

Decriminalisation of Laws Limiting Freedom of Expression in Africa: Burundi Country Report

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Preface

Across the world, there exist numerous criminal laws which restrict the enjoyment of the right to freedom of expression, as guaranteed by numerous international and regional human rights treaties as well as national constitutions. These laws which are generally relics of colonial times, have nevertheless continued to be used, and in some cases further strengthened by post-colonial governments. In Africa, offences such as sedition, criminal defamation, criminal libel, publication of false news and insult remain on the statute books of most countries. In recent times, anti-terrorism laws are increasingly being utilised to 'criminalise' free speech.

While many governments justify the continued maintenance of these laws on grounds such as protecting national security and the right to privacy, in reality, this is rarely the motivation for their use. Rather, these laws are routinely utilised to stifle public debate and legitimate criticism on issues of national interest such as corruption, lack of respect for the rule of law and poor service delivery. For some, the mere knowledge of the existence of these laws induces self-censorship. For others who remain undeterred, their eventual arrest, charge, conviction or sentencing and the attendant consequences on their professional and personal lives, becomes their lived reality. Inevitably, the existence and use of these laws creates an unfavourable climate for the promotion and protection of all human rights, limits the accountability of elected officials, hinders the effectiveness of democratic institutions and ultimately stunts democratic governance.

The African Commission on Human and Peoples' Rights (African Commission) recognising the important role of freedom of expression in the realisation of other human rights has continuously reiterated that these criminal laws constitute a violation of the right of freedom of expression. Thus, the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission in October 2002, in principle 12 states that individuals should not be 'liable for true statements, opinions or statements regarding public figures, which it was reasonable to make in the circumstances'; requires public figures to 'tolerate a greater degree of criticism; and prohibits the imposition of sanctions which are 'so severe as to inhibit the right to freedom of expression'.

Furthermore, in a communication submitted to the African Commission by Kenneth Good against the Republic of Botswana, the African Commission reiterating principle 12 of the Declaration stated that a high level of tolerance is expected when political views are expressed and 'an even higher threshold is required when it is directed towards the government and government officials'. Again, in November 2010, the African Commission adopted a resolution, ACHPR/Res169 (XLVIII) 2010: Resolution on Repealing Criminal Defamation Laws in Africa. This resolution called on states parties to the African Charter to repeal criminal defamation and insult laws and to 'refrain from imposing general restrictions that are in violation of the right to freedom of expression'.

On my part, I have consistently appealed to Member States of the African Union to decriminalise media offences through my Activity Reports, presented to each Ordinary Session of the African Commission, as well as through numerous letters of appeal sent to heads of states, expressing concern about the application of these laws. It was with this in mind that during the 52nd Ordinary Session of the African Commission held in October 2012 in Cote d'Ivoire, I announced the launch of a pan-African campaign for the decriminalisation of laws that restrict freedom of expression, to be implemented under my leadership.

It was thus as part of this this campaign, that a multi-country research into the use and impact effect of laws criminalising freedom of expression in Benin, Burundi, Lesotho, Tanzania, Zambia and Zimbabwe, was commissioned in September 2013, with the principal objective of providing a solid evidence base of the effects of these laws on freedom of expression.

This report on Lesotho, as with all the other 5 country reports, provides empirical evidence of the use and impact of laws criminalising freedom of expression in Lesotho. The findings of this research will most certainly be useful in future engagements by the African Commission and my mandate with the government of the Republic of Lesotho in encouraging the decriminalisation of these laws. It is also my earnest hope that freedom of expression activists in Lesotho and beyond, will find the information provided in this research useful, in championing the cause for the repeal of the relevant criminal laws in Lesotho.

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List of acronyms and abbreviations

ABELO : Burundian Association of Municipal Councillors

ABR : Burundian Association of Broadcasters

ACAT : Christian Alliance for the Abolition of Torture

ADC : Alliance of Democrats for Change
AFJO : Association of Women Journalists

APRODH : Association for the Protection of Human Rights and Detainees

CCIB : Chamber of Trade and Industry
CNC : National Communication Council

CNDD : National Council for the Defence of Democracy

CNDD-FDD : National Council for the Defence of Democracy-Force for the Defence of Democracy

CNIDH : Independent National Human Rights Commission
COMESA : Common Market for Eastern and Southern Africa

CPP : Code of Criminal Procedure
EAC : East African Community
FM : Frequency Modulation

FOCODE : Forum for Conscience and Development
FORSC : Forum for the Strengthening of Civil Society

FRODEBU : Burundian Democratic Front

MP : Public prosecutor

MSD : Movement for Solidarity and Democracy
OAG : Observatory of Government Action

OLUCOME : Observatory for the fight against Corruption and Economic Mismanagement

ONNGOG: Non-Governmental Organisation

Op. cit. : Opere Citato

OPB : Burundian Press Observatory

PARCEM: Words and Action for the Awakening of Consciences and the Changing of Mentalities

PISC : Integrated Civil Society Platform
RDC : Democratic Republic of the Congo

RFI : Radio France Internationale
RPA : Radio Publique Africaine
SOCIC : Citizen's Civil Society

UBJ : Union of Burundian JournalistsUPRONA : Union for National Progress

Introduction

Burundi is a country in East Africa with a total surface area of 27,834 square kilometres. It is bordered to the north by Rwanda, to the west by the Democratic Republic of the Congo (the DRC) and to the south and east by Tanzania. It is a landlocked country: although part of it is on the shores of Lake Tanganyika, it is nearly 2000km away from the nearest access to the sea.

Burundi is a member of international organizations such as the United Nations and its specialized agencies, but also regional organisations such as the African Union, the East African Community, (together with Kenya, Uganda, Rwanda and Tanzania), the Economic Community of Countries of the Great Lakes Region (the DRC, Rwanda and Burundi) and the Economic Community of Central African States (together with Angola, Burundi, Cameroon, the Central African Republic, Congo Brazzaville, the DRC, Gabon, Equatorial Guinea, Chad and Sao Tome).

Apart from its landlocked status, which takes a heavy toll on its economy, Burundi also has very high population density. According to the most recent census, which was conducted in 2008, the population then stood at 8,053,574 inhabitants, which, with 310 inhabitants per square kilometre, makes it one of the three most densely populated countries in Africa. Almost 90% of the population lives in rural areas and engages in subsistence farming.

Burundi is one of the poorest countries in the world, with 67% of the population living below the poverty line 1 and per capita gross domestic income at 170 USD in 2010. According to the latest classification of the United Nations Development Programme's Human Development Report, Burundi is 178^{th} out of 186 States listed.

This widespread poverty gives rise to a high late of illiteracy, at 50%, despite efforts by the Government to instituted schooling for all. The media landscape is greatly dominated by the radio: only 5% of the population reports that it does not listen to the radio, whereas 60% say they never watch television. But the press is by far the least accessible medium for the population, given that 88% of Burundians say they never read newspapers.³

As has been seen, Burundi is a member of many international and regional organisations. As such, it is a signatory to many international continental and sub-regional legal instruments, including those which protect freedom of expression.

The Constitution and the Press Law guarantee the right to freedom of expression, although some specific instruments, such as the Press Law adopted in June 2013, limit the scope of some of their provisions.

For this reason, Burundi holds an unenviable position in the world classification of freedom of expression produced by Reporters Without Borders.

¹ Republic of Burundi, Strategic Framework for Growth and Poverty Reduction (SFGPR II), January 2012.

² African Development Bank, Study on the private investment environment in Burundi, 2011, www.afdb.org.

³ Burundian Association of Broadcasters (ABR), Audit of the media by the media, Final Report, October 2013, pp. 92-93.

In 2013, it came 132^{nd} out of 179 countries. It slid down 2 places from 2012, when it was classified 130^{th} . In 2005, it was 90^{th} of 167 countries, showing that freedom of expression reduces from year to year.⁴

Section One: Background and context

1.1. International and constitutional legislative framework

1.1.1 International, African Union and sub-regional legal instruments

As shown in the table below, Burundi is party to a large number of international, regional and subregional instruments for the protection of human rights in general and freedom of expression in particular.

Name	Date of signature	Date of ratification	Reservations
Universal Declaration of Human Rights	18 September 1962 (date of admission of Burundi to the UN)		
International Covenant on Civil and Political Rights	Not signed	09/05/90	No reservations
First Optional Protocol to the International Covenant on Civil and Political Rights	Not signed	Not ratified	
Convention on the Rights of the Child	09/05/90	19/10/90	No reservations
Convention on the Rights of Persons with Disabilities	26/04/07	26/03/2014	
Convention No. 169 of the International Labour Organization	1989	Not ratified	
International Convention on the Elimination of all forms of Racial Discrimination	01/02/67	27/10/77	No reservations

⁴ Reporters Without Borders, Press Freedom Index 2005: http://en.rsf.org/press-freedom-index-2005,549.html.

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Name of the instrument	Date of signature	Date of ratification	Reservations
African Charter on Human and Peoples' Rights	28/06/89	28/07/89	No reservations
Treaty for the Establishment of the East African Community	18/06/07	30/06/07	No reservations
Constitutive Act of the African Union	12/07/00	28/02/01	
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	03/12/03	Not ratified	
Protocol to the Amendment of the Constitutive Act of the African Union	03/12/03	29/12/06	No reservations
Protocol to the African Charter on Human and Peoples' Rights on the creation of an African Court of Human Rights	09/06/98	02/04/03	No reservations
Protocol relating to the creation of the Peace and Security Council of the African Union	09/07/02	04/11/02	No reservations
African Charter on Democracy, Elections and Governance	20/06/07	Not ratified	
African Charter on the Rights and Well-being of the Child	21/05/04	28/06/04	No reservations
Grand Baie (Mauritius) Declaration and Action Plan	19/04/99		
Kigali Declaration (First Ministerial Conference of the African Union on Human Rights in Africa)	09/05/03		

Windhoek Declaration on Promotion an	03/05/91	
Independent and Pluralistic African Press		
United Nations Declaration on the Rights of	13/09/07	
Indigenous Peoples		
Declaration on Democratic, Political,	09/03/03	
Economic and Corporate Governance		

So far, no complaints have been lodged against Burundi for violation of the instruments for the protection of freedom of expression before the African Human Rights Commission or the Special Rapporteur on freedom of expression in Africa. On the other hand, the Union of Burundian Journalists, a union with journalists from the public and private media, brought action on 19 July 2013 against the State of Burundi before the East African Community's Court of Justice. The complaint concerned certain provisions of the law of 4 June 2013 governing the press in Burundi, in particular the violation of the right to the protection of sources, the exorbitant fines punishing press offences, the system of censorship for films produced in Burundi, etc.

The matter is still pending before the Court of Justice.

1.1.2 Constitution

Since attaining independence on 1 July 1962, Burundi has had eight Constitutions and is in the process of acquiring a new Basic Law, which will therefore be the ninth.

This confusion is the result of a turbulent political history marked by coups d'état (1966, 1976, 1987 and 1987) and political upheavals which culminated in the assassination of the President Melchior Ndadaye in 1993, followed by large-scale inter-ethnic massacres, and the adoption of a post-transition Constitution in 2005, heralding an end to the political and ethnic conflicts which the country had suffered for twelve years.

1. The political system under the Constitution of 16 October 1962⁵

The Constitution of 16 October 1962 was the first written Constitution of independent Burundi.

As with all independent countries at the time, Burundi opted for imitation — its constitution was largely copied from the Belgian Constitution of 1831. Since that Constitution instituted a parliamentary system, the Constitution of 16 October 1962 set up a constitutional monarchy.

