IN THE SUPREME COURT OF RWANDA

Case No: RP 0082/10/HC/KIG

In the case of Mrs. Agnès UWIMANA NKUSI and Saïdati MUKAKIBIBI

Before:
Sé TUGIREYEZU Vénantie UMUCAMANZA
Sé MUGABO Pie PEREZIDA
Sé RUTAZANA Angéline UMUCAMANZA
Sé INGABIRE Louise UMWANDITSI

AMICUS CURIAE BRIEF

Of ARTICLE 19: Global Campaign For Free Expression

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Introduction

1. This *amicus curiae* brief is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression ("ARTICLE 19"). ARTICLE 19 is an international organization with offices in different regions, including East Africa. The organization has been working extensively in Rwanda for a number of years.

2. The purpose of this Brief is to present to the Supreme Court of Rwanda the international standards on freedom of expression that are applicable in the case of Mrs. Agnès Nkusi and Mr. Saïdati Mukakibibi. Nkusi and Mukakibbi ("Appellants"). It is our understanding that the Appellants are appealing against their conviction by the High Court for crimes of threatening national security, defamation of the President of Rwanda, genocide denial, and incitement to divisionism. This Brief is based on the principles of freedom of expression, as protected by Article 19 of the Universal Declaration on Human Rights and Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"). The Brief also includes a review of comparative jurisprudence and best practices to provide an idea of positive standards regarding freedom of expression from around the world. In addition, the Brief refers to ARTICLE 19's publications, the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information* ("Johannesburg Principles"),[1] and *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* ("Defining Defamation").[2] These Principles are based on an extensive analysis of international law and best practice and have been endorsed by, among others, the United Nations Special Rapporteur on Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples Rights.

3. ARTICLE 19 believes that the present case raises important questions on the freedom of the media, the Appellants' rights to freedom of expression and, in particular, the legality of the limitations on these freedoms imposed by the High Court. This Brief attempts to contribute to a better understanding and implementation of these freedoms in Rwanda and to their proper implementation by the Supreme Court of Rwanda.

Interest of ARTICLE 19

4. ARTICLE 19 is an international freedom of expression organization, based in London with regional offices in Bangladesh, Brazil, Kenya, Mexico and Senegal. The organization takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 works globally to protect and promote the right to freedom of expression, including access to information and the means of communication. ARTICLE 19 frequently submits joint written comments to international and regional courts as well as to courts in national jurisdictions in cases which raise issues touching on the international guarantee of freedom of expression, including on rights of journalists and media.

5. The persons with conduct of this amicus curiae brief is Stephanie Muchai, Legal Officer for East Africa, at +254 (20) 3862230/2 or email: muchai@article19.org and Henry Maina, Director of ARTICLE 19 Kenya/Eastern Africa at +254 (20) 3862230/2 or email: henry@article19.org.

[1] ARTICLE 19, London: 1996; http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf.
[2] ARTICLE 19, London: 2000; http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf.

Statement of Facts

6. In this Brief, ARTICLE 19 relies upon and adopts the facts as presented in the court materials made available to ARTICLE 19, for the purposes of this submission, by the legal counsels of the Appellants.

7. The first appellant, Mrs. Agnès Nkusi, was the chief-editor of the newspaper *Umurabyo,* a privately-owned bi-monthly tabloid with circulation under 100 copies before it ceased to exist in 2010. The second appellant, Mrs. Saïdati Mukakibibi, was a reporter for *Umurabyo*. In July 2010, the prosecution opened the criminal proceedings against the first Appellant for crimes of threatening national security (under Article 166 of the Rwandan Penal Code),[3] genocide denial (under Article 4 of the Genocide Ideology Law),[4] defamation of the President of Rwanda (under Article 391 of the Penal Code)[5] and incitement to divisionism (under several articles of the Law on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianis[6]), and against the second Appellant for the crime of threatening national security, based on their statements made in different articles, published in 2009 and 2010 in the *Umurabyo* newspaper.

