Umuhoza v Rwanda (merits) (2017) 2 AfCLR 165

Application 003/2014, *Ingabire Victoire Umuhoza v Republic of Rwanda*

Judgment, 24 November 2017. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, RAMADHANI, TAMBALA, GUISSE, ACHOUR and BOSSA

The Applicant, a politician, was convicted for speeches alleged to have minimised the Rwandan genocide. She prayed the Court to repeal certain legislation, order the review of the case, annul decisions taken in relation to the case, order her release and order the Respondent State to pay reparations and costs. The Court held that there were conflicting versions of one of her speeches and one version clearly did not violate the law. Another speech, the Court held, just amounted to political criticism. Her conviction was therefore not necessary and proportional and violated the right to freedom of expression. The Court held that it did not have the power to repeal legislation and that there were exceptional and compelling circumstances to order her release.

Admissibility (exhaustion of local remedies, extraordinary remedy, 70-72)

Fair trial (presumption of innocence, 83, 84; defence, 94-98; non-retroactivity, 116)

Expression (importance, 131; limitations, 132, 139; in line with international human rights standards, 135; legitimate interest, 140, 146; necessary and proportional, 141-143, 147, 161; conflicting versions of speech, 156; speech clearly not violating the law, 158; political criticism should be allowed, 160)

Reparations (repeal national legislation, 166; release, 167)

I. The Parties

1. The Application is filed by Ingabire Victoire Umuhoza (hereinafter referred to as "the Applicant"), pursuant to Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol").

2. The Application is filed against the Republic of Rwanda (hereinafter referred to as "the Respondent State"). The latter became a Party to the African Charter on Human and Peoples` Rights (hereinafter referred to as "the Charter") on 21 October 1986, to the Protocol on 25 May 2004, and to the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") on 23 March 1976. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 22 January 2013, and on 29 February 2016, notified the African

Union Commission of its intention to withdraw the said Declaration[1].

II. Subject of the Application

3. The instant Application emanates from the Judgment of the High Court of Kigali in Criminal Case No. RP 0081-0110/10/HC/KIG delivered on 30 October 2012, and the Judgment of the Supreme Court of Rwanda in Criminal Appeal No. RPA 0255/12, delivered on 13 December 2013. The Application relates to the arrest, detention and trial of the Applicant, on the basis of which she alleges violation of her human rights and fundamental freedoms.

A. The facts of the matter

4. On 3 October 2014, the Applicant seized the Court with the Application stating that when the genocide in Rwanda started in April 1994, she was in The Netherlands in furtherance of her university education in Economics and Business Administration.

5. The Applicant submits that in 2000, she became the leader of a political party known as the *Rassemblement Républicain pour la Démocratie au Rwanda* (RDR) (the Republican Movement for Democracy in Rwanda). She states that a merger of this party and two other opposition Parties (the *ADR and the FRD)* led to the creation of a new political party known as *Forces Démocratiques Unifiées* (FDU Inkingi), which she leads to date.

6. The Applicant avers that in 2010, after spending nearly seventeen (17) years abroad, she decided to return to Rwanda, according to her, to contribute in nation building. Her priorities included the registration of the political party - FDU Inkingi, in compliance with Rwandan law on political Parties, which would have enabled her to popularise the political party at the national level with a view to future elections.

7. The Applicant contends that she did not attain this objective because from 10 February 2010, charges were brought against her by the judicial police, the prosecutor and the tribunals of the Respondent State.

8. The Applicant further maintains that on 21 April 2010, she was remanded in custody by the police, charged with having committed the following:

> "a. The crime of [propagation of] ideology of genocide, an offence punishable under Law No. 18/2008 of 23 July

1 See Ruling of the Court of 3/6/ 2016 of the Respondent's withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

2008, on the punishment of the ideology of genocide;

b. Aiding and abetting terrorism, an offence punishable under Law No. 45/2008 of 9 September 2008, on the punishment of the offence of terrorism;

c. Sectarianism and divisionism, an offence punishable under Law No. 47/2001 of 18 December 2001; sectarianism and divisionism;

d. Undermining the internal security of the State, spreading of rumours likely to incite the population against political authorities and mount citizens against one another, punishable under Law No. 21/77 of 18 August 1997, instituting the Penal Code;

e. Establishing an armed branch of a rebel movement, an offence punishable under Article 163 of Law No. 21/77 of 18 August 1997, instituting the Penal Code; and

f. Attempted recourse to terrorism, force of arms and such other forms of violence to destabilize established authority and violate constitutional principles, all offences punishable under Articles 21, 22, 24 and 164 of Law No. 21/77 of 18 August 1997, instituting the Penal Code".

B. Alleged violations

9. On the basis of the foregoing, the Applicant alleges violation of some provisions of the following instruments:

"a. Articles 1, 7, 10, 11, 18 and 19 of the Universal Declaration of Human Rights;

b. Articles 3, 7 and 9 of the Charter; and

c. Articles 7, 14, 15, 18 and 19 of the ICCPR".

III. Procedure at national level as presented by the Applicant

A. Pre-trial investigations

10. The Applicant avers that on 10 February 2010, she received a summons requiring her to forthwith appear before a judicial police officer at the Criminal Investigation Department (CID). According to her, she was accused of committing the offence of aiding and abetting terrorism, punishable under Article 12 of Law No. 45/2008 of 9 September 2008, on the punishment of the offence of terrorism. She

states that the allegations were "exclusively based on contacts she is said to have had with some defectors of the *Forces Démocratiques de Libération du Rwanda* (FDLR), with a view to establishing an armed branch of the political party called *Forces Démocratiques Unifiées*, of which she is President". She further submits that she was also charged with "spreading the ideology of genocide, sectarianism and divisionism".

11. According to the Applicant, she was arrested on 21 April 2010, and remanded in custody, and then brought before a Judge at the Gasabo High Court

> "to adduce the means of her defence following a complaint filed by the legal body attached to that Court, in which the said legal department demanded her remand in custody, on the grounds of alleged serious, grave and consistent indications of guilt, which could mean that the Applicant committed the offence of aiding and abetting terrorism and the ideology of genocide as outlined above".

12. The Applicant further indicates that on 22 April 2010, the Gasabo High Court issued a judicial interim release order with certain conditions, such as withholding of her passport, prohibition from leaving the city of Kigali without authorisation, reporting two times a month to the *Organe Nationale des Poursuites Judiciares* - National Prosecution Department (ONPJ). However, on 14 October 2010, she was re-arrested, taken to the CID Headquarters and was again charged with terrorist acts, an offence punishable under Article 12 of Law No. 45/2008 of 9 September 2008.

13. The Respondent did not contest the facts presented by the Applicant.

B. Proceedings before the High Court

14. According to the Applicant, she was arraigned before the High Court on the charges enumerated in paragraph 8 above, adding that "by an order of the President of the High Court the matter was set down to be heard on 16 May 2011. On the day of the hearing, the matter was joined with the case '*the State of Rwanda v Nditurende Tharcisse, Karuta JM Vinney and Habiyaremye Noel*, and the new matter adjourned for 20 June 2011".

15. The Applicant submits that on 20 June 2011, the matter was again adjourned to 5 September 2011, and on the same day, she deplored the "various acts of violation perpetrated against her, such as systematic body search, by the security services". According to her,

> "this situation was vehemently protested before the High Court which, through a pre-trial order, deemed that the said security services had the latitude to carry out body search operations on anyone found in the

courtroom, including the Counsel for the defence."

16. The Applicant claims that this decision of the High Court was appealed against, however, "in accordance with relevant Rwandese law, the appeal could be considered only after a final ruling on the merits of the main matter".

17. The Applicant avers that on 26 September 2011, *in limine litis*, she raised "many objections to admitting that decision based on the fact that the indictment order was issued in violation of certain principles, such as the legality of crimes and penalties, non-retroactivity, lack of jurisdiction, etc." The Applicant claims that on 27 September 2011, she sent a letter to the President of the High Court, with copies to the President of the Supreme Court, the Attorney General and the President of the Bar Association, to inform "all these institutions on how serious the situation was".

18. According to the Applicant, "by a pre-trial order issued on 13 October 2011, the High Court systematically threw out all the objections and petitions". She avers that

> "from that moment, the bench went ahead to examine the merits of the matter, taking into account only the submissions of the prosecution and those of the accused persons who had opted to plead guilty. Each time the defence attempted to question the accused persons to prove that their statements were contrary to the truth and condemn their collusion with the Office of the State Prosecutor and security services, the defence was called to order by the presiding judge, who in actual fact was acting not as a judge but rather as a prosecution body. It is in this climate of mistrust and suspicion that Habimana Michel, a prosecution witness, was heard".