However, a tug of war quickly ensued between the King and the Prime Minister, with the King wanting to "govern" and "reign" whereas under a parliamentary system, the King "reigns" but does not

⁵ Recueil des lois fondamentales burundaises de l'indépendance à nos jours [compendium of basic laws of Burundi from independence to the present] (1962-1998).

"govern". This was the backcloth to the proclamation of the Republic on 28 November 1966, putting an end to the multisecular monarchy.

2. The political system of the First Republic (1966-1976)

The First Republic can be divided into two periods: 1966 to 1974 and 1974 to 1976.

From 1966 to 1974, Burundi did not have a real Constitution. The powers of the State were set forth in by a Decree-law promulgated on 19 December 1966 which stipulated in essence that all legislative and regulatory powers would be exercised by the President of the Republic, head of Government and head of the ruling party. Ministers were answerable only to the President.

The second period began with the promulgation of the Constitution on 11 July 1974. However, it brought no fundamental changes, save that the ruling party became a State institution.

Again, all the power was in the hands of the President of the Republic and no parliament was elected. The position of Prime Minister was not provided for and Ministers were answerable to the President.

The resulting political system concentrated power with the Executive, represented by the President of the Republic.

3. The political system of the Second Republic (1976-1987)⁶

There were distinct two periods, from 1976 to 1981 and from 1981 to 1987.

On 1 November 1976, after a military coup, the Constitution of 1974 was suspended and superseded by Decree-Law No. 1/186 of 26 November 1976 organising legislative and regulatory power.

This first period resembles the first period of the First Republic: the President performed all functions and the Prime Minister, who was appointed, merely had to countersign. Consequently, the political system is of similar character during the two periods.

The promulgation of the Constitution on 20 November 1981 brought seemingly profound change: election of the President of the Republic and the National Assembly through direct universal suffrage.

However, the elected Assembly lacked real power: it could not pass a vote of censure against the Government. Conversely, in addition to the President being vested with broad powers, he could also dissolve the Assembly. This system was therefore grossly in favour of the President of the Republic to the detriment of the National Assembly.

4. The political system of the Third Republic (1987-1992)

With the suspension of the Constitution of 20 November 1981, the date of 3 September 1987 heralded a return to the conflation of powers. This is undeniably the result of Decree-Law No. 1/001 of 27 October 1987 to organise the legislative and regulatory powers, concentrating all powers in the hands of the President of the Republic.

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⁶ Idem.

5. The political system under the Constitution of 13 March 1992

The Constitution of 13 March 1992 was a clean break from the Constitutions and constitutional instruments which had preceded it as from 1966. This is the Constitution which revived multi-party politics; under it, human rights had pride of place for the first time and it instituted universal suffrage as the normal mode of gaining power after decades of dictatorship.

However, this political system was short-lived. On 21 October 1993, an attempted coup d'état left the institutions leaderless. From that point, Burundi spiralled into an institutional and socio-political crisis without precedent. It was plunged into a terrible civil war which was to last more than ten years.

6. The constitutional crisis regimes (1996, 1998, 2001)⁹

From 1996 to 2005, Burundi was governed by transitional regimes, also called constitutional crisis regimes.

These were the governments which successively held power as from the 1996 coup d'état until the post-transition Constitution of 18 March 2005. The Constitutions of 1996, 1998 and 2001 had a shared objective: ensure a balanced sharing of power between political/ethnic groups characterised by twin leadership at the helm of the State: a head of State and a Prime Minister belonging to rival, if not enemy, political families. The transition period was ended with the promulgation of the Constitution of 18 March 2005, the so-called post-transition Constitution.

7. The post-transition Constitution of 2005¹⁰

As its name suggests, this text was intended to end several years of transitional governments.

It had two major objectives: restore the constitutional principles contained in the Constitution of 1992 and guarantee and foster the constitutional principles set forth in the Arusha Agreement on power-sharing between the two main ethnic groups, the Hutus and the Tutsis.

Without exception, all eight of these instruments recognise the rights proclaimed and enshrined in international and regional instruments for the protection of human rights, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. These rights include equality before the law, the right to be tried by an independent judiciary and the right to freedom of expression.

The Constitution of the Republic of Burundi guarantees equality before the law. Article 13 of the Constitution stipulates that "All Burundians are equal in their merits and dignity. All citizens enjoy the same rights and are entitled to equal protection of the law. No Burundian may be excluded from the social, economic or political life of the nation on the basis of race, language, religion, sex or ethnic origin." Article 22 is in the same vein: "All citizens are equal before the law, which affords them equal protection." These provisions reflect those contained in international instruments such as the Universal

⁷ Article 53 of the 1992 Constitution: "Multi-Party Politics are recognised in the Republic of Burundi".

⁸ Article 10 of the 1992 Constitution: "the rights and obligations proclaimed and guaranteed by the Universal Declaration of Human Rights [...] shall be an integral part of the present Constitution".

⁹ Compendium of basic laws, op.cit.

¹⁰ Codes and Laws of Burundi 2010, Vol. I, updated on 31 December 2006.

Declaration of Human Rights and the International Covenant on Civil and Political Rights which, according to Article 19 of the Constitution, are part and parcel thereof. Article 7 of the Declaration on Human Rights states, for instance, "All are equal before the law and are entitled without any discrimination to equal protection of the law." Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

The principle of equality of all individuals before the law means that all persons facing trial must be tried identically by Burundian courts. In fact, this means that people brought before the courts in identical circumstances must be tried by the same court, according to the same rules of procedure and evidence. There should not be justice for the rich and justice for the poor, justice for the powerless and justice for the powerful. All the Constitutions of Burundi, those of 1962, 1974, 1981, 1992, 1996, 1998, 2001 and 2005, have always recognised the right to freedom of expression.

Article 31 of the Basic Law of 2005 stipulates that "Freedom of expression is guaranteed. The State shall respect freedom of religion, thought, conscience and opinion."

Article 31 states that freedom of expression is guaranteed in Burundi, but does not impose specific limits. However, other provisions of the Constitution provide for limits to the basic rights.

For instance, Article 19 proclaims that the fundamental rights it proclaims are not subject to any restriction or derogation save in certain circumstances justifiable by the general interest or the protection of a fundamental right.

Article 47 states: "Any restriction of a fundamental right must be founded in law; it must be justified by the general interest or by the protection of a fundamental right of another person; it must be proportionate to its purpose."

Article 61 follows this trend: "No one may abuse the rights recognized by the Constitution or by the law to compromise national unity, peace, democracy, the independence of Burundi, infringe the secularity of the State or otherwise violate this Constitution."

These limits are those found in international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the Declaration of Principles on Freedom of Expression in Africa.

Article 30 of the Universal Declaration of Human Rights states: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

Article 19. 3 of the International Covenant on Civil and Political Rights states:

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

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 9 .2 of the African Charter on Human and Peoples' Rights states: "Every individual shall have the right to express and disseminate his opinions within the law."

Article XIII of the Declaration on the Principles of Freedom of Expression in Africa recognises that freedom of expression can be restricted as follows:

- (1) States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.
- (2) Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

The exercise of press freedom and its limits are governed by Law No. 1/11 of 4 June 2013 amending Law No. 1/025 of 27 November 2003 to govern the press in Burundi. This law, which was widely criticised, as will be seen later, was promulgated by the President of the Republic after being tabled before parliament and adopted at the second reading on 29 April 2013.

1.1.3 Judicial system

Under Article 205 of the Constitution, "[j]ustice is rendered by the courts and tribunals in all the territory of the Republic in the name of the Burundian People." 1

The same article states: "An organic law shall establish the judicial organisation and powers." The instrument in question is Law No. 1/08 of 17 March 2005 to set forth the organisation and powers of the judiciary.

The judiciary has ordinary and special courts. The ordinary courts include *tribunaux de résidence*, *tribunaux de grande instance* and courts of appeal. There are special courts such as labour courts, the commercial court, administrative courts, the anti-corruption court and military courts.

Burundi's judicial system has a double degree of jurisdiction, which is a guarantee for people brought before it. Anyone may challenge a judicial decision before a court of appeal. In this regard, there are no judgments of first and last resort, even for matters of lesser importance.

In terms of punishment, the *Tribunaux de Grande Instance* deal with appeals against judgments rendered in the *Tribunaux de Résidence* within their jurisdiction.

The courts of appeal deal with appeals against matters dealt with in the first instance by the *Tribunal de Grande Instance* within their jurisdiction (Article 31 of Law No. 1/08 of 2005 to organise the judiciary).

These courts also hear appeals against judgments of the anti-corruption court.

Under Article 1 of Law No.1/07 of 25 February 2005 which governs it, the Supreme Court the highest ordinary court of the Republic of Burundi. It ensures the proper application of the law by courts and tribunals. The Constitutional Court, established by Article 225 of the Constitution, is the State court

 $^{^{11}}$ Codes and Laws of Burundi, 2010, Vol. II, updated on 31 December 2006.

¹² Codes and Laws of Burundi, *idem*.

which deals with constitutional issues. It determines the constitutionality of laws and interprets the Constitution. It is governed by Law No.1/03 of 11 January 2007.

The Constitution does not provide for other special courts and tribunals to hear and determine human rights issues. Therefore this is undertaken by the ordinary or special courts, in this case the administrative court, which may, as the case may be, hear these matters depending on the defendant.

The Constitution of 2005 states at Article 209: "judicial power is impartial and independent of legislative power and of executive power", adding that "[i]n the exercise of their functions, judges shall be subject only to the Constitution and to the law." It further adds: "The President of the Republic, Head of the State, is the guarantor of the independence of the Magistracy."

"The judicial system of Burundi has three flaws: a severe deficiency in the training of personnel, a total lack of equipment and, most of all, a lack of independence of the judicial apparatus." Thus, notwithstanding these fine legal and regulatory provisions on the independence of judges, the reality is different because apart from the Executive, the general view is that judges in Burundi are not independent of the two other powers, particularly the Executive. ¹⁴

A study conducted in 2010 by the Observatory of Government Action (OAG) fully supports this view.¹⁵ After listing the instruments which enshrine the independence of the magistracy,¹⁶ the study shows that breaches of the independence of judges are legion: dismissals, opposition by the Executive to the application of some "sensitive" judgments, threats against and exiling of judges, financial and material dependence, corruption, initial subjugation through recruitment and appointment, transfers that are redolent of disciplinary measures, etc.

The lack of independence of the judiciary in Burundi explains the application lodged before the East African Community Court of Justice by the Union of Burundian Journalists in respect of the Press Law of June 2013.

Aside from the judicial system, there are a number of human rights protection mechanisms.

These include the Centre for the Promotion of Human Rights, established by Decree No. 100/081 29 May 1998. This is a public administrative body with a legal personality, assets and autonomous management under the authority of the ministry in charge of human rights. Article 3 of the decree stipulates that the centre cannot institute proceedings for human rights violations. However, the Centre may listen to victims of human rights violations and if it sees fit, refer the matter to the prosecution. In such case, the Centre would provide or facilitate legal assistance to victims of human rights violations, especially the vulnerable. The Centre also draws government's attention on human rights violations and proposes measures to promote the protection of human rights.