   7.1. Mrs. Nkusi was charged with threatening national security for four articles published in the *Umurabyo* newspaper. The prosecution claimed that in the article '*Rwandans have been in a coma for 15 years,'* she incited the population to resist the Government's programmes and to hate the authorities by arguing that the Government was imposing on Rwandans certain crops to grow. According to the prosecution, this might have irritated the population and made them resent President Kagame's regime. She was also accused of "sensitizing the population" to flee through her article concerning the government policy on Gacaca courts, titled "*Kagame in Hard Times*". She was further charged with inciting hate against the public authorities in an unidentified article in which she reported about discrimination on the job market; and with "spreading rumours with the intent of creating insecurity" in another unidentified article alleging that a high ranking army officer colluded in acts resulting in the explosion of grenades in the city of Kigali. Nkusi was also charged with defaming the President of Rwanda, by printing a picture of him bearing Nazi symbols in an article entitled "*Who shall Kagame belong to in the future?*", and by stating that the President protected a prominent army official from day to day scandals, and colluded with that official to steal money from taxi drivers. Nkusi was also supposed to commit the crime

[3] Article 166 of the Penal Code states: "Whoever either through speech in a meeting or public place, writing of any kind, typing, pictures and drawings of any kind, hanged, distributed, bought, sold or availed to the public eyes or internationally spread rumours, incites or trying to incite the people against the established powers, be raised or attempted to raise the people against each other, or alarmed the people and sought to bring the disorder and the territory of the Republic, will punished with imprisonment from two to ten years and a fine of 2000 to 100,000 francs or one of these penalties, without prejudice to more severe penalties under other provisions of this Code."

[4] Article 4 of Law N° 33 Bis/2003 Of 06/09/2003 on Repressing The Crime Of Genocide, Crimes Against Humanity And War, states: "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 shall be sentenced to an imprisonment of ten (10) to twenty (20) years. Where the crimes mentioned in the preceding paragraph are committed by an association or a political party, its dissolution shall be pronounced."

[5] Article 391 of Penal Code of Rwanda reads: "Whoever will say, with bad intent or publically, lying that a person has done something which would affect his/her reputation and personality shall be given an 8-day to 1-year sentence and the fine payment varying from 1,000rwf to 10,000rwf or one of these penalties."

[6] Article 1 of the Law on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism, Law No. 47/2001 of 18/12/2001, defines divisionism as "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." Article 8 of the same Law, states: "Any person who makes public any speech, writing, pictures or images or any symbols over radio airwaves, television, in a meeting or public place, with the aim of discriminating [against] people or sowing sectarianism [divisionism] among them is sentenced to between one year and five years of imprisonment and fined between five hundred thousand (500,000) [US$ 1000] and two million (2,000,000) Rwandan francs [US$ 4,000] or only one of these two sanctions." Moreover, Article 3 of the same Law provides that "the crime of divisionism occurs when the author makes use of any speech, written statement or action that causes conflict that causes an uprising that may degenerate into strife among people."

of genocide denial by an article in which she stated that "*Rwandans have grown in those hates until they killed reciprocally one another after the death of Kinani.*" Another article, entitled "*Rwandans have been in a coma for 15 years*," - in which she said that every regime in the past favoured a clan, and that current President Kagame favoured his own clan - resulted in the charges of incitement to divisionism.

7.2. Mrs. Mukabibi was accused of threatening national security for a July 2010 article in *Umurabyo* in which she commented that during the current President's term of office, killings and insecurity in Rwanda increased; Rwanda became an enemy to neighbouring countries; ethnicity continued to separate Rwandans; the Rwandan economy declined; the quality of education was low; the living standards of orphans and widows had been worsening; and members of the Rwanda Patriotic Front Government and genocide survivors were killing people.

8. On 4 February 2011, both Appellants were sentenced by the High Court of Rwanda. Mrs. Nkusi was found guilty of the crimes of threatening national security, genocide denial, defamation of the President of Rwanda and incitement to divisionism; and was sentenced to 17years imprisonment and a fine of 250,000 Rwandan francs (US$ 420). Mrs. Mukakibibi was found guilty of the crime of threatening national security and sentenced to 7years imprisonment. Both were ordered to pay court fees of 64,200 Rwandan francs (US$108).

8.1. The High Court concluded that Mrs. Nkusi was guilty of threatening national security, as she was said to have written the articles with intent to incite the readers to hate the current public authority. In particular, the Court determined there was no evidence that the situation of the poor in Rwanda was as bad as had been described by Nkusi in her article, and that she had therefore been spreading rumours. The Court also found that there was no evidence supporting allegations that the government had a "policy of imprisoning a group of people," or that some people had left the country due to the strong fear of the Gacaca courts being used as a means of revenge. The Court also found that the information about the high ranking officer was not substantiated and was therefore based on rumours. The Court declared that it was irrelevant that the articles had caused no insecurity in the country. As for the defamation of the President, the Court reasoned that there was proof of a 'nasty' intention from the offensive character of the used terms and that the article affected the reputation of the President. As for the crime of genocide denial, the Court concluded that Nkusi's article intentionally denied the genocide by not acknowledging the agenda to exterminate Tutsis, but rather claiming that it was mutual hatred that caused the killings. As for the incitement to divisionism, the Court said that in putting forth the notion of favouritism of one clan over another, and making reference to antagonism between clans, Nkusi intended to create conflict between ethnic groups and incite disorder among them.

