The judiciary treatment of human rights defenders in the regions of the African Great Lakes and Eastern Africa

Comparative case study / January 2015

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Avocats Sans Frontières (ASF) is an independent, international, non-governmental organization founded in Belgium in 1992, with the aim of contributing to the creation of equitable societies in which the law and its institutions serve the most vulnerable people. ASF has been working in the regions of the African Great Lakes and East Africa since its creation in 1992 on various projects to enhance access to justice for the vulnerable, projects on pre-trial detention, as well as projects for the training and coaching of lawyers, and numerous interventions in strategic litigations.

The East Africa Law Society (EALS) is the premier regional bar association in East Africa. It is a dual membership organization, bringing together more than ten thousand individual lawyer-members from the region, as well as six national Bar Associations (Law Society of Kenya, Tanganyika Law Society, Zanzibar Law Society, Uganda Law Society, Kigali Bar Association and Burundi Bar Association). It is the largest organized professional civil society membership organization in the region, with a strong mandate and interest in the professional development of its members.

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ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ADL	Association pour la défense des droits des personnes et des libertés publiques
APRODH	Association pour la promotion des droits humains et des personnes détenues
ASF	Avocats Sans Frontières
CLADHO	Collectif des Ligues et Association de Défense des Droits de l'Homme
DRC	Democratic Republic of the Congo
DPC	District Police Commander
EAC	East African Community
EACJ	East African Court of Justice
ECHR	European Convention on Human Rights
FBu	Franc burundais
FIDH	Fédération internationale des droits de l'homme
FDR	Forces de la restauration de la démocratie
HRDs	Human Rights Defenders
ICCPR	International Covenant on Civil and Political Rights
IFEX	International Freedom of Expression Exchange
ICJ	International Commission of Jurists
LIPRODHOR	Ligue rwandaise pour la promotion et la défense des droits de l'homme
MDD	Maison de droit
MP	Member of Parliament
NGO	Non-Governmental Organization
OLUCOME	Observatoire de lutte contre la corruption et les malversations économiques
OMCT	Organisation Mondiale contre la Torture
PARCEM	Parole et action pour le réveil des mentalités
PRALP	Popular Resistance against Life Presidency
REDHAC	Réseau des défenseurs des droits humains en Afrique centrale
RWAMREC	Rwanda Men's Resource Center
RFI	Radio France internationale
RPA	Radio Publique Africaine
RRU	Rapid Response Unit
RSF	Reporters Sans Frontières
UBJ	Union of Burundian Journalists
VSF	La Voix des Sans-Voix

INTRODUCTION

As democratisation processes are under way in Eastern Africa, Human Rights Defenders (HRDs) continue to face multiple obstacles in their mission to defend rights and in their everyday work. This issue has been documented and reported extensively over the past few years at national, regional and international levels. These obstacles faced by HRDs on a daily basis range from physical threats and administrative or judiciary harassment, to being charged with serious criminal charges and, sometimes, being the victim of violent crimes.

The democratization processes in the Region will, however, only become effective when HRDs are provided with unrestricted working environments. By strengthening accountability of public officials, contributing to the development of policies and legislation, reporting on human rights violations, or developing public debates on issues relating to the public interest, HRDs are essential partners for healthy democratization processes. Their work with the most vulnerable populations allows for wider participation in public debates and ensures that authorities are reminded of their responsibilities.

While their protection generally remains a challenge, HRDs are often reluctant to resort to legal actions legal actions as protective measures or to seek justice and reparation after attacks. The lack of trust and confidence of some HRDs in the impartiality and independence of the judicial system contributes to their isolation and adds to their fear of being further persecuted when taking legal action against their aggressor. When HRDs do decide to take legal action, the response is often weak or even non-existent. Investigations and prosecutions of well-known cases related to attacks against HRDs have yet to be acceptably carried out. In other cases, however, HRDs have sought and obtained judicial protection and recognition of their rights.

In response to these trends, ASF and the EALS have been working together to support HRDs in their actions and to protect and defend their rights. Together, they have advocated for the fair judiciary treatment of HRDs, particularly when they have been accused or held responsible for committing offences. Both organizations have equally promoted transparent and fair justice against the perpetrators of criminal acts against HRDs. In particular, they have closely followed or directly supported court cases involving HRDs.

This study is part of ASF and the EALS integrated strategy in the sector. It was designed to provide insight in the way the judiciary system is handling cases involving HRDs in the region and to provide States institutions with key recommendations on the need to strengthen the legal protection of HRDs.

I – SCOPE AND METHODOLOGY OF THE STUDY

I.1 - The definition of Human Rights Defenders (HRDs)

The definition of HRDs used in this report is the one established by the United Nations in the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,* known as the Declaration on HRDs[1].

There is no specific definition of who is or can be a HRD. However, the Declaration refers to "individuals, groups and associations contributing to the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals" (fourth preambular paragraph).

In accordance with this broad definition, a HRD can be any person or group of persons working to promote human rights, ranging from intergovernmental organizations based in the world's largest cities, to individuals working within their local communities. Defenders can be from all sorts of professional or other backgrounds.[2]

This broad definition encompasses professional, as well as non-professional, human rights workers and activists, volunteers, journalists, lawyers, workers, community leaders, civil servants, members of the private sector, etc., and anyone else carrying out, even on an occasional basis, a human rights activity. HRDs are identified by what they do; that is to say, seeking the promotion and protection of civil and political rights, as well as the promotion, protection and realisation of economic, social and cultural rights.

The Declaration underlines that the rights contained in the major human rights instruments, in particular, the right to freedom of expression, association and assembly, apply to HRDs. It also outlines the specific duties of States in safeguarding rights of HRDs.

Those rights include:

- the right to freedom of assembly and of association;
- the right to develop and discuss new human rights ideas and to advocate for their acceptance;
- the right to criticise governmental bodies and agencies and to make proposals to improve their functioning;
- the right to provide legal assistance or other advice and assistance in defence of human rights;
- the right to unhindered access to and communication with non-governmental and intergovernmental organizations, and international bodies;
- the right to access resources for the purpose of protecting human rights, including the receipt of funds from abroad.

[1] http://www2.ohchr.org/english/issues/defenders/docs/declaration/declaration.pdf
[2] http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx

I.2 – Purpose and Methodology

The purpose of this study is to provide an overview of the way the judiciary system has handled cases involving HRDs in the regions of the African Great Lakes and East Africa. It is based on case-law collected from ASF offices and partners in the following countries: Burundi, the Democratic Republic of Congo (DRC), Kenya, Rwanda, Tanzania and Uganda.

In total, 51 recent judgments and decisions handed down by different courts were collected by ASF teams and partners and then transmitted to the consultant. Most of them are from domestic courts. Only three decisions emanate from the East African Court of Justice and one from the African Court of Human and People's Rights.

These 51 decisions were collected according to the criteria of involving one or more HRDs. No *numerus clausus* was established per country; the idea being to have a significant number of decisions in order to identify issues and trends.

Out of these 51 decisions, 45 court decisions were found especially relevant and were selected for this Study. These decisions involve 29 HRDs: 7 from Burundi, 2 from the DRC, 4 from Kenya, 8 from Rwanda, 2 from Tanzania and 6 from Uganda.

Among these 45 decisions, some were related to the same case (i.e.: one decision taken by the lower court, then a different decision on appeal) which could provide a very broad picture of judicial procedures, as well as relevant information on the way the different courts appraised and adjudicated the case.

All of these decisions were originally drafted in English or French, except the decisions taken by Rwandan courts that were translated into French from Kinyarwanda and one decision from a court in Burundi that was translated from Kirundi to French.

The decisions have been analysed from a strict legal point of view; that is to say, with respect to their compliance with the applicable domestic law, whether substantive or procedural, including compliance with the rules of fair trial that exist in the penal legislations of Burundi, the DRC, Kenya, Rwanda, Tanzania and Uganda. In addition, no analysis was made concerning the fairness or the legitimacy of a law; the consultant limiting the analysis to the implementation of the applicable law.

After being analysed one by one, the decisions were separated into the following two categories:

- those that concerned in the practice of the Judiciary in regard to the implementation of substantive law and of the rules of fair trial; and
- those that related to the treatment by the judiciary of public freedoms and personal liberties.

This study does not pretend to be exhaustive or representative of all situations that HRDs face in the countries of the regions of the African Great Lakes and East Africa, but rather aims through concrete case studies to identify issues, dysfunctions and good practices. Finally, it suggests recommendations to improve the situation of HRDs.

II – JUDICIARY PRACTICE IN REGARD TO SUBSTANTIVE LAW AND TO THE RULES OF FAIR TRIAL

II.1 – Respect of Substantive Law

The analysis of the case law found that in a vast majority of the decisions, the principles of legality and jurisdiction were respected. In two of the decisions, however, the court did not abide by the legality principle and another decision involved an abuse of jurisdiction.

II.1.1 Breach of the Principle of Legality in Criminal Law

The principle of legality in criminal law, according to which there is no criminal conduct or sanction without the existence of a law, constitutes a core rule of criminal law and a fundamental principle under human rights law.

The Principle of legality entails the following overlapping rules:

- First, only the law can define a crime and prescribe a penalty. Therefore, any prosecution of conduct or any imposition of a penalty which has not been defined in a written and promulgated law is prohibited.
- Second, the definition of the crime and the penalty attached to it must be clear and precise, so as to guarantee certainty and predictability.
- Third, the law defining a crime and its penalty must be strictly interpreted, which excludes application of the law by analogy.
- Fourth, conduct may not be subject to retrospective prohibition. This is the principle of non-retroactivity.
- Fifth, conduct may not attract a higher penalty than that provided for in the law in effect at the time the action took place.[3]

In summary, an act can be punished if and only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.

The principle of legality is designed to guarantee the primacy of the law in criminal procedure, so as to avoid arbitrary bias.

It is enshrined in international and regional human rights instruments that Burundi, the DRC, Kenya, Rwanda, Tanzania and Uganda have all ratified; namely, in Article 15 of the ICCPR[4] and Article 7 of the ACHRPR[5], as well as in the Constitutions of these countries. Few of the decisions analysed showed prosecutions based on inappropriate law(s). In most of the situations where this occurred, the acts were simply reclassified by the court. In only two decisions the courts did violate the principle of legality.

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[3] See, in particular: Claus Kreß, *Nullapoenanullumcrimen sine lege*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2010, http://www.uni-koeln.de/jur-fak/kress/NullumCrimen24082010.pdf

[4] Article 15 of the ICCPR provides:
No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

[5] Article 7 of the ACHRPR states:
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.

The first of these two cases involved trade-unionist **Juvenal RUDURURA**, a public servant of the Burundi Ministry of Justice. In September 2008, Juvenal RUDURURA was brought before the Anti-Corruption Court (*Cour Anti-Corruption*) for making a statement on the radio television channel *Renaissance* concerning acts of corruption in the recruitment of agents in the Ministry of Justice. He was prosecuted on the basis of Article 14 of the 2006 Anti-Corruption Law, a law that gave exclusive jurisdiction to the Anti-Corruption Court to adjudicate the offences defined in the law[6]. Article 14 penalized the act of making false statements or statements that did not reflect reality concerning other offences especially provided for in the Anti-Corruption Law. These other offences were precisely described in Articles 42 to 63 of the Law.

During the first hearing, the Anti-Corruption Court gave no ruling on the merits of the case; only taking a decision on the pre-trial detention of the accused[7]. Eight months later, when the case was again before the Court, the defense raised an objection to Court's jurisdiction, arguing that the act of making the false statement attributed to Juvenal RUDURURA did not relate to corruption or any other offence prohibited in the Anti-Corruption Law[8]. In its ruling, the Court noted that the Public Prosecutor had failed to answer the defense's objection and found that the false statement did not fall within any the offences exhaustively listed in the Anti-Corruption Law, including corruption, bribery, influence peddling, theft and embezzlement, fraud, fraudulent management, illicit enrichment, favoritism, illegal taking of interest, misuse of assets and money laundering[9]. Ruling that the accused had been prosecuted for an act that was not related to any offence contained in the Anti-Corruption Law, and, consequently, that it had no jurisdiction, the Court referred the case back to the Public Prosecutor, who then lodged an appeal to the Supreme Court.

More than two years later, on January 31, 2012, the Supreme Court sitting on appeal took its decision, blatantly disregarding the principle of legality and its related rule of strict interpretation of criminal law[10]. This highest court in Burundi declared that the offence of making a false statement, as provided for in the Article 14 of the 2006 Anti-Corruption Law, was applicable to the accused, even though it did not relate to an offence expressly listed in the Anti-Corruption Law. Consequently, the Court ruled that the Anti-Corruption Court was competent to adjudicate the case.

The second case identified for undermining the principle of legality involved a Rwandan lawyer at the Kigali Bar, **Leopold MUNDERERE,** who was sentenced to one year imprisonment by a trial judge based on Article 67 of the 2004 Act governing proceedings before civil, commercial, social and administrative courts[11].

The facts in this case were as follows. While Leopold MUNDERERE was defending a client in a genocide case, a witness started accusing him of denying the Rwandan genocide. When the defense lawyer tried to protest against the contemptuous remarks that he had been subjected to, the presiding judge refused to let him speak; however, Leopold MUNDERERE continued to ask the judge why he was not stopping the witness. The judge immediately called the police, who removed the lawyer from the courtroom. Leopold MUNDERERE was immediately sentenced to one year imprisonment without being charged of any criminal offence and without having a proper trial.