19. Still according to the Applicant, "through a direct summons to a witness introduced at the behest of the Registrar-in-Chief of the High Court a certain Habimana Michel was requested to appear before the Court sitting to examine a criminal matter at the public hearing of 11 April 2012, as prosecution witness". Counsel for the Applicant were able to put questions to the witness to obtain clarification, and according to the Applicant,

> "to all these questions, the witness provided clear, concise and precise answers, thus putting into question the very basis of the charges, showing in broad daylight all the farce and scenario that had been orchestrated based on false statements by the accused, Uwumuremyi Vital, working in connivance with the Office of the State Prosecutor and various services".

20. The Applicant claims that realising that its strategy hitherto based on statements made by the accused persons, Uwumuremyi Vital, Nditurende Tharcisse and Karuta J M Vianney, had been undermined by the witness, the prosecutor seized by panic, "started intimidating the witness by using subterfuges and intimidation manoeuvres". She

alleges that,

> "without the knowledge of the bench and the defence, the State prosecutor ordered prison services to carry out a search on all the personal effects of the witness in his absence. In the evening of 11 April 2012, he was interrogated on the testimony he made in Court".

21. According to the Applicant, during the public hearing of 12 April 2012,

> "the prosecution used such clearly illegal investigation to claim to have discovered reportedly compromising documents against the defence… Upon analysing the content of the report, it was found that (i) the interrogation was held outside applicable legal hours, (ii) the witness was not assisted by a counsel of his choice; (iii) the interrogation dwelt on statements made by the witness in the morning before the Court".

22. Still according to the Applicant,

> "the defence tried in vain to protest before the High Court against such practices but was each time insulted and rudely interrupted by the presiding judge. Such acts have considerably undermined the fair trial nature of the trial and contributed to the Applicant's decision to quit the trial".

23. The Applicant stated that on 30 October 2012, the High Court delivered a judgment on the matter in which it

> "(i) admits the case submitted by the *Organe Nationale des Poursuites Judiciares* and rules it partially founded …(ii) rules in law that Ingabire Victoire Umuhoza is guilty of the offences of conspiracy to undermine established authority and violate constitutional principles by resorting to terrorism and armed force which are punishable under Law No. 21/1977 instituting the Penal Code. It further rules that Ms. Ingabire Victoire Umuhoza is guilty of the offence of minimization of the genocide, an offence punishable under Article 4 of Law No. 6/09/2003 on the punishment of genocide, crime against humanity and war crimes; (iii) sentences her on this count to 8 years of imprisonment with hard labour".

24. The Applicant asserts that in its judgment, the High Court indicated that the appeal "must be done in a period of 30 days following the sentencing".

25. The Court notes that the Respondent State did not contest the facts presented by the Applicant.

C. Petition before the Supreme Court

26. While the matter was still pending before the High Court, the Applicant on 16 May 2012, filed an application before the Supreme Court sitting in Constitutional Matters, seeking annulment of Articles 2 to 9 of Law No. 18/2008 of 23 July 2008, repressing the crime of genocide ideology and Article 4 of Law No. 33 bis/2003 of 6 September 2003, punishing the crime of genocide, crimes against humanity and

war crimes, on grounds of incompatibility with Articles 20, 33 and 34 of the Constitution of the Republic of Rwanda of 4 June 2003, as amended and updated.

27. According to the Applicant,

> "the aforementioned legal provisions have been formulated in unintelligible and ambiguous terms likely to generate confusion and arbitrary decision, to the point of immensely infringing the fundamental human rights of individuals as enshrined in the Constitution, especially with regard to freedom of expression in relation to the genocide which took place in Rwanda. Furthermore, the said legal provisions lend themselves to several interpretations".

28. In its Judgment of 18 October 2012, the Supreme Court

> "(i) declares inadmissible the application filed by Ingabire Victoire seeking annulment of Article 4 of Law No. 33 bis/2003 of 6 September, 2003, punishing the crime of genocide ideology, crimes against humanity and war crimes, as unfounded; (ii) declares inadmissible the request filed by Ingabire Victoire seeking annulment of Articles 4 to 9 of Law No. 18/2008 of 23 July, 2008, repressing the crime of genocide ideology, as groundless; and (iii) however, declares admissible the application filed by Ingabire Victoire seeking annulment of Articles 2 and 3 of Law No. 18/2008 of July, 2008, supressing the crime of genocide ideology, but declares the application groundless".

i. Appeal before the Supreme Court

29. Following the High Court judgment of 30 October 2012, both the Prosecution and the Applicant appealed before the Supreme Court of Rwanda.

30. The Prosecution argued on appeal, *inter alia,* that (i) it was not satisfied with the fact that the Applicant was not convicted of the crime of creating an armed group with the intent to carry out an armed attack, (ii) that the Applicant was acquitted of the offence of intentionally spreading rumours with the intent to incite the population against the existing authorities by disregarding the legislation in force at the time; and (iii) that the sentence the Applicant received on the crimes of which she was convicted was extremely reduced given the gravity of the crimes at issue.

31. For her part, the Applicant submitted on appeal that the High Court had disregarded the preliminary issues raised by her counsel, that the trial proceedings had not respected the basic principles of fair trial and that she was even convicted for crimes she had not committed.

32. According to Applicant, in its judgment of 13 December 2013, the Supreme Court ruled that she "has been found guilty of conspiracy to undermine the Government and the Constitution, through acts of

terrorism, war or other violent means, of downplaying genocide, and of spreading rumours with the intent to incite the population against the existing authorities". She was sentenced to 15 years imprisonment by the Supreme Court.

33. The Court notes that the Respondent State did not contest the facts presented by the Applicant.

ii. Procedure before the Court

34. By a letter dated 3 October 2014, the Applicant seized the Court with the present Application through her Counsel, and the Application was served on the Respondent State by letter dated 19 November 2014, given 60 days within which to file its Response.

35. By a letter dated 6 February 2015, the Registry, pursuant to Rule 35(2) and (3) of the Rules of Court transmitted the Application to the Chairperson of the African Union Commission and, through her, to the Executive Council of the Union, as well as to all the other States Parties to the Protocol.

36. By a letter dated 23 January 2015, the Respondent State forwarded to the Court its Response to the Application.

37. By a letter dated 9 June 2015, the National Commission for the Fight against Genocide of Rwanda applied to the Court for leave to appear as *amicus curiae* in the Application, and on 10 July 2015, the Court granted the request.

38. By a letter dated 6 April 2015, the Applicant filed her Reply to the Respondent's Response.

39. On 7 October 2015, during its 38th Ordinary Session, the Court ordered the Respondent State to furnish additional documentation. The Respondent did not do so.

40. By a letter dated 4 January 2016, the Registry notified the Parties of the Public Hearing set down for 4 March 2016.

41. By a letter dated 1 March 2016, the Respondent State notified the Court of its deposit of an instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol. The Respondent State in its letter contended that after deposition of the same, the Court should suspend hearings involving the Republic of Rwanda until review is made to the Declaration and the Court is notified in due course.

42. By a letter dated 3 March 2016, the Legal Counsel of the African Union Commission notified the Court of the submission of the Respondent State's instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol, which was received at the African Union Commission on 29 February 2016.

43. At the Public Hearing of 4 March 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr Caroline

Buisman. The Respondent State did not appear. The Court heard the representatives of the Applicant on procedural matters in which they requested the Court to:

"a. Reject the *amicus curiae* brief submitted by the National Commission for the Fight against Genocide;

b. Order the Respondent State to facilitate access to the Applicant by her representatives;

c. Order the Respondent State to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court; and

d. Order the Respondent State to comply with the Court's order of 7 October 2015, to file pertinent documents".

44. In an order issued on 18 March 2016, the Court decided as follows:

"a. That Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Court Protocol, within fifteen (15) days of receipt of this Order.

b. That its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Court Protocol shall be handed down at a date to be duly notified to the Parties.

c. That the Applicant file written submissions on the procedural matters stated in paragraph 14 above, within fifteen (15) days of receipt of this Order."

45. On 3 June 2016, the Court delivered a Ruling on the Respondent State's withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol. In that Ruling, the Court decided, among other things, that "the withdrawal of its declaration by the Respondent State has no effect on the instant Application and that the Court has jurisdiction to continue hearing the Application".

46. On 22 March 2017, a Public Hearing was held to receive arguments on jurisdiction, admissibility and the merits. The Applicant was represented by Advocate Gatera Gashabana and Dr Caroline Buisman. The Respondent State did not appear.