8.2. As to the accusations concerning Mrs. Mukabibi, the High Court found that she threatened national security through certain expressions in her article as the article was written without research to support the findings of her statements. The Court thus concluded that she spread rumours with the intention of creating public insecurity and sensitizing the population to hate public authority.

9. Article 19 of the *Universal Declaration on Human Rights* ("UDHR"),[7] UN General Assembly resolution 217A(III), guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

While the UDHR is not directly binding on States parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[8] States are under a duty, arising from the nature of treaty obligations and from customary international law, to bring their internal law into conformity with these obligations.[9]

10. Rwanda's international legal obligations to respect freedom of expression are also spelt out in Article 19 of the *International Covenant on Civil and Political Rights* ("ICCPR"),[10] to which Rwanda became a State Party in 1975. Like Article 19 of the UDHR, Article 19 guarantees freedom to seek and receive information. The right to freedom of expression applies not only to information and ideas generally considered to be useful or correct, but to any kind of fact or opinion which can be communicated. The UN Human Rights Committee has emphasised that Article 19 encompasses "news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression".[11] Moreover, the right to freedom of expression also extends to controversial, false or even shocking material; the mere fact that an idea is disliked or thought to be incorrect cannot justify preventing a person from expressing it.

11. Rwanda is also a State Party to the *African Charter on Human and Peoples' Rights* ("ACHPR"),[12] which guarantees freedom of expression in Article 9. Article 1 of the ACHPR imposes an obligation on State Parties to recognize the rights contained in the Charter and to take positive steps to give effect to these.

12. In its Declaration of Principles on Freedom of Expression in Africa,[13] the African Commission on Human and Peoples' Rights interpreted the meaning of the right to freedom of expression. This Declaration expresses the African Commission's understanding of the key elements of the right to freedom of expression and of the principles for ensuring respect, promotion and protection of the right. As a member of the African Union, Rwanda has recognized the powers of the African Commission to interpret the ACHPR and is obliged to comply with its interpretation of the right to freedom of expression

13. For a comparative perspective, it is noted that both the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR")[14] and the *American Convention on Human Rights* ("ACHR")[15] guarantee freedom of expression.[16] These conventions, and their interpretation by authoritative courts, are not legally binding on Rwanda. Nor are the many national decisions, declarations and other authoritative statements by international bodies outlined below. At the same time, ARTICLE 19 submits that these all provide good evidence of generally accepted rules

[7] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[8] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[9] I. Brownlie, *Principles of Public International Law*, 5th Ed. (Oxford: Oxford University Press, 1998), p. 35.
[10] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[11] *Ballantyne and Davidson v Canada*, Communication No 359/1989 and *McIntyre v Canada*, Communication No 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev 1, 5 May 1993 Annex para 11.3.
[12] Adopted 26 June 1981, in force 21 October 1986. Rwanda ratified the Convention on 15 July 1983.
[13] Adopted by the African Commission on Human and Peoples' Rights at the 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.
[14] E.T.S. No. 5, in force 3 September 1953.
[15] Adopted 22 November 1969, in force 18 July 1978.
[16] Articles 10 and 13 respectively.

of international law, and in particular of the scope and nature of the guarantee of freedom of expression, binding on all members of the international community.[17]

Fundamental Status of Freedom of Expression

14. The overriding importance of freedom of expression as a human right has been widely recognized, both for its own sake and as an essential underpinning of democracy and a means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

> Freedom of expression is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated.[18]

15. These views have been reiterated by all three regional judicial bodies dealing with human rights. The African Commission on Human and Peoples' Rights noted, in respect of Article 9 of the ACHPR:

> This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.[19]

16. The European Court of Human Rights has also recognized the key role of freedom of expression as "one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man...it is applicable not only to "information" or "ideas" that are favourably received...but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society."[20] Similarly, the Inter-American Court of Human Rights, stated that "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[21]

17. These views have been reiterated by numerous national courts around the world. For example, the Zimbabwean Supreme Court has stated:

> This Court has held that s.20 (1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy...Furthermore, what has been emphasized is that freedom of expression has four broad special objectives to serve: (i) it helps an individual obtain self-fulfillment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.[22]