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[6] Loi 1/12 du 18/04/2006 portant mesures de prévention et de répression de la corruption et des infractions connexes,
http://cejp.bi/sites/default/files/Loi%20portant%20r%C3%A9pression%20de%20la%20corruption_0.pdf
[7] Cour Anti-Corruption de Bujumbura, RPAC 233, 23/10/2008.
[8] Cour Anti-Corruption de Bujumbura, RPAC 233-RMPGAC 336/NG, 15/06/2009.
[9] Articles 42 to 63 of the 2006 Anti-Corruption Law.
[10] Cour Suprême, RPSA 128, 31/01/2012.
[11] Loin° 18/2004 du 20/6/2004 portant code de procédure civile, commerciale, sociale et administrative,
http://www.track.unodc.org/LegalLibrary/LegalResources/Rwanda/Laws/Rwanda%20Loi%20portant%20proc%C3%A9dure%20civile%20commerciale%20administrative%20et%20sociale%202004.pdf

MUNDERERE lodged an appeal before the High Court of the Republic who then reversed the first decision[12]. The High Court of the Republic ruled that the first judge erred in law in applying the 2004 Act governing proceedings before civil, commercial, social and administrative courts since it is not a penal law that defines offences and establishes penalties. The Court stated that the court of first instance should have based its decision on Article 147 of the Act governing criminal proceedings that prohibits acts that disrupt court hearings[13].

However, in addition to violating the principle of legality, the High Court found the judgment of the first judge unreasonable as it did not demonstrate in which manner the attitude of Leopold MUNDERERE was rude and disrespectful and it wrongfully classified a request for recusal as a disruption to court proceedings. With respect to the latter, the High Court pointed out that recusal should not be regarded as a disruption of court proceedings as the Rwandan law expressly gives parties the right to recuse a judge[14].

Breaches of the principle of legality are extremely dangerous for HRDs in the sense that they instigate judicial proceedings without a legal basis. Consequently, these proceedings, that are often made up to prevent human rights defenders from achieving their missions become purely arbitrary.

II.1.2 Abuse of Jurisdiction

Courts are empowered to apply the law as well as interpret the law when it lacks clarity. Likewise, according to the principle of jurisdiction, they are only empowered to decide a case according to the powers they have been granted by the law. However, when the law is silent as to a particular matter or contains legal loopholes, courts have the power to look to other laws for appropriate solutions, provided they are applicable.

In the great majority of decisions analysed, the courts stuck to their prerogatives. However, in one case, the court granted itself the power to adjudicate a case when it had no jurisdiction to do so.

The case involved the Chairman of the Burundi Bar Association, **Isidore RUFYIKIRI**[15]. In this case, the Court of Appeal was requested by the Chief Prosecutor to investigate breaches of professional ethics allegedly committed by the lawyer. According to the prosecutor, Isidore RUFYIKIRI had violated the lawyers' oath, as established in Article 11 of the Law on the Bar[16], which bans lawyers from making statements contrary to regulations, morals, State security and public peace. The charges against him related to a letter he wrote to the Governor of the Province of Bubanza, as well as a press conference, in which RUFYIKIRI had denounced the failure of the State to guarantee the rule of law, criticized the Government's interference in the Judiciary, and requested the Head of the State to disband the *Imbonerakure* militia.

According to Article 61 of the Law on the Bar, the Bar Council is the only body empowered to take disciplinary actions against lawyers. A case can be referred by the Chief Prosecutor or the Bar Council may open a case on its own initiative. The Bar Council then has two possibilities: either it declines to take action and closes the case because there are no substantive grounds upon which to engage disciplinary proceedings or it

[12] Haute Cour de la République à Nyanza, RPA 0786/07/HC/NYA, 27/09/2007.
[13] Loi n°13/2004 du 15/05/2004 portant code de procédure pénale, http://competenceuniverselle.files.wordpress.com/2013/08/cpp-rwanda.pdf
[14] Décret-loi n°07/2004 du 23/04/2004 portant l'organization, le fonctionnement et la compétence judiciaire (article 172).
[15] Cour d'appel de Bujumbura, RA 10/NG.I, 28/01/2014.
[16] Loi n°014 du 29 /11/2002 du Statut de la profession d'avocat, http://barreauduburundi.org/index.php?option=com_content&view=article&id=22:la-loi-sur-la-profession-davocat&catid=29:la-loi-sur-la-profession-davocat&Itemid=61

imposes sanctions (Articles 65 and 66). In both cases, the Bar Council has the duty to inform the interested party and the Chief Prosecutor.

Article 71 of the Law on the Bar provides that the Bar Council has 60 days from the date it has been referred a case to take a decision. However, the law does not contain any provision with regards to the silence of the Bar Council. Obviously, silence does not mean closure of the case in accordance with the above mentioned rule, as the Bar Council is bound to inform the interested party and the Chief Prosecutor.

As for the Appeals Court, according to Article 61, it has jurisdiction to decide appeals against the sanctions imposed by the Bar Council. Article 64 of the Law on the Bar also states that every disciplinary decision of the Bar Council can be referred to the Appeals Court, either by the lawyer of the interested party or by the Chief Prosecutor[17]. According to the drafting of these two articles, sanctions imposed by the Bar Council are definitely subject to appeal, but decisions not to take action and to close a case are not.

This leaves us with two legal voids: the Law does not provide for the situation where the Bar Council is silent; and it does not provide a right of appeal against Bar Council's decision to close a case.

In the Isidore RUFYIKIRI case, the Chief Prosecutor filed two complaints with the Bar Council requesting disciplinary action against RUFIKIRI: one on October 7, 2013, and one on October 30, 2013. The Bar Council neither replied, nor took a decision. Consequently, the Chief Prosecutor referred the case to the Appeals Court on December 17, 2013.

In its decision, the Appeals Court made five successive mistakes of law.

The first question the Appeals Court should have asked itself was whether the Chief Prosecutor had lodged an appeal against a Bar Council decision, but he did not. The Appeals Court decision referred to the case as a "request to disbar" the lawyer ("*Demande d'une mesure de radiation du Tableau*"). Moreover, in the summary of facts and proceedings, it is mentioned that the Chief Prosecutor had simply requested the Appeals Court to carry out investigations. Nowhere is it mentioned that the reference of December 17, 2013, was an appeal.

Clearly, according to the provisions of the Law of the Bar quoted above, the reference to the Appeals Court was not an appeal against a decision of the Bar Council, as the Bar Council had not taken a decision, much less a sanction.

The second question the Appeals Court should have addressed was whether it had jurisdiction to adjudicate the case. As it was not an appeal against a Bar Council sanction, the Appeals Court clearly could not claim jurisdiction on the basis of Articles 61 and 64, which are the only provisions that define the jurisdiction of the Appeals Court under the Law of the Bar. The Appeals Court simply dismissed the question and continued to consider the merits of the case.

Two complaints were submitted to the Appeals Court: one on October 7 and one on October 30. A close reading of the summary of facts and proceedings in the decision reveals that there is no mention as to the precise acts these two complaints relate to. Even if one can assume that the first complaint relates to the first grievance, that is to say the letter to the Governor; and the second complaint relates to the conference, such an omission in the decision constitutes a serious formal error. On the merits, the Appeals Court did not consider the two complaints separately even though they related to two different sets of facts, and they were made on two different dates. Actually, the first

[17] *La Cour d'Appel est compétente pour connaître des recours contre les sanctions prononcées par le Conseil de l'Ordre* (Article 61), *Toute décision du Conseil de l'Ordre en matière disciplinaire peut être déférée à la Cour d'Appel par l'avocat intéressé ou par le Procureur Général près ladite Cour* (Article 64).

complaint made by the Chief Prosecutor to the Bar Council was made 71 days before he referred the case to the Appeals Court, but the second complaint, dated October 30th was made 48 days before referral to the Appeals Court, that is to say, less than 60 days. In this regard, the time limit for the Bar Council to take a decision on this second complaint had not expired.

Thus, not only did the Appeals Court lack jurisdiction to adjudicate the request of the Chief Prosecutor related to the first complaint of October 7 because it was not referred as an appeal against a decision of the Bar Council, it was even less competent to adjudicate the request related to the second complaint of October 30 because the legal time limit of 60 days for a Bar Council decision had not yet expired.

The Appeals Court made a fourth legal mistake by holding that the Bar Council's silence equaled a dismissal based on Article 380 of the Law on Civil Proceedings which establishes the rules of administrative procedure[18]. However, this provision applies to public administrations. As the Bar Council is not a public administration, but rather a professional order, such a provision is simply not applicable to it.

Finally, the Appeals Court did not demonstrate how the declarations of Isidore RUFYIKIRI as reported by the Chief Prosecutor were in breach of Article 11 of the Law on the Bar. It simply declared that they were. Moreover, according to Article 57 of the Law of the Bar, there are four possible disciplinary sanctions: warning, official warning, suspension for a year or more, and disbarring. The Appeals Court disbarred the lawyer without justifying why this sanction was appropriate and relevant.

The proceedings against Isidore RUFYIKIRI are symptomatic of what could be characterized as judicial harassment without legal basis[19]. In this regard, it can be related to the lack of-respect for the principle of legality in criminal law discussed in the previous section, where the judiciary is no longer in the service of the Law. Beyond causing harm to HRDs and dismantling the Rule of Law, such practices lead judges to make great legal mistakes that can only undermine their proficiency and credibility.

II.2 – Observance of Fundamental Rules of Criminal Procedure

In criminal law, criminal responsibility can only be determined after a serious and careful investigation has been carried out and evidence collected, concluding with charges being laid or the release of the accused.

Conducting appropriate investigations and collecting evidence is the duty of the State in its fight against crime and in its mission to protect society. Moreover, with the presumption of innocence being a pillar of criminal procedure, the burden of proof lies with the prosecution. Indeed, it is the prosecution's duty to demonstrate the existence of an offence through the evidence collected.

The presumption of innocence is also the principle governing the placement of accused persons under pre-trial detention. According to human rights principles, liberty is the rule, and detention the exception. Pre-trial detention is, therefore, subject to strict legal requirements that judges have the duty to follow.

In spite of these principles, the analysis of the 51 court decisions found serious breaches in the conduct of investigations, in the collection of evidence by the State, in the

[18] Loi n° 1/010 du 13/05/2004, Code de procédure civile, http://www.droit-afrique.com/images/textes/Burundi/Burundi-Code-2004-procedure-civile.pdf

[19] The EACJ rule on May 15, 2015 that the procedure adopted and employed by the Prosecutor General to disbar Mr. Isidore Rufyikiri was in breach of the right to a fair trial : Reference no. 1 of 2014, East Africa Law Society v. The Attorney general of the republic of Burundi, The Secretary General of the East African Community, 15/05/2015.

allocation of the burden of the proof and in respect for the rules governing pre-trial detention.

II.2.1 Failure to Investigate

Over the past years, HRDs in the DRC and in Burundi have been subject to serious physical attacks, including murder and assassination, targeting prominent leaders known for their struggle for State integrity and accountability, and independent journalists.

Five cases have been identified concerning attacks against HRDs; cases which resulted in poor investigations of the violations committed against them by the authorities and in lengthy proceedings that severely undermined the discovery of truth and the prosecution and judgment against the perpetrators.

The failure to investigate has had the effect of providing impunity for all perpetrators of these violations, at times protecting criminal masterminds, or sentencing innocents in place of the real perpetrators.

In the DRC, on June 2010, Human Rights activist **Floribert CHEBEYA**, founding President of the Congolese NGO, *La Voix des Sans-Voix* (Voice of the Voiceless - *VSV*), was found dead in his car, his hands tied behind his back, on a road on the outskirts of Kinshasa. His driver, **Fidel BAZANA,** was missing. Floribert CHEBEYA was working on very sensitive files related to the massacres perpetrated in Lower-Congo in 2007, as well as a series of arbitrary arrests and enforced disappearances. On the day of his death, he and his driver were going to meet the police chief, General John NUMBI, in his office.

Eight police officers were charged with criminal conspiracy, assassination and kidnapping, illicit possession of weapons of war, desertion and terrorism, including Colonel Daniel MUKALAY, the mastermind of the murder, according to the Public Prosecutor. Their trial started on November 2010, before the Military Court of Kinshasa. Only five policemen appeared, who then pleaded not guilty; the other three were on the run.

During the first hearing, the *partie civile*[20] began by raising an objection to jurisdiction, arguing that the reference to the Military Court of Kinshasa was irregular since many of the documents in the procedure referred the case to the Military High Court (*Haute Cour Militaire*). The jurisdiction of the Military High Court would have allowed the prosecution of John NUMBI, who was among the suspects, while the Military Court had no jurisdiction to try an officer of his rank. The Military Court held that the decision to refer the 7 other suspects was proper; consequently, Court was legitimately seized of the case. As for John NUMBI, the Military Court declared that the file did not contain any decision referring him to the Court in order to be judged and justified this ruling by stating that NUMBI's previous long address to the Tribunal and his following examination did not reveal any evidence against him[21].

In June 2011, the Military Court pronounced its verdict: four policemen, including Colonel Daniel MUKALAY, deputy head of the police special services, were sentenced to death, one other was sentenced to life imprisonment, and three were acquitted.

The 73-page decision rendered by the Military Court proved to be very detailed in providing some information, e.g., the tracking of suspects during the day of CHEBEYA's death through their mobile phones and the transcripts of mobile phone text messages, but it was absolutely void in giving any substantial details as to the elements that would have enabled a determination of precisely each accused's individual responsibility. More

[20] In the Civil Law systems, the « partie civile » designates the aggrieved party whose complaint triggers a criminal lawsuit and a civil action for compensation. Like the accused and the prosecution, the "partie civile" is a party in the proceedings.
[21] Cour Militaire de Kinshasa Gombe, RP N°066/2010, RMP N°1046/MBJ/2010, 23 juin 2011.

precisely, the decision did not contain any information on the personal motives of the accused, their respective roles in the assassination, the circumstances of the conspiracy and its preparation, etc. Moreover, the decision provided little discussion as to the initial impairment of evidence during the first investigations where Daniel MUKALAY and other suspects were in charge of the police investigation after Floribert CHEBEYA was discovered dead.

In 2007, **Serge MAHESHE,** the editorial secretary of the independent Congolese Radio *Okapi,* was killed. The trial of his alleged murderers took place before the Military Court of Bukavu, whose decision stirred popular outrage when two of Serge MAHESHE's friends were found guilty and sentenced for the crime of ordering MAHESHE's assassination without any evidence to support this verdict; and the two military officers who had claimed to have executed the assassination order were acquitted[22].