¹³ Justice and Peace Commission for Francophone Belgium, quoted by Aimé-Parfait Niyonkuru in *L'indépendance du pouvoir judiciaire burundais vis-à-vis de l'exécutif.*

 ¹⁴Aimé-Parfait Niyonkuru, The Indepedence of the Judiciary in Vis-a-Vis the Executive, p. 6, www.the-rule-of-law-in-africa.com/wp-content/
 ¹⁵ Observatoire de l'Action Gouvernementale, Analyse de l'Indépendance de la Magistrature au Burundi, Droit et réalités [Analysis of Judicial Independence in Burundi: Fact and Law], June 2011, www.oag.bi

¹⁶ Protocol III, Chapter I Article 9.2, Arusha Peace and Reconciliation Agreement for Burundi: "The Judiciary shall be impartial and independent and shall be governed solely by the Constitution and the law. No person may interfere with the Judiciary in the performance of its judicial functions." Article 209 of the Constitution: "The judiciary shall be impartial and independent of the legislature and the executive. In performing their functions, judges are subject only to the Constitution and the law."

Law No. 1/04 of 5 January 2011 established the Independent National Human Rights Commission (CNIDH), whose members were appointed by Decree No. 100/142 du 23/5/2011. Its missions include the following:

- Entertaining complaints, investigating cases of human rights violations and working to improve the situation of persons in detention.
- Informing the Public Prosecutor of human rights violations whilst providing legal assistance to victims.
- Drawing the Government's attention to all cases of human rights violations.
- Drawing the Government's attention to all measures which may foster the protection of human rights.
- Drafting a report on the human rights situation for the Government.

CNIDH has already produced reports for 2011 and 2012 which list all the human rights violations of which it was informed and the solutions it provided. These reports do not mention violations of the freedom of expression.

An Office of the Ombudsman has also been established. This was provided for in Article 10.7 of Protocol II, Democracy and Good Governance, of the Arusha Agreement. It is included under Part IX, Articles 237 to 239 of the Constitution of 18 March 2005.

The Ombudsman is appointed by a three-fourths majority of the National Assembly. The appointment is subject to a two-thirds majority of the Senate. The Ombudsman has a ten-year, non-renewable term of office. One of the missions of this office is to receive complaints and conduct inquiries concerning the violation of civil rights by civil servants and the judiciary and to make recommendations to the competent authorities.

Under Article 238 of the Constitution and Article 17.1 of the law on the organisation and functioning of the Office of the Ombudsman, the Ombudsman shall "submit every year a report to the President of the Republic, the National Assembly and to the Senate". The Ombudsman is perceived by journalists as being too close to the Government in that the holder of this office plays a primordial role in the ruling party, the CNDD-FDD, of which he is a member of the Council of Elders, which is chaired by the Head of State himself. This might explain why he has so far not received any complaint from journalists, although they are prey to constant harassment from the judicial and police authorities.

Institutions such as the Independent National Human Rights Commission (CNIDH) and the Office of the Ombudsman are recent creations. To date, they have not been the subject of reforms or amendments.

¹⁷Codes and Laws of Burundi, Vol. I, *idem*.

1.1.4 Law reform process

Pursuant to Article 192 of the Constitution of the Republic of Burundi, "The initiative to make laws shall be vested concurrently in the President of the Republic, the Government, the National Assembly and the Senate."

Government bills and private member's bills are simultaneously filed with the Bureau of the National Assembly and the Senate either by the Government or by members of Government.

Under Article 90 of the Regulations of the National Assembly, Government and private member's bills are registered at the presidency of the National Assembly. Private member's bills are transmitted to the Bureau of the National Assembly or to any of its members delegated for this purpose. A member of parliament may table a bill but it must be endorsed beforehand by his or her parliamentary group.

Under Article 92, bills may be withdrawn by the President of the Republic or the Government at any time until their final adoption by the National Assembly.

Government and private Member's bills are included in the agenda of the National Assembly pursuant to Article 193 of the Constitution in accordance with the conditions set forth in Rule 55 of the Internal Rules, which stipulate that the agenda of the National Assembly shall include as a matter of priority and by order of debate Government bills and private member's bills tabled by members of the National Assembly or the Senate.

The President of the National Assembly then brings all bills filed with the Bureau of the National Assembly before the Standing Committee or Special Committee designated for this purpose.

Reports prepared in respect of Government bills may recommend their adoption, rejection or amendment; annexes to the report must insert the amendments submitted to the Committee, regardless of whether they were transmitted by the President of the Assembly or submitted directly by their drafters, before the filing of the report.

Reports prepared in respect of private member's bills end with a general text. Debate on Government and private member's bills are begun with a hearing of Government sponsors if judged appropriate and by the presentation of the report of the Committee charged with examining the bill on the merits. The adopted text is immediately afterwards transmitted to the Senate by the President of the National Assembly.

Upon request by a member of the Bureau or at least one third of its members, the Senate examines the draft bill. This request must be made with seven days of receipt of the bill.

Within ten days of the request, the Senate may either decide that there are no grounds for amending the bill or adopt it after amendment.

If the Senate fails to rule within the prescribed time limit or if it informs the Assembly that it has decided not to amend the bill, the President of the National Assembly transmits the bill within forty-eight hours to the President of the Republic for promulgation.

If the bill has been amended, the Senate transmits it to the National Assembly, which takes a decision either to adopt the bill or to reject in whole or in part the amendments adopted by the Senate.

If, during the examination of the bill amended by the Senate, the National Assembly adopts a new amendment, the bill is sent back to the Senate, which rules on the amended bill. Within five days of receiving the bill, the Senate may either decide to endorse the amended bill or adopt it after further amendment. If the Senate fails to rule within the prescribed time limit or if it informs the National Assembly of its decision to endorse the bill as adopted by the National Assembly, the National Assembly transmits it within forty-eight hours to the President of the Republic for promulgation.

If the bill undergoes further amendment, the Senate transmits it to the National Assembly, which makes a final determination, either adopting or amending it.

Ordinary laws are passed by a two-thirds majority of the members present or represented.

Hence, the Press Law is an ordinary law in that it organises an area provided for in Article 159 of the Constitution which states:

The following shall be governed by law:

- (1) The fundamental guarantees and obligations of the citizen:
 - safeguard of individual freedom;
 - · safeguard of individual freedoms

It is therefore not an organic law, whose mode of adoption is different.

Organic laws are those whose content is materially constitutional in that they concern the organisation and functioning of public institutions. ¹⁸

Under Article 197, "[b]efore promulgating organic laws, the President of the Republic shall ensure that their conformity to the Constitution is verified by the Constitutional Court." This provision is wholly consonant with Article 18 of Law No. 1/018 of 1 December 2002 setting forth the organisation and functioning of the Constitutional Court and its rules of procedure, which provides that organic laws adopted by the National Assembly and the Senate are to be transmitted to the Constitutional Court by the President for an examination of their constitutionality.

Organic laws are passed by a two-thirds majority of members present or represented. This majority may not be lower than the absolute majority of the members of the National Assembly. Ordinary laws, as has been seen, are passed by a two-thirds majority of members present or represented, regardless of their number.¹⁹

Conversely, with regard to ordinary laws, the Constitutional Court may be seized by the President of the Republic, the President of the National Assembly, the President of the Senate, one quarter of the members of the Senate or the Ombudsman. Moreover, any individual or corporate body concerned or the Public Prosecutor may seize the Constitutional Court as to the constitutionality of laws, either

¹⁸ Georges Burdeau, Francis Hansen, Michel Troper, Droit constitutionnel, 25th Ed., Librairie Générale de Droit et de Jurisprudence, Paris, 1997.

¹⁹ Constitution of 18 March 2005, Article 175.

directly by action or indirectly through a challenge to constitutionality raised in a matter brought before a court.²⁰

These were the grounds on which the Union of Burundian Journalists seized the Constitutional Court to challenge the constitutionality of the June 2013 Press Law, to which we shall return in further detail in Part II and Part III of this paper.

There is no legal reform committee. There is a National Legislative Council, created by Decree No. 100/135 of 6 June 2006 with the mission to:

- examine bills and draft regulations submitted to it by the Government through the Ministry of Justice;
- harmonise draft laws and regulations;
- translate laws and regulations;
- update and adopt legislation in force to keep abreast of changes in Burundian society.

This body is purely advisory in that nothing compels the Government to submit any bill to its prior examination before tabling it before the National Assembly. For example, the 2003 press bill was never brought before it.

The review process is subject to the same rules as for the initiation of legislation. Under Article 297 of the Constitution, "[t]he initiative to amend the Constitution shall be vested concurrently in the President of the Republic upon consultation with the Government, the National Assembly or the Senate, which shall respectively pass amendments by absolute majority of their members."

Under Article 298, the President of the Republic may submit to a referendum a draft constitutional amendment.²¹

A draft constitutional amendment is adopted by a four-fifths majority of the National Assembly and two-thirds of the Senate.

The 2005 Constitution is currently being revised. On 9 and 10 October 2013, the Council of Ministers adopted a new draft Constitution. It was rejected by one vote at the National Assembly on 21 March 2014. Of the 106 Members of the National Assembly, 84 voted for, whereas the four-fifths majority required 85 votes. The referendum option was closed on account of the principle of intangibility of the choice of the Head of State and therefore the Government may only table another draft bill after one year, that is, in March 2015.

One of the amendments was of particular concern to freedom of expression. This was the removal from the Constitution of two National Councils, one of them being the National Communication Council, which were to be governed by organic laws. Since the 1992 Constitution and subsequent ones, there had been an intention to set up a National Communication Council. As will be seen under the point

²⁰ Law No. 1/03 of 11 January 2007 to amend certain provision of Law No. 1/018 of 19 December 2002 to fix the organisation and functioning of the Constitutional Court together with its Rules of Procedure, Article 4.

²¹Article 298 of the 2005 Constitution: "The President of the Republic may submit to a referendum a draft constitutional amendment."

concerning the regulation and self-regulation of the media, the National Communication Council plays a key role in the management of the media in. Under Article 284 of the 2005 Constitution:

The National Communication Council shall ensure the freedom of audio-visual and written communication in compliance with the law, having regard to public order morality.

The National Council of Communication has, to this effect, a power of decision notably in the area of respect for and promotion of press freedom and equitable access of the various political, social, economic and cultural opinions to the public media.

The National Council of Communication shall also act in an advisory capacity vis-a-vis the Government in the area of communication.

It is therefore the National Communication Council which is in charge of regulating the media in Burundi, as will be seen in the part dealing with regulation and self-regulation.

1.2. The media landscape

1.2.1 Overview of media landscape

The current topography of the media landscape is due to the political liberation brought about by the 1992 Constitution, which saw the birth and growth of a private press characterised by a universally recognised vibrancy. Whilst the table below includes publications which exist only in name, it does provide some idea of the situation. Until 1992, there was only one private newspaper, two government newspapers, one public radio and one public television broadcaster. Today, the situation is entirely different.