47. During the public hearing, the Judges posed questions to the Applicant's representatives to which the latter provided answers.

IV. Prayers of the Parties

A. Prayers of the Applicant

48. The Applicant prays the Court to:

"a. Repeal, with retroactive effect, sections 116 and 463

of Organic Law N° 01/2012 of 2 May 2012, relating to the Penal Code as well as that of Law N° 84/2013 of 28 October, 2013, relating to the punishment of the crime of ideology of the Genocide;

b. Order the review of the Case;

c. Annulment of all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment;

d. Order the Applicant's release on parole; and

e. Payment of costs and reparations".

The Applicant reiterated these prayers during the Public Hearing of 22 March 2017.

B. Prayers of the Respondent State

49. In its Response, the Respondent State prays the Court to:

"a. Declare the Application vexatious, frivolous and without merit; and

b. Dismiss the Application with cost".

V. Jurisdiction

50. In accordance with Rule 39(1) of its Rules, the Court shall conduct a preliminary examination of its jurisdiction, before dealing with the merits of the Application.

A. Objection to the material jurisdiction of the Court

51. The Respondent State contends that the Applicant has seized this Court as an appellate Court by requesting the latter to reverse or quash the decisions of the Respondent State's courts, and to replace the Respondent State's legislative and judicial institutions. According to the Respondent, "…the African Court is neither a Court of Appeal nor a legislative body which can nullify or reform court decisions and make national legislation in lieu of national legislative Assemblies". The Respondent State submits in this regard that an "application requesting the Court to take such action should be dismissed".

52. In her Reply to the Respondent State's Response, the Applicant submits that the Respondent State's argument is at variance with all evidence and cannot resist the slightest bit of serious analysis. She substantiates by indicating that the Application mentions "the legal instruments of human rights duly ratified by the State of Rwanda which

have suffered various violations in the course of proceedings or simply ignored". She reiterates that

> "it is clear that this Court was not seized as an appellate jurisdiction as wrongly claimed by the Respondent, but rather as a court responsible for adjudicating disputes resulting from multiple human rights violations that considerably undermine the case between the Applicant and the National Public Prosecution Authority before the High Court and Supreme Court, respectively".

53. This Court reiterates its position as affirmed in *Ernest Francis Mtingwi v Republic of Malawi,*[1] that it is not an appeal court with respect to decisions rendered by national courts. However, as it underscored in its Judgment of 20 November 2015, in *Alex Thomas v United Republic of Tanzania,* and confirmed in its Judgment of 3 June 2016, in *Mohamed Abubakari v United Republic of Tanzania,* this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.[2]

54. Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as an appellate Court.

55. Furthermore, regarding its material jurisdiction, the Court notes that since the Applicant alleges violations of provisions of some of the international instruments to which the Respondent State is a party, it has material jurisdiction in accordance with Article 3(1) of the Protocol, which provides that the jurisdiction of the Court "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

B. Other aspects of jurisdiction

56. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent State, and nothing in the pleadings indicate that the Court does not have jurisdiction. The Court thus holds that:

> "(i) it has jurisdiction *ratione personae* given that the Respondent State is a party to the Protocol and deposited the declaration

1 Application No. 001/2013. Decision on Jurisdiction 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi*, para 14.

2 Application No. 005/2013. Judgment on Merits 20/11/2015, Alex *Thomas v United Republic of Tanzania* (hereinafter referred to as "the *Alex Thomas Judgment*"), para 130, Application No. 007/2013. Judgment on Merits of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania* (hereinafter referred to as "the *Mohamed Abubakari Judgment*"), para 29.

required under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol;

ii. it has jurisdiction *ratione temporis* in terms of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what she considers as unfair process;

iii. it has jurisdiction *ratione loci* given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

57. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility

58. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of … admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

59. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> "1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> 2. Comply with the Constitutive Act of the Union and the Charter;
>
> 3. Not contain any disparaging or insulting language;
>
> 4. Not be based exclusively on news disseminated through the mass media;
>
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
>
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
>
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

60. While some of the above conditions are not in dispute between the Parties, the Respondent State raises an objection relating to the alleged failure by the Applicant to exhaust local remedies, pursuant to Article 56(5) of the Charter and Rule 40(5) of the Rules.

A. Objection relating to non-compliance with Article 56(5) of the Charter and Rule 40(5) of the Rules

61. The Respondent State contends that the Applicant failed to seize the Supreme Court sitting in constitutional matters to challenge the provisions of Rwandan laws that she alleges to be inconsistent with the Charter and other relevant international instruments. The Respondent State contends that the Applicant is challenging the conformity of Law No. 33 *bis* of 6 September 2003, on the punishment of genocide, crimes against humanity and war crimes and that the Constitution of the Respondent State empowers the Supreme Court to hear petitions aimed at reviewing laws that are inconsistent with the Constitution.

62. The Respondent State further contends that in terms of Article 145(3) of the Constitution of Rwanda of 3 June, 2003, "the Supreme Court has jurisdiction and the responsibility to hear petitions aimed at reviewing adopted laws that are inconsistent with the Constitution", and Article 53 of Organic Law N° 03/2012/OL of 13 June 2012, determining the organization, functioning and jurisdiction of the Supreme Court, gives the Court, upon petition by any Applicant, jurisdiction to "partially or completely repeal any Organic Law or Decree-Law for reasons of non-conformity with the Constitution".

63. The Respondent State submits that as the Applicant is alleging that Law No. 33 *bis* of 6 September 2003, is not in conformity with the Constitution, "she must exhaust the local remedies available for the purpose: this being an application made before the Supreme Court sitting in Constitutional Matters…". The Respondent State adds that "having failed to do so, makes the application inadmissible due to non-compliance with Article 56(5) [of the Charter] and Rule 40 of the Rules of Court".

64. The Respondent State avers further that the Applicant failed to seize competent courts to apply for judicial review of the decisions against her. According to the Respondent State, Article 78 of the Organic Law No. 03/2012/OL of 13/06/2012, provides that the Supreme Court shall have exclusive jurisdiction over applications for review of final decisions due to injustice, and Article 81(2) provides that the grounds for an application for review due to injustice, which include, inter alia, the review of a Court decision in disfavour of anyone for injustice, especially when there are provisions in this regard and irrefutable evidence that the judge ignored in rendering the judgment. The Respondent State submits that "by failure to make an application for the Supreme Court to review the decision that she considers unjust, the Applicant has failed to satisfy the requirement set forth in Article 56 of the Charter and Rule 40 of the Rules", and invites the Court to declare the application inadmissible.

65. The Applicant submits that the Respondent State's courts are not empowered to hear disputes concerning interpretation and application of the Charter, the Protocol and other human rights instruments. According to the Applicant, "Rwandan positive law has never put in place special courts or tribunals competent to adjudicate human rights issues". The Applicant concludes in this regard that "in the absence of Rwandan courts and tribunals competent to hear cases and disputes concerning the interpretation and implementation of the Charter, the Protocol and any other human rights instrument", the submission regarding the Applicant's breach of Article 56(5) of the Charter and Rule 40(5) of the Rules are devoid of any legal basis, and the objection must therefore be found "groundless".

66. On the Respondent State's submission that the Applicant failed to challenge the constitutionality of Law No. 33 *bis* of 6 September 2003, before the Supreme Court, the Applicant's Counsel contends that "she filed before the Supreme Court a Motion to challenge the constitutionality of Law No. 33 bis of 6 September 2003, punishing the crime of genocide, crime against humanity and war crimes". To corroborate her argument, she adds that "the case was entered on the cause list as No. RINST/PEN/002/12/CS, examined and pleaded before the Supreme Court for a ruling on the merits of the said Motion in open court on 19 July 2012". The Applicant concludes that "in its open court hearing of 10 October 2012, the Supreme Court dismissed the Motion, having found it groundless", and according to the Supreme Court, **"**Law No. 33 bis of 6 September 2003…is clearly consistent with the Constitution".

67. On the submission that the Applicant failed to avail herself of the of judicial review remedy, the Applicant contents that "the action instituted for review of a final judicial decision on grounds of injustice does not respect the criteria of effectiveness, accessibility, efficiency and other criteria as required by international jurisprudence". According to the Applicant, pursuant to Article 79 of the Organic Law 03/2012 of June 2012, only the Office of the Ombudsman can petition the Supreme Court over applications for review, adding that the remedy of judicial review is subject to the discretion of the Office of the Ombudsman, the General Inspectorate of Courts and the President of the Supreme Court, and that the remedy may be subject to undue prolongation.