One year later, another journalist of Radio *Okapi,* **Didace NAMUJIMBO,** was killed under mysterious circumstances. Again, human rights organizations denounced the slow proceedings and the prison break of one suspect from the military detention centre. Given the precedent of Serge MAHESHE, they had serious doubts as to the emergence of truth and justice[23]. In 2010, the trial commenced in the Bukavu Military Court involving 15 accused. Three were sentenced to death, 7 to imprisonment ranging from 16 months to 5 years, and 5 acquitted[24]. No particular motivation of the accused appears in the court decision, and the question of a possible mastermind is simply alluded to, which can only raise concerns.

The failure to investigate was also significant in the case of **Eloge NIYONZIMA,** a journalist at the *Radio Publique Africaine* or *Radio des Sans Voix* in Burundi. In June 2012, **NIYONZIMA** was severely beaten by two men claiming to be members of the military forces. A lack of evidence due to the failure to investigate the case resulted in the acquittal of the two suspected men brought before the Bubanza Court in December 2012[25].

In the case of the assassination of **Ernest MANIRUMVA,** the *partie civile* criticized the poor investigation carried out by the Public Prosecutor. **Ernest MANIRUMVA,** Vice-President of the anti-corruption organization OLUCOME, was an eminent Burundian activist fighting against corruption. He also chaired the Committee for settlement of disputes within the national Procurement Authority. He was assassinated in April 2009. According to human rights organizations, a few months before he was killed, he had started investigating trafficking activities within the national police force and the army[26].

During the trial of the eight suspects in the Bujumbura Court in 2012[27], the family of Ernest MANIRUMVA, constituted as *partie civile,* stressed that it did not accept the investigations carried out by the prosecution; in particular, the fact that many of the documents, including reports and photographs, were missing from the file and the fact that the prosecutor rejected its request to question some suspects during the investigations. Believing that those who had perpetrated the killing were out of the courtroom and at liberty, MANIRUMVA's family refused to claim compensation. In

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[22] See the article of Colette Braeckman in *Le Soir* : http://blog.lesoir.be/colette-braeckman/2007/09/20/sud-kivu-qui-a-tue-serge-maheshe-et-pourquoi/

[23]See IFEX, RSF and Radio Okapi reports :
https://www.ifex.org/democratic_republic_of_congo/2009/11/20/namujimbo_murder_investigation/fr/
http://fr.rsf.org/republique-democratique-du-congo-un-des-principaux-suspects-dans-l-24-11-2009,35033.html
http://fr.rsf.org/republique-democratique-du-congo-bukavu-la-cite-des-meurtres-18-03-2009,30606.html
http://radiookapi.net/sans-categorie/2010/01/28/bukavu-proces-didace-namujimbo-13-personnes-accusees-d%E2%80%99association-des-malfaiteurs-2/#.U8O5mbGrYrM

[24] Tribunal militaire de garnison de Bukavu, RP 303/09 RMP:1133/KMC/08

[25] Tribunal de grande instance de Bubanza, RP 3753, RMP 11044/NS.C, 28/12/2012.

[26] See the report of the FIDH and the OMCT of April 7th 2011, http://www.fidh.org/fr/afrique/burundi/L-assassinat-d-Ernest-Manirumva

[27] Tribunal de grande instance de Bujumbura, RPC 307, 22/05/2012.

response, the Court declared that the file was complete and that the claimants did not look at it carefully. It added that it is the prerogative of the prosecutor to decide who the relevant people to question are during an investigation.

From a reading of the Court's decision, it is obvious that the necessary evidence to support many of the elements of the crime for which the accused were charged and necessary to hold them responsible for the crime was missing. The evidence supporting the charges selected by the Court were far too inadequate to support the accused's liability. Most of the evidence supporting the elements was based on the testimony of one or two witnesses which could not be corroborated by scientific proof (such as DNA test) or careful investigation.

Sentenced to long term imprisonment ranging from 20 years to life, the convicted lodged an appeal, arguing that they were found guilty and sentenced without any proof; in particular, that the tribunal failed to establish both the necessary actions and intent elements of the crimes, that the judges made erroneous findings of fact and that they failed to justify their decision, as prescribed in Articles 207 and 209, second subparagraph of the Constitution[28] and in Article 29 of the Law on the status of magistrates[29].

The Appeals Court reduced the sentenced of the appellants without further establishing their criminal liability. Only one appellate was acquitted on the basis that the lower court judges did not prove complicity. Moreover, in its decision, the Court dismissed the appeal of the *parties civiles* without justification, obviously ignoring its obligation to provide reasons[30].

The failure to investigate crimes committed against HRDs, especially when they involve State officials, with the harmful consequences of leading to judicial decisions where perpetrators escape with impunity and innocents and sentenced, calls into question the States' impartiality towards HRDs on one side, and towards the perpetrators on the other. It can be perceived as a deliberate action of States to hide the truth concerning violations against HRDs. HRDs no longer feel protected and supported by their States. They are also abandoned by the judiciary which is supposed to be impartial and independent from State's policy.

II.2.2 Poor Evidence

In addition to the cases presented in the previous section, the analysis of court decisions showed four other cases instigated against HRDs resulting in their sentencing on the basis of shaky evidence.

In Tanzania, the human rights activist **Bruno MWAMBENE** testified to the District Court of Mbozi District that he had tried to stop police officers from beating a man they had just arrested for driving without a license[31]. While he was trying to intervene and to take pictures, he was assaulted by the police officers and tried to defend himself. Bruno MWAMBENE was consequently charged with assaulting the police in the execution of their duty. During his trial, the Court discounted his testimony against the police officers' and did not take into consideration the medical certificates he had brought to show that he was assaulted. The court found him guilty and sentenced him to four years in prison.

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[28] Article 207 : Toute décision judiciaire doit être motivée avant d'être prononcée en audience publique. Article 209, al.2 : Dans l'exercice de ses fonctions, le juge n'est soumis qu'à la Constitution et à la loi, http://icoaf.org/docs/Burundi/Loi_N_1-010_du_18.03.05.pdf

[29] Loi N° 1/001 du 29/02/2000 portant réforme du statut des magistrats, http://www.genie.bi/doc/lois/Statut_Magistrats.pdf

[30] Cour d'appel de Bujumbura, RPCA 402, 25/01/2013.

[31] District Court of Mbozi District, Criminal Case N°15 of 2012, *Republic v. Bruno Mwambene*, 25/09/2013.

In Kenya, the farmer and land rights activist **Ang'Ongo Joel OGADA,** known to be the member of the Malindi Rights Forum advocating for the land rights of farmers in the Marereni Kilifi County, was found guilty of arson of a salt mine company solely on the basis of the testimonies of two witnesses who said they had recognised the farmer at the time. The judgment of the Court does not mention whether an investigation was carried out to determine where Ang'Ongo Joel OGADA was during the time the salt mine was set afire[32].

In Burundi, the journalist **Hassan RUVAKUKI,** radio correspondent of RFI, was accused of preparing and perpetrating terrorist attacks in the Burundian villages of Kigamba and Mishiha during the nights of 20 to 21 November 2011. After being sentenced to life imprisonment by the trial judges, he appealed his sentence before the Court of Appeal of Gitega, together with the 22 other convicted terrorists[33]. The decision of the Court of Appeal appeared to be very imprecise concerning the terrorist acts attributed to the accused, simply vaguely stating that they perpetrated the attack, abducted and killed people (without mentioning how many and whom) and looted the victims' properties (without mentioning precisely which ones). The Court went on to hold that the declarations of the Province Governor stating that the attacks had resulted in no deaths and material damage were wrong. As for Hassan RUVAVUKI, he was found complicit in the attack simply because, as a journalist, he had made a documentary on the FRDs (forces for the Restoration of Democracy) and had recorded their statements in Tanzania. The Court of Appeal sentenced him to three years imprisonment.

In Rwanda, the human rights defender **François-Xavier BUYMA**, President of the child rights NGO *Turengere Abana* and Coordinator of the Network of Human Rights Defenders in Central Africa REDHAC, was sentenced to 19 years imprisonment in May 2007 by the Biryogogo Gacaca Court for his alleged participation in the Genocide; more precisely, for training the perpetrators in the handling of firearms and attempting to take a woman's life. During the hearing, **BUYMA** challenged the impartiality of the sitting judge, arguing that the judge was involved in a rape case that *Turengere Abana* was investigating and, therefore, his right to a fair trial was not guaranteed. His request was rejected. Moreover, human rights organizations pointed out that the decision of the Court was not based on evidence supporting any material element and was not substantiated[34]. The Gacaca Appeal Court which heard **BUYMA'** case in March 2009, did not admit further evidence or include further reasoning for sentencing him to 17 years in prison[35].

In Kenya, contrary to the above examples, the Resident Magistrate's Court in Mombasa dismissed the case of the community activist and founder of the Centre for Justice and Environmental Action, **Phylis OMIDO,** and 16 others[36]. They had been charged with inciting violence and conducting unlawful assembly. The Court expressly declared that the prosecution had failed to bring sufficient evidence.

The case of Phylis OMIDO and the 16 others appears as an exception in this section. The judiciary played its full role in hearing the case with total impartiality. In the four other cases discussed above, in spite of non-existent evidence, the judiciary actively relinquished its role in confirming the prosecution's charges against the HRDs and condemning them to particular harsh sentences; which can be interpreted as an attempt to muzzle the HRDs and to prevent them from taking action.

[32] Magistrate's Court at Garsen, Criminal Case N°41 of 2013, *Republic v. Ang'Ongo Joel Ogada*, 26/05/2014.
[33] Cour d'appel de Gitega, RPC 600/GIT, RPC 205/CANK, RMP 5902/NT.B, 8/01/2013.
[34]See the communiqués of OMCT and LIPRODHOR: http://www.omct.org/fr/human-rights-defenders/urgent-interventions/rwanda/2007/08/d18809/ ;
www.eurac-network.org/web/uploads/documents/20090415_11345.doc
[35]Juridiction Gacaca d'appel du secteur Kigabiro (Rwamagana), 14 mars 2009.
[36] Resident Magistrate's Court at Mombasa, Criminal Case 1363 of 2012, *Republic v. Phylis Omido and 16 others,* 9/11/2012

II.2.3 Misapplication of the Burden of Proof

In the law of criminal procedure, the burden of proof is placed upon the prosecution whose duty it is to admit sufficient evidence to prove that the charged offence has been committed by the accused.

Despite this allocation of the burden of proof, two cases were found where this rule was completely reversed, leading to an unfair trial. These two cases concerned limitations to the freedom of expression. In both cases, the court mistakenly applied the rules of defense that are applicable to defamation cases where the defense is entitled to prove its innocence by admitting evidence that the alleged defaming statements are true. However, the law of defamation was definitely not applicable here as both cases dealt with offences to the media law. It was, therefore, the prosecution's role to bring evidence that such offences were committed.

One case involved **Faustin NDIKUMANA**, Chairman of the NGO Burundian PARCEM. He was charged with the offence of making a false statement, as provided for in Article 14 of the Anti-Corruption Law[37]. As a representative of PARCEM, he had publically declared that the magistrates' recruitment system was corrupt and that the Minister of Justice was personally involved in this corruption. The Anti-Corruption Court hearing the case held that **NDIKUMANA** had not been able to prove that his declarations were true, whereas it should have been the Public Prosecutor's duty to prove that they were false as an element of the offence. Consequently, **NDIKUMANA** was found guilty and sentenced to five years' penal servitude, a fine of 500,000 FBu, and, together with PARCEM, ordered to pay civil damages amounting to 10 million FBu to the Minister of Justice[38].

Beyond the misapplication of the burden of the proof, this decision was particularly iniquitous. Both PARCEM, as a legal entity, and Faustin NDIKUMANA, as natural person were prosecuted. The defense raised the objection that only PARCEM should have been prosecuted since **NDIKUMANA** had made the statement on behalf of PARCEM as its Chairman. The court however found both guilty and failed to distinguish the acts of NDIKUMANA from those of PARCEM and to provide any legal reasoning for his conviction.

In Rwanda a similar case involved the journalists **Agnès UWIMANA NKUSI** and **Saidati MUKABIDI,** respectively, Director and Publisher of the Newspaper *Umurabyo.* Both were charged of sectarianism and crimes against the security of the State before the High Court of Kigali. Agnès UWIMANA NKUSI was also charged with several other offences, including libel and minimizing the Genocide[39].

Article 166 of the Rwandan Penal Code prohibits publications and false statements aimed at inciting people against the authorities[40]. Based on this provision, Agnès UWIMANA KKUSI was accused of publishing an article in which she reported that some farmers were unsatisfied with the State's policy of single-crop farming. The Court found that she wrote the article in order to provoke the population to rise up against the State and that she had not been able to prove that what she had written was true, including the failure to provide the names and addresses of witnesses so that they could be called before the Court.

Her lawyer referred to Article 44 of the Code of Penal Procedure which places the burden of proof on the prosecutor[41]. However, the Court found that the provision was not

[37] Loi 1/12 du 18/04/2006 portant mesures de prévention et de répression de la corruption et des infractions connexes, http://cejp.bi/sites/default/files/Loi%20portant%20r%C3%A9pression%20de%20la%20corruption_0.pdf
[38] Cour anti-corruption de Bujumbura, RPAC 859, RMPGAC 1316/BP, 24/07/2012.
[39] Haute Cour de Kigali, RP 0082/ 10/ HC/ KIG, 4/02/2011.
[40] Penal Code of Rwanda: http://www.wipo.int/wipolex/en/text.jsp?file_id=221102
[41] Code of Penal Procedure of Rwanda : http://competenceuniverselle.files.wordpress.com/2013/08/cpp-rwanda.pdf

applicable in this case as Mrs. UWIMANA had violated Article 12 of the Media Law, according to which a journalist must only publish information of which he/she is sure of the accuracy.[42].This line of reasoning was, however, not legally correct. As Mrs. UWIMANA was accused of making a false statement under to the Media Law, it was the prosecution's responsibility to submit evidence that her statement was false; not her responsibility to demonstrate that what she had had written was true.