INVENTORY OF BURUNDIAN MEDIA ORGANS

(As at November 2013)²²

1. TELEVISION			
NAME	GOVERNMENT /OPPOSITION ²³	OWNER	COVERAGE OR CIRCULATION
Télévision Nationale	Affiliated with the Government	Public	Nationwide
Télé Renaissance	Affiliated with the opposition	Private	Bujumbura and Imbo and Mumirwa Plain
Héritage TV	Neutral	Private/Denominational	Bujumbura Imbo Plain, Uvira (DRC), Cangugu (Rwanda)
Télévision Salama	Affiliated with the Government	Private	Bujumbura and Imbo Plain
Rema TV	Government	Private	Gitega, Muramvya, Mwaro, Cibitoke Bubanza, part of Ngozi, Bujumbura and Bujumbura Mairie
2. RADIO	1		
Radio CCIB FM	Neutral	Private/Commercial	Uncertain
Radio Culture	Neutral	Private	Uncertain
Radio Nderagakura	Government	Public	Nationwide
Radio Ivyizigiro	Neutral	Private /Commercial	Nationwide
RPA	Affiliated with the opposition	Private	Nationwide
Radio Bonesha	Affiliated with the opposition	Private	Nationwide
Radio Isanganiro	Affiliated with the opposition	Private	Nationwide
Radio Renaissance	Affiliated with the opposition	Private	Bujumbura, Imbo Plain, Mumirwa, Bujumbura Rural and Bubanza
Radio Maria	Neutral	Private/Denominational	50 % of the national territory
Radio Agakiza	Neutral	Private/Denominational	Bujumbura Mairie and Provinces, Cibitoke, Bubanza, Muramvya, Gitega, Part of Kayanza, Ngozi, Karusi, Muyinga, Rutana, Cankuzo, Rusizi Plain and southern Rwanda
Radio Salama	Affiliated with the Government	Private	Nationwide except for Rumonge
Radio Rema FM	Affiliated with the Government	Private	Nationwide except for Kirundo and part of Muyinga

²² Source: National Communication Council.
²³ Private media never declare their affiliation with the Government or the opposition and all claim to be neutral. However, readers, listeners and viewers, of which the author is one, know what to expect.

Radio Voix de l'Espoir	Neutral	Private/Denominational	Uncertain
Radio vivante Ijwi	Neutral	Private/Denominational	Uncertain
ry'Impemburo			
Radio Fréquence Menya	Neutral	Private/Denominational	Imbo Plain, Bujumbura Mairie, part of Bujumbura Province, part of Bubanza
Radio China International	Neutral	Private	Uncertain
Radio Voix d'Afrique	Neutral	Private/Denominational	Uncertain
Radio spéciale Humuriza	Affiliated with the	Private	Town of GITEGA and environs
FM	Government		
RPA Ngozi	Affiliated with the	Private	Town of NGOZI and environs
	opposition		
Umuco FM	Affiliated with the	Private	Commune KAYOGORO and environs
	Government		
Radio Star FM	Affiliated with the	Private	Gitega, Mwaro and Muramvya
	Government		
Radio Colombe FM	Neutral	Private/Community	City of Bujumbura
3. AGENCIES			
ABP (online daily)	Government	Public	
Agence Net Presse	Affiliated with the	Private	500/bimonthly
	opposition		
4. PRESS			
Le Renouveau	Government	Public	1,200
Ubumwe	Government	Public	2,500
Arc-en-ciel	Affiliated with the	Private	1,200
	opposition		
Syfia Grands lacs	Neutral	Private	1,200
Ndongozi y'Uburundi	Neutral	Private/Denominational	1,200
Rumurikirango	Government	Public	800
IWACU	Affiliated with the	Private	2,000
	opposition		
Ikiyago c'Inama	Government	Public	1,000
Nshingamateka			
Inama Nkenguzamateka	Government	Public	01/01/00
Tribune libre des Travailleurs	Opposition	Private	100 /monthly
"Twungurunani"			90 e-mail subscribers
Iteka ry'Umukenyezi	Neutral	-	20-month project until 2012 (5,000 copies).
			Funding-based publication.
Echo du sanctuaire	Denominational	Private	Uncertain
Gutwara Neza	Government	Public	3,000
Business Time	Commercial	Private	800
Peace Great Lakes/Paix des	-	-	200
grands lacs/Amani grands			
lacs			
Inkingi	-	-	
	1	i i	2,500

Intumwa	Government	Private	5,000	
Magazine Get-It	Culture and Youth	Private	1,000	
Business Week	Affiliated with Government	Private	1,000	
La Référence	-	Private	1,000	
Journal Net Press	Affiliated with the opposition	Private	1,000	
Burundi Echo	Commercial	Private	700	
La voix de l'enseignant	Neutral	Private	4 pages per week	
La voix des communes burundaises (ABELO)	Government	Public	200	

1.2.2 Internet access

	Year	Number	% 1000 inhabitants.
Radio set	2008	718427	426 ²⁴
TV set	2008	10556	6 ²⁵
Fixed telephone	2008	17699	13 ²⁶
Cell phones	2012	2.247.126	300 ²⁷
Internet use	2012	1.760.000	200 ²⁸
Internet service provider	2012	8 ²⁹	

On 21 January 2014, the Head of State of Burundi launched the first phase of the Burundi Backbone System. This broadband connection with a budget of 18 million US dollars is now available in 9 of the country's provinces. Phases 2 and 3 are expected to be completed by May 2014.

²⁴ General population and habitat census (2008), Burundi.
²⁵ *Idem*.
²⁶ Telecommunications Monitoring and Regulation Agency, Annual Report, 2012.

²⁷ Idem. ²⁸ Idem. ²⁹ Idem.

1.2.3 Media Standards/Codes of ethics

Article 2 of Law No. 1/03 of 24 January 2013 governing the mission, composition, organisation and functioning of the National Communication Council vests it with oversight of all media operating in Burundi.³⁰

The National Communication Council authorises the establishment and exploitation of radio and television broadcasting organisations, as well as both public and private cinemas (Article 7 of the 24 January 2013 law). It also issues and withdraws press cards and accredits foreign journalists wishing to cover activities taking place in Burundi.

The National Communication Council is also empowered to impose penalties and sanctions on press organs and journalists in breach of the rules.³¹

In the recent past, under the 2003 Press Law, the National Communication Council has issued warnings to some media organisations and suspended some programmes.

Thus, the newspaper *Arc-en-ciel* was issued with a warning for publishing in its issue no. 357 of 14 October 2011 an editorial entitled: "Lydia Nsekera brings bad luck to Burundian football". Lydia Nsekera, who was then the President of the Burundian Football Federation, was accused of lack of transparency in the management of the federation's funds and of behaving like a dictator. ³²

A warning was also issued to Radio Isanganiro for broadcasting in its news bulletin of 25 July 2011 the words of Mr Isidore Rufyikiri, the President of the Burundian Bar Association, in which he called the judges of Burundi "little men" and "little women".³³

In 2013, a warning was issued on 29 May 2013 to the IWACU press group for publishing on 28 May on its website words considered defamatory and injurious of the National Assembly. 34

On 5 May 2013, a warning was issued to *Radio Publique Africaine* for broadcasting defamatory statements against the Ministers of Public Security and the Interior.³⁵

In 2011, the National Communication Council suspended the program "Kabizi" for 4 days for broadcasting on 8 and 9 April 2011 statements offensive to the Head of State. 36

In 2012, the National Communication Council decided to suspend commentary, the editorial, analysis and the editor's viewpoint of Radio REMA FM which in the midday and evening editorials of 8 June 2012

³⁰ Article 2 of the 24 January 2013 law setting forth the missions, composition, organisation and functioning of the National Communication Council: "All media active within Burundi shall fall within the ambit of the Council, regardless of their legal status."

³¹ Article 57 de of the Press Law: "The National Communication Council shall be empowered to issue warnings to any press organ or journalist found to be in breach of the law." Article 58: "The National Communication Council, after three months of warning, may suspend or prohibit the distribution or sale of newspapers, periodicals or any other information medium, the broadcast of a programme, the use of a radio or television station or a press agency [...]".

³² Activity Report of the National Communication Council, 2012.

³³ Idem.

³⁴ Activity Report of the National Communication Council, 2013.

³⁵ Idem.

³⁶ Activity Report of the National Communication Council, 2012.

and the morning editorial of 9 June 2012, accused certain officials of civil society of various shortcomings, using insulting and defamatory language.³⁷

In 2013, the web comments of visitors to www.iwacu-burundi were suspended for 30 days as from 30 May 2013 following the publication of malicious and insulting language about the Head of State. Indeed the laws (of 2007 and 2013) governing its mission, composition, organisation and functioning, the National Communication Council is an independent authority.

In order to be credible, a regulator must behave in a manner consistent with its assigned missions. This includes adhering to such important values as impartiality. If an institution such as the National Communication Council exists in almost all countries of the world, it is to remove media regulation from the purview of governments, which tend to use the media to defend their interests, sometimes to the detriment of the democratic exchange of views.³⁹

The incompatibilities provided for in respect of the National Communication Council should in principle guarantee this impartiality.⁴⁰

This is in fact the spirit of the Declaration of Principles on Freedom of Expression in Africa, which contains a section dealing with regulatory bodies. Article VII stipulates that any public authority that exercises powers in the areas of regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

Article 14 of the law on the National Communication Council (law of 2003 and law of 2013) states: "the council shall be composed of 15 members selected from the communication sector and various media user communities on the basis of their interest in communication and freedom of the press, freedom of expression and freedom of opinion."

It is this lack of clarity in the manner of designating and appointing members which explains, as do the behaviour and decisions of some council members, the distrust of Burundian journalists and the judgment of observers regarding the neutrality of the press regulator in Burundi.

For example, on 9 June 2010 the Burundian Association of Journalists, The Union of Burundian Journalists, the Burundian Press Observatory, the Association of Women Journalists and the Central Africa Media Observatory wrote to the National Communication Council to protest against and denounce its complicit silence regarding Radio Rema FM, purportedly close to the Government, which systematically manipulated information, promoted hate and stigmatised certain opposition and civil society figures.

The European Union made sure to highlight the controversial role of the President of the National Communication Council during the 2010 elections. She was the Executive Secretary of the Women's League of the CNDD-FDD and was on this party's list for elections to the Communal Council and the

 $^{^{}m 37}$ Activity Report of the National Communication Council, 2012.

³⁸ Activity Report of the National Communication Council, 2013.

³⁹ Guyot, J.C and Tiao, L.A., La régulation des médias: principes, fondements, objectifs et méthodes, Institut Panos, Paris, February 2007.

⁴⁰ Article 16 of the November 2003 law and the 2013 law on the National Communication Council: "The functions of the permanent members of the Council shall be incompatible with any political mandate or any other political office." Articles 17 of the same laws: "No member of the Council may be a member of the management or Board of Directors of a public or private corporation involved in the audio-visual, newspaper or periodical media."

Senate (she had also been a councillor of Mpanda Commune in Bubanza province. "The political commitment of Ms Nahimana is a violation of the law establishing the CNC", which states that "membership in the Council is incompatible with any political office". The EU observer mission deplored this situation and considered that this partisan appointment was antithetical to the neutrality required for this position. Indeed, during the press conference to present the report on media coverage of the presidential election, the conflation of roles between the President of the National Communication Council and membership in a political movement reached its apex when she severely criticised communication professionals.

Ms Nahimana accused them of being "in the pay of the opposition and of having done everything in their power to send the country up in flames". ⁴¹ The media professionals' distrust of the regulator will remain for as long as the appointment of its members lacks transparency.

Taking the view that ethical issues are within their ambit and not that of the public authorities, media professionals in Burundi issued a press code of ethics on 27 February 2004 as a tool for self-regulation. Drafted by the journalists themselves, the self-regulation mechanism aims to prevent State and judicial intervention to the extent possible. To this end, the journalists created a self-regulator, the Burundian Press Observatory.

Ethics are less binding than the law. Offences are not dealt with by courts, whose role is to impose fines, damages or terms of imprisonment, but rather, by the internal organs of the profession.

It is for the Burundian Press Observatory (OPB), a self-regulator established in late 2004 by the General Assembly of the Professional Media Associations, to ensure compliance with the rules of the code of ethics.