Restrictions on Freedom of Expression

18. Under international standards, restrictions on the right to freedom of expression must meet a strict three-part test, set by Article 19(3) of the ICCPR. *First*, the interference must be in accordance with the law; *second*, the legally sanctioned restriction must protect or promote an aim deemed legitimate (respect for the rights and reputation of others, and protection of national security,

[17] Note 9, p. 12.
[18] Resolution 59(1), 14 December 1946.
[19] *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 21 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para. 52.
[20] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.
[21] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No.5, para.70 ("Compulsory Membership" case).
[22] Chavanduka & Choto v. Minister of Home Affairs and Another, Judgment No.S.C. 36/2000, 22 May 2000, p. 9.

public order, public health or morals); and *third*, the restriction must be necessary for the protection or promotion of the legitimate aim. A similar test is set by Article 43 of the Constitution of Rwanda which requires that any restriction on the right to freedom of expression should be set out by law in order to ensure the recognition and respect of others' rights and freedoms, good morals, public order and social welfare which characterize a democratic society.

19.1. Provided by law: This requirement implies not only that the restriction must be based on law but also that the relevant law should meet certain standards of clarity and accessibility. Vague provisions are susceptible to wide interpretation by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relation to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited or prescribed; thus, they exert an unacceptable "chilling effect" on freedom of expression as individuals steer well clear of the potential zone of application in order to avoid censure.

19.2. Legitimate aim: Article 19(3) of ICCPR provides an exhaustive list of aims that may justify a restriction on freedom of expression; restrictions imposed on the basis of any other aims are not therefore valid.[23] In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both its purpose and its effect. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld. At the same time, the burden of proving that restrictions imposed on freedom of expression are necessary to achieve one of the legitimate aims lies with the government.[24]

19.1. Necessity: Only restrictions that are necessary to secure one of the above aims are permitted. This part of the test presents a high standard to be overcome by the State seeking to justify the restriction. The reasons given to justify the restriction must be "relevant and sufficient". Finally, the impact of restrictions must be proportionate[25] in the sense that the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would not pass the test.

19. Article 20 of the ICCPR also sets limitations on freedom of expression and requires states to prohibit certain forms of speech which are intended to sow hatred. Article 20(2) states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Article 20(2) does not require states to prohibit all negative statements towards national group, races and religions, but as soon as a statement "constitutes incitement to discrimination, hostility or violence" it should be banned.

20. As a member of the UN and the African Union and a State Party to both the ACHPR and the ICCPR, the Rwandan judicial bodies are legally bound to respect and protect the right to freedom of expression in accordance with international law. They must also subject any interference with freedom of expression to the three-part test. Moreover, the Rwandan Constitution establishes that international agreements to which Rwanda is a party constitute an integral part of the legislative system of Rwanda, and that whenever there is a conflict between domestic laws and international treaties and agreements provisions of the latter shall dominate.

[23] See *Mukong v. Cameroon*, note **Error! Bookmark not defined.**, para. 9.7.
[24] See *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997, paras. 8.3-8.5.
[25] See *Morais v. Angola*, 18 April 2005, para 6.8.

Discussion

21. The issue in this case is whether the charges against two Appellants for the crimes of threatening national security, defamation of the President, genocide denial and incitement to divisionism respectively should be upheld by the Supreme Court of Rwanda.

22. Based on the facts and the decision of the High Court, ARTICLE 19 believes that the present case raises the following issues concerning the implementation of international safeguards on freedom of expression:
    - The degree to which freedom of expression may be restricted to protect national security;
    - The extent to which statements about public officials (in particular the President of the country) are entitled to special protection;
    - The standard that should be applied by the Supreme Court in assessing the limitations on freedom of expression on the grounds of genocide denial;
    - The standard that should be applied by the Supreme Court in assessing the limitations on freedom of expression on the grounds of incitement to divisionism/creating diversionist ideas;
    - The proportionality of the sentences imposed on the Appellants.

    The following sections analyze these questions in greater detail from the international perspective.

Limitation on freedom of expression on national security grounds

23. Both Appellants were convicted for the crime of threatening national security on the basis of several articles they published in the *Umurabyo* newspaper. ARTICLE 19 respectfully submits that the Supreme Court should review whether this interference with the Appellants' right to freedom of expression, as well as the sanctions imposed on them, meet the three-part test for the legitimacy of limitations on the right; in particular, the Court should determine whether the interference was necessary in accordance with the second part of the test.