Similarly, Saidati MUKABIDI was found guilty of a crime against the security of the State for having published an article stating that President Juvenal Habyarimana should not have been replaced by President Paul Kagame, whose accession to power had brought plagues to the country, including an increase in killings, insecurity at the borders, a fall in the economy and in the quality of the education system; and whose party, the Rwandan Patriotic Front, had blamed others for the killings it had committed.

The Court held that the journalist had not provided evidence of racial segregation that would have enabled her to compare the two political regimes.

Agnès UWIMANA NKUSI and Saidati MUKABIDI were sentenced to 17 and 7 years imprisonment, respectively. The Supreme Court of Kigali reduced their sentences to 4 and 3 years, but applied the same reasoning as the High Court in regard to the burden of proof[43].

Misapplication of the burden of proof has had the effect of abrogating the right to a fair trial for HRDs. However, in addition, such a procedural error has been made with the deliberate objective of limiting their freedom of expression.

II.2.4 Illegal Pre-Trial Detention

The presumption of innocence is a core principle of criminal law to which numerous States have included in their constitutions and laws of criminal procedure. According to this principle, a person is presumed innocent until he/she is found guilty by a tribunal, so his/her liberty must be the rule and his/her detention an exception, not the contrary. Moreover, as detention is a serious deprivation of liberty, it must be imposed by an independent judge. That is why in modern criminal systems, the decision whether to impose pre-trial detention must strictly follow substantial and formal conditions. Burundi's criminal system is no exception to this rule.

According to Article 110 of the Burundian Code of Criminal Procedure, a person can be detained before his/her trial only if there are enough charges against him/her and if it constitutes the sole means of[44]:

- preserving material evidence or clues needed to ascertain the truth, of preventing witnesses or victims from being pressurized, of preventing fraudulent conspiracy between persons under judicial investigation and any possible accomplices; or
- putting an end to an exceptional disruption of public order; or
- protecting the person under judicial investigation; or
- putting an end to the offence or preventing its renewal or
- guaranteeing that the person remains at the disposal of the law.

Moreover, the law requires pre-trial detention to be determined by a pre-trial judge, whose decision is then subject to judicial review.

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[42] Loi N°22/2009 du 12/08/2009 régissant les média : https://en.rsf.org/IMG/pdf/loi_sur_les_medias_du_12_aout_2009-2.pdf

[43] Cour suprême de Kigali, RPA0061/11/CS, 5/04/2012

[44] Burundi has adopted on April 3, 2013, a Bill reviewing the Code of Criminal Procedure : Loi n°1/10 du 3 avril 2013 portant revision du code de procedure pénale, http://www.assemblee.bi/IMG/pdf/n%C2%B01_10_2013.pdf

Yet, three cases of illegal pre-trial detention were identified in Burundi: they involved the Burundian journalist Jean-Claude KAVUMBAGU twice, the trade-unionist Juvénal RUDURURA and the NGO leader Pierre Claver MBONIMPA. The abusive use of pre-trial detention in cases involving HRDs is not an issue limited to Burundian jurisdictions as we find this type of practice in many countries; however, the present study revealed a particular pattern in this specific country.

In 2008, proceedings were opened against **Jean-Claude KAVUMBAGU** concerning an alleged defamatory statement he made following his publication on Net Press of an article stating that the Head of State had received an enormous sum of money to attend the Olympic Games in Beijing. He was put in detention before his trial and objected to this decision on the grounds that it had not been taken by a judge.

The Bujumbura Court did not address this objection and simply ruled that his detention was legal in accordance with the criteria required by Article 71 of the Code of Criminal Procedures which governs detention[45], on the grounds that it would guarantee his presence before the Court[46].

Jean-Claude KAVUMBAGU lodged an appeal, arguing that the prosecutor did not respect the conditions prescribed by Article 72 of the Code of Criminal Procedures according to which the Public Prosecutor must present the accused to a judge. Instead, the Prosecutor had referred him to the Trial Court on the 13th day without ever legalising his pre-trial detention. The Appeals Court ruled that the Trial Court was seized of the issue on the 13th day, that is to say, within the legal deadline of 15 days, thus blatantly ignoring the rule of pre-trial detention that requires separation between the judge in charge of determining the issue of detention and the judge in charge of the trial[47].

As a result of the Court of Appeal's decision, Jean-Claude KAVUMBAGU's detention was upheld, but it continued to be imposed well after the expiration of the legal time-limit without any judicial review. Consequently, the journalist petitioned the Bujumbura Court for release. The Court admitted that his detention had not been legally extended and therefore released him[48].

In 2010, Jean-Claude KAVUMBAGU was again brought before the Bujumbura Court for having questioned the capability of the Burundi army to defend the country against a possible attack from the Somalian militia *Al-Shabab.* Again, he was put in jail before his trial on May 2011[49], without ever seeing a judge, and was brought to the Trial Court 14 days later. The Court took the same decision it had previously made; that his detention was legal. Moreover, the Court ignored the other objections raised by the journalist, including that he was interrogated for two hours without a defense lawyer and that he was informed of the charges against him only on the second day of his detention[50].

The same scenario happened to **Juvénal RUDURURA** after he had criticised the recruitment policy of the Ministry of Justice.[51] He was brought before the Tribunal three weeks after his provisional arrest warrant had expired without being given the opportunity of having his pre-trial detention reviewed by a judge. The Court ruled that the omission of the prosecutor did not prevent the accused from making an application to

[45]Former Penal Procedure Code of Burundi (before the adoption of the Criminal Procedure Code Review Bill of 3 April 213) :
http://defensewiki.ibj.org/index.php/Code_de_Proc%C3%A9dure_P%C3%A9nale_du_Burundi_%28Burundi_Criminal_Procedure_Code%29
[46] Tribunal de grande instance de Bujumbura, RP. 16.485 - RMP.126.875, 26/09/2008.
[47] Cour d'appel de Bujumbura, RPA 3632 - RMP 126.875, 28/11/2008.
[48] Tribunal de grande instance de Bujumbura, RP 16.485 – RMP 126.875, 18/03/2009
[49] Tribunal de grande instance de Bujumbura, RPC 275, 6/09/2011.
[50] Tribunal de grande instance de Bujumbura, RPC 275, 6/06/2010
[51] For the merits of the case, see Section II.1.2 - *Breach of Criminal Legality.*

the Court to suspend his detention or order his temporary release as provided for in Article 89 of the Code of Criminal Procedure[52].

Juvénal RUDURURA challenged the legality of his pretrial detention before the Supreme Court on the basis of Article 75, paragraph 5, of the Code of Criminal Procedure, which prescribes disciplinary action or criminal prosecution against an instructing magistrate who fails to present an accused before a pretrial detention judge.

The Supreme Court, in full disregard of the Law, endorsed the earlier ruling, holding that the Public Prosecutor had not violated any law in referring the accused to the trial judge instead of a pretrial detention judge because such a referral includes both substantive and procedural law[53]. It held that though the Public Prosecutor had not respected the 15 days requirement, the accused retained his right to lodge an appeal. However, the Court also declared that pre-trial right to appeal had now expired since the accused was before the Trial Court. In addition, without providing any reasons for its decision, the Court held that no violation of the right of defense had occurred and confirmed Trial Court's decision.

The case of **Pierre Claver MBONIMPA** is also symptomatic of the practices of the Burundian judiciary in the area of pretrial detention. In May 2014, MBONIMPA, Chairman of the NGO APRODH, made a statement on the radio station RPA denouncing the recruitment of young Burundians into military training camps located in Eastern DRC. He was then summoned by the police on the 7th, 12th and 15th of May 2014, in connection with his statement. He appeared at the police station on the 7th and 12th, but was not able to comply with the summons on the 15th and sent his lawyer to the police station to inform them of this. The police then issued a new summons for May 19th. However, on May 15th, a warrant had been issued against him. Pierre Claver MBONIMPA was then brought before the prosecutor and charged with the following crimes: breach of internal and external State security, and forgery and counterfeiting. He was immediately detained in jail.

During the first detention hearing held on May 23rd, MBONIMPA's lawyers argued that the warrant of May 15th was illegal as it did not comply with the provisions of Article 336 of the Code of Criminal Procedure which addresses the delivery of such a warrant when a person does not appear[54]. They submitted that Pierre Claver MBONIMPA had justified his absence on May 15th and had received a new summons for May 19th. The Bujumbura Court ignored this argument in its judgment of May 26th and simply declared that the warrant was proper.

The Court maintained Pierre Claver MBONIMPA's detention on the simple ground that there was "serious evidence of guilt" ("*indices sérieux de culpabilité*") against him. While Article 110 of the Criminal Procedure Code prescribes that pretrial detention can be justified if there are enough charges against the accused, the expression of "serious evidence of guilt" prejudges a final decision on the merits and is, consequently, an error of law.

The Bujumbura Court did refer to Article 110 of the Criminal Procedure Code, but did not mention any of the reasons for justifying pretrial detention expressly provided in this Article. In this regard, it failed to fulfil its legal obligation to provide reasons for its decision.

The detention was confirmed by the Bujumbura Appeals Court after a hearing held on June 8, 2014.

[52] Cour anti-corruption, RPAC 233, 23/10/2008.
[53] Cour Suprême, RPSA 73, 24/04/2009
[54] Tribunal de grande instance de Bujumbura, RMP 148 310/SND, 26/05/2014.

The trial before the Bujumbura Court (Tribunal de Grande Instance) begun on July 4th and Pierre Claver MBONIMPA's counsels again applied for release, but the pretrial detention was again maintained in a judgment dated July 8, 2014. The NGO leader then lodged an appeal based on a Circular of the Justice Minister of February 2014, according to which he would be eligible to judicial interim release on the basis of his old age and ill health[55]. At the age of 64, MBONIMPA had been suffering from severe diabetes which required dietary restrictions that were impossible to follow in jail, as well as regular lab tests.

The appeal based on the basis of the Circular was held on July 21th. The Bujumbura Appeals Court dismissed his request for interim release on the ground that the Circular was not applicable to him, only to detainees imprisoned at the time the Minister's order was issued and only then for the limited duration of four weeks[56]. The Court also pointed out that the Circular excluded accused charged with serious offences and the offences of which Pierre Claver MBONIMPA was charged were "extremely serious" offences which could trouble bilateral relations between Burundi and the DRC. The Court held that he could obtain an authorization to temporarily leave the detention centre to perform his medical checks, and that by being provided with food from outside the jail, he could follow his diet. Consequently, the Court ordered his continued detention.

Not only did the Appeals Court judges refuse to comply with the humanitarian exceptions to detention prescribed by the Ministry of Justice, but as the court of the first instance in this matter, they also erred in law by not grounding their decision on any of the five justifications for pretrial detention articulated in Article 110.

At the next hearing held on September 15th, Mr. MBONIMPA's counsels again applied for release. The Bujumbura Court dismissed the request, but agreed to order a medical inquiry to certify Mr. MBONIMPA's medical condition. Based on the medical report submitted by the medical experts, the Court finally ordered pretrial release on September 26th, on humanitarian grounds.

Most of the decisions involving pretrial detention discussed above have been lacking a clear and explicit legal basis, which is definitely problematic for the credibility of judicial proceedings and very dangerous for HRDs for whom law is no longer a rampart against arbitrariness.

[55]Lettre Circulaire n°550/28/CAB/2014 du 27/02/2014
[56]Cour d'appel de Bujumbura, 21/07/2014, *Pierre Claver Mbonimpa c. Ministère Public*

III – JUDICIARY TREATMENT OF PUBLIC FREEDOMS AND PERSONAL LIBERTIES

III.1 – Freedom of Expression

Linked to freedom of opinion, freedom of expression is a fundamental public freedom which constitutes a pillar of a democratic society. According to Article 19 of the ICCPR, this right includes the 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. Freedom of expression is, therefore, of paramount importance for HRDs whose actions consist of voicing, defending and protecting human rights, including those of the voiceless.

In democratic societies, freedom of expression is a highly protected right, but it is not absolute. It entails special duties and responsibilities. As Article 19 of the ICCPR states, it may be subject to certain restrictions provided by law and necessary for the respect of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals.

The constitutions of the countries dealt with in this study all provide for the freedom of expression with its limitations. The issue, however, is the implementation of such limitations. Case-law developed under this section shows that freedom of expression has been under serious threat in the DRC and has faced severe restrictions in Burundi and in Rwanda. On the other hand, it has been the subject of very progressive landmark rulings by Ugandan courts, especially concerning the definition and scope of its limitations.

III.1.1 Freedom of Speech under Serious Threat and Restrictions

Under Section III, the cases were highlighted where HRDs were killed, assaulted or judicially harassed for having investigated sensitive issues involving powerful State officials[57].

Those HRDs included journalists who have been very exposed to attempts on their lives and assaults to their physical integrity for informing on embarrassing issues. The cases of the journalists of Radio *Okapi,* **Serge MAHESHE** and **Didace NAMUJIMBO,**[58] in Bukavu in the DRC, are particularly indicative of this climate of danger. Both journalists were working for Radio *Okapi,* designated as the "Peace Radio" and known for its independence in news coverage on the war in South Kivu.

In Rwanda and Burundi, journalists have often been prosecuted for defamation following criticism of the attitudes and practices of high ranking officials. The proceedings related to these cases have often resulted in a series of irregularities (such as prosecutions or decisions lacking a legal basis), bringing into question the independence of the judicial institution.

