy would be law reform, a revision of the law to bring it in accordance with the parameters of article 19(3) of the ICCPR as defined in the treaty itself and further refined in the case law of the U.N. Human Rights Committee.[120]

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[115] Like the ICCPR, the African Charter allows for limitations on expression only when certain conditions have been met. Resolution 62 of the African Union states these conditions as follows: "[a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society." African Comm'n, Res. 62, 32nd Sess., § II(2) (Oct. 17-23, 2002), http://www.achpr.org/sessions/32nd/resolutions/62/.

[116] Hum. Rts. Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011). See, e.g., U.N. Hum. Rts. Comm., J. R. T. and the W. G. Party v. Canada, Comm. No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 (July 18, 1981).

[117] General Comment No. 34, supra note 116, ¶ 50.

[118] Id. ¶ 25.

[119] For a discussion of how French genocide denial laws, and denial laws more generally, can be consistent with the aim of preserving democracy, see Sevane Garibian, Taking Denial Seriously, 9 Cardozo J. Conflict Resol. 479 (2008).

[120] For arguments that no genocide denial law should be found consistent with the right to freedom of expression, see Noam Chomsky, Preface: Some Elementary Comments on The Rights of Freedom of Expression, in Robert Faurisson, Mémoire en Défense (1980).

¶50 A process of reform for the genocide denial laws was formally announced in 2010.[121] In 2012 and 2013, two new laws were adopted to replace the 2003 and 2008 laws.

¶51 On June 14, 2012, a new Penal Code was adopted,[122] which included article 116 on "punishment of the crime of negationism and minimisation of the genocide against the Tutsi."[123] The text is practically identical to the provision on genocide minimization in the 2003 Law, except that it reduces the applicable penalty:

> Any person who publicly shows, by his/her words, writings, images, or by any other means, that he/she negates the genocide against the Tutsi, rudely minimizes it or attempts to justify or approve its grounds, or any person who hides or destroys its evidence shall be liable to a term of imprisonment of more than five (5) years to nine (9) years.
>
> If the crimes under paragraph one of this Article are committed by an association or a political organisation, its dissolution shall be pronounced.[124]

¶52 So, while the new Penal Code reduces the possible prison sentence for genocide minimization from somewhere between 10 and 20 years to a sentence of five to nine years, the text of the provision remains the same, including the shortcomings discussed in Section II.

¶53 The law replacing the 2008 Law was finally passed by a joint National Assembly and Senate committee on August 13, 2013, after draft bills languished in the legislature for several years (the "2013 Law").[125] While the reforms offered in the 2013 revision can be considered as a positive development, the law leaves much to be desired.

¶54 The 2013 Law adds two elements to the offense of "negation of genocide": the act must be in public and the act must be deliberate.[126] Both elements appear at first to be improvements over the 2008 Law, which allows for prosecution of comments made in private and lacks statutory language regarding intent. However, the 2013 Law in its current form defines "public acts" as any act that occurs in "a place accessible" by two or more people, offering little in the way of change.[127]

¶55 Also a matter of concern is the fact that the requirement in the text of the 2013 Law that an act must be "deliberate" is anything but clear. Article 5 requires that an act negating the genocide must be deliberate. The act of genocide denial is defined there as follows:

> Negation of genocide shall be any deliberate act, committed in public, aimed at:

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[121] The National Law Reform Commission, tasked with reviewing a number of Rwandan laws, was established by Law No. 01/2010/OL of 09/6/2010.
[122] Law No. 01/2012/OL, Instituting the Penal Code, Official Gazette of Rwanda, Jun. 14, 2012.
[123] Code Pénal du Rwanda [Penal Code], art. 116 (2012).
[124] Id.
[125] Law No. 84/2013, Law on the Crime of Genocide Ideology and Other Related Offenses, Official Gazette of Rwanda, Sept. 9, 2013.
[126] Id. art. 5.
[127] Id. art. 2(4).