68. Regarding the appeal on unconstitutionality, this Court notes from the records before it that the Applicant did approach the Supreme Court of Rwanda, which is the highest court in the Respondent State, to challenge the constitutionality of Law No. 33 *bis* of 6 September 2003, on the punishment of genocide, crimes against humanity and war crimes, and the Supreme Court handed down its decision on 18 October 2012, finding the motion groundless.

69. In relation to the application for review, this Court notes that under Article 81 of Organic Law 03/2012 of June 2012, on the Organization, Functioning and Jurisdiction of the Supreme Court, applications for review may be heard only on the following grounds:

> "1. when there is an unquestionable evidence of corruption, favouritism or nepotism that were relied upon in the judgment and that were unknown to the losing party during the course of the proceedings;
>
> 2. when there are provisions and irrefutable evidence that the judge ignored in rendering the judgment;
>
> 3. when the judgment cannot be executed due to the drafting of its content."

70. An examination of these grounds shows that the review remedy would not have been sufficient to redress the Applicant's complaints which concerned alleged substantive violation of the Applicant's human rights and not only allegations of bias or technical and procedural errors. Moreover, under Article 79 of Organic Law 03/2012 of June 2012, which governs the Procedure for petitioning the Supreme Court over applications for review of a final decision due to injustice:

> "The Office of the Ombudsman shall be the competent organ to petition the Supreme Court over application for review of a final decision due to injustice. When, the final decision is made and there is evidence of injustice referred to under Article 81 of this Organic Law, Parties to the case shall inform the Office of the Ombudsman of the matter. When the Office of the Ombudsman finds that there is no injustice in handing down the decision, it shall inform the Applicant. When the Office of the Ombudsman finds that the decision handed down is unjust, it shall send to the President of the Supreme Court a letter accompanied by a report on the issue and evidence of such injustice and request to re-adjudicate the case".

71. The above provision demonstrates that the capacity to exercise the review remedy lies exclusively with the Ombudsman which, in this regard, uses its discretionary power. The assessment on whether there has or has not been injustice rest with the Ombudsman.

72. In the view of the Court and in the circumstances of this case, therefore, an application for review under the Rwandan legal system is an extraordinary remedy which would not constitute an effective and efficient remedy, and which the Applicant did not have to exhaust.[3]

73. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that this Application fulfils the admissibility requirement under Article 56(5) of the Charter and Rule 40(5) of the Rules.

3 See *Alex Thomas* Judgment, para 63.

B. Compliance with Rule 40(1), (2), (3), (4), (6) and (7) of the Rules

74. The Court notes that the issue of compliance with sub-rules 40(1), (2), (3), (4), (6) and (7) is not in contention, and nothing in the Parties' submissions indicates that they have not been complied with. The Court therefore holds that the requirements under those provisions have been met.

75. In light of the foregoing, the Court finds that the instant Application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VII. On the merits

76. The Applicant alleges violation of Articles 3, 7, 9 and 15 of the Charter, Articles 7, 14, 15, 18 and 19 of the ICCPR and Articles 1, 7, 10, 11, 18 and 19 of the Universal Declaration on Human Rights (hereinafter referred to as "the Universal Declaration). It emerges from the case file that the Applicant's allegation focuses on the rights to a fair trial and freedom of opinion and expression.

77. It should be stated here that although in her Application, the Applicant alleges violation of Articles 3 of the Charter, and Articles 7 and 18 of the ICCPR, she did not pursue these allegations in the course of the proceedings, and the Court will accordingly not pronounce itself on them.

A. Right to a fair trial

78. The elements of the right to a fair trial as raised in the instant case are as follows:

"a. the right to presumption of innocence;

(b) the right to defence;

(c) the right to be tried by a neutral and impartial court;

(d) the principle of legality of crimes and penalties and non-retroactivity of criminal law.

i. The right to presumption of innocence

79. The Applicant submits that the Respondent State's allegations linked to the terrorist attacks that occurred in the city of Kigali were a pretext orchestrated by the prosecution to impute to the Applicant the offence of complicity in the terrorism on the basis of the confessions

unlawfully obtained from her co-defendants. According to the Applicant, the co-defendants were allegedly forced to testify against themselves and to plead guilty; and it is on the basis of these irregularities that the prosecution justified remanding her in custody. The Applicant submits in conclusion that this act constitutes a violation of the principle of presumption of innocence.

80. According to the Respondent State, the Applicant's accusations are unfounded because her trial was conducted with all the guarantees provided by law and in accordance with international standards. It avers that the Applicant was given the opportunity to appear in court, to be assisted by Counsel and in the end was lawfully convicted. The Respondent State concludes that the Applicant's right to presumption of innocence and therefore, her right to a fair trial, has not been violated.

81. The Court notes that presumption of innocence is a fundamental human right enshrined in Article 7(1)(b) of the Charter, which provides that:

> "Every individual shall have the right to have his cause heard. This comprises b) the right to be presumed innocent until proved guilty by a competent court or tribunal".

82. Article 14(2) of the ICCPR also provides for the same right in the following terms:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

83. The essence of the right to presumption of innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment, and until his guilt is legally established.

84. The Court finds, on the basis of the pleadings, that the Applicant has not adduced evidence to the effect that her right to presumption of innocence has been violated. It therefore dismisses this allegation.

ii. The right to defence

85. The Applicant submits that the prosecuting authorities harassed the defence witness, Mr Habimana Michel, employing subterfuge and intimidation manoeuvres. She alleges that, unknown to the Judge and the defence, the Public Prosecutor ordered the prison services to search all the personal effects of the witness in his absence in the evening of 11 April 2012. She alleges further that the witness was questioned over his testimony in court earlier that day.

86. According to the Applicant, at the public hearing on 12 April 2012, the prosecuting authorities used material obtained from the

search to allege the discovery of compromising documents against her. She avers that the documents seized included a letter referenced 165/PR/2012 dated 11 April 2012, sent by the Remera Prison Superintendent, together with a report on the hearing of the witness.

87. The Applicant further contends that analysis of the report indicated that the questioning took place outside the applicable legal hours; that the witness was not assisted by Counsel of her choice and that the interrogation focused on the statements made in court by the witness in the morning of that day. According to the Applicant, this was an attempt to intimidate the witness; and that through her counsel, she sought to protest such a practice during the trial but to no avail; on the contrary, they were each time thoroughly insulted and rudely interrupted by the President of the Court.

88. The Applicant also avers that there were "various abuses" characterised by systematic searches of the Defence team by the security services. According to her, this security measure was not applied to the prosecution team, thus creating an unequal treatment. She contends that the judges of the High Court "systematically" prevented her team of counsel from speaking. She claims that the written and oral protests of the Defence at both the High Court and the Supreme Court were not heeded.

89. According to the Applicant, the acts of intimidation and the threats to which the Defence witness was subjected undermines the right to defence. She avers that one of the Judges instead stated that the Counsel should not have intervened in favour of a person who was not his client. She added that, following that incident, the President of the Supreme Court terminated the examination of the defence witness followed by the withdrawal of Ingabire's trial. For the Applicant, this is a flagrant violation of her right to a fair trial, contrary to Article 7 of the Charter; Article 14(1) of the ICCPR and Article 10 of the Universal Declaration.

90. The Respondent State submits that the search of the Defence witness was conducted after the witness gave his oral and written testimony in Court. It avers that it is a common practice for prison guards to search prisoners from time to time; and that the search of members of the Defence team was conducted as part of security measures, as there had been grenade attacks in Kigali before the trial.

91. The Respondent State also submits that the Applicant was assisted by a team of two lawyers of her choice, one of whom was an international lawyer, throughout the proceedings, and that they had full latitude to organise her defence without hindrance. It further submits that the trial lasted two years and, therefore, all the Parties had the time needed for them to defend their cause. According to the Respondent State, the allegations of violation of the right to defence are unfounded.

92. The Court notes that Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises:

a)……

b)……

c) the right to defence, including the right to be defended by Counsel of his choice".

93. An essential aspect of the right to defence includes the right to call witnesses in one's defence. Witnesses in turn deserve protection from intimidation and reprisals to ensure that they can assist the accused persons and the authorities to reach a just decision.

94. In the instant case, the Court notes that the Applicant submits two main allegations relating to her right to defence: searches conducted on her Defence Counsel at the High Court and secondly, the search of the Defence witness at the prison. Based on the records, at the High Court after the Defence Counsel complained, the High Court ordered that the searches have to be done on all Parties, including the public for security reasons.