In 2009, the Rwandan journalist **Bosco GASASIRA** was prosecuted for revealing an adulterous relationship between a medical doctor and a prosecutor in the newspaper *Umuvuguzi.* He was charged with the offences of defamation, public abuse and invasion of privacy. Several breaches of law characterized the proceedings, including, among others, the fact that his case was referred by the prosecution to the trial court before it was complete; that the accused was not heard; and that the complainants had been

[57] See in particular the cases of Floribert CHEBEYA, Ernest MANIRUMVA, François-Xavier BUYMA.
[58] See Section II.2.1 – Failure to Investigate

interviewed before filing their complaints, which is not logical in defamation cases where proceedings are initiated by the alleged victim's complaint. The Kagarama Court, however, dismissed all of the journalist's grievances and thereby justified all of the procedural irregularities, found him guilty of the offences of public abuse and invasion of privacy, and sentenced him to a fine of 1 million Rwandan francs and to legal damages[59].

Procedural irregularities and illegal pretrial detention characterized the two proceedings against the Burundian journalist **Jean-Claude KAVUMBAGU**[60]. In the second proceeding, though KAVUMBAGU was charged with a press offence, treason and slander against the Burundi military forces because he had questioned their competence to defend Burundi in the event a possible attack by the Somali militia *Al Shabab*, the Public Prosecutor requested a disproportionate penalty: life imprisonment. Although Jean-Claude KAVUMBAGU had already spent almost a year in pretrial detention having been refused bail, the Bujumbura Court hearing the case found that the offence of treason had not been established as it lacked a legal basis – this offence being applicable only in war time[61]. It also found that the offence of slander was baseless as the military forces don't enjoy a legal personality. However, without any legal reasoning to support its decision, the Court found that the journalist had damaged the State's reputation and, consequently, found him guilty of the press offence prescribed in Article 50 of the 2003 Press Law, and sentenced him to a penal servitude of 8 months.

Legislation prohibiting sectarianism, divisionism and negation of the Genocide in Rwanda has also led to abusive prosecutions and significant restrictions of journalists' freedom of speech. **Agnès UWIMANA NKUSI**[62] was found guilty of the offences of defamation against the Head of State, a crime against the security of the State, sectarianism and genocide minimisation by the Kigali High Court.

In regard to the offence of sectarianism, from an article the journalist had written mentioning the existence of a war between the *Abega* and the *Abanyiginya*, the tribunal drew the conclusion that she was inciting hatred between the two clans. Based on another of her articles in which she declared that Rwandans grew up in hatred of one another until the massacre after the death of the President Habyarimana, the High Court found that she was minimising the Tutsi Genocide[63].

The Supreme Court, however, though sustaining the conviction of the crime against the State, quashed the convictions for the offences of sectarianism and Genocide minimisation[64]. Contrary to the lower court, the highest Court made the effort to consider Agnès UWIMANA NKUSI's writings in their context. Considering that the journalist had written that many *Banyiginga* were employed in the Public Administration and that she mentioned that the Tutsis had been persecuted, the Court concluded that there was an absence of the required intent that was necessary to justify the existence of the two offences.

Regarding the offence of defamation against the Head of State, Agnès UWIMANA NKUSI was accused of publishing an altered picture showing President Paul KAGAME with the insignia of the Nazis in the background on the Internet. In the end, the Supreme Court took into consideration her defense that the photo was published on the website of the Presidency depicting President KAGAME visiting a memorial of the Jewish genocide and found that she was not responsible for the montage.

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[59] Tribunal de base de Kagarama, N◦RP 0201/09/TB/KMA, 13/11/2009.
[60] See Section II.2.4– Illegal Pre-Trial Detention
[61] Tribunal de grande instance de Bujumbura, RPC 275, 13/05/2011.
[62] See Section II.2.3– Misapplication of the Burden of Proof
[63] Haute Cour de Kigali, RP 0082/ 10/ HC/ KIG, 4/02/2011.
[64] Cour suprême de Kigali, RPA 0061/11/CS, 5/04/2012.

In Burundi, judicial harassment even reached the sentencing of journalists for media coverage when they were simply performing their jobs of providing information to the public This is the case of **Hassan RUVAKUKI** who by making a documentary on the FRDs (*Forces pour la Restoration de la Démocratie*) in Tanzania, was found to have associated with their actions and was sentenced for aiding and abetting terrorist acts[65]. Such judicial harassment against journalists who bear a duty to inform the public is a serious impediment to free and impartial expression.

In such a context of judicial harassment, the draft of a new press law in Burundi had raised many hopes and expectations, but instead, the law adopted in June 2013, led to real disenchantment and serious fears[66]. Soon after its adoption, it was subject to a petition by the Union of Burundian Journalists (UBJ) before the Constitutional Court[67].

Seven provisions of the law were challenged before the Court:

- Article 19 b) and i): These provisions prohibit information infringing on the stability of the currency and information likely to harm the national economy and the credit rating of the State. UBJ argued that citizens had the right to be informed about their national economy, including acts of bad governance. They alleged that such provisions would prevent the media from reporting on acts of corruption and that they violated Article 18, subparagraph 2, of the Constitution which requires the Government to respect the separation of powers, the rule of law, good governance and transparency in the conduct of public affairs. The Court, however, while holding that the contested provisions did not prohibit information on bad governance, ruled that they were consistent with the Constitution.

- Article 21: This provision creates an obligation on media organizations to maintain their original editorial line as presented in their authorization request to the National Council of Communication - the national body supervising and regulating media activity. According to UBJ, such a provision amounts to prohibiting media organizations from changing their opinions and, therefore, contravenes Article 19 of the Constitution and Article 18 of the Universal Declaration of Human Rights on freedom of opinion. Again, the Court was content to merely assert without any further legal reasoning, that the provision did not forbid media organizations from changing their opinions and declared the provision to be in line with the Constitution.

- Article 19 h): This provision prohibits the publishing of information which could be used for propaganda by the enemy in times of peace and in times of war. UBJ argued that the word "enemy in peace time" was not defined and could lead to prosecution of individuals for propounding opinions opposed to the Government. The Court held that "propaganda for the enemy" meant publishing "partial, large scale, distorted, even insidious information" that threatens public order and public security. Affirming that the Constitution protects public order and public security, the Court concluded that prohibiting propaganda which could be used by the enemy was not contrary to the Constitution.

- Article 58, subparagraphs 1 and 3: UBJ stated that these provisions - according to which the National Council of Communication's decision to stop or forbid publication of information or to close a media would be enforceable, notwithstanding a right to appeal before the Administrative Court - are contrary to the freedom of expression enshrined in Article 31 of the Constitution. In the name

[65]See Section II.2.2 – Poor Evidence
[66]Loi n°1/11 du 4 juin 2013 portant modification de la loi n°1/025 du 27 novembre 2003 régissant la presse au Burundi
[67]Cour constitutionnelle, RCCB 271, 7/01/2014

of the protection of the freedoms of others and the common interest, the Constitutional Court ruled they were not.

- Articles 61, 62 and 67 provided for a regime of fines based on out-of-court settlements for media organizations that violate the press law. UBJ contested this regime on the grounds that, as it is not provided for by the penal system, it violates the principle of legality contained in Article 39, subparagraph 2, of the Constitution. The Constitutional Court agreed with this legal argument and declared Articles 61, 62 and 67 of the press law contrary to Article 39, subparagraph 2, of the Constitution.

- Article 68: This provision states that in the case of appeal, the alleged perpetrator of a press offence has to pay a deposit amounting 50% of the fine. The Constitutional Court ruled that such a provision did not contravene the principle of presumption of innocence enshrined in Article 40 of the Constitution, on the ground that such a deposit is aimed at guaranteeing the presence of the accused before the court.

- Article 69: The Constitutional Court held that this article, which provided for the implementation of penal code sentences in cases where the accused refused to pay the above-mentioned fine, was contrary to Article 40 of the Constitution.

In summary, the Constitutional Court only declared unconstitutional the provisions related to the payment of fines for cases settled out of court and to the application of penal sanctions for refusals to pay the fines. The other provisions submitted for review which seriously threaten the freedom of the press were all ruled constitutional after a hasty constitutional appraisal and often inadequate legal reasoning.

A few days after review of the press law had been seized by the Constitutional Court, UBJ petitioned the EACJ on the grounds that the adoption of the press law constituted a violation of the fundamental principles of the EAC, as protected by Articles 6(d) and 7(2) of the Treaty establishing the EAC to which Burundi is party. Article 6(d) and 7(2) requires that member States abide by the principles of good governance, including the principles of democracy; the rule of law: accountability and transparency; social justice; equal opportunity; gender equality; the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR; and with the universally accepted standards of human rights[68].

UBJ based its complaint on the following merits:

- The Burundi press law curtails the freedom of the press which is essential for the realization of the Community's fundamental and operational principles, in particular democracy, rule of law, accountability, transparency and good governance;
- It violates the right of the press to freedom of expression, which is a violation of Burundi's obligation under the EAC Treaty to recognise, promote and protect human and peoples' rights and abide by universally accepted standards of human rights.

The UBJ has requested the EACJ to order the Government of Burundi to repeal or amend the press law to comply with the above-mentioned Treaty provisions.[69] In the meantime, the Burundi press law has been enacted, and then further amended and is being enforced.

[68]UBJ Statement of Reference before the EACJ, 26/07/2013.

[69] The EACJ ruled on May 15, 2015 that restrictions on the press imposed through Burundi's 2013 Press Law violate the right to press freedom and the right to freedom of expression: the East Africa Court of Justice, no. 7 of 2013, Burundian Jousnalists Union v. The Attorney General of the Republic of Burundi, 15/05/2015.

III.1.2 | Landmark Rulings about its Affirmation

The Supreme Court and the Constitutional Court of Uganda, in 2004 and 2010 respectively, handed down two landmark rulings promoting freedom of expression. These rulings are significant in two respects: the appraisal by the constitutional judges of the limitations of the freedom of speech; and the criminality of making false statements, this offence being found in several press restriction laws and being used against HRDs[70]. Consequently, these decisions can definitely serve as precedents in other countries of the regions of the Great Lakes and East Africa.

In 2004, two journalists, **Charles ONYANGO OBBO** and **Andrew MUJUNI MWENDA,** seeking to invoke constitutional protection for the freedom of the press, lodged an appeal with the Supreme Court of Uganda against a decision of the Constitutional Court[71]. Article 29 of the Constitution of the Republic of Uganda[72] guarantees protection of the individual's right to freedom of expression, which includes the freedom of the press. The central issue in the appeal was whether section 50 of the Penal Code[73], which made publication of false news a criminal offence, contravened that protection.

Charles ONYANGO OBBO and Andrew MUJUNI MWENDA were an editor and a senior reporter, respectively, of the Monitor Newspaper. On October 1997, the two were jointly charged in the magistrates' court with two counts of "the publication of false news", contrary to section 50 of the Penal Code. The charges arose out of a story that the accused extracted from a foreign paper called *The Indian Ocean Newsletter*, and then published in the Sunday Monitor on September 21, 1997, under the headline: "Kabila paid Uganda in Gold, says report". The particulars of the offence charged in one count quoted the following excerpt from the story as the alleged false news: "*President Laurent Kabila of the newly named Democratic Republic of the Congo (formerly Zaire) has given a large consignment of gold to the Government of Uganda as payment for "services rendered" by the latter during the struggle against the former military dictator, the late Mobutu Sese Seko".* The alleged false news quoted in the other count was: "*The Commander of Uganda Revenue's (URA) Anti Smuggling Unit (ASU) Lt. Col. Andrew Lutaya, played a key role in the transfer of the gold consignment from the Democratic Republic of Congo to Uganda".*

In November 1997, the accused, who believed that their prosecution was a violation of several of their rights guaranteed by the Constitution, decided to seek legal relief through a joint petition to the Constitutional Court under Article 137 of the Constitution, seeking, *inter alia*, a declaration that the action of the Director of Public Prosecutions in prosecuting them under section 50 of the Penal Code was inconsistent with the provisions of Articles 29(1)(a) and (e), 40(2) and 43(2)(c) of the Constitution; and that section 50 of the Penal Code was inconsistent with the provisions of Articles 29(1)(a) and (b), 40(2) and 43(2)(c) of the Constitution.

The court postponed consideration of the petition pending conclusion of the criminal case in the magistrates' court which finally acquitted the accused of the criminal charges. Subsequently, the Constitutional Court considered the petition and unanimously decided that the action of the Director of Public Prosecutions in prosecuting the appellants was not inconsistent with the Constitution; and, by majority of four to one, that section 50 was not inconsistent with Article 29(1)(a) of the Constitution. Accordingly, the Court dismissed the petition.

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[70] See case-law under Section II.2.3– Misapplication of the Burden of Proof
[71]The Supreme Court of Uganda, Charles OnyangoObbo and Anor v. Attorney General, Constitutional Appeal No.2 of 2002, 10/02/2004 : http://www.ulii.org/ug/judgment/supreme-court/2004/1
[72]The Constitution of Uganda: http://www.opm.go.ug/assets/media/resources/6/Constitution.pdf
[73]The Penal Code of Uganda: http://www.ulii.org/ug/legislation/consolidated-act/120

In their appeal to the Supreme Court, the appellants did not challenge the unanimous decision that the action of the Director of Public Prosecutions was consistent with the Constitution. They also did not pursue their original allegations that the prosecution and the law it was based on infringed upon their rights to the freedoms of thought, conscience, belief, and association, and/or freedom to practice their profession. Their appeal was solely against the majority decision that section 50 was consistent with Article 29(1)(a) of the Constitution.

Section 50 of the Penal Code was drafted as follows:
(1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.
(2) It shall be a defence to a charge under sub-section (1) if the accused proves that prior to publication, he took such measures to verify the accuracy of the statement, rumour and or report as to lead him to believe that it was true.

As for Article 29(1)(a) of the Constitution, it stated:
Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.

The Supreme Court began by confirming that the burden of proof in establishing the offence under section 50 of the Penal Code is placed with the prosecution, which has to prove the following:

- That the accused published the statement, rumour or report;
- That the statement, rumour or report is false;
- That the published statement, rumour or report is likely to cause fear and alarm to the public or to disturb the public peace.