> 1. stating or explaining that genocide is not genocide;
> 2. deliberately misconstruing the facts about genocide for the purpose of misleading the public;
> 3. supporting a double genocide theory for Rwanda;
> 4. stating or explaining that genocide against the Tutsi was not planned.
>
> Any person who commits an act defined by the preceding paragraph commits an offence of negation of genocide.[128]

¶56 A deliberate act is also required for "minimising" the genocide[129] as well as "justifying" the genocide.[130] However, what minimization exactly entails is all but clear. Article 6 of the 2013 Law states that anyone who "downplays the gravity or consequences of genocide" or "the methods through which genocide was committed' is guilty of minimization.[131] The precise elements of the crime remain undefined.

¶57 "Deliberate" is defined in article 2 as "willingly and with a desire to promote genocide ideology."[132] As such, the intent requirement ostensibly forces prosecutors to prove an act of negationism was committed with the intention of promoting genocide ideology. However, the only definition of "genocide ideology" given is as follows:

> Genocide ideology is any intentional act, done in public whether by oral, written or video means or by another means and through which may show that a person is characterized by ethnic, religious, nationality or racial-based with the aim to:
>
> 1. advocate for the commission of genocide;
> 2. support the genocide.[133]

¶58 Ostensibly, genocide ideology is an element of negationism under the 2013 Law. However, what constitutes genocide ideology remains elusive. Language such as "may show that a person is characterized by ethnic, religious, nationality, or racial-based" thought is vague,[134] leaving unturned concerns regarding prosecutorial discretion and abuse. Furthermore, if negationism has as an element the willing advancement of genocide ideology, it is unclear what differentiates crimes under article 5's "negationism" from "genocide ideology" as proscribed by article 3.

¶59 The law reform process indicates that the Government of Rwanda considers reform of its genocide denial laws necessary. However, in their current form, the laws still fall short of the requisite standards under international law, as described above. Considering that the Supreme Court also confirmed that there is need for more clarity on the matter, it

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[128] Id. art. 5.
[129] Id. art. 6.
[130] Id. art. 7.
[131] Id. art. 6.
[132] Id. art. 2(5).
[133] Id. art. 3.
[134] In a draft version of the law the sentence read ". . . nationality or racial-based thought," but the word "thought" was omitted from the English translation in the final publication. The French version, however, still refers to "des pensées basées sur l'ethnie, la religion, la nationalité ou la race".

might be opportune to implement interim measures to bridge the period until the necessary law reform has actually unfolded. This would prevent unjustified prosecutions and convictions under faulty laws. One option would be for the Minister of Justice and the Prosecutor General to issue prosecutorial guidelines, as allowed under articles 161 and 162 of the Constitution.[135] These guidelines could, for example, instruct Public Prosecutors to take heed of the Supreme Court's findings as well as Rwanda's obligations under article 19(3) of the ICCPR. By pointing out to the corps of Prosecutors that the genocide denial laws are formulated too broadly and informing them of the Supreme Court's guidance on the required element of intent, more careful decisions on prosecution can be taken.

¶60 Similar measures could be taken on the other side of the Bar, by issuing judicial guidelines, which would instruct lower courts to interpret and apply the laws in accordance with the Supreme Court's findings. Guidance could be offered by the High Council of the Judiciary through its General Assembly under Organic Law No. 06/2012/OL of 14/09/2012 Determining the Organisation, Functioning and Jurisdiction of Commercial Courts.[136]

¶61 Finally, the Supreme Court itself could set clearer standards through its decisions. Under the Constitution, the Supreme Court's jurisdiction extends to "coordinating and supervising [lower courts'] activities,"[137] as well as to the interpretation of customary law where "the written law is silent."[138] However, this "legislating from the bench" has downsides. First, the Constitution does not expressly afford the Court the power to constructively interpret statutes that are otherwise constitutional. Additionally, the April 2012 ruling's inconsistent influence on subsequent prosecutorial and judicial behavior seems to indicate that the Supreme Court's decisions, at least in this area, lack efficacy on the ground. Finally, judge-made law runs the risk of being viewed as illegitimate. The fear that judges have inserted their own worldview and politics into a controversial piece of legislation, a phenomenon referred to derisively in the United States as "judicial activism," could reduce the esteem of the Court and upset the constitutional balance of powers.[139]