24. ARTICLE 19 observes that no clear definition of what constitutes "national security" is available in international jurisprudence. The UN Human Rights Committee has, however, made it clear that the suppression of democratic discourse and human rights cannot be justified on the grounds of national security.[26] The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has addressed this in the *Siracusa Principles,* by stating that:

> National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
>
> National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
>
> National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.[27]

25. According to this definition, restrictions on the basis of national security are only justifiable if they address a threat to the *"existence of the nation or its territorial integrity or political independence."* Ordinary criminal activities cannot, therefore, be used to justify restrictions on freedom of expression.

[26] *Albert Womah Mukong v. Cameroon*. Communication 458/1991 of the Human Rights Committee
[27] United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984); Principle B.

26. Furthermore, when examining national security claims international and domestic courts have consistently sought to establish whether: i) the statements have been made with the intent to cause harm to national security;[28] and ii) there is a clear nexus between the statement and the likelihood of this harm occurring.[29]

27. ARTICLE 19 points out that the requirement of intent seeks to draw a line between legitimate political debate on matters of national security and incitement to illegal action. Citizens should be permitted to introduce any views they hold into the marketplace of ideas and promote them through peaceful means, so that others can form their own opinion about them. The intent requirement further serves to shield speakers from responsibility for unintended responses on the part of their listeners.

28. ARTICLE 19 also notes that there must be a clear nexus between the statement and the likelihood of harm occurring. Granting governments the discretion to restrict expression based on an unsure or remote risk of harm would create a great opportunity for abuse, and endanger democratic debate about some of the most important and contentious political issues. National security can actually benefit from a situation where individuals with controversial and radical opinions are permitted to express themselves within the framework of the law. In this respect, ARTICLE 19 also refers to the decision of the Human Rights Committee in the case of *Keun-Tae Kim v. Republic of Korea*, which concerned the conviction of a founding member of the National Coalition for Democratic Movement of national security offences for distributing and reading out documents to an audience of 4000, criticising the government and appealing for reunification with North Korea. The Human Rights Committee found it was,

> [not clear] what was the nature and extent of any . . . risk [to national security]. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.[30]

29. In the case at hand, ARTICLE 19 observes that there is no indication that the High Court considered these standards. Hence, the Supreme Court of Rwanda should examine both whether the Appellants had the intent to cause harm to national security and also whether there was any possibility of such a harm occurring. ARTICLE 19 requests the Supreme Court to undertake a thorough assessment of these issues in light of all the available evidence.

Statements with respect to the President of Rwanda

30. The High Court found the first Appellant, Mrs. Nkusi, guilty of criminally defaming the President, based on proof of a 'nasty' intention established by the offensive character of the used terms. The

[28] For example, emphasising that intent is a crucial factor to be taken into consideration in judging the legitimacy of a restriction on the grounds of national security, the European Court of Human Rights made the following observations in the case of *Sener v. Turkey*, which concerns the conviction of an editor of a weekly newspaper for the publication of a critical article about the Turkey's policy towards its Kurdish minority: "[A]lthough certain phrases seem aggressive in tone . . . the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, rectification or armed resistance. ... In the Court's view these are the essential factors which should be considered. ... Furthermore, the Court observes that the applicant was convicted ... for disseminating separatist propaganda by referring to a particular region of Turkey as "Kurdistan" and alleging that the population of Kurdish origin living in that region was subjected to oppression. In this regard, the Court considers that the domestic authorities ... failed to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them." See *Sener v. Turkey*, 18 July 2000, Application No. 26680/95, para. 45-46.

[29] See, also *the Johannesburg Principles*, that summarises in Principle 6 the intent and nexus requirements as follows: "Expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."

[30] *Keun-Tae Kim v. Republic of Korea*, Communication No. 574/1994, UN Doc. CCPR/C/64/D/574/1994 (4 January 1999), para. 12.4.

High Court also found that the article in question affected the reputation of the President. In response to these conclusions, ARTICLE 19 respectfully asks the Supreme Court to consider the following.