It then held that the decision of the Constitutional Court was flawed in the sense that it focused on justifying the need for limitation on the freedom of expression in law and, therefore, held that section 50 was a necessary legal limitation, but it failed to consider Section 50 within the parameters of Article 43 of the Constitution which defines permitted limitations on such freedoms as follows:
General limitation on fundamental and other human rights and freedoms
(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
(2) Public interest under this Article shall not permit—
(a) political persecution;
(b) detention without trial;
(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

Analysing the freedoms guaranteed in the Constitution in light of these permitted limitations, the Supreme Court found that: "*(P)rotection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. The exceptional circumstances set out in clause (1) of Article 43 are the prejudice or violation of protected rights of others and prejudice or breach of social values categorised as public interest*".

Concerning freedom of expression, the Court stated that: "*Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as*

such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression."

Considering freedom of expression in light of the issue of falsity (i.e., making a false statement), Justice MULENGA in his reasoning highlighted that: "*it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information. Subject to the limitation under Article 43, a person's expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed, the protection is most relevant and required when a person's views are opposed or objected to by society or any part thereof, as false or wrong"*.

As for Article 50 of the Penal Code, the Court determined that it was definitely a limitation on the enjoyment of the right to the freedom of expression and was concerned more with public interest than the rights of others. However, its limitation had to fit within the parameters of Article 43. Therefore, it had to satisfy two conditions; namely, be directed to prevent or remove "prejudice . . .[to] the public interest" (clause 1), and, in addition, be a measure that is "acceptable and demonstrably justifiable in a free and democratic society" (clause 2).

Concerning the first condition of prejudice to the public interest, Justice MULENGA's provided the following legal analysis: "*A court applying section 50 to the false fire alarm would convict and sentence to imprisonment, the person who shouted the false alarm, if it is satisfied that at the time the alarm was expressed, it was "likely" to cause panic, notwithstanding that no panic was actually caused. That would mean overriding the right to the freedom of expression, when the public interest is not prejudiced at all. In those circumstances can it be said that the danger, against which section 50 protects the public is substantial and prejudices the public interest? In my view, the answer must be in the negative".* He concluded that both in form and in substance, section 50 did not fit within the parameters of clause (1) of Article 43, which was a sufficient ground to hold that section 50 did not pass the first test of validity.

The Court concluded by stating that "*clearly, because of its broad applicability, section 50 lacks sufficient guidance on what is, and what is not, safe to publish, and consequently places the intending publisher, particularly the media, in a dilemma. In my view, given the important role of the media in democratic governance, a law that places it into that kind of dilemma, and leaves such unfettered discretion in the state prosecutor to determine, from time to time, what constitutes a criminal offence, cannot be acceptable, and is not justifiable in a free and democratic society*".

It therefore ruled that Section 50 of the Penal Code was inconsistent with Article 29(1) of the Constitution and, consequently, void.

Two years later, the Constitutional Court was again petitioned on the same issue of freedom of expression by **Andrew MUJUNI MWENDA** in a new proceeding. Together with the **Eastern African Media Institution,** the journalist appealed to the Court for nullification of the offences of sedition and promoting sectarianism which had been preferred against the journalist in the Chief's Magistrate's Court. He was prosecuted for

having uttered words with the intention to bring hatred or contempt or to excite disaffection against the President and the Government of Uganda[74].

At the time, the journalist was the host of a programme known as "Tonight with Andrew Mwenda Live" on the radio station 93.3 KFM which debated current topical issues prevailing in the country. About August 1, 2005, the First Vice President of Sudan, General John Garang, died, along with a number of officers and men of the Ugandan Government, when the Ugandan presidential helicopter they were travelling in crashed in southern Sudan. Two public holidays were declared in Uganda to mourn the deceased. Andrew MUJUNI MWENDA hosted a debate involving prominent politicians entitled "*Tonight is a Public Holiday. What justifies a Public Holiday?"* He was charged with sedition following statements he made during the debate. A few days later, on August 10, addressing the President of Uganda, he vehemently declared that he could not intimidate him. He said that the security of General Garang had been put in danger by President Museveni's incompetent government.

One of the questions the Constitutional Court had to answer was whether Sections 39 and 40 of the Penal Code that dealt with the offence of sedition were consistent with Articles 29(1)(a) and 43(2)(c) of the Constitution.

Taking the lessons learned from the precedent setting Supreme Court case, the Constitutional Court recalled the responsibility of the prosecution to prove the offence and found that "*apart from stating the law on freedom of speech and acceptable limitations thereto, there were no averments as to what were the reactions or feelings of the community. For example from political or civil leaders so as to satisfy the element of "prejudices to public interest". Apart from citing some international conventions, Mrs. Patricia Mutesi counsel for the respondent adduced no evidence that the limitation was justifiably acceptable in a democratic society*".

In regard to the offence of sedition, the Court found that "*the way impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1) (a)*". It concluded that both Sections 39 and 40 were inconsistent with the provisions of Articles 29(1)(a) and 43(2)(c) of the Constitution. It declared them null and void and struck them from the Penal Code.

Cases developed under this Section of landmark rulings show a dramatic difference between the judicial treatment of freedom of expression in Burundi and Rwanda on the one side and in Uganda on the other. Whereas Burundi and Rwanda still criminalise the publication of alleged false statements and criticism of State officials or State policy, the Highest Court of Uganda has declared such legislation null and void on the grounds that it contravenes freedom of expression as such should exist in a democratic society, and has provided very relevant boundaries concerning its limitation. Such a gap in vision undeniably creates a difference in the treatment of HRDs in the region to the disadvantage of Burundian and Rwandan HRDs, who continue to suffer from restrictions on their freedom of speech. However, the case law in Uganda can definitely serve as examples for the improvement of the right to freedom of expression in the Region, especially in the context of the regional cooperation and integration that is taking place within the EAC.

[74] The Constitutional Court of Uganda in Kampala, Andrew Mujuni Mwenda & Anor v Attorney General, Consolidated Constitutional Petitions N° 12 of 2005 and 3 of 2006, 25/08/2010, http://www.ulii.org/ug/judgment/constitutional-court/2010/5

III.2 – Freedom of Association

Freedom of association is the individual right to join or leave a group of a person's own choice, and for the group to take collective action to pursue the interests of its members. It is of paramount importance for HRDs, as it enables collective action and is a real launching point for the defense and protection of HRDs' rights.

Article 35 of the Rwandan Constitution guarantees freedom of association. Yet two cases where this freedom was undermined were identified. One was about the impairment of the independence of associations and the other was related to judicial harassment.

III.2.1 Impairment of the Independence of Associations

CLADHO is registered in Rwanda as a non-governmental umbrella of human rights organizations. It is governed by the 2012 law on national NGOs[75].

In July 2012, CLADHO's general assembly elected a new board of directors. New members were elected according to the established regulations. However, some organizations, like RWAMREC and KANYARWANDA, refused to endorse these new members because they were not pro-government[76]. Consequently, they referred matter to the Rwanda Governance Board (RGB) and then to the judiciary[77].

The Nyarugenge Court ruled in the plaintiff's favour by suspending the newly elected board and forbidding it to make decisions for CLADHO[78]. The Court applied an internal regulation of CLADHO which stated that the campaign for elections must done within 10 days prior to the General Assembly and invalidated the new board under the fallacious argument that the newly elected members had campaigned during the time the General Assembly took place.

After the ruling, three member organizations of CLADHO: ADL, MDD and LIPRODHOR, wrote a letter to CLADHO stating that both the Court and the RGB's were violating the principle of freedom of association, as established in Article 35 of the Constitution, and that the decision was contrary to the enjoyment of the financial, moral and administrative autonomy granted to national NGOs under Article 10 of the NGO Law; and consequently, they had decided to withdraw from CLADHO[79].

III.2.2 Judicial Harassment

The independent human rights organization LIPRODHOR, involved in the CLADHO election invalidation case above, has also been affected by judicial harassment.

On November 2011, the Nyarugenge District, where LIPRODHOR had purchased and occupied its premises, sent a letter to the organization requiring it to suspend its commercial activities, arguing that, based on the District Inspection Commission's evaluation, these activities were endangering the health and security of LIPRODHOR employees.

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[75] Law Nº04/2012 of 17/02/2012 Governing the Organization and Functioning of National Non-Governmental Organizations, Official Gazette n°15 of 09/04/2012, page 31 and following: http://www.rcsprwanda.org/IMG/pdf/Official_Gazette_no_15_of_09-04-2012_1_.pdf

[76] See Robert Mugabe's report on Great Lakes Voice:http://greatlakesvoice.com/exclusive-orchestrated-chaos-hits-rwanda-human-rights-umbrella-cladho/

[77] See the LIPRODHOR communique : http://www.liprodhor.org/tag/cladho/

[78] Tribunal de grande instance de Nyarugenge, RC 0558/ 12/ TGI/ NYGE, 27/06/2013.

[79] Lettre ouverte au représentant légal du CLADHO, 3/07/2013, http://www.liprodhor.org/wp-content/uploads/2013/07/Lettre-ouverte-Cladho.pdf

LIPRODHOR petitioned the Nyarugenge Court on the merits of the case, arguing that as an NGO, it was not carrying on commercial activities, but non-profit ones.

And, in separate request, LIPRODHOR sought an injunction in the same Court to allow it to remain at the premise pending a decision on the merits. LIPRODHOR pointed out that it had never received any visit from the District Inspection Commission and that the forced closure of its office by the District had brought about prejudicial consequences on its activities by forcing it to stop using its premises, equipment and vehicles and preventing its 20 employees from working.

In January 2012, the Court rendered a summary judgment regarding the injunction, holding that as LIPRODHOR had not answered the District's request to present a plan to solve the issues identified by the District, it will allow the implementation of the District's decision[80].

A few months later, the Court ruled on the merits of the case and upheld the District's suspension decision[81]. However, instead of basing its ruling on the District's position regarding health and security issues from LIPRODHOR's commercial activities, the Court, while acknowledging the LIPRODHOR was a non-profit organization, held that the urban plan designated this plot of land for residential use only. As LIPRODHOR was using the land for administrative purposes, the Court concluded that it had not respected the designated purpose of the plot.

The failure of the Rwandan judiciary to respect the freedom of association enshrined in the country's Constitution severely undermines opportunities for HRDs to take collective action in order to defend and protect human rights.

III.3 – Freedom of Assembly, Right to Political Participation, Freedom of Movement

Freedom of assembly, the right to political participation and freedom of movement have been the subject of rights-based rulings by Ugandan, Tanzanian and Regional courts.

III.3.1 | Affirmation of the Freedom of Assembly

Freedom of assembly was at stake in the case of **Phylis Omido** and the 16 other accused presented in the Section II, but the Kenyan Magistrate Court found no evidence to justify the charges of inciting violence and conducting unlawful assembly[82].

One significant freedom of assembly case involved **Muwanga KIVUMBI,** member and coordinator of the organization Popular Resistance against Life Presidency (PRALP), as petitioner to the Constitutional Court of Uganda[83].

On March 11, 2005, the organization wrote a letter to the Ministry of Internal Affairs seeking permission to hold a political rally in the Masaka District. The Ministry's Permanent Secretary, in his reply dated March 15, 2005, declared the planned rally illegal as PRALP was not a registered organization. On April 14, 2005, the Masaka branch of PRALP wrote to the District Police Commander (DPC) to inform him of the organization's intention to hold a rally and demonstration in Masaka town. The DPC, in his letter dated April 18, 2005, advised the organization to instead hold a seminar or

[80]Tribunal de grande instance de Nyarugenge, RAD 0044/11/TGI/Nyge, 5/01/2012.
[81]Tribunal de grande instance de Nyarugenge, 4/05/2012.
[82]See Section II-2.2 – Poor Evidence
[83]The Constitutional Court of Uganda at Kampala, Muwang Kivumbi vs Attorney General, Constitutional Petition No. 9 of 2005, 28/05/2008

consultative meeting in an enclosed place; warning them that if they went ahead to hold any rally or demonstration, the police would disperse it. However, the rally was held and the police dispersed it as promised. The petitioner and some other people were arrested.

On May 18, 2005, PRALP wrote to the District Police Commander Mukono, informing him of the organization's intention to hold a public dialogue and distribute leaflets in the towns of Lugazi, Nkokonjeru and Seetas The DPC advised PRALP to hold consultation meetings in an enclosed place as the organization was unregistered.

In both of these incidents, the DPCs quoted Sections 32, 34 and 35 of the Police Act[84] and the now repealed Article 73 of the Constitution. The Petitioner felt aggrieved by these decisions of the police and filed the petition to have Section 32 of the Police Act declared unconstitutional.

Section 32 which deals with the police power to regulate assemblies and processions provided:
(1) Any officer in charge of police may issue orders for the purpose of: -(a) regulating the extent to which music, drumming or a public address system may be used on public roads or streets or at occasion of festivals or ceremonies; (b) directing the conduct of assemblies and processions on public roads or streets or at places of public resort and the route by which and the times at which any procession may pass.
(2) If it comes to the knowledge of the inspector general that it is intended to convene any assembly or form any procession on any public road or street or at any place of public resort, and the inspector general has reasonable grounds for believing that, the assembly or procession is likely to cause a breach of the peace, the inspector general may, by notice in writing to the person responsible for convening the assembly or forming the procession, prohibit the convening of the assembly or forming of the procession.
(3) The inspector general may delegate in writing to an officer in charge of police all or any of the powers conferred upon him or her by sub Section (2) subject to such limitations, exceptions or qualifications as the inspector general may specify.

The Court unanimously granted the petition and declared that Section 32(2) was inconsistent with and contravened Articles 20 (1) (2) and 29 (1) (d) of the Constitution. Article 20(1)(2) provides that the rights enshrined in the Constitution shall be guaranteed by all organs of the State, and Article 29(1)(d) proclaims the freedom to assemble and to demonstrate together with others peacefully and unarmed, as well as to petition. Hence, Section 32(2) was declared null and void.