95. Regarding the search of prisoners and detainees, the Court notes that, this is a normal practice in prisons. Similarly, searches of the Defence Counsel and the public at the Court may be carried out as part of security measures, given that grenade attacks had happened in Kigali before the Applicant's trial. Thus, as far as the searches in the prison and of the Defence Counsel at the High Court are concerned, the Court is of the view that the Applicant's right to defence was not contravened.

96. The Court however notes from the pleadings that the search conducted in prison resulted in the seizure of certain documents, without the knowledge of the Defence, documents which were allegedly later used against the Applicant before the High Court. Furthermore, the Applicant complained about the Judges' refusal to allow her Counsel to put questions to the co-accused; the questioning and the threats to which the Defence witness was subjected to on account of his deposition upon return to prison; the difficulties faced by the Counsel in visiting their client; the use of the co-accused's statements obtained in suspicious conditions after the latter's stay in a military camp. The Respondent did not refute each of these allegations but made a general denial that the allegations of violation of the right to defence are unfounded.

97. As regards the questioning of a witness by prison authorities over the testimony he/she has given in court, the Court notes that this is not a conduct consistent with standards that aim to promote a fair trial. Such actions may have an intimidating effect on witnesses'

willingness and disposition to cooperate and adduce evidence against the Respondent State. This is especially so for witnesses in detention or already serving prison sentences. However, as the questioning happened after the witness had given testimony in Court, the Court concludes that in the circumstances of the case, this did not violate the right to defence of the Applicant.

98. The Court further observes that the right to defence is not limited to the choice of Counsel. This right also includes principles such as access to witnesses, and opportunity for Counsel to express themselves, consult with their clients and to examine and cross-examine witnesses. The right to defence further includes the right to know and examine documents used against one's trial. In the instant case, the difficulty encountered by the Applicant's Defence Counsel in putting questions to the co-accused, the threats and environment of intimidation faced by the defence witness and the use of documents seized during what the Applicant considers an illegal search, that was later used against her, without giving her the chance to examine it, are incompatible with international standards pertaining to the right to defence. The Court therefore holds that the Applicant's right to defence in this regard was violated, contrary to Article 7(1)(c) of the Charter.

iii. The right to be tried by a neutral and impartial tribunal

99. The Applicant contends that the fact that the Judges of the Supreme Court and the High Court did not react to the national prosecution authorities' intimidation of a Defence witness, in the person of one Habimana Michel, and also that the Court considers the said acts of intimidation as having had no impact on the content of the witness's testimony, is proof of their partiality. The Applicant further argues that, at the Supreme Court, her counsel mounted a strong protest denouncing the abuses and excesses of the prosecution authorities vis-à-vis a defence witness.

100. The Respondent submits that this allegation is unfounded, since according to the latter, all the guarantees provided by law have been observed.

101. The Court notes that the Charter in its Article 7(1)(d) provides that: "Every individual shall have the right to have his cause heard. This comprises "(d) the right to be tried … by an impartial court or tribunal".

Article 14(1) of ICCPR[4] and Article 10 of the Universal Declaration also protect the right to trial by an independent and impartial tribunal.[5]

102. According to the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,

> "the impartiality of a judicial body could be determined on the basis of [the following] three relevant facts:
>
> "1. that the position of the judicial officer allows him or her to play a crucial role in the proceedings;
>
> i. the judicial officer may have expressed an opinion which would influence the decision-making;
>
> ii. the judicial official would have to rule on an action taken in a prior capacity".[6]

103. The aforementioned Guidelines provide that the impartiality of a judicial body would be compromised when:

> "1. a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
>
> 2. a judicial official secretly participated in the investigation of a case;
>
> 3. a judicial official has some connection with the case or a party to the case; or
>
> 4. a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body".[7]

104. In the instant case, the evidence adduced by the Applicant does not sufficiently demonstrate that any of the above factors existed in the course of her trial. In the circumstances, the Court dismisses this allegation.

iv. The principle of legality and non-retroactivity of the law

105. The Applicant submits that she was first charged and convicted

4 Article 14(1) of the ICCPR provides that: "…All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…".

5 Article 10 of the Universal Declaration: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

6 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle 5.

7 *Ibid*.

for the crime of propagating the ideology of genocide under Law No. 18/2008 of 23 July 2008. Subsequently, the Supreme Court found her guilty of minimising genocide, re-qualifying the acts under a new law, that is, Law No. 84/2013 on the repression of the ideology of the crime of genocide, which entered into force on 28 October 2013. According to her, the reference to this new law by the Supreme Court violates the principle of non-retroactivity of the law and the non-retroactive application of the criminal punishment.

106. The Respondent contends that the principle of legality of crimes and penalties as provided under Article 7(2) of the Charter was fully respected during the trial. For the Respondent, any Judge both at the High Court and the Supreme Court has the last word in terms of re-characterising an offence and applying the appropriate law, and this does not amount to a violation of the principle of legality and non-retroactivity of the law.

107. The Court notes that the relevant provision for the issue at hand is Article 7(2) of the Charter, which states that:

> "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..."

108. The non-retroactivity of criminal law is an important rule intrinsic to the principle of legality, which stipulates, among others, that criminal responsibility and punishment must be based only on the prior promulgation of laws which prohibit a particular conduct. The principle of legality requires that society is informed of prohibited behaviour before the law prohibiting or criminalising such behaviour comes into force. In other words, the prohibited conduct must be clear and verifiable and the punishment that an infringement entails should be specified before individuals are held accountable for the same.

109. The rule of non-retroactivity forbids the retrospective application of a criminal law to acts committed before the enactment of the law when such law makes previous lawful acts reprehensible or attaches new punishment to the existing criminal acts. The only exception where a criminal law may apply retroactively is when its application favours an individual by decriminalising a previous criminal conduct which he/she is accused of or provides lighter penalty than the law which was in force during the commission of the conduct.[8]

110. In the instant case, the Court observes that crimes for which the Applicant was convicted were said to have been committed between 2003 and 2010. During this time, there were four criminal laws in the

8 See Article 15(1) of the ICCPR.

Respondent State governing the offences she was charged with: the 1977 law instituting the Penal Code, Law No. 33/2003 of 6 September 2003, on the Repression of Crimes of Genocide and Crimes against Humanity of 2003, Law No. 18/2008 of the 23 July 2008, on the Repression of the Crime of Ideology of Genocide and Law No.45/2008 on Counter-terrorism of 2008. Law No. 18/ 2008 repealed the Law No. 33/2003 to the extent the latter contradicts the provisions of the former.

111. The Court notes that Article 4 of Law No. 33/2003 of 2003 contains a provision criminalising minimisation of genocide while Law No. 18/ 2008 of 2008 on the Crime of the Ideology of Genocide does not have a similar provision. In other words, as far as the crime of minimisation of genocide is concerned; Law No. 33/2003 of 2003 continued to apply. However, in 2013, both Law No. 33/2003 of 2003 and Law No. 18/2008 of 2008 were repealed by Law No. 84/2013 of 2013 on the Crime of Genocide and Other related offences. Similarly, the 1977 Law Instituting the Penal Code was replaced by the 2012 Law Instituting the Penal Code.

112. Under its Article 6, Law No. 84/2013 of 2013 provides for provisions on minimisation of genocide. In comparison to Law No. 33/2003 of 2003, which provides for 10-20 years imprisonment for the crime of minimisation of genocide, Law No. 84/2013 provides for 5-10 years imprisonment for the same crime.[9] On the other hand, for crimes of conspiracy and threatening State security and the Constitution, and crimes of spreading rumours with intent to incite the population against the existing authorities, the 1977 Penal Code provides a criminal punishment extending up to life imprisonment while the 2012 Penal Code provides a maximum penalty ranging from 20- 25 years for the same crimes.

113. The Court takes note that the Applicant was initially charged with propagating the ideology of genocide before the High Court on the basis of Law No 18/2008 of 2008. However, the High Court re-qualified the charge and convicted her for the crime of revisionism of genocide on the basis of Article 4 of Law No. 33/2003 of 2003 and crime of treason to threaten state security and the Constitution under the 1977 Penal Code, and sentenced her to 8 years imprisonment. On appeal, the Supreme Court sustained the conviction but rejected the mitigating circumstances invoked by Applicant and crimes of which she was acquitted at the High Court. The Supreme Court, citing the existence of concurrence of crimes, imposed a punishment of 15 years imprisonment on the basis of Law No. 84/2013 of 2013 and the

9 Article 12(3) Law No. 84/2013 "cum" Article 116 of the 2012 Organic Law Instituting the Penal Code.

2012 Penal Code for the crime of minimising genocide and crimes of conspiracy and threatening State security.

114. The Court is of the view that the rule of non-retroactivity of the law does not preclude the requalification of a criminal charge in the course of a criminal trial resulting from the same facts. What is rather prohibited is the application of new criminal laws, in the instant case, Law No. 84/2013 of 2013 and the 2012 Penal Code, to crimes alleged to have been committed before the coming into force of such law.