31. Criminal defamation: ARTICLE 19 notes that there is a strong argument in international law that criminal defamation is itself a breach of the right to freedom of expression. For example, the UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concern, in the context of its consideration of regular country reports, about the possibility of criminal sanctions for defamation; recommending a thorough reform in countries as wide-ranging as Azerbaijan,[31] Norway[32] and Cameroon.[33] Similarly, the UN Special Rapporteur on Freedom of Opinion and Expression, in his Report in 2000, and again in 2001, called on States to repeal all criminal defamation laws in favour of civil defamation laws.[34] In a similar vein, in their joint Declarations of November 1999, November 2000 and again in December 2002, the three special international mandates for promoting freedom of expression called on States to repeal their criminal defamation laws.[35]

32. Furthermore, ARTICLE 19 wishes to point out that in a number of jurisdictions, politicians and public officials are required to tolerate a greater degree of criticism than ordinary citizens. There are a number of reasons for this higher standard. *First*, and most importantly, democracy depends on the possibility of open public debate about matters of public interest. Without this, democracy is a formality rather than a reality. Hence, those who hold office in government and who are responsible for public administration must always be open to criticism and any attempt to interfere with such criticism amounts to unacceptable political censorship.[36] *Second*, public officials have already knowingly and willingly exposed themselves to scrutiny by assuming public functions. *Third*, public officials normally have greater access to the means of communication and hence can respond publicly to any allegations, whereas this may not be so easy for ordinary citizens. Inasmuch as the *Umurabyo* article concerned the President of Rwanda, these special standards are clearly relevant. This standard has been widely recognized in the regional and national comparative jurisprudence.

    32.1. For example, in its very first defamation case, the European Court of Human Rights ("European Court") emphasized that "*the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual*", as politician "*inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.*"[37] This case concerned a conviction of a journalist for defamation of the retiring Austrian Prime Minister (Chancellor). The journalist harshly criticized the Chancellor for agreeing to collaborate with a political party headed by a former Nazi. The journalist used expressions such as "basest opportunism", "immoral" and "undignified" to describe his attitude. The European Court ruled in favour of the journalist, highlighting the importance of political debates in a democratic society.

    32.2. An even greater degree of tolerance applies to criticism of governments. In *Castells vs. Spain*, the European Court held that the "*limits of permissible criticism are wider with*

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[31] *Concluding observations of the Human Rights Committee: Azerbaijan*, UN Doc. CCPR/CO/73/AZE, 12 November 2001.
[32] *Concluding Observations of the Human Rights Committee: Norway,* UN Doc. CCPR/C/79/Add.112, 1 November 1999.
[33] *Concluding observations of the Human Rights Committee: Cameroon*, UN Doc. CPR/C/79/Add.116, 4 November 1999
[34] See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression* , UN Doc. E/CN.4/2001/64, 26 January 2001.
[35] The 2002 statement read: Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Joint Declaration of 10 December 2002. Available at http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm.
[36] The Judicial Committee of the Privy Council, *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), p. 318.
[37] See *Lingens v. Austria*, 8 July 1986, para 42.

regard to the Government than in relation to a private citizen, or even a politician."[38] This case concerned the conviction for defamation of an opposition Member of Parliament, who published an article complaining of the inactivity on the part of the authorities with regard to numerous attacks and murders that had taken place in the Basque Country. The article alleged that the police were in collusion with the guilty parties and implied that the Government was responsible.

32.3. In 1994, the Inter-American Commission on Human Rights ("Inter-American Commission") issued a study on the compatibility of laws that provide special protection for the honour and reputation of public official with international standards. The Commission held that such laws offended freedom of expression, and noted that, "*in democratic societies political and public figures must be more, not less, open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of a democratic society, necessarily involves those persons who are involved in devising and implementing public policy.*"[39]

32.4. In 2000, the Joint Declaration of the three special international mandates for promoting freedom of expression - the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression – stated that "*at a minimum... defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, ..., should be repealed.*"[40]

32.5. The principle that politicians and public officials must tolerate a greater degree of criticism has been stressed by courts in a number of national jurisdictions. For example:

- In 1994, in a case where public officials tried to block the publication of an autobiography they considered damaging, the Indian Supreme Court ruled that public officials did not have a right of privacy or remedy of action for damages with respect to acts and conduct relevant to their official duties.[41] As a result, the government and bodies exercising governmental power could not maintain a suit in defamation.[42]
- In 1994, the Hungarian Constitutional Court struck down Section 232 of the Penal Code which provided special protection against defamation for public officials, finding it an unacceptable limitation on freedom of expression.[43]
- In 1985, the Supreme Court of the Netherlands held that public figures must tolerate more and sharper criticism than ordinary citizens.[44]

33. As with the above review of the conviction for threatening national security, ARTICLE 19 is concerned that there is no evidence that the High Court took these international standards in to account when imposing the guilty sentence for defamation against Mrs. Nkusi. From the facts of the case, it appears that the article in the *Umurabyo* newspaper discussed the issue of public importance; it is, therefore, necessary for the Supreme Court to examine carefully all the aspects of the publication in the light of international standards outlined herein.