The reasons given by the judges were the following: "*Convening rallies, assemblies or demonstrations are a right provided for in article Articles 20 (1) (2) and 29 (1) (d) of the Constitution. They cannot be limited if there is no contravention of article 43 of the Constitution. The Police have powers under provision of the law to maintain law and order or deal with any situation envisaged in the Police Act. But, police powers as they are provided for under Section 32 of the Police Act are prohibitive and not regulatory. They consequently infringe above mentioned rights provided for in the Constitution".*

[84] The Police Act, http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/32bd94473f5720a7c12573830052a27f/$FILE/THE%20POLICE%20ACT.pdf

III.3.2 | Struggle for the Right to Political Participation

The right to political participation was the subject of a judicial battle in Tanzania that ended with a ruling from the African Court on Human and Peoples' Rights.

This case involving human rights campaigner and political leader **Christopher MTILIKA** is an illustrative example in two aspects: it shows the integration of international human rights conventions into the decisions of domestic courts, and demonstrates the role of regional human rights instruments in safeguarding fundamental rights and freedoms.

In 2005, Christopher MTIKILA, chairman of the Democratic Party, petitioned the High Court of Tanzania in Dar es Salam, by challenging the constitutional amendment to Articles 39 and 67 of the Constitution, as introduced by amendments to Act N°34 of 1994. According to the petitioner, this amendment violated the basic human rights protected in Articles 21 (1), 9 (a) and (f) and Article 20 (4) of the Constitution[85], as well as the International Covenants on Human Rights to which the United Republic was a party. The effect of these amendments was that an ordinary Tanzanian was forced to join a political party to be able to participate in government affairs and to be elected to the posts of President or Member of Parliament.

According to Articles 20(4) and 21(1) of the Constitution:

20 (4): *It shall be unlawful for any person to be compelled to join any association or organization, or for any association or any political party to be refused registration on grounds solely the ideology or philosophy of that political party.*

21 (1): *Subject to the provisions of Article 39, 47 and 67 of this Constitution and of the laws of the land in connection with the conditions for electing and being elected or for appointing and being appointed to take part in matters related to governance of the country, every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law.*

The High Court, after reviewing the political and constitutional history of Tanzania, particularly where the country evolved from a one-party State to multipartism, stated that a multiparty political system was not inconsistent with private candidacy[86]. However, the Court found that the respondent had failed to justify why Articles 20(4) and 21(1) of the Constitution should be restricted and had produced no evidence to support their fears regarding private candidature. It therefore concluded that Act 34 of 1994 was an infringement on the fundamental right to participate in the governance of the country, that its restriction was not necessary and reasonable, and that it did not meet the proportionality test.

The High Court conducted its analysis of these amendments in reference to the international conventions of which Tanzania was party, resulting in a very sound precedent for the inclusion of international human rights instruments into domestic law.

The Court stated: *"We have no doubt that international conventions must be taken into account in interpreting, not only our constitution but also other laws, because Tanzania does not exist in isolation. It is part of a comity of nations. In fact, the whole of the Bill of Rights was adopted from those promulgated in the Universal Declaration of Human Rights. To come nearer to the case at hand, Articles 20 and 21 (as originally drafted before the Amendments) of the Constitution are replica of Articles 20 (1) and (2) and 21*

[85] The Constitution of Tanzania : http://www.judiciary.go.tz/downloads/constitution.pdf
[86]The High Court of Tanzania at Dar es Salam, Civil Case N°10 of 2005, Christopher Mtikila v. The Attorney General, 5/05/2006.

of the Declaration. The Covenant of Civil and Political Rights which followed the declaration and ratified by Tanzania in June 1976 provides in its Article 25 thus: Every citizen shall have the right and the opportunity without any of the distinctions in article 2 and without unreasonable restriction: - (a) To take part in the conduct of public affairs directly or through freely chosen representatives (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electorates. Article 2 of the convention, enshrines the right of an individual without any distinction of any kind such as political or other opinion Article 29 (2) of the Universal Declaration of Human Rights, relied upon by Mr. Mwaimu has the same effect as Article 30 (1) of the Constitution of the United Republic of Tanzania. As seen above, case law has subjected any justification for restricting fundamental rights under that Article 30 (1) to the proportionality test."
The Court concluded that the alleged amendments were both unconstitutional and contrary to international covenants to which Tanzania was a party.

Dissatisfied with this decision, the Attorney General appealed[87].

Basing its decision on Article 98(1) of the Constitution which provides for the power of Parliament to alter the Constitution in accordance with specific conditions, the Court concluded that the Constitution could only be altered by the vote of two-third of the MPs, and that only the Parliament had the power to amend the Constitution. It, therefore, held that a court could not declare an Article of the Constitution unconstitutional, except where it had not been enacted in accordance with the procedures established by Article 98(1).

The Court concluded that the "*issue of independent candidates has to be settled by parliament which has the jurisdiction to amend the Constitution and not Courts which, as we found, do not have jurisdiction*". It added "*the decision whether or not to introduce independent candidates depends on the social needs of each State based on its historical reality. Thus the issue of independent candidates is political and not legal*".

In its reasoning, the Court of Appeal simply ignored the powers attributed to the High Court pursuant to Article 30 (3) and (4) of the Constitution to examine laws allegedly violating constitutional rights. Considering the Parliament and the High Court to be two competing entities, the Court violated the principles of separation of powers and the independence of the judiciary, and it clearly declared that political considerations should prevail over judiciary control of the rights and freedoms enshrined in the Constitution.

As a last resort, using the protection mechanism guaranteed in the ACHPR[88] to which Tanzania is a party, Christopher MTILIKA, the Tanganyika Law Society, and the Legal and Human Rights Centre referred the case to the African Court of Human and People's Rights[89].

Article 3 (1) of the Protocol to the ACHPR on the Establishment of the African Court on Human and Peoples' Rights confers on the said-Court jurisdiction to hear matters concerning the alleged violation of human rights; Article 5(3) of the Protocol read together with Article 34(6) of the Protocol sets out the jurisdiction of the Court to consider applications from individuals and NGOs[90].

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[87] Court of Appeal of Tanzania at Dar Es Salam, Civil Appeal No 45 of 2009, Attorney General v. Christopher Mtikila, 17/06/2010.
[88]The ACHPR: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf
[89]African Court on Human and People's Rights, Tanganyka Law Society, The Legal Human Rights Centre, Reverend Christopher R. Mtikila v. The United Republic of Tanzania, Applications No 009/2011 and No 011/2011, 14/06/2013: http://www.african-court.org/en/images/documents/case/Judgment%20-%20%20Rev%20Christopher%20Mtikila%20v.%20Tanzania.pdf
[90] The Protocol to the ACPR on the Establishment of the African Court on Human and Peoples' Rights : http://www.achpr.org/instruments/court-establishment/

The Republic of Tanzania challenged the Court's jurisdiction based on the fact that the conduct complained of, namely the barring of independent candidates, occurred before the Protocol came into operation. The African Court immediately dismissed the issue stating that "*the rights alleged to be violated are protected by the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it, the Charter was operational, and there was therefore already a duty on the Respondent as at the time of the alleged violation to protect those rights. At the time the Protocol was ratified by the Respondent and when it came into operation in respect of the Respondent, the alleged violation was continuing and is still continuing: independent candidates are still not allowed to stand for the position of President or to contest Parliamentary and Local Government elections. Furthermore, the alleged violations continued beyond the time the Respondent made the declaration in terms of Article 34(6) of the Protocol*."

On the merits, the Court started by affirming the right to participate freely in the government of one's country, as established in the ACHPR : "*In view of the patently clear terms of Article 13(1) of the Charter, which gives to the citizen the option of participating in the governance of her country directly or through representatives, a requirement that a candidate must belong to a political party before she is enabled to participate in the governance of Tanzania surely derogates from the rights enshrined in Article 13 (1) of the Charter. Although, the exercise of this right must be in accordance with the law.*"; *"Article 27(2) of the Charter allows restrictions on the rights and freedoms of individuals only on the basis of the rights of others, collective security, morality and common interest. The needs of the people of Tanzania, to which individual rights are subjected, we believe, must be in line with and relate to the duties of the individual, as stated in Article 27(2) of the Charter, requiring considerations of security, morality, common interest and solidarity. There is nothing in the Respondent's arguments set out earlier, to show that the restrictions on the exercise of the right to participate freely in the government of the country by prohibiting independent candidates falls within the permissible restrictions set out in Article 27(2) of the Charter. In any event, the restriction on the exercise of the right through the prohibition on independent candidacy is not proportionate to the alleged aim of fostering national unity and solidarity."*

Considering the requirement of joining a political party in light of the freedom of association, the Court provided very clear and interesting reasoning concerning the dual aspect of this right: "*It is the view of the Court that freedom of association is negated if an individual is forced to associate with others. Freedom of association is also negated if other people are forced to join up with the individual. In other words freedom of association implies freedom to associate and freedom not to associate. The Court therefore finds that by requiring individuals to belong to and to be sponsored by a political party in seeking election in the Presidential, Parliamentary and Local Government posts, the Respondent has violated the right to freedom of association. This is because individuals are compelled to join or form an association before seeking these elective positions. The Court is not satisfied that the social needs argument raised by the Respondent, which has already been dealt with, meets the exceptions in Articles 29(4) and 27 (2) of the Charter to such an extent that it justifies the limitation of the right to freedom of association*."

Analyzing political participation in light of the right not be discriminated and the right to equality, the Court stated: *"Article 2 of the African charter provides: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." To justify the difference in treatment between Tanzanians, the respondent has, as already mentioned, invoked the existence of social needs of the*

people of Tanzania based, inter alia, on the particular structure of the State (Union between Mainland Tanzania and Tanzania Zanzibar) and the history of the country, all requiring a gradual construction of a pluralist democracy in unity. The question then arises whether the grounds raised by the Respondent State in answer to that difference in treatment enshrined in the above mentioned constitutional amendments are pertinent, in other words reasonable, and legitimate. As the Court has already indicated, those grounds of justification cannot lend legitimacy to the restrictions introduced by the same constitutional amendments to the right to participate in the Government of one's country, and the right not to be compelled to be part of an association. It is the view of the Court that the same grounds of justification do not legitimise the restrictions to not be discriminated against and the right to equality before the law."

The Court therefore concluded that the constitutional amendment violated Articles 2 and 3(2) of the Charter and directed the Republic of Tanzania to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations and to inform the Court of the measures taken.

III.3.3 | Assertion of the Freedom of Movement

Section III.3.2 has highlighted the importance of international and regional human rights instruments. In the following case, regional mechanisms also played a role in safeguarding the freedom of movement when confronted by arbitrary limitations on this freedom by the State. The case involved the Kenyan lawyer **Samuel Mukira MOHOCHI**, Advocate at the High Court of Kenya, who filed a petition with the East African Court of Justice[91].

On April 2011, the lawyer travelled to Uganda from Kenya on a Kenya Airways flight. He was part of a 14-member delegation from the International Commission of Jurists (ICJ) scheduled to meet the Chief Justice of Uganda. The whole delegation was on the same flight. On arrival at Entebbe International Airport at 9.00 am, the Applicant was not allowed to pass beyond the Immigration checkpoint in the airport. What happened immediately thereafter was contested. The Applicant contended he was arrested, detained and confined by airport immigration authorities. Immigration authorities maintained that that they handed him over to Kenya Airways who then took him into their custody.

Samuel Mukira MOHOCHI was served with a copy of a "Notice to Return or Convey Prohibited Immigrant" addressed to the Manager, Kenya Airways, by the Principal Immigration Officer at Entebbe International Airport. The same day at 3.00 pm, he was put on a Nairobi-bound Kenya Airways flight and returned to Kenya. The immigration authorities did not inform him, either verbally or in writing, of the reasons why he had been denied entry or why he had been declared a prohibited immigrant and subsequently returned to Kenya. They maintained that they owed him no such duty under the law. Samuel Mukira MOHOCHI contended that these actions were a violation of Uganda's obligations under the EAC Treaty[92], the Protocol for the Establishment of EAC Common Market[93]and the ACHPR.

Pursuant to Article 27(1) of the EAC Treaty, by which the East African Court of Justice is conferred jurisdiction over the interpretation and application of the EAC Treaty, Samuel Mukira MOHOCHI petitioned the East African Court of Justice.

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[91]The East African Court of Justice, Reference no.5 of 2011, Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda, 17/05/2013 : http://www.icj-kenya.org/dmdocuments/opinions/judgment%20muhochi%20case.pdf

[92] The EAC Treaty : http://www.eac.int/treaty/

[93] Protocol for the Establishment of EAC Common Market, http://www.eac.int/legal/index.php?option=com_docman&task=cat_view&gid=59&Itemid=47

In its decision, the Court examined whether Uganda complied with the provisions of the EAC Treaty and the Protocol, namely:

i) Article 104 of the Treaty by which Uganda and other Partner States agree to adopt measures to achieve the free movement of persons;
ii) Article 6 (d) of the Treaty by which Partner States undertake to abide by principles of good governance including adherence to of the principles democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
iii) Article 7 of the Protocol by which Uganda guaranteed the free movement of persons within its territory who are citizens of the other Partner States;
iv) Article 7(2) of the Protocol by which Uganda committed to the non-discrimination of the citizens of the other Partner States by ensuring an entry without a visa, free movement within its territory, permission to stay within its territory, and an exit without restrictions ;
v) Article 7(5) by which, in respect of citizens of Partner States, Uganda can impose limitations on the free movement of persons solely on grounds of public policy, public security and public health;
vi) Article 7(6) by which Uganda must notify the other Partner States if it should impose any limitations under Article 7(5) ;
vii) Article 54(2) of the Protocol, by which Partner States guaranteed that persons whose rights and liberties as recognised by the Protocol have been infringed upon, shall have a right to redress, even when the infringement has been committed by persons acting in their official capacities; and that the competent judicial, administrative or legislative authority or any other competent authority shall rule on the rights of the person who is seeking redress.