VI. DEVELOPMENTS SINCE THE APRIL 2012 SUPREME COURT RULING

¶62 It is relatively difficult for non-Kinyarwanda speakers to assess prosecutorial and judicial practice in Rwanda in full, since the case law in the country is mainly in Kinyarwanda. However, a number of internationally reported cases appear to indicate that the April 2012 Supreme Court guidance has not been followed.[140] The issuance of

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[135] The Constitution, supra note 4, arts. 161, 162.

[136] Law No. 06/2012, Organic Law Determining the Organisation, Functioning and Jurisdiction of Commercial Courts, art. 14, Official Gazette of Rwanda, Sept. 14, 2012.

[137] The Constitution, supra note 4, art. 145(2).

[138] The Constitution, supra note 4, art. 145(13).

[139] For a discussion of the term, see Keenan Kmiec, The Origin and Current Meanings of "Judicial Activism", 92 Calif. L. Rev. 1441 (2004).

[140] One case that demonstrates the lack of deference given to the April 2012 decision concerns radio presenter Epaphrodite Habarugira, who was arrested in April 2012 in the district of Muhanga, Southern Province. When reading the news about the genocide commemorations on the radio on April 22, 2012, Mr. Habarugira inadvertently switched the Kinyarwanda word for "survivors" with the Kinyarwanda word for

contradictory judicial decisions is therefore a point of concern and the Supreme Court itself added to this concern in October 2012 with its ruling in the Victoire Ingabire case. While the Court had been explicit about the shortcomings of the genocide denial laws in its April 2012 ruling, it stopped short of declaring the provisions on genocide denial unconstitutional six months later.

¶63 Ms. Ingabire returned to Rwanda from exile in January 2010, with the intention of running against President Paul Kagame in the August elections of that year. However, she was arrested in April 2010, released on bail, then re-arrested in October 2010 and charged with terrorism,[141] threatening national security,[142] creating an armed group,[143] and discrimination and sectarianism.[144] Another charge brought against her was that of genocide ideology under articles 2 through 4 of the 2008 Law for having called for the prosecution of wrongdoing by members of the RPF.[145]

¶64 On March 27, 2012, Ms. Ingabire lodged a constitutional challenge to the 2008 Law, requesting the Supreme Court to nullify articles 2 through 9 of the law.[146] She argued, *inter alia*, that articles 2 and 3 of the law contradicted articles 20, 33 and 34 of the Constitution and were too broad in scope. In other words, she alleged that they did not meet the provided by law requirement. The Supreme Court struck down the challenge on October 18, 2012.[147] While acknowledging that the law required more clarification, the Court ruled that Ms. Ingabire's arguments regarding articles 2 and 3 were baseless as the law was "meaningful."[148]

¶65 While this article is not intended to second-guess the Supreme Court's ruling on constitutionality in the Victoire Ingabire case or its motives for ruling as it did, the Court's decision is difficult to understand in light of the following.

¶66 One of the Supreme Court's functions is to rule on the constitutionality of Rwanda's laws. As described above in Section II, Rwanda's constitutional framework and obligations under international law would argue against the genocide denial laws in their current form: they are in contravention of Rwanda's obligations under treaties it ratified such as the African Charter and the ICCPR, which, according to the Constitution, have supremacy over Rwanda's regular laws. None of the treaties to which Rwanda is a State Party prescribe legislation like the genocide denial laws, not even the 1948

"victims." This slip of the tongue caused him to be prosecuted for genocide denial under articles 2, 3 and 8 of the 2008 Law. While the Court of First Instance acquitted him for lack of intent, the Prosecution has appealed the acquittal. At time of writing, the appeal was slated for April 2014. MLDI has assisted in the first instance defense and appeal of Mr. Habarugira.