115. However, as indicated above, the punishments for the crime of threatening State security and the Constitution in the 1977 Penal Code may extend to life imprisonment and for the crime of minimisation of genocide in the Law No. 33/2003 of 2003 ranges from 10-20 years as opposed to 15 years' imprisonment in the 2012 Penal Code and 5-10 years imprisonment prescribed in the Law No. 84/2013, respectively.

116. It is therefore evident that the application of the 2012 Penal Code and Law No. 84/2013 for the Applicant was in general favourable and is congruent with the exception to the rule of non-retroactivity, that new criminal laws may be applied to acts committed before their commission when these laws provide lighter punishment. The fact that the punishment imposed on the Applicant by the Supreme Court was higher than the penalty that was initially imposed by the High Court was not because of the retroactive application of the new laws. As the records before this Court reveal, this was rather because the Supreme Court had rejected the mitigating circumstances considered by the High Court and convicted the Applicant for an offense (spreading of rumours) for which she had been acquitted by the High Court.

117. The Court, therefore, finds that there was no violation of Article 7(2) of the Charter.

118. For the avoidance of doubt, the Court wishes to state that this finding of the Court relates to the allegation of violation of the principle of non-retroactivity only and is without prejudice to its position with respect to the right to freedom of expression and opinion below.

B. Freedom of opinion and expression

119. The Applicant contends that she was convicted for minimisation of genocide whereas the opinion she expressed in the course of her speech at the Kigali Genocide Memorial concerned the management of power, the sharing of resources, the administration of justice, the history of the country and the attack that led to the demise of the former President of the Republic. The Applicant submits that she had no intention to minimise and trivialise genocide or to practice the ideology of genocide and that the right to express her opinion was protected by the Constitution of Rwanda and other international instruments.

120. The Applicant maintains that the laws of Rwanda which criminalise the negation of genocide are vague and unclear, and do not comply with the requirement that restrictions on the rights of individuals must be necessary. She added that the Respondent State had admitted that there were defects in the laws penalising the minimisation of genocide.
121. The Applicant further contends that she was found guilty of spreading rumours likely or seeking to cause a revolt among the population against established authority. She also contends that in convicting her for propagating rumours, the local courts failed to prove or to substantiate their arguments through specific and corroborative evidence showing that her positions were likely to establish her criminal liability.
122. During the Public Hearing, Counsel for the Applicant, in reference to a letter from the Applicant, said:

> "We are not against a law to punish those who minimize the genocide committed against Tutsis in Rwanda, as is the case for other genocides committed elsewhere. But we demand solid benchmarks to avoid any amalgamation and the use of such a law for political purposes. Thus, we demand that such a law clearly show the border between the legitimate freedom of opinion and the actual crime of minimisation of genocide."

123. For the Applicant, the theory of margin of appreciation invoked by the Respondent State refers to the latitude that the international monitoring bodies are willing to grant national authorities in fulfilling their obligations under the international human rights instruments they have ratified. The theory can also be described as the latitude a government enjoys in evaluating factual situations and in applying the provisions set out in international human rights instruments. This theory is premised on the fact that the process of realising a "uniform standard" of human rights protection must be gradual because the entire legal framework rests on the fragile foundations of the consent of Member States. According to the Applicant, the margin of appreciation provides the flexibility needed to avoid damaging confrontations between human rights tribunals and Member States and enables the Court to strike a balance between the sovereignty of States and their international obligations.
124. The Respondent State argues that the right to express one's opinion is subject to limitations and that considering the social context, the history of and the environment in Rwanda, there was reason to enact laws to penalise the minimisation of genocide. It also notes that the Judgment of the Supreme Court had alluded to the fact that other countries had imposed similar restrictions so as to prevent the minimisation of genocide.
125. The Respondent State affirms that this Court should apply the principles of subsidiarity and adopt a margin of appreciation in its

assessment of the internal situation of Rwanda.

126. The Respondent State submits that in examining the Application, the Court should consider the margin of appreciation in complying with Article 1 of the Charter. In this regard, it argues that "the content given to the right cannot be enforced in a vacuum and as such the ambit of its enforcement will be heavily influenced by the domestic context in which that right operates". To this end, the Respondent State avers that "it is critical that the African Court gives serious contextual consideration to the domestic situation when evaluating a particular State's level of compliance". On the principle of subsidiarity, the Respondent State submits that:

> "… since the initial responsibility rests with the Respondent [State] to give effect to the rights guaranteed by the Charter, she also has to be given an opportunity through her institutions to decide how to discharge this duty".

127. The National Commission for the Fight against Genocide *(CNLG*), intervening as *Amicus Curiae,* argues that the theory of double genocide to which the Applicant referred is nothing but another way of denying the genocide perpetrated in 1994 against Tutsis in Rwanda. According to *CNLG,* revisionism is structured around a number of affirmations which help to conceal the criminal intent that is an integral part of the crime of genocide, without denying the reality of the massacres and to sustain the idea of double genocide. *CNLG* submits further that the theory of double genocide is intended to transform the 1994 genocide against Tutsis in Rwanda into an inter-ethnic massacre, and at the same time, exonerate the perpetrators, their accomplices and their sympathisers.

128. *CNLG* further alleges that the statements made by the Applicant at the Kigali Genocide Memorial constitute a form of expression of the theory of double genocide in Rwanda, a manipulation skilfully executed and sowing the seeds of confusion around the genocide committed against the Tutsis in Rwanda in 1994. According to *CNLG*, this statement signifies that there were two genocides in Rwanda, and that the Tutsis are therefore as guilty as their executioners. It submits that the Applicant's statements are a revisionist manoeuvre with the peculiar feature of using partial and dishonest methodology to select, disguise, divert or destroy information that corroborates the existence of genocide against the Tutsis.

129. The Court notes that the Charter in its Article 9(2) enshrines the right to freedom of expression in the following terms:

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

130. Article 19 of the ICCPR also provides that:

> "1. Everyone shall have the right to hold opinions without

interference.

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

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

131. The right to freedom of expression is one of the fundamental rights protected by international human rights law, the respect of which is crucial and indispensable for the free development of the human person and to create a democratic society. It comprises *inter alia*, the freedom to express and communicate or disseminate information, ideas or opinions of any nature in any form and using any means, whether at national or international level. The right to free expression requires that States protect this right from interferences regardless of whether the interferences originate from private individuals or government agents.

132. While freedom of expression is as important as all other rights for the self-development of individuals within a democratic society, it is not a right to be enjoyed without limits. In its Judgment in the Matter of *Lohé Issa Konate v Burkina Faso* of 5 December 2014, this Court emphasised that freedom of expression is not an absolute right and under some circumstances, it may be subject to some restrictions. In that judgment, relying on Article 19(3) of ICCPR and the jurisprudence of the African Commission on Human Rights, and other international and regional human rights bodies, the Court held that the terms "within the law" in Article 9(2) envisage the possibility where restrictions may be put in place on the exercise of freedom of expression provided that such restrictions are prescribed by law, serve a legitimate purpose and are necessary and proportional as may be expected in a democratic society.[10]

133. In the instant case, the Court infers from the undisputed submissions of both Parties that the Applicant was convicted and sentenced both at the High Court and the Supreme Court of the Respondent State for the remarks that she made at the Kigali Genocide

10 Application No. 004/2013. Judgement on Merits of 5/12/2014, *Lohé Issa Konate v Burkina Faso* (hereinafter referred to as "the *Issa Konate Judgment*"), paras 145-166.

Memorial, and her interviews and other statements she expressed on different occasions. It is no question that the said conviction and sentence of the Applicant constitute a restriction on her freedom of expression for the purpose of Article 9(2) and in terms of Article 19(3) of ICCPR. The key issue that the Court should thus address is whether such restriction was reasonable, in that, it was provided by law, served a legitimate purpose, and was necessary and proportional in the circumstances of the case.

i. Whether the interference was provided by law

134. There is no dispute between the Parties that the Applicant's conviction and sentence for the crimes of minimisation (revisionism) of genocide, spreading rumours to undermine the authority of the government, propagating the ideology of genocide and threatening State security and the Constitution were based on the national law of the Respondent State. The records of the case reveal that both the High Court and Supreme Court in their verdicts relied upon Law No. 33/2003, Law No. 84/2013 and the 2012 Penal Code. However, the Applicant challenges the nature of these laws, asserting that they are 'vague and unclear'.