The OPB's Statute entrusts it with the following missions (Article 5):

- (1) Contribute to ensuring respect of the press code of ethics by the media by monitoring regularly the content of public and private media;
- (2) Make relevant observations and recommendations to journalists and media professionals who fail to observe the professional code of ethics and report thereon to the Association of Burundian Journalists;
- (3) Participate actively in the defence and promotion of press freedom and the public right to information;
- (4) Act as a peer tribunal.

Under Article **7** of the Statute, the following are members of OPB: professional journalist's associations, publishers, whether or not they are organised into associations, and information consumers, represented by delegates on the following basis:

- (a) 6 delegates representing the Association of Burundian Journalists (ABJ);
- (b) 2 delegates representing the Maison de la Presse;
- (c) 2 delegates representing the heads of press agencies and newspapers;

⁴¹http://www.eeas.europa.eu/ European Union, Election Observation Mission – Final Report, communal, presidential,legislative,senatorial and hill elections – 2010, p. 37, http://eeas.europa.eu/eueom/missions/2010/burundi/index_en.htm.

- (d) 2 delegates representing broadcasting heads;
- (e) 1 delegate representing television heads; and
- (f) 2 delegates representing information consumers;

Article 8 states that the delegates representing the publishers must include at least one representative of the public press.

As to the procedure for accepting cases, investigation and decision-making, the Statute of the OPB are somewhat vague. Under Article 22(2), the Secretary General receives complaints from the public, conducts the necessary investigations and reports to the President. Upon request by the President of the OPB, each committee analyses the public complaint and the investigations conducted by the office and prepares reports to submit for decision-making, which consists of mere recommendations. No sanctions are provided for against a media outlet or a journalist refusing to heed the recommendation.

The functioning of the committees is defined in the internal regulations, which are sadly lacking. On 12 December 2013, OPB submitted a study by a consultant, Mr Gérard Ntahe, on a revision of the press code of ethics and the Statute of the OPB, which were unanimously considered to be out of date and poorly drafted, especially the code. This study was accepted and is to be submitted to the General Assembly of the OPB for adoption. The General Assembly had not yet met as at 31 March 2014.

In some countries there is provision for mechanisms (such as an ombudsman) as part of the staff of some media organisations to answer the comments and criticism of the public regarding the work done by journalists. There is no media ombudsman in Burundi.

1.3. Conclusion

Burundi is a member of international organisations such as the United Nations, the African Union and regional organisations such as the East African Economic Community. Thus, even if it has so far declined to adhere to certain conventions, it is party to a significant number of treaties and conventions which guarantee or protect human rights, which include the right to freedom of expression.

The Constitution of Burundi also guarantees fundamental human rights and whilst it provides to limits to how they are exercised, these limits are consistent with the international legal instruments which it has incorporated by virtue of Article 19.

The question is therefore not so much one of instruments, even though these pose a concrete problem, as of their implementation, especially by domestic laws, but also of the practices of State bodies, in particular the judicial system. Sections 2 and 3 of this paper will analyse their implementation.

Section Two: Overview of legislation that criminalises expression

2.1 Overview of laws in place

There are a number of laws criminalising or limiting freedom of expression in Burundi. They are:

- Law No. 1/11 of 4 June 2013 amending Law No. 1/025 of 27 November 2003 to govern the press in Burundi;
- Law No. 1/05 of 22 April 2009 to amend the Criminal Code;
- Law No. 1/12 of 18 April 2006 instituting preventative and punitive measures against corruption and related offences;
- Law No. 1/28 of 5 December 2013 regulating public demonstrations and events.

2.1.1. Law No. 1/11 of 4 June 2013 amending Law No. 1/025 of 27 November 2003 to govern the press in Burundi.

This law provides for and sanctions a broad range of offences, including the following:

- Breach of public order and security;
- Insults against the Head of State;
- Defamatory, insulting, slanderous or offensive statements against public and private personalities
- Violation of the secrecy of investigations during pre-trial proceedings

This law provides for exorbitant fines to punish press offences, thereby posing a significant risk to editors and publishers.

2.1.2. The 2009 Criminal Code

The Burundian Criminal Code provides for and punishes a number of crimes that may be committed through the press. In practice, these provisions are often used to limit freedom of expression.

They are:

- damaging allegations;
- · breaches of public order and security;
- insults against the Head State;
- acts of terrorism;
- treason;
- spreading false news; and
- violation of secrecy of investigations during pre-trial proceedings.

2.1.3. Law No. 1/12 of 18 April 2006 instituting preventative and punitive measures against corruption and related offences

This law metes out harsh punishments for false allegations in matters of corruption and related crimes under ordinary law.

2.1.4. Law No. 1/28 of 5 December 2013 regulating public demonstrations and events

This law criminalises freedom of expression in several provisions:

- All public events are subject to prior declaration of intent;
- The administrative authorities may decide to delay or prohibit the meeting if public order so requires;
- The prior declaration must reach the competent authorities at least 4 working days before the meeting;
- The members of the requesting organisation's executive may be prosecuted before civil and criminal courts for offences committed during a public meeting.

2.2 Detailed description of each law and whether and how they have been used

2.2.1 The 4 June 2013 law to govern the press in Burundi

The 4 June 2013 law was robustly resisted by media professionals, civil society and even representatives of the international community, including ambassadors, who generally express themselves with more restraint regarding domestic issues. The draft bill itself was criticised in respect of the many new provisions and considered fatal to press freedom.

The main criticisms against Law No. 1/11 of 6 June 2013 are concentrated in the following articles:

(a) The protection of journalists' sources

Article 16 of the law guarantees the protection of sources thus: "the confidentiality of journalistic sources is guaranteed".

However, Article 20 limits it in a singular manner. Thus:

[J]ournalists must provide to the competent courts the information revealing their sources in one of the following cases:

- (1) information concerning offences against State security
- (2) information concerning breaches of public order
- (3) information concerning breaches of defence secrecy
- (4) information concerning breaches of the physical and moral integrity of one or more persons.

One of the main benefits of the 2003 law was the protection of sources afforded to journalists. Article 16 of the 2003 law acknowledges this protection but the exceptions to the protection of sources of information are in fact tantamount to its abrogation, especially as Article 20 gives wide room for misinterpretation of these notions.

Article 20 contravenes the spirit and the letter of Article XV of the Declaration of Principles on Freedom of Expression in Africa which obliges journalists to reveal sources only in case of an investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence. Moreover, the information expected can only be divulged if it cannot be obtained elsewhere or if disclosure has been ordered by a court after a full hearing.

(b) Punishment for a broad range of offences.

Article 19 states:

The right to broadcast information or publish documents may not be exercised if such are connected to:

- (a) national defence secrets, State security and public security;
- (b) information undermining the stability of the currency;
- (c) privacy, including personal and medical documents;
- (d) secrecy of judicial investigations at the pre-trial stage;
- (e) offences and insults against the Head of State;
- (f) press releases, calls or announcements inciting revolt, civil disobedience, unauthorised public demonstrations, apologia for crime, conducting blackmail or fraud, ethnic or racial hatred;
- (g) defamatory, insulting, mendacious or offensive statements against public or private individuals;
- (h) information spreading propaganda from enemies of the nation of Burundi both in peace and war;
- (i) information undermining the State's reputation and the national economy;
- (j) secret or confidential documents or recordings concerning military operations, national defence, diplomatic activity, scientific research and the reports of State commissions of enquiry;
- (k) reports of judicial deliberations either in camera or concerning minors, without prior authorisation;
- (I) the identity of rape victims;
- (m) the protection of minors against obscene or shocking images.

In order to stay within the scope of this paper and to avoid repetition, we will deal with insults against the Head of State (19(e)), defamation (19(g)), breaches against State security and (19(a)) breaches of pre-trial confidentiality (19(d)) under the section dealing with the Criminal Code since both texts provide punishment for these offences.

(c) Exorbitant fines

The law of 2013 provides for exorbitant fines to punish press offences.

Article 61 stipulates:

Without prejudice to the provisions of Articles 57 and 58, together with the relevant provisions of the Criminal Code, a fine of 2,000,000 (two million) to 6,000,000 (six million) Burundian francs shall be imposed

on any press organ which publishes or broadcasts information containing the crimes provided for in Articles 18 and 19. In case of information synergy, each medium shall be legally responsible for its broadcasts.

The exorbitant nature of these fines will be demonstrated in the discussion on the proportionality of sentences.

For the moment, these fines are not enforced for the following reason. In a ruling of the Constitutional Court handed down on January 7, 2014 at the request of the Burundian Journalists Association dated 20 April 2013. The court struck down sections 61, 62, 67 and 69 of the Press Law after finding them unconstitutional. These articles relate to fines for press offenses listed in Articles 18 and 19. The reason given was that these articles provide for "settlement" fines, while the Burundian Penal Code provides only for a penalty of a fine, custodial sentence and community service. The penalty of a settlement fine has been ruled unconstitutional under Article 39, paragraph 2 of the Constitution which provides that "no one shall be accused, arrested, detained or tried in the cases determined by law promulgated after the facts alleged against him."

Until provisions punishing press offenses and in compliance with the Constitution are adopted, the Penal Code or other special laws remain applicable, as required by Article 71 of the Press Law which states "all other offenses committed by the press not covered by this Act shall be punished in accordance with the relevant provisions of the penal code and other pertinent laws."

2.2.2 The Criminal Code of Burundi

(a) Defamation or defamatory allegations

The Criminal Code makes punishable defamation or defamatory allegations thus:

Whosoever maliciously and publicly attributes a precise act which is such as to damage the honour and respect of such person or to expose him or her to public ridicule shall be punished by a term of imprisonment of one month to one year and a fine of ten thousand to one hundred thousand francs or by any of these penalties alone.

In Burundi, it is possible to be prosecuted and found guilty of defamation even if the reported events are true. Put differently, there is no defence of truth as in other systems (for example, in France, Senegal and Mali) which are consistent with Article XII (protecting reputations) of the Declaration on the Principles of Freedom of Expression in Africa, which states that no one should be found liable for true statements.

(b) Breach of order and security

Parts VII and IX of the Criminal Code of Burundi make punishable a significant number of offences breaching public order and security. These include insults against the Head of State, spreading false news, treason and acts of terrorism. These are discussed below.

(c) Insults against the Head of State

This offence is punishable both under the Press Law and the Criminal Code. Article 378 of the Criminal Code states:

The following shall constitute offences: insulting or defamatory words, gestures or threats, any written material or the sending of any object to persons charged with a public service mission in the course of the

performance of their duties, which is such as to undermine their dignity or the respect due to their functions.

Article 379 stipulates: "An insult against the Head of state shall be punishable by a term of imprisonment of six months to five years and a fine of ten thousand francs to fifty thousand francs."

To protect certain personalities who hold public authority or power, Burundian law sanctions all acts which undermine their dignity or the respect due to their functions.

The offence should be understood to be anything that deliberately intended to diminish the moral authority of a person or the respect due to the function he or she performs.

Insults against the Head of State are punishable under the Criminal Code, but also under the Press Law (art. 19(e)). If they are committed through the press, they are punished in accordance with the Press Law, i.e. a fine of two million to six million francs. Where an offence is provided for in both a general and a specific law, the specific law prevails.

Insults against the Head of State should be treated with care: public figures, as stated in Article XII (protecting reputation) of the Declaration of Principles on Freedom of Expression in Africa, should tolerate much more criticism than private citizens because they are answerable for their acts before the people who may, in return criticise them in case of shortcomings. Using an overly repressive law against journalists whose job is precisely to highlight what does not work in a society means simply preventing them from plying their trade.