141 Law No. 45/2008, Law on Counter Terrorism, arts. 21(3), 75, 76, Official Gazette of Rwanda, Sept. 9, 2008; Code Pénal du Rwanda [Penal Code], arts. 21, 22, 24, 164 (2012).

142 Code Pénal du Rwanda [Penal Code], art. 166 (2012).

143 Id. art. 163.

144 The 2001 Law, supra note 29, arts. 3, 5.

145 Safer to Stay Silent, supra note 15.

146 The Constitution, supra note 7, arts. 145, 200.

147 The Ingabire Judgment, supra note 19.

148 Id.; Eric Didier Karinganire, Supreme Court Rejects Ingabire's Petition, The Rwanda Focus (Oct. 18, 2012), http://focus.rw/wp/2012/10/supreme-court-rejects-ingabires-petition/. Having appealed her conviction of an eight-year sentence, the Supreme Court in December 2013 extended Ms. Ingabire's sentence from eigth to 15 years. See Edmund Blair, Rwandan Court Extends Jail Term of Opposition Politician, Reuters (Dec. 13, 2013), http://www.reuters.com/article/2013/12/13/us-rwanda-opposition-idUSBRE9BC0KA20131213.

Genocide Convention. As discussed above, the obligation under article 20 of the ICCPR has to be read in conjunction with Rwanda's obligations under article 19(3) of the ICCPR. While, arguably, the Constitution also includes (broad and unspecified) objectives regarding the prevention of genocide, these objectives can also be pursued within a properly defined framework that is in compliance with international human rights standards.

¶67 It is important to note, however, that the Supreme Court, even while refusing to declare the 2008 Law unconstitutional, did concede in its ruling that the law required clarification.[149] In that sense, it confirmed its stance of April 2012. What now remains is a situation in which on the one hand the genocide denial laws have been deemed constitutional, while on the other hand it has been acknowledged that they fail to meet essential legal standards under international law and the Constitution. The recent law reforms failed to deal adequately with these shortcomings. In short, the one thing that is clear is that the legal landscape on genocide denial is anything but transparent, with obvious voids in the legislation which are yet to be filled by either proper legislation or judicial interpretation.

VII. CONCLUSION

¶68 The Supreme Court's April 2012 decision in the appeal of journalists Agnès Uwimana-Nkusi and Saidati Mukakibibi made clear that Rwanda's genocide denial laws fail to meet the requisite standard of precision under international law. The Court stopped short of clarifying this point itself, but did stress that the element of intent was essential to finding anyone guilty of the offense. When presented with the opportunity to declare one of the genocide denial laws unconstitutional in the context of the Victoire Ingabire trial in October 2012, the Supreme Court declined to do so, but did confirm that the law needed clarification.

¶69 The revisions to the 2003 and 2008 laws only partially address the shortcomings in legislation, and may have created an even broader base for unwarranted prosecution. This leaves Rwanda with laws on the books that do not comply with the international standards it has signed on to and which also fail to offer the protection its own Constitution gives to free expression. The situation is made more complex by a Supreme Court that acknowledges that the genocide denial laws are flawed, but stops short of providing comprehensive guidance on their interpretation or declaring the laws unconstitutional. This is a situation prone to abuse, in which unjustified prosecutions can easily take place.

¶70 Solid legislative reform, which would bring the genocide denial laws in line with Rwanda's obligations under public international law, would be the preferred remedy. However, given the pace of the recent law reform projects, and taking into consideration the shortcomings of the laws that were ultimately adopted, this may still be a long time coming.

¶71 A good intermediate solution would be for the Rwandan government to acknowledge that the current situation is not sustainable and to make sure that prosecutorial and judicial guidelines are issued to encourage coherent legal interpretation in accordance with Rwanda's international obligations to protect human rights and

[149] The Ingabire Judgment, supra note 19.

prevent unjustified prosecutions and convictions. Another option is for the Supreme Court to further clarify the laws' weak points in its upcoming decisions. The alternative would be to continue with the framework as it currently exists, which means that those subject to Rwanda's laws are at the mercy of individual decisions made within the prosecutor's office and inside judges' chambers.