135. The Court recalls its established jurisprudence that the reference to the 'law' in Article 9(2) of the Charter and in other provisions of the Charter must be interpreted in the light of international human rights standards,[11] which require that domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable and compatible with the purpose of the Charter and international human rights conventions and has to be of general application.[12]

136. In the instant case, regarding the Applicant's assertion that the laws relating to the minimisation of genocide is vague and unclear, the Court notes that some provisions of the aforementioned laws of the Respondent State are couched in broad and general terms and may

11 *Issa Konate Judgment*, para 129.

12 *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/199**3** (1997), para 9.5, *Coard et al. v United States*, IAComHR, case 10.951, Report N° 109/99, 29/91999, paras 42-59, see also *Medvedyev and others v France*, ECtHR, Judgment, 29/32010, paras 92-100.

be subject to various interpretations.[13]

137. Nonetheless, the nature of the offences, that these laws seek to criminalise, are admittedly difficult to specify with precision. In addition, considering the margin of appreciation that the Respondent State enjoys in defining and prohibiting some criminal acts in its domestic legislation, the Court is of the view that the impugned laws provide adequate notice for individuals to foresee and adapt their behaviour to the rules.[14] The Court therefore holds that the said laws satisfy the requirement of "the law" as stipulated under Article 9(2) of the Charter.

ii. Whether the restriction served a legitimate purpose

138. In its submissions, the Respondent alludes that, given its past history of genocide, the kind of restrictions imposed by the domestic law (which were applied on the Applicant) are meant to protect State security and public order. The nature of the crimes for which the Applicant was charged and convicted also relate to the protection of national security, from expressions creating divisions among the people and internal strife against the government.

139. Unlike Article 19(3) of the ICCPR, the Court observes that Article 9(2) of the Charter does not list those legitimate purposes for which the right to freedom of expression may be restricted. Nonetheless, the general limitation clause under Article 27(2) of the Charter requires that all rights and freedoms must be exercised "with due regard to the rights of others, collective security, morality and common interest". In its case law, the Court has also acknowledged that restrictions on freedom of expression may be made to safeguard the rights of others, national security, public order, public morals and public health.[15]

140. In the instant case, the Court considers that the crimes for which the Applicant was convicted were serious in nature with potential grave repercussions on State security and public order and the aims of the abovementioned laws were to protect the same. The Court therefore

13 See for example, Article 8 of Law No. 84/2013 of 28 October 2013 on the crime of the ideology of genocide, which stipulates that: "The minimization of genocide is any intentional act manifested in public aimed at: 1. Minimising the seriousness of the consequences of the genocide; 2. minimising the methods by which the genocide was committed. Whoever commits an act provided for in the preceding paragraph, shall be guilty of an offense of minimization of the genocide". Article 116 of the Code of Criminal Procedure on negation and minimization of the genocide also stipulates that: "Anyone who, publicly, in his words, writings, images or in any other way, denies the genocide perpetrated against the Tutsi, grossly trivializes it, seeks to justify it or to approve its basis or conceals or destroys the evidence, is liable to imprisonment for more than (5) to (9) years".

14 *Issa Konate* Judgment, para 128.

15 *Issa Konate* Judgment, para. 134-135.

holds that the restriction made on the Applicant's freedom of expression served the legitimate interests of protecting national security and public order.

iii. Whether the restriction was necessary and proportional

141. The Court notes that restrictions made on the exercise of freedom of expression must be strictly necessary in a democratic society and proportional to the legitimate purposes pursued by imposing such restrictions.[16] In this regard, the Court wishes to point out that, the determination of necessity and proportionality in the contexts of freedom of expression should consider that some forms of expression such as political speech, in particular, when they are directed towards the government and government officials, or are spoken by persons of special status, such as public figures, deserve a higher degree of tolerance than others.[17]

142. It should also be noted that freedom of expression protects not only" information" or "opinions that are favourably received or regarded as inoffensive, but also those that offend, shock or disturb" a State or any section of the population.[18] As the European Court of Human Rights has stated in its decision in *Handyside v United Kingdom*, these are "the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[19]

143. The Court is also of the opinion that the assessment of necessity and proportionality under Article 9(2) of the Charter and Article 19(3) of ICCPR cannot be done in a vacuum and due consideration should be given to particular contexts in which the impugned expressions were made.

144. In the instant Application, the Respondent State and CNLG in their submissions aver that the various statements made by the Applicant on different occasions, including those made at the Kigali Genocide Memorial were intended to minimise the genocide committed against Tutsis, by propagating the idea of 'double genocide', and sought to

16 *Issa Konate* Judgment para 145.

17 In17, para 155. *Kenneth Good v Republic of Botswana*, AfComHPR (2010), paragraph 198; case of *Ivcher-Bronstein v Peru*, Judgment of 6/2/2001, para 155, case of *Ivcher-Bronstein v Peru* (IACtHR, Preliminary Objections, Merits, Reparations and Costs), Judgment of 2/7/2004, para 127, case of *Ricardo Canese v Paraguay*, IACtHR, (Merits, Reparations and Costs), judgment of 31/8/2004, para 98.

18 *Handyside v The United Kingdom*, (1976), para 49, see also *Gunduz v Turkey*, Judgment of 4/12/2003, para 37, Human Rights Committee, General Comment 34 (2011), para 11.

19 *Handyside v United Kingdom* (1976), para 49.

undermine the authority of the government by inciting citizens to turn against the government by spreading rumours that create divisions and internal strife among the people of Rwanda. In this regard, the Respondent State prays the Court, in determining the matter, to consider its particular past history and apply the principles of margin of appreciation and subsidiarity.

145. On its part, the Applicant insists that the laws of Rwanda which criminalises the negation and minimisation of genocide do not comply with the requirement that restrictions on the rights of individuals must be necessary. The Applicant also contends that her conviction for spreading rumours likely or seeking to cause a revolt among the population against established authority was not substantiated in the domestic courts through specific and corroborative evidence showing that her positions were likely to establish her criminal liability.

146. The Court wishes to underscore that it is fully aware and cognisant of the fact that Rwanda suffered from the most atrocious genocide in the recent history of mankind and this is recognised as such internationally. This grim fact of its past evidently warrants that the government should adopt all measures to promote social cohesion and concordance among the people and prevent similar incidents from happening in the future. The State has the responsibility to ensure that the laws in this respect are respected and that every offender answers before the law. It goes without saying that it is entirely legitimate for the State to have introduced laws on the "minimisation", "propagation" or "negation" of the genocide.

147. Nevertheless, the laws in question should not be applied at any cost to the rights and freedoms of individuals or in a manner which disregards international human rights standards. The legitimate exercise of rights and freedoms by individuals is as important as the existence and proper application of such laws and is of paramount significance to achieve the purposes of maintaining national security and public order. In all circumstances, it is important that restrictions made on the fundamental rights and freedoms of citizens are warranted by the particular contexts of each case and the nature of the acts that are alleged to have necessitated such restrictions.

148. It is thus incumbent upon this Court to examine the nature of the opinion alleged to have been expressed by the Applicant and determine whether such expression warranted her conviction and imprisonment, and whether such measure was proportional under the circumstances.

149. In this regard, the Court notes from the records of the file that the Applicant's statements that were alleged to have been made on different occasions were of two natures: those remarks made in relation to the Genocide, particularly, at the Kigali Genocide Memorial and those directed against the government, including the President of

the Republic, and the Judiciary (comprising the *Gacaca* Courts).