(d) Spreading false news

Unlike the Press Law, which makes no reference to it, Article 602 of the Criminal Code provides for and makes punishable the spreading of false news:

Anyone who, with a view to breaching the peace, knowingly contributes to the publication, broadcast, replication by any means of false news, fabricated items, forgeries or items mendaciously attributed to others shall be liable to a terms of imprisonment of two years and a fine of one hundred thousand to two hundred thousand francs or by any of these penalties alone.

Burundian law therefore obliges the media to publish only accurate information. This is not always easy because unlike legal proceedings, which are slow, news cycles are fast-paced. Regardless of his or her area of work, each journalist has fairly limited time depending on the medium being used and will also have a deadline for the submission of articles.

The journalist's time can be even shorter given that, as always, there is merciless competition in the media to break stories.

A journalist may therefore publish information which turns out to be false. He or she will however only be punished if the publication was done in bad faith.

For the spreading of false news to be an offence, the act must satisfy two conditions.

• The allegations published must be false in whole or in part.

 The publication of false news must also have been done in bad faith, i.e. the journalist must have intended to breach public order.⁴²

As has been seen, the offence of spreading false news is not provided for by and is therefore not punishable under the Press Law. However, it is provided for in the Criminal Code (Article 602). Even if it is committed via the press, it is punished in accordance with the provisions of the Criminal Code.

(e) Acts of terrorism

The Criminal Code provides for and punishes terrorism. This offence is dealt with in Articles 614, 615 and 618

Article 614 states:

The following deliberate acts, if committed as part of an individual or collective attempt to disrupt public order to a serious extent by means of intimidation or terror, constitute terrorism:

- (1) deliberate attacks on life, deliberate attacks on the physical integrity of persons, abduction and unlawful detention and the hijacking of aircraft, vessels or any other means of transport;
- (2) theft, extortion, destruction, defacement and damage;
- (3) manufacture or custody of deadly or explosive machines or devices;
- (4) production, sale, import or export of explosives;
- (5) purchase, custody, transport or illegal possession of explosives or devices manufactured with the aid thereof.

Article 615 states: "The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism set forth at Article 614 shall also constitute an act of terrorism."

Article 615 states that an act of terrorism is punishable by a sentence of imprisonment of ten to twenty years and a fine of two hundred thousand to one million francs. If the act causes the death of one or more persons, it shall be punishable by life imprisonment. These sentences cannot be commuted.

In the following section, we will see how this provision was used against a journalist and what the result of the case was, whereas at first glance this is not an extraordinary offence within the profession.

(f) Treason

Article 570 of the Criminal Code sanctions treason as follows:

Any Burundian shall be guilty of treason if he or she, in time of war:

[...]

3. Deliberately participates in an enterprise to demoralise the Army or the nation for the purpose of undermining national defence.

⁴²Gérard Ntahe, Les textes juridiques et déontologiques régissant les médias au Burundi, op.cit.

This offence is included because a Burundian journalist was prosecuted for treason, as will be seen in the part dealing with the use of laws.

(g) Breach of pre-trial investigation confidentiality

Article 393 of the Criminal Code states:

Without prejudice to the rights of the defence, anyone one who, by virtue of his or her duties has knowledge, pursuant to the provisions of the Code of Criminal Procedure, regarding information derived from an ongoing investigation or pre-trial investigation of a crime or offence and reveals it directly or indirectly to persons likely to be involved as perpetrators, co-perpetrators, accomplices or receivers, in the commission of these offences, where such revelation is likely to impede the conduct of the investigation and the ascertainment of the truth, shall be punishable by a term of imprisonment of three months and a fine of fifty thousand to one hundred thousand francs or by any of these penalties alone.

Such person may also be prohibited from holding public office for a period of two to five years.

It should be noted that it is the investigation and the pre-trial proceedings which are secret. What is prohibited is only the revelation of the material contained in the investigation and pre-trial case file. Whatever can be observed and noted by anyone (movements and investigations at the *locus in quo*, witness summonses and interviews, reconstruction of crimes, etc.) is not subject to any particular protection or legal restrictions. Accordingly, the media are not prohibited from reporting on these matters.

However, this provision has been employed by the Government to prohibit journalists from doing their work, under the pretext that this is in compliance with the above-mentioned article, as will be seen in the section dealing with the use of laws.

2.2.3 Law No. 1/12 of 18 April 2006 setting forth measures to prevent and punish corruption and related offences

Through Article 14, this law provides for and punishes slander.

Article 14 states:

Any natural person who makes untruthful written or oral statements in relation to the offenses provided for in the present law (active and passive corruption, commission, influence-peddling, embezzlement and misappropriation of property, fraudulent management, illicit enrichment, favouritism, unlawful taking of interest, misuse of company assets, money-laundering) to the Special Anti-Corruption Brigade, a judicial official or a public service employee who is obligated to report to the said official or through the press shall be punishable by a term of imprisonment of five to ten years and a fine of five hundred thousand to one million francs. If the guilty party is a corporate body, the fine shall be five to ten million francs.

The following are the elements of the offense of slander:

- (1) The crime has to be reported;
- (2) The reporting may be written or oral (or in the press in a matter relating to corruption and related offences);

- (3) It must be made to a judicial official, a superior or an employer;
- (4) The offence must be punishable (criminally or administratively); and
- (5) The report must be slanderous, that is, concern an accusation that is known to be untrue.

It is therefore self-evident that any person who accuses an innocent person in the belief that the person is guilty is not criminally liable in that he or she has no criminal intent. However, the accuser may be ordered to remedy the harm caused in civil proceedings.

This article has previously been used to punish the exercise of freedom of expression, as will be seen below.

2.2.4 Law No. 1/28 of 5 December 2013 to regulate public street demonstrations and public meetings

This law contains provisions which limit freedom of assembly and expression.

Article 3(j) states: "A public meeting shall be any momentary, concerted and organized gathering of persons with a view to exchanging opinions and to study and defend ideas and interests, to which all citizens have free access."

Article 1 of this law also states: "Public [...] meetings are free in Burundi."

However, this freedom is limited by Articles 4 and 5 of the law. Article 4 states:

All public meetings shall be subject to a prior declaration. Such declaration shall provide the complete identities of the members of the organisation's management, the date and time of the demonstration, its purposes, its expected attendance and the intended itinerary of the procession or march. The prior declaration shall be made in writing and sent to the competent administrative authority, who shall issue a written acknowledgment of receipt."

The administrative authority may decide to delay or prohibit the meeting if such action is in the absolute interests of public order. Such decision shall be duly reasoned.

Article 5 provides:

The prior declaration shall be submitted to the competent authority at least four working days before the planned meeting. The competent authority has forty-eight working hours to provide any written observations and recommendations to the declarant together with an acknowledgment of receipt. The authority may decide to delay or prohibit the meeting if such action is in the absolute interests of public order. Such decision shall be duly reasoned.

The decision is appealable before the Administrative Court, which shall rule according to the procedure for urgent matters.

Control of public meetings by the administration can also be used to limit freedom of expression.

Thus, Article 12 states: "The competent administrative authority may send an authorised delegate to attend any public meeting. In such case, the delegate is empowered to suspend or end the meeting if such action is imperative in the interests of public order [...]"

Article 13 provides: "all public [...] meetings shall be organised and monitored until they end, under the responsibility of an executive composed of three persons at least and headed by a chairperson."

But the problem is that the same article adds: "[t]he members of the executive may be prosecuted in civil proceedings for damages or in criminal proceedings for offences committed during the activities pertaining to the meeting, if it is proven that these were committed by the meeting organisers".

2.3 Use of laws

Under the heading "Stop Menacing the Media. Government Threatening Journalists with Legal Action", the NGO Human Rights Watch issued a report on 21 November 2011. 43

"We are deeply concerned about the recent escalation in intimidation against the news media in Burundi. [...] This assault on the free press makes it practically impossible for journalists to carry out independent investigations and reporting."

The report also states:

Burundi government officials should halt their intensifying pressure on journalists. [...] In the last few weeks, journalists have been summonsed by state prosecuting authorities for questioning with increasing frequency in response to radio broadcasts implicating state agents in alleged human rights abuses."

Senior government officials, including three ministers, have stepped up public warnings against the media in recent days, threatening them with legal action, and hinting they could be accused of criminal offenses such as inciting public disobedience and hatred. Threats escalated following reporting restrictions imposed after a mass killing in Gatumba on September 18, 2011.

The report then went on to provide examples.

On November 10, Nduwimana of Radio Bonesha FM, Eric Manirakiza, director of RPA, and Vincent Nkeshimana, director of Radio Isanganiro, received a summons to appear before the public prosecutor's office and were questioned about the funding sources for their radio stations. On November 14, RPA received a letter from the interior minister directing it to provide annual activity reports and financial documentation within 10 days.

The minister's letter also accused RPA of departing from its original objectives. It stated that instead of being a tool for social cohesion, the radio station was being used "to discredit institutions, undermine the legitimacy of the judiciary, accuse individuals gratuitously, incite the population to hatred and disobedience and promote a culture of lies.

On November 14, Rugurika and Bonfils Niyongere, a journalist for RPA, received a summons from the public prosecutor's office. They were released after around 10 hours of questioning about their reporting of an incident at the University of Bujumbura on October 16 in which police had raided the university campus and two students were killed. Niyongere had been briefly detained by police based at the university on November 6. He was accused of holding illegal meetings at the university, while Rugurika was accused of creating disturbances at night. It was the eighth time in four months that Rugurika had been called in for questioning.

⁴³ www.hrw.org.

On November 15, four radio stations – Renaissance, RPA, Radio Bonesha FM, and Radio Isanganiro – asked members of the public to honk their car horns for 15 seconds at 12:20 p.m. to protest political violence and the muzzling of journalists. Police in Bujumbura noted the license plate numbers of cars that took part in this small demonstration. The next day the radio stations received a letter from the minister of telecommunication, information and communication informing them that this action was regarded as an "attack on public peace." The minister told them that anyone who published information relating to cases under investigation would be dealt with according to the law."

Some of these cases have exceeded mere harassment and intimidation and have been taken to court, as will be seen below.

2.3.1 Case No. RP C 16485 (Prosecutor v J.C. Kavumbagu)

On 11 September 2008, Jean Claude Kavumbagu was arrested for publishing in the Net Press issue of 10 August 2008 an article suggesting that there was misappropriation of funds behind the mission allowance paid to the President of the Republic during his visit to China on the occasion of the opening of the Beijing Olympics in 2008. In the article, a "huge" sum was alleged to have been paid to the President of the Republic, in the amount of 100,000 US dollars, not for a State visit, but only to attend the Beijing Olympics. The author wondered whether the participation in the Olympics by the President of the Republic was in the nation's interests at the time. The journalist added that according to his sources, the Minister of Finance had had a great deal of difficulty in gathering the requested amount and had to dip into the civil servants' salaries for July.

The Attorney General of Burundi brought charges against the author of the article. The publisher of Net Press was arrested on 11 September 2008 and taken to Mpimba central prison. Before that, he had been ordered to reveal the source of his information, a matter which the Secretary General of the Government pressed hard for. Arguing on the basis of Article 8 of Law No. 1/025 of 27 November 2003⁴⁴ and Article 12 of the Press Code,⁴⁵ Jean Claude Kayumbagu refused to divulge his sources.

He was charged with defamation and insults, insults against and breach of the honour of the President of the Republic, under Article 50 of the Press Law. ⁴⁶ After six months of detention on remand, he was acquitted by the *Tribunal de Grande Instance* of Bujumbura Mairie. The grounds for the acquittal were that such offences could only be prosecuted upon complaint by the individual concerned, who in this case was the Head of State, and that the Secretary General of the Government lacked the standing to act in his behalf, even if he acted for the Government. None of the parties appealed and the case ended.