Statements concerning genocide denial

34. ARTICLE 19 observes that the first Appellant, Mrs. Nkusi, was convicted of genocide denial for expressing an opinion that in one specific incident the Rwandans had reciprocally killed one

[38] See *Castells v Spain*, 23 April 1992, para 46.
[39] Annual Report of the Inter-American Commission on Human Rights, 1994, p. 210
[40] Joint Declaration. 30 November 2000.
[41] *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (SC), para. 21.
[42] *Id.*, para. 26.
[43] Decision 36/1994. (VI.24) AB.
[44] *Herrenberg/Het Parool* case, 6 March 1985, *Nederlandse Jurisprudentie* 1985, 437.

another. According to the High Court this statement amounted to genocide denial because Mrs. Nkusi failed to acknowledge that there was an agenda to exterminate Tutsis. ARTICLE 19 considers that the dispute in question concerns the debate on historical issues; hence, the Supreme Court of Rwanda should consider the following international standards.

35. On the outset, ARTICLE 19 wishes to point out that we consider all laws prohibiting the denial of genocide, including the provisions of the respective Rwandan legislation, to breach international guarantees of freedom of expression. It is inherently illegitimate for the State to impose a blanket ban on discussion of historical matters. Such laws are both unnecessary – since generic hate speech laws already prohibit incitement to hatred – and open to be abused to stifle legitimate historical debate and research.

36. Although ARTICLE 19 acknowledges the particular context within which the High Court reviewed the case (the historical legacy of the Rwandan genocide and the role that certain media played in creating the conditions that gave rise to the genocide), we are concerned at how the charges of genocide denial are summarily used to either trample the opposition or to suppress any discussion on this part of Rwanda's history. We also note that a similar view has already been expressed on the Genocide Ideology Law by the Committee on the Elimination of Racial Discrimination, which recommended that Rwanda "contemplate revising Law No. 18/2008 of 23 July 2008, ... to include intention as one of the constituent elements of this crime listed in article 3, and thus to provide all the guarantees of predictability and legal security required of a criminal law and prevent any arbitrary interpretation or application of this law."[45]

37. We note that historical views in general, and on their causes in particular, cause heated debates. However, these debates are protected by international law because they concern matters of public interest. For example, the European Court has repeatedly stated that "there is little scope under Article 10(2) [the ECHR's provision concerning restrictions on the right to freedom of expression] for restrictions on political speech or on debate of matters of public interest" [46] and has established that "*very strong reasons* are required to justify restrictions on political speech [emphasis added]".[47] In that connection, the European Court reiterated that, subject to permissible limitations, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[48]

38. At the same time, ARTICLE 19 wishes to reiterate that a blanket ban on denial of genocide or any other historical event, regardless of the context, goes beyond the established standard of incitement to hatred by elevating a historical event to dogma and by prohibiting a category of statement. Where instances of genocide denial do wilfully incite racial hatred, general hate speech laws, conforming to international standards, can be used to prosecute the perpetrators. The experience of the vast majority of the countries of the world, which do not have any form of genocide denial law, suggests that this approach is effective and that specific genocide denial laws are not needed to combat incitement to hatred, even where it is framed as genocide denial.

39. In this particular case, ARTICLE 19 notes that the guilty verdict for genocide denial was imposed without regard to these standards. Therefore, ARTICLE 19 requests the Supreme Court to consider both the legality of the restrictions imposed by the Genocide Ideology Law and also the circumstances in this particular case.

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[45] See Consideration of Reports Submitted By States Parties Under Concluding observations of the Committee on the Elimination of Racial Discrimination: Rwanda, 19 April 2011, Committee on the Elimination of Racial Discrimination, Seventy-eighth session, 14 February–11 March 2011

[46] *Surek v. Turkey (No. 4),* Judgement of 8 July 1999, Application No. 24762/94, *para 57* (European Court of Human Rights).

[47] *Feldek v Slovakia*, Judgment of 12 July 2001, Application No. 29032/95 (European Court of Human Rights).

[48] *Ibid.* para 55.

Statements concerning incitement to divisionism

40. As for the sentence against Mrs Nkusi on the grounds of incitement to divisionism, ARTICLE 19 recalls that Article 19(3) of the ICCPR does not recognize "incitement to divisionism" as a legitimate aim for restricting the right to freedom of expression. Therefore, we note that the Rwandan law enforcement authorities are banned by international law to limit free speech on this ground.