150. At the Kigali Genocide Memorial, the Applicant claims to have made the following statement in Kinyarwanda:

> "…if we look at this memorial, it only refers to the people who died during the genocide against the Tutsis. There is another untold story with regard to the crimes against humanity committed against the Hutus. The Hutus who lost their loved ones are also suffering; they think about the loved ones who perished and are wondering "When will our dead ones also be remembered?""[20]

151. In its submissions, the Respondent has not made any comments on the authenticity of this statement.

152. However, the Court observes from the records that the Applicant's statement at the Memorial, as indicated in the High Court's judgment of 30 October 2012, reads as follows:

> " … For example, we are honouring at this Memorial the Tutsi victims of Genocide, there are also Hutus who were victims of crimes against humanity and war crimes, not remembered or honoured here. Hutus are also suffering. They are wondering when their time will come to remember their people (…)"[21]

153. On the other hand, the Court further notes from the files that the statements of the Applicant at the Memorial, as recounted by the Supreme Court reads as:

> "… For instance, this memory has been dedicated to people who were killed during the genocide against the Tutsi, however there is another side of genocide: the one committed against the Hutu. They have also suffered: they lost their relatives and they are also asking, "When is our time?" (…)"[22]

154. The key issue at stake is whether in that speech which the Applicant made at the Genocide Memorial she propagated the 'theory of double genocide'. According to Article 5 of Law No. 84/2013 of the 2013 "supporting a double genocide theory for Rwanda" is part of the offence of "negation of genocide". Pursuant to Article 6 of the said law,

> "Minimization of genocide shall be any deliberate act, committed in public, aiming at:
>
> a. downplaying the gravity or consequences of genocide
> b. downplaying the methods through which genocide was committed."

20 See submission of the Applicant (Annex 3).

21 See Paragraph 404 of the Judgment of the High Court of Kigali of 30 October 2012.

22 See paragraph 371 of the Judgment of the Supreme Court of 13 December 2013.

155. From the above, the Court takes note that the versions of the Applicant's speech made at the Memorial, as recited by the High Court and the Supreme Court, are at variance with each other and with the Applicant's version. While the version of the speech as indicated by the Supreme Court talks about "another side of genocide: the one committed against the Hutu", the version of the speech, as recounted by the High Court talks about Hutus being "…. victims of crimes against humanity and war crimes".

156. In the face of these conflicting versions of the speech as quoted by the domestic courts of the Respondent State, the Court is of the view that the doubt should benefit the Applicant. In its assessment, the Court therefore will rely on the speech of the Applicant at the Memorial, as recounted by the High Court. In fact, the High Court's version is similar to what the Applicant herself claims to have said and which was tendered before this Court as evidence, which was not challenged by the Respondent State.

157. The Court acknowledges that, as in any country where there is a history of genocide, the issue is very sensitive, and opinions or comments made in relation to the genocide may not be treated in a similar manner as opinions expressed on other matters. Statements that deny or minimize the magnitude or effects of the genocide or that unequivocally insinuate the same fall outside the domain of the legitimate exercise of the right to freedom of expression and should be prohibited by the law. In the present Application, the Court is however of the opinion that there is nothing in the statements made by the Applicant, which denies or belittles, the genocide committed against the Tutsi or implies the same.

158. Concerning the allegation that the same remarks at the Genocide Memorial propagated the theory of 'double genocide', the Court is also of the opinion that nothing in her remarks suggests that she advanced this view. The relevant paragraph which the High Court used as evidence for the same (quoted above under paragraph 152) are clear that the Applicant admits "the genocide against the Tutsis" but has never claimed that a genocide was committed against the Hutus. The judgment of the High Court of Kigali itself acknowledges that her statements do not refer to genocide against the Hutu but rather reached a different conclusion relying on the context in which they were made. In this connection, the Court understands that the contexts in which statements are expressed may imply a different meaning than the ordinary message that they convey. Nevertheless, in circumstances where statements are unequivocally clear, as is in the present case, putting severe restrictions such as criminal punishments, on the rights of individuals merely on the basis of contexts would create an atmosphere where citizens cannot freely enjoy basic rights and

freedoms, including the right to freedom of expression.

159. The second group of statements made by the Applicant contain severe criticisms against the government and public officials, that includes statements which allege that political power is "dominated by a small clique" that has "a secret parallel power structure around President Kagame, DMI [Directorate of Military Intelligence], the local defence force, … the judiciary and the executive branches of the government"[23]; and stating that she is ready to fight against "the yoke [of fear], poverty, hunger, tyranny, servitudes, corruption, unfair Gacaca court system, repression, prison term for works of general interests (TIG), reasons that lead people to flee the country, inequality, expropriation, homelessness, lack of self-esteem and killing through torture".[24]

160. The Court notes that some of these remarks may be offensive and could have the potential to discredit the integrity of public officials and institutions of the State in the eyes of citizens. However, these statements are of the kind that is expected in a democratic society and should thus be tolerated, especially when they originate from a public figure as the Applicant is.[25] By virtue of their nature and positions, government institutions and public officials cannot be immune from criticisms, however offensive they are; and a high degree of tolerance is expected when such criticisms are made against them by opposition political figures. An examination of these statements cannot reasonably be considered as capable of 'inciting strife'; creating 'divisions among people' or 'threatening the security of the State'. In fact, even though these statements were made at different times before the Applicant was jailed for the same, there is no evidence showing that the statements caused strife, public outrage or any other particular threat to the security of the State or public order.

161. In light of the foregoing, the Court is of the view that the Applicant's conviction and sentence for making the above statements both at the Kigali Genocide Memorial and on other occasions, was not necessary in a democratic society. Even if this Court were to accept that there was a need to put restrictions on such statements, the Applicant's punishment was not proportional to the legitimate purposes which the conviction and sentence seek to achieve. In this regard, the Court notes that the Respondent State could have adopted other less restrictive measures to attain the same objectives.

23 See *Ingabire Victiore and others v the Prosecution*, Judgment of the High Court of Kigali, para 288

24 *Ibid*, para 306

25 *Issa Konate* Judgment, para 155.

162. The Court therefore finds that there was a violation of Article 9(2) of the Charter and Article 19 of the ICCPR.

IX. Measures requested

163. In the Application, the Court is requested to: (a). Repeal, with retroactive effect, sections 116 and 463 of Organic Law N° 01/2012 of 2 May 2012, relating to the Penal Code as well as that of Law N° 84/2013 of 28 October 2013, relating to the punishment of the crime of the ideology of the Genocide, (b) Order the review of the Case (c) Annulment of all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment, (d) Order the Applicant's release on parole; and (e) Payment of costs and reparations.

164. Article 27(1) of the Protocol provides that "if the Court finds that there has been violation of a human or peoples' rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

165. In this respect, Rule 63 of the R.ules provides that "the Court shall rule on the request for reparation by the same decision establishing the violation of a human and people's rights, or if the circumstances so require, by a separate decision".

166. As regards the Applicant's prayers (a), (b) and (c), the Court reiterates its decision in *Ernest Francis Mtingwi v Republic of Malawi,* that it is not an appeal court with respect to the decisions and does not have the power to repeal national legislation. It therefore does not grant the requests.

167. Regarding the Applicant's prayer to be set free, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances.[26] In the instant case, the Applicant has not provided proof of such circumstances. Consequently, the Court does not grant this prayer.

168. The Court however notes that such finding does not preclude the Respondent State from considering such measure on its own.

169. The Court finally notes that none of the Parties submitted opinion on other forms of reparations. It will therefore make a ruling on this question at a later stage of the procedure after having heard the Parties.

26 *Alex Thomas* Judgment para 157; *Mohamed Abubakari* Judgment para 234.

X. Costs

170. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."
171. Having considered the circumstances of this matter, the Court decides that the question of cost will be addressed when considering reparations.
172. For these reasons:
The Court,
Unanimously
On jurisdiction
i. *dismisses* the objection to the Court's jurisdiction raised by the Respondent State;
ii. *holds* that it has jurisdiction to hear the instant Application;

On admissibility
iii. *dismisses* the objection to admissibility of the Application raised by the Respondent State;
iv. *holds* that the Application is admissible;

On the Merits
v. *declares* that the Respondent State has not violated Article 7 (1) b and d of the Charter as regards the right to presumption of innocence and the right to be tried by a neutral and impartial tribunal;
vi. *finds* that the Respondent State has not violated Article 7(1) (c) of the Charter as regards the searches conducted on the Counsel and on the defense witness;
vii. *finds* that the Respondent State has violated Article 7(1)(c) of the African Charter on Human and Peoples' Rights as regards the procedural irregularities which affected the rights of the defense listed in paragraph 96 of this Judgment;
viii. *rules* that the Respondent State has violated Article 9(2) of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights on freedom of expression and opinion;
ix. *orders* the Respondent State to take all the necessary measures to restore the rights of the Applicant and to submit to the Court a report on the measures taken within six (6) months;
x. *dismisses* the Applicant's prayer for the Court to order her direct release without prejudice to the Respondent State's power to take this measure itself;
xi. *defers* its decision on other forms of reparation;
xii. *grants* the Applicant, pursuant to Rule 63 of its Rules, a period of thirty (30) days from the date of this Judgment to file her observations

on the Application for reparation and the Respondent State to file its Response within thirty (30) days from the date of receipt of the Applicant's observations.