2.3.2 Case No. RP C 27 (Public Prosecutor v. Jean Claude Kavumbgu)

On 17July 2010, whilst he was in his office, Jean Claude Kavumbagu was apprehended by a police officer who took him immediately before the Public Prosecutor of Bujumbura Mairie where, after a marathon interrogation in the absence of his counsel, he was charged with treason and defamatory allegations.

⁴⁴ Article 8 of Law No. 1/025 of 27 November 2003: "Journalists shall not be required to reveal their sources of information."

⁴⁵ Article 12 of the Press Code of Ethics in Burundi: "Journalists shall observe professional confidentiality and respect the confidentiality agreed with sources of information."

⁴⁶ Under Article 50 of the November 2003 Press Law, each of these crimes is punishable by a term of imprisonment of six months to five years and a fine of 100,000 to 300,000 Burundian francs.

The Public Prosecutor accepted the case and opened an investigation which was followed by the joint filing of complaints by the Army Chief of Staff, Major General Godefroid Niyombare of behalf of the National Defence Force, and the Director General of the Police, Commissioner Fabien Ndayishimiye on behalf of the Police.

Mr Jean Claude Kavumbagu was prosecuted on the grounds that on 22 July 2010 he published an article on Net Press in which he wrote the following: "as from Monday, the investigation was indeed taking place in Bujumbura and all those who learnt what happened yesterday in Kampala were convinced that if the Shabbab militia members wanted to "try something in our country, they would succeed with disconcerting ease given that our security and defence forces are best known for their ability to loot and kill their fellow citizens than for defending our country."⁴⁷

As Burundi and Uganda had been participating since December 2007 in the African Union Mission in Somalia to support the Somalian army against the Islamic insurrection, the Shabbab militia had threatened to attack Bujumbura and Kampala thus: "We will make their people weep. We will attack Bujumbura and Kampala [...]. We will take our fight to these two cities and we will destroy them."

Then, on 11 July 2010, the Somali Islamists attacked an Ethiopian restaurant and a rugby club where the football World Cup final was being broadcast, killing 76 people.

The Prosecutor argued that the sole purpose of Jean Claude Kavumbagu's article as to demoralise the security and defence forces and that the language of the article was a signal to the enemy to press on with its intended crime. Moreover, it was disturbing to the international community living in Burundi because it would normally react by leaving the country in order to stay alive.

Jean Claude Kavumbagu had therefore deliberately participated in an enterprise to demoralize the army and the police for the purpose of undermining national defence. He was therefore guilty of treason, punishable under Article 570 of Book II of the Criminal Code.

Jean Claude Kavumbagu's article was also a defamatory allegation within the meaning of Article 251 of the Criminal Code, Book II, which states:

Anyone who maliciously and publicly attributes to a person a specific act which breaches the honour and diminishes the respect of such person, exposing him or her to public ridicule, shall be punishable by a term of imprisonment of one month and a fine of ten thousand to one hundred thousand francs or by any of these penalties alone.

In the view of the Prosecutor, stating that the defence and security forces were more renowned for their ability to loot and kill their fellow citizens than for defending their country constituted a defamatory allegation.

Finally, Jean Claude Kavumbagu was prosecuted on the basis of Article 50 of the Press Law which punishes a person who spreads false news likely to discredit the State and undermine the national economy with 6 months to five years of imprisonment and a maximum fine of three hundred thousand francs.

⁴⁷

The prosecutor sought life imprisonment but in a judgment issued on 13 May 2011, ten months after he was taken into custody, Jean Claude Kavumbagu was sentenced to eight months in prison and ordered to pay a fine of one hundred thousand francs. The only offence that was accepted was discrediting the state and undermining the economy, as the bench held that the information published could discredit the country and undermine its economy, since Burundi's credibility in the eyes of its partners could be adversely affected.⁴⁸

The crimes of treason and defamatory allegations were not proven.

The judges held that treason could not be argued except in a state of war in the legal sense and not "psychological warfare", as the Public Prosecutor had alleged. Under Article 110 of the Constitution, only the Head of State could declare war after consulting the Government, the National Assembly and Senate Bureaus and the National Security Council, none of which he had done.

The defamatory allegation offence was also rejected in that it could only concern public or private individuals with a legal personality: the army and police, not having legal personality, could not be defamed. None of the parties appealed and the case ended.

The bench was composed as follows:

Presiding Judge: Fidèle Nyabenda

Judges: Jean Marie Karitunze, Vianney Niyonkuru, Evelyne Nishimagizwe, Blaise Ndaye Kazinguvu

Registrar: Béatrice Ndike

2.3.3 Case No. RCPA 850 (Prosecutor v. Faustin Ndikumana and PARCEM)

On 7 February 2012, the legal representative of a non-profit organization, "Words and Action for the Awakening of Consciences and a Change in Mentality", PARCEM, was arrested and detained in Mpimba central prison.

The Public Prosecutor charged him as follows. On February 3, 2012, he made false oral declarations to the press by stating that recruitment into the magistracy was based on bribes, adding that the sum then required was two million Burundian francs (about 1300 US dollars) and that the Minister of Justice was personally involved in these acts. Such offence is punishable under Article 14(1) of Law No. 1/12 of 18 April 2006 setting forth measures to prevent and punish corruption and related offences. PARCEM was also prosecuted in the person of its legal representative for making false oral statements to the press in the same time and place (Article 14(1) of Law No. 1/12 of 18 April 2006).

The Public Prosecutor added that Faustin Ndikumana had told the press that the recruitment of new magistrates was based on corruption, stating that the new recruits had paid one million francs beforehand and that they were subsequently paying two million francs in order to join the magistracy. He also accused the Minister of Justice at the time, stating that the Minister was personally involved in these acts of corruption given that he was the recruiter.

Law No. 1/025 of 27 November 2003 to govern the press in; Article 50: "By waiver of the relevant severances of the Criminal Code, a term of imprisonment of one month to five years and a fine of 100,000 to 300,000 Burundian francs shall be imposed on the publisher, editor-in-chief, sub-editor or journalist for offences that discredit the State and undermine the national economy [...]".

The Public Prosecutor also accused PARCEM of making the same reprehensible statements through Faustin Ndikumana, its legal representative. This was confirmed by the signed letter of the legal representative bearing the organisation's logo and seal, which was sent to the Ministry of Justice and Keeper of the Seals on 1 February 2012. This letter repeated the same false allegations against the Minister of Justice, Keeper of the Seals.

The Public Prosecutor asked for a term of imprisonment of ten years for Faustin Ndikumana and a fine of one million francs and a fine of ten million francs against PARCEM.

The legal representative of PARCEM first entered a challenge to admissibility concerning the standing of the accused, arguing that the statements at issue had been made as legal representative of PARCEM and that in this capacity, he was acting for the accused PARCEM. The statements were therefore only attributable to PARCEM and if the offence were to be proven, the organisation as a corporate body with a distinct legal personality should be prosecuted rather than Faustin Ndikumana.

With regard to the content of the statements at issue, the accused argued that during the recruitment of magistrates, there were no public calls for expressions of interest, entrance examinations or selection criteria, and that the principle of recruitment following order of graduation was not respected. This practice of corruption was a fact because the Minister of Justice had made a clear statement on the subject during a question-and-answer session in the Senate concerning the fight against corruption in his ministry.

The Minister of Justice asked to be joined as a civil party and sought 170,000,000 Burundian francs (about 150,000 US dollars) as damages.

In its judgment, the Anti-Corruption Court found Faustin Ndikumana and PARCEM guilty of making false statements. Faustin Ndikumana was sentenced to a term of imprisonment of five years and a fine of five hundred thousand Burundian francs, payable within eight calendar days on pain of an additional sentence of 6 months in prison. The court also ordered Faustin Ndikumana and PARCEM together to pay the Minister of Justice the sum of 10,000,000 francs for moral damages.

The judgment was issued on 24 July 2012. It was appealed at the Supreme Court and the case is pending.

The bench which issued the judgment was composed as follows:

Presiding Judge: Cassien Sindaye

Judges: Pierre Claver Miburo, Fercule Nsengiyumva

Registrar: Nelly-Libérate Nikwigize

2.3.4 Case of RPCA 600/GIT (Prosecutor v. Hassan Ruvakuki et al.)

On 8 January 2013, the Gitega Appeals Court, sitting as a court of second instance in a criminal matter, issued the following judgment in a public hearing:

(1) Reverses Judgment No. RPC 205/CNAK and recharacterises the acts charged against Hassan Ruvakuki, Mibohe, Karim, etc.

(2) Finds them guilty of the crime of participation in an association established for the purpose of harming persons and destroying property and accordingly sentences each of them to three years of imprisonment.

In Judgment RPC 205/CNAK issued by the Cankuzo *Tribunal de Grande Instance*, journalist Hassan Ruvakuki had been sentenced to life imprisonment.

He was prosecuted for participating on 19 November 2011 in the publicity drive for the official launching of acts of terrorism committed against the people of Kigamba and Muhiha Communes on 20 November 2011, crimes provided for in Articles 615(2) and 618(2) of Book II of the Criminal Code.

On appeal, Hassan Ruvakuki and his counsel argued that he had never been a member of the group of terrorists who attacked the people of Cankuzo, but that he had gone to Kinyinya Forest in Tanzania, where the men in question were based as part of his work as a journalist, seeking information. Moreover, although he recorded the information he collected in Tanzania, he had not broadcast the information in the Burundian media.

The Public Prosecutor for his part argued that Hassan Ruvakuki had not gone to Tanzania for his work, but instead used his profession as cover for committing the acts charged.

The appeal judge accepted that Hassan Ruvakuki had gone to Tanzania on a day when he did not have professional obligations and was therefore on a private mission rather than on an official one. The judge held that for having recorded the statement of rebel leader Kabirigi, which was broadcast thanks to the facilitation of a co-accused, Emmanuel Ndereyimana, he had knowingly and deliberately aided and abetted armed men with the intent of harming persons and damaging property.

Nonetheless, the judge recharacterised the facts, finding that Hassan Ruvakuki was guilty not of acts of terrorism within the meaning of Articles 615(2) and 618(2) of the Criminal Code, but of participation in an association established for the purpose of harming persons and destroying property within the meaning of Article 475 of the Criminal Code, a crime punishable by two to five years of imprisonment. He was sentenced to three years of imprisonment.

But Hassan Ruvakuki left Muramvya prison in March 2013, for "health reasons". He had been arrested on 28 November 2011. This measure was taken unexpectedly on the eve of an official visit to France by the President of Burundi. It is true that the imprisonment of Hassan Ruvakuki had much exercised national opinion, strongly mobilised by the Burundian media, civil society in general and human rights organisations in particular. Given that he was a journalist of Radio Bonesha, but also a correspondent of Radio France International (RFI), Hassan Ruvakuki's fate had also mobilised the international community. Hence ambassadors accredited to Bujumbura did not hesitate to attend the hearings in Cankuzo, in the far east of the country, and in Gitega, in the centre. All of a sudden, he was no longer just any accused person. According to rumours that cannot be confirmed, France had indicated that President Nkurunziza's visit was contingent upon the release from prison of the RFI correspondent. Hassan Ruvakuki was granted conditional release after withdrawing his appeal before the Court of Cassation. He can therefore resume his career in all legality, provided he remains quiet. But his co-accused did not enjoy the same favour and continue to serve their sentences, to general indifference.