Concerning the refusal of Uganda to grant the petitioner entry into its territory, the Court found that Uganda failed to explain what their immigration officials had against the petitioner and why this warranted such harsh treatment; and then related the issue to the principle of due process of law: Pursuant to Article 54(2) of the Protocol "*immigration officials had, foremost, an obligation to strictly apply the limitations of the freedom of movement, given its importance to the East African Community Common Market in particular, and integration in general. Failing this, once they decided to infringe upon the Applicant's rights and liberties as recognised by the Protocol, they ought to have guaranteed his right to redress. This entailed, in our view, a duty to give the Applicant sufficient reasons for denying him entry, declaring him a prohibited immigrant and removing him from Uganda. Equally importantly, they had a duty to afford him a fair opportunity to be heard, and, as they made their decisions about him, to take into consideration whatever he had to say. These, in our view, are basic indicators of due process, are the hall marks of the rule of law and they distinguish a potentially just and fair process from a potentially unjust and unfair one.*"

The Court added that the fact that the lawyer was singled out of a delegation, declared a prohibited immigrant, denied entry, and returned to Kenya, without being furnished with the reasons why and without being heard in his defence was clearly at variance with and in violation of Uganda's obligation to adhere to the rule of law, accountability, and transparency, as well as the recognition and protection of human rights in accordance with the Charter, as provided under Articles 6(d) and 7(2) of the Treaty and 7(2) of the Protocol.

The Court conducted a comprehensive analysis of the status of prohibited immigrants based on Section 52 of the Uganda Citizenship and Immigration Control Act that defines

twelve categories of prohibited immigrants.[94]Such analysis enabled the Court to highlight the lack of legality of the notice served to Samuel Mukira MOHOCHI: "*A good faith and plain reading of the aforesaid Section shows that, from (a) through (k), for any person to be declared a prohibited immigrant under any of the twelve categories, there is a formal technical process by which it is ascertained that certain conditions exist and, once ascertained, then the decision to declare him such prohibited immigrant or not is made. Secondly, while a person can be declared a prohibited immigrant under one or more clearly ascertained categories, our reading of the Section indicates that it would be impossible for a person to be declared a prohibited immigrant pursuant to the whole blanket Section 52. From the foregoing, it would seem to us that the Applicant could not have possibly been declared a prohibited immigrant under the whole of Section 52, without reference to any of the twelve categories*". In the end, the Court declared that it had been unable to ascertain whether the Applicant had ever been declared a prohibited immigrant, and if so, by what procedure and at what point. The only document that was issued was the Notice to Return or Convey Prohibited Immigrant under Section 66(4) of the Citizenship and Immigration Control Act[95]; and it was to Kenya Airways, not to the Applicant.

The foregoing left the Court with four conclusions: "*Firstly, that the Applicant was not a prohibited immigrant, under the law, because there is no evidence that he was declared so. Secondly, that Immigration Authorities merely labeled him a prohibited immigrant so as to deny him entry. Thirdly, that the Notice was issued in order to corner Kenya Airways into returning him to Kenya and, finally, that the Immigration Authorities resorted to kangaroo methods for want of a lawful procedure by which to swiftly return the Applicant to Kenya*".

After analysing the denial of entry and the declaration of prohibited immigrant, the Court elaborated on the applicant's detention and the question of his deprivation of liberty: "*Detention is indeed deprivation of liberty. When it is illegal it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity. Furthermore, when a citizen of a Partner State is illegally detained in another Partner State, with no right to be informed why or to be heard in his defence, and the reasons cannot be disclosed, even in a court of law, it is not just a violation of the Treaty, it is indeed a threat to integration*."

The East African Court of Justice concluded that the actions and decisions of Ugandan officials declaring the Applicant a prohibited immigrant, denying him entry into Uganda, detaining him and returning him to Kenya were illegal, unjustified, unlawful; and inconsistent with transparency, accountability, the rule of law, and universally accepted standards of human rights; and were, therefore, in violation of Uganda's obligations under Articles 6(d) and 7 (2) of the Treaty and Articles 7(2) and 54(2) of the Protocol.

Another similar case brought before the East African Court of Justice involved Uganda, Kenya and the Kenyan lawyer **Mbugua MUREITHI WA NYAMBURA[96].**

On September 15, 2010, MUREITHI WA NYAMBURA flew from Kenya to Uganda in order to represent six Kenyan citizens handed over to Ugandan authorities for alleged terrorist bombings in Kampala on July 11, 2010. Their case was scheduled in the Nakawa Chief

[94] Uganda Citizenship and Immigration Control Act, Cap 66: http://www.ulii.org/ug/legislation/consolidated-act/66

[95] Section 66(4):*Where a prohibited immigrant enters Uganda from a ship, aircraft or vehicle, whether or not with knowledge of the owner, agent or person in charge of it, the owner, agent or person in charge commits an offence and is liable on conviction to a fine not exceeding one hundred currency points; and provision shall be made by the owner, agent or person in charge, as the case may be, to the satisfaction of an immigration officer for the conveyance out of Uganda of the prohibited immigrant.*

[96]East African Court of Justice, Reference no. 11 of 2011, Mbugua Mureithi Wa Nyambura v. The Attorney General of the Republic of Uganda and The Attorney General of the Republic of Kenya, 24/2/2014, http://www.worldcourts.com/eacj/eng/decisions/2014.02.24_Wa_Nyambura_v_AG_of_Uganda.pdf

Magistrate's Court for September 16th and the lawyer intended to petition for temporary admission to the Roll of Ugandan Advocates in order to defend the accused in Court.

Mbugua MUREITHI WA NYAMBURA alleged that, shortly after his arrival at Entebbe Airport, he was hurled into a trap by members of Uganda's Rapid Response Unit (RRU) set up by an officer who pretended to be waiting for him at a hotel with a letter from one of the Applicant's clients. When the lawyer reached the hotel, he was arrested at gunpoint, manacled on the legs and subjected to endless high speed driving around the outskirts of Kampala throughout the night. He was then locked up incommunicado with his clients in the cells of the RRU from September 16th to 17th and his belongings were seized. He was thereafter transferred to Entebbe International Airport Police Station where he continued to be detained incommunicado without any contact from his family until September 18th. In the morning, he was escorted by Ugandan security officers to a Uganda Airlines aircraft destined for Nairobi, Kenya. His passport, mobile phone and other personal belongings were handed back to him in the aircraft. No reasons were given to him for the mistreatment.

The lawyer challenged the aforesaid acts of ill-treatment before the East African Court of Justice on December 30, 2011.

As first Respondent, the State of Uganda alleged that the Applicant was arrested on the same night of his arrival on September 15, 2010, on suspicion of being involved in terrorism, being a facilitator of terrorism by way of being a conduit for funds directed towards terrorist operations, and the murder of over 70 Ugandans on July 11, 2010, based on intelligence information obtained by Uganda's security forces; and that he was, at the time of his arrest, informed of the preferred charges against him and then driven to Kampala for interrogation.

The second Respondent, the State of Kenya, contended that it was not aware of the arrest, interrogation, detention or the alleged deportation of the Applicant; it denied any implication in or responsibility for the matter; and it has taken action with the Government of the Republic of Uganda since it was informed of the Applicant's case.

In this very sensitive case concerning alleged acts of terrorism attributed to a defense lawyer in charge of defending terrorist suspects, the East African Court of Justice granted the status of *amicus curiae* to ASF, the intervention of which was based on the role and independence of lawyers as provided by international human rights instruments[97].

In its written submissions, ASF emphasized that each State has the obligation to respect and protect the principles of lawyer's independence in the EAC; that independence of a lawyer is a fundamental standard of human rights; that it is most essential in protecting and upholding the rule of law and is a universally accepted standard of human rights recognized in the EAC Treaty.

Unfortunately, however, the opportunity to have the issues of lawyers' independence, due process of law and freedom of movement ruled on was missed. As the applicant had taken more than a year to file the reference instead of the two months prescribed by the EAC Treaty, the reference was consequently time-barred, so the EACJ could not rule on the merits and had to dismiss the case.

The affirmation of the freedom of assembly by the Constitutional Court of Uganda, of the right to political participation by the African Court on Human and Peoples' Rights, and of the freedom of movement by the EACJ is very encouraging. It is hoped that it will have an influence on the exercise of those rights and freedoms in the countries of the region and serve the cause of HRDs.

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[97]East African Court of Justice, Application N°2 of 2013, 28/08/2013, http://www.worldcourts.com/eacj/eng/decisions/2013.08.28_ASF_v_Mureithi_Wa_Nyambura.pdf

IV – CONCLUSION AND RECOMMENDATIONS

This study based on 45 court decisions has identified issues, dysfunctions and good practices concerning the judiciary treatment of HRDs in the Regions of the African Great Lakes and East Africa. Though this study is not exhaustive in terms of case identification (mainly due to the difficulty to access written judgments in many jurisdictions of the regions under study), it is broad in range and thorough in terms of capturing the trends in the sector.

To address the shortcomings in judicial practices with regards to cases involving human rights defenders and extend the best practices identified in the study, ASF and the EALS invite the relevant State institutions to adopt the following recommendations:

1) **In order to put an end to the impunity enjoyed by those who harass HRDs in the region, the conduct of serious and evidentiary investigations for all offences committed against HRDs must be ensured by the authorities responsible for the criminal or administrative investigations.**

2) **In parallel, the Executive shall refrain from any act which might influence or prevent the good conduct of the investigation and judicial processes.**

A large number of attempts to limit the capacity of HRDs to defend and promote human rights in the region are documented every year by CSOs and international organizations. In comparison, there are a relatively small number of judicial cases involving HRDs which result in written and accessible court decisions. This is symptomatic of a series of interrelated factors and issues highlighted in this report, such as the low response to crimes committed against HRDs or the often questionable level of independence and impartiality of the justice system.

The HRDs' negative perception of their national justice system and institutions often results in hesitation and fear to seek justice, even in situation when they are victims of the most serious violations of their fundamental rights. In parallel, when they do decide to resort to the justice system, the response by law enforcement is often unsatisfactory. The investigations are rarely thorough and the judicial proceedings often fail to meet the most basic requirements of a fair trial.

As a result, this study has highlighted a very small amount of cases dealing with crimes committed against HRDs (5 cases) and a slightly higher number of individual actions before constitutional or regional courts for alleged human rights violations (7 cases). However, these figures do not match the regional data on crimes and human rights violations against HRDs reported every year.

In comparison, the number of cases involving criminal charges or administrative sanctions against HRDs (mainly resulting from lawful activities they have undertaken in the course of their work to promote human rights) reveals an alarming trend (16 cases). The justice system is becoming more and more a means to control the work of HRDs, instead of a means to protect them from all sorts of threats and violence. In order to reverse this trend, State authorities must, at all levels, concretize their commitment to protect HRDs from human rights violations and strengthen institutional safeguards against judicial and administrative harassment of HRDs.

3) **To ensure the implementation of good judiciary practices which are not an obstacle to the realization of the HRDs' most fundamental rights, members of the Judiciary shall, at all levels, ensure an unrestrictive and unconditional application of existing substantive and procedural law. In order to achieve this, a special focus shall be given to the scrupulous respect of the rules of fair trial.**

Cases from almost all jurisdictions under study showed a series of important issues regarding the respect of substantive law and the observance of fundamental rules of criminal procedure. Among these cases, we found breaches of the principle of legality and abuse of procedures involving HRDs, failure to investigate crimes committed against HRDs, sentencing of HRDs on the basis of poor evidence, misapplication of the burden of proof, illegal pre-trial detention and the failure to respect the fundamental rules for the humane treatment of detainees.

These widespread practices lead to the conclusion that HRDs in those countries continue to suffer from particularly harsh judicial harassment that prevents them from carrying out their actions. Such harassment is mainly due to the relentless failure of the judiciary to apply the law and, consequently, calls into question the independence of the judiciary. Above all, it creates an appalling legal insecurity for HRDs when the law should be the ultimate shield against such arbitrariness.

4) **As the placement into custody is the most extreme judicial measure which ultimately prevents HRDs from accomplishing their work, members of the Judiciary shall ensure an unconditional respect of the national and international rules governing pre-trial detention.**

Pre-trial detention is one of the most serious and radical measures that State authorities can take against an individual who benefits from presumption of innocence. Any instance of pre-trial detention must observe international standards which guarantee that individual freedoms are respected. Therefore, it may only be used as an exceptional measure where essential to the proper functioning of the legal proceedings or in order to maintain public order.

As recent case law shows, these important principles have, unfortunately, not always been followed by the judiciary in cases involving HRDs, especially in Burundi. The most recent decision in Burundi, the Mbonimpa case, shows some positive development in this sense, but this trend should continue to be monitored at the regional level and good practices extended.

5) **Freedoms of expression, association, assembly and movement are rights which are fundamental to successful democratic processes. They shall be guaranteed by the Judiciary to all HRDs, as defined in national constitutions, as well as in regional and international treaties.**

6) **At the same time, the legislative authorities shall adopt regulatory approaches to the freedom of expression, rather than prohibitive ones, and repeal legislation that broadly criminalises speech.**

Freedom of expression is in serious threat in many countries of the region. Such limitations take various forms, including attempts to the life and physical integrity of HRDs and irregular proceedings, as well as an escalation in the criminalization of speech (which is usually based on the protection of public interest, public order and national security as the rule, rather than the exception). Freedom of association has also been impaired by government interference in the management of civil society organizations and by judicial harassment.

In response to these judicial and legislative trends, constitutional and regional courts have developed some favorable precedents towards the realization of public freedoms and personal liberties. The Uganda Supreme and Constitutional Courts in landmark rulings have, for instance, declared legislation penalising false statements null and void, recognising that the right of freedom of expression cannot be precluded from constitutional protection because the expression is considered to be false, erroneous, controversial or unpleasant; and affirming that its limitation must be justified.

If progress is noticeable in the case-law concerning public freedoms and personal liberties in some countries from the rulings of regional courts, very much remains to be done in other countries so that HRDs can fully exercise these freedoms which are indispensable to the fulfillment of their mission.

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