41. ARTICLE 19 also points out that the crime of divisionism is defined in a very broad way, which makes freedom of speech subject to a significant degree of interpretation by the government. We recall that a similar conclusion has already been adopted by the Human Rights Committee, whichhas recommended to the Rwandan Government that it "make sure that any restriction on the exercise of their activities is compatible with the provisions of article 19, paragraph 3, ICCPR and cease to punish acts of so-called "*divisionism*" [emphasis is added].[49].

42. Hence, ARTICLE 19 submits that the Supreme Court should consider that the conviction of Mrs. Nkusi for the incitement to divisionism did not meet the requirements of legitimate restrictions established by Article 19(3) of the ICCPR. We respectfully request the Supreme Court to remedy this issue on the appeal.

Sentences imposed on both Appellants

43. In addition to all the arguments against the individual charges against the Appellants, ARTICLE 19 believes the Supreme Court of Rwanda must review the length of sentences imposed by the High Court in the light of international freedom of expression standards.

44. In particular, ARTICLE 19 observes that the international courts consider sanctions *per se* as interference with the right to freedom of expression and therefore they should meet the three-part test outlined above.

    44.1. For example, the European Court has previously established that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with freedom of expression.[50] It has repeatedly stated that "the utmost caution" should be exercised where the measure taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.[51]

    44.2. Furthermore, the European Court took note of the severe character of criminal convictions both in terms of the nature of the penalty and the consequences for having a criminal record. Therefore, it has established that: "[i]mposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with [right to freedom of expression]... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired."[52] In *Liashko v. Ukraine*, the European Court further held that "the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, *particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media*.[emphasis added]"[53] Also, in the case of *Mahmudov and Agazade v*

[49] See Consideration of Reports Submitted By States Parties Under Article 40 Of The Covenant : International Covenant On Civil And Political Rights : Concluding Observations of the Human Rights Committee : Rwanda, 7 May 2009, Human Rights Committee, Ninety-fifth session, New York, 15 March - 3 April 2009.
[50] See among other authorities *Skałka v. Poland*, 27 May 2003, Application No. 43425/98, §§ 41-42.
[51] See among other authorities *Cumpănă and Mazăre v. Romania,* Judgment of the Grand Chamber, 14 December 2004, Application no. 33348/96.
[52] *Gavrilovici v. Moldova*, 15 December 2009, Application No. 25464/05, para. 60
[53] Judgment of 10 August 2006, Application No. 21040/02, para. 41.

Azerbaijan[54], which concerns the conviction of defamation of a chief editor and a journalist and their prison sentence, the European Court has stated that "[the states] ... must not ... unduly deter the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power. Investigative journalists are liable to be inhibited from reporting on matters of general public interest if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment. A fear of such a sanction inevitably has a chilling effect on the exercise of journalistic freedom of expression."

45. In light of this comparative jurisprudence, ARTICLE 19 asks the Supreme Court of Rwanda to consider whether the 17-year and 7-year prison sentences imposed on the Appellants were disproportionate and, as such, in violation of their right to freedom of expression. Given the importance of the right to freedom of expression, the Supreme Court of Rwanda must ensure that measures taken or sanctions imposed on expression do not dissuade individuals and the media from taking part in discussion of matters of legitimate public concern. The Court should acknowledge the principle that in a democratic society, the press must be able to perform the role of a public watchdog.

[54] Judgment of 18 March 2009, Application no. 35877/04, para. 50

Conclusions

46. Freedom of expression has been recognized as a basic condition for democracy and indeed human progress and development. The free flow of information and ideas is important in many walks of life but it is the very lifeblood of a democratic system of government. International law protects the right to freedom of expression and media freedom. Courts should therefore protect expression concerning matters of public interest and ensure that the media can keep the public informed and act as a watchdog of government.

47. As outlined in this Brief, the international legal standards on national security, defamation and other restrictions on freedom of expression impose strict criteria under which the charges against both Appellants should be reviewed by the Supreme Court of Rwanda. In sum, this Brief suggests that under these international standards and in many countries around the world, the High Court decision would be considered a violation of the right of the Appellants to freedom of expression. Hence, ARTICLE 19 respectfully requests the Supreme Court of Rwanda to take these standards into account in the appellate review of the case, and to consider whether the convictions of the Appellants should be invalidated.

48. **This is the opinion of ARTICLE 19, prepared by the undersigned, and is subject to the decision of this Court.**

Dated: 24 October 2011

Respectfully submitted,

For ARTICLE 19, Global Campaign for Freedom of Expression

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