The bench which heard the Ruvakuki appeal was composed as follows:

Presiding Judge: Fulgence Ruberintwari;

Judges: Emmanuel Niyonkuru, Tharcisse Ndayizeye, Joseph-Désiré Nduwayezu, Emmanuel Ciza; and

Registrar: Désidératte Mukerabega

Hassan Ruvakuki has just been selected as one of the "100 news heroes" by RFI during the World Press Freedom Day. ⁴⁹

2.3.5 Use of the law in respect to public meetings

Unlike private meetings, which are free and for which there are no administrative formalities, public meetings are subject to the submission of a prior declaration to the competent administrative authority.

This freedom is therefore relative since it can be curtailed under Article 5 of the Law of 5 December 2013 which provides that a public meeting may be delayed or prohibited if public order so requires. Given the elasticity and variability of interpretations of the concept of public order, application of this provision could be a weapon in the hands of authorities which decide to limit the right to freedom of assembly

Yet, this is a fundamental freedom like freedom of expression, upon which it is conditional.

In countries where democracy is firmly established, this prior authorisation, which existed in the past, was replaced by a declaration pure and simple, which was itself subsequently abolished. In France, for example, freedom of assembly was established by the law of 30 June 1881 which established a system of prior authorisation. Article 81 of a law passed in 1907 proclaimed that public meetings, regardless of their purpose, could be held without prior declaration.

Settled case law before the European Court of Human Rights implicitly condemns the prohibition of public meetings, which holds the principle of prior declaration, which allows an administrative authority to determine whether or not a public meeting may be prohibited, to be contrary to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

In her report of 6 March 2014 on Burundi, Navy Pillay, United Nations High Commissioner for Human Rights, expressed her concerns regarding the laws passed in the previous year, in particular the law on public meetings passed on 5 December 2013.

She added that the prohibition of spontaneous meetings under the new law could constitute a disproportionate restriction of the right to peaceful assembly and freedom of expression.

She is concerned that "holding the organisers of public gatherings civilly and criminality liable for a criminal act perpetrated by another person attending one of those gatherings may discourage the organisation of such events, which are quite legitimate under international law".

The High Commissioner adds that these increasingly stringent restrictions on public gatherings could severely limit the democratic space ahead of the elections.

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⁴⁹ www.iwacu.burundi.org.

Applying the law of 5 December 2013, the Burundian police, acting on the instructions of the administrative authorities, have already disrupted or banned a good number of public gatherings, and even some private ones, organised by opposition political parties or civil society.

On 16 February 2014, the police used tear gas to disperse militants of the UPRONA party attending a central committee meeting.

On 18 and 19 February 2014, on the instructions of the administrative authorities, the police disrupted meetings of the MSD, an opposition party.

On 2 March 2014, a meeting of the MSD party was banned by the Gihosha commune Administrator on the grounds that it was illegal, without any further explanation.

On 18 February 2014, a workshop convened by the Burundi Bar Association was banned by the Mayor of Bujumbura. The Bar association and the National Council of the French Bars were due to sign a cooperation agreement during the workshop. To all intents and purposes, this was a private meeting rather than a public gathering within the meaning of Article 3(j) of the law of 5 December 2014.

2.3.6 Provisions punishing violations of the confidentiality of pre-trial investigations

Article 11 of the Press Law of 2003 and Article 393 of the Criminal Code provide for and punish violations of the confidentiality of pre-trail investigations, and have been used to curb freedom of expression, especially after the Gatumba massacre of 2011.

The small town of Gatumba, near the border between Burundi and the Democratic Republic of the Congo, was the site of a large-scale massacre in the night of 18 to September 2011, when individuals dressed in police uniform stormed a bar and, for a period of 25 minutes, fired at everyone on the premises. Thirty-nine people were killed on the spot whilst dozens of others were injured. In the aftermath of the massacre, the Attorney General, Mr Valentin Bagorikunda, set up a seven-member committee of inquiry on the killings.

The committee was given one month to submit its report. The Minister of Communication, Ms Concilie Nibigira, in tandem with the National Communication Council, imposed a one-month ban on any information about the Gatumba killings, under pain of legal proceedings, during the pre-trial investigation period. Heated debates took place within the various media organisations to determine whether or not to comply with the injunction. The majority of the media houses decided to comply in order to avoid reprisals by the government. Only the RPA, Bonesha FM and Isanganiro radio stations decided to ignore the ban. They broadcast the testimony of a certain Innocent Ngendakumana, who claimed to have witnessed the massacre and implicated high-ranking officers of the police and the national intelligence agency in it. Bob Rugurika, Editor-in-Chief of Radio Publique Africaine and Patrick Nduwimana, Editor-in-Chief of Bonesha FM, were summoned to the Public Prosecutor's office in Bujumbura Mairie on 8 November 2011, where they were questioned for over two hours about the unauthorised broadcasts. They were then allowed to return home and remain at the disposal of the judicial authorities, which is an indication that the purpose of the summons was to intimidate them.

And yet the injunction in question could not have been more illegal. Articles 393 of the Criminal Code and 11 of the 2003 Press Law indeed provide for and punish the offence of violating the confidentiality of a pre-trial investigation.

However, the confidentiality of such an investigation is only binding on the individuals involved in it, namely, magistrates and state prosecutors, judicial police officers and registrars. They are all subject to the obligation of confidentiality with regard to any information they obtain in the course of the performance of their duties in cases that require a criminal investigation and are the subject of an ongoing judicial inquiry.

The fact of the matter is that the obligation of confidentiality is not applicable to journalists. In the same way as suspects, civil parties and witnesses, journalists are not subject to the confidentiality of pretrial investigations.

Pursuant to the various international instruments to which Burundi is party, as well as to the country's Constitution and Press Law, journalists have the right to carry out their own investigations on any subject whatsoever, no matter how painful it might be, and to broadcast their findings without any impediment. The only thing they may not do is undermine the legitimate interests of the community and third parties in the course of exercising their profession. Furthermore, any such restrictions must be specifically provided for by the law. Anything else amounts to censorship, pure and simple. ⁵⁰

2.4 Analysis of the proportionality of sentences/fines

Burundian Press Laws also draw criticism on account of their lack of precision. In fact, Article 61 of the Law of 4 June 2013 is a real conundrum because the sentences prescribed, at least in certain cases, are both indiscriminate and disproportionate.

The sentences set forth in Article 61 are indiscriminate considering that all of them provide for a fine of between 2,000,000 and 6,000,000 Burundian francs, irrespective of the offence. This raises the question as to whether it is reasonable for such crimes as insulting a private individual, insulting the Head of State, libel and slander, or incitement to racial hatred, to be punished in the same manner.

Depending on their severity, offences are characterised as "felonies", "misdemeanours" or "petty offences". Offences punishable by up to two months' imprisonment are "petty offences". Those punishable by between two months and five years' imprisonment are "misdemeanours", whilst offences punishable by more than five years are "felonies". ⁵¹

The same material act, for example theft, is punished differently depending on the circumstances in which it is perpetrated. Petty theft is punishable by a prison term of between two months and five years, and a fine of between 10,000 and 100,000 francs, or by a prison term only. On the other hand, aggravated theft, (theft committed by a gang or at night, etc.) is punishable by between five and seven years' imprisonment.⁵²

The principle of proportionality which is internationally recognised today is not respected. It simply means that any crimes committed may lead to punishment, but such punishment must not be disproportionate to the severity of the crime.

If one compares the amounts of the fines prescribed in the Press Law of 2013 to those in the Criminal Code of 1981 (which was in force at the time of promulgation of the 2003 Press Law), and the Criminal

 $^{^{\}rm 50}$ /wacu, No. 135 of 7 October 2011.

Law No. 1/05 of 22 April 2001 to revise the Penal Code - Article 12.

Idem, articles 261 and 262.

Code of 2009 (currently in force), it is striking to note that the percentage increments in the fines are enormous. Let us consider a few examples:

The crime of insulting the Head of State was punishable under the 1981 Criminal Code by a fine of between 5,000 and 20,000 francs. The Press Law prescribes a fine of between 2,000,000 and 6,000,000 francs. Under the 2009 Criminal Code, the same crime is punishable by a fine of between 10,000 and 50,000 francs whilst, as we have just mentioned, the law of 2013 imposes a fine of between 2,000,000 and 6,000,000 francs.

As for the crime of insult, it was punishable in the Criminal Code of 1981 by a fine of between 1,000 and 5,000 francs. The Press Law provides for a fine of between 2,000,000 and 6,000,000 francs.

The other articles have been similarly modified.

It clearly appears that, in comparison to the previous laws, the Press Law of 2013 considerably increased the fines imposed for press offences. It may, at best, be understandable that lawmakers should increase the fines for the purpose of discouraging the commission of press offences, but this would also require Burundian media outlets and journalists to be able to afford the fines imposed on them, taking into account their salaries.

In reality, Burundian journalists earn extremely low salaries, on which they are barely able to survive. As a matter of fact, 12% of them earn less than 100,000 Burundian francs per month, or the equivalent of 55 dollars. This category is made up mainly of cub reporters and freelancers, and even includes contract employees who are paid only 100,000 Burundian francs in certain media organisations. Thirty-two per cent of the journalists earn between 250,000 and 550,000 Burundian francs (between 150 and 340 dollars), and those are in the intermediate category of salaried workers.

A small minority earn over 550,000 Burundian francs. This relatively high salary is due to the advancement procedures in the public service, and is earned almost exclusively by journalists working in public media. These are people over 50 years of age who, generally speaking, have been working in the profession for more than 15 years. Such salaries are practically unheard of in the private media (3). To put these figures in perspective, it is worth noting that the rent payable for a one-bedroom apartment in a working-class neighbourhood is 150,000 Burundian francs.

A used vehicle costs 10,000,000 Burundian francs at the very least, or the equivalent of 40 times the salary of a mid-level journalist and, as such, remains a pipe dream.

Increasing the fines was supposed to compensate for the decriminalisation of press offences, but the exorbitant amounts prescribed expose the journalists to prison terms. Inability to pay a fine of 6,000,000 Burundian francs, or the equivalent of two years' salary, inevitably leads to the enforcement of Article 51 of the Criminal Code which provides that:

In the event of non-payment within eight days following a final conviction, [...] the fine may be replaced by a prison term the length of which is determined by the conviction judgment depending on the circumstances and the amount of the fine imposed on the convicted person.

As mentioned above, the Constitutional Court struck down section 61 of the 2013 Press Law providing for settlement fines⁵³. The reason for the invalidation was not on amounts provided for but for the fact that Burundi laws do not provide for settlement fines. It rests on the Government to submit to Parliament a new 'sanitised' Bill with no mention of the phrase "transactional".

2.5 Conclusion

As has already been mentioned, Burundi is party to the main international treaties that proclaim and protect human rights, including the right to freedom of expression, which is considered, and quite correctly so, as the touchstone for the other rights. The current constitution, promulgated in 2005, in the same manner as all the previous ones, guarantees all those rights, using language that is often similar to that used in the international instruments.

The enshrinement of those rights in national instruments governing freedom of expression, and their enforcement by the judicial authorities, presents a real problem.

Burundian lawmakers have passed certain laws that actually impede freedom of expression. A case in point is the Criminal Code which punishes the crime of insulting the Head of State with a term of imprisonment of between six months and five years, and a fine of between 10,000 and 50,000 francs. The stiffness of the punishment is likely to deter journalists tempted to report on matters that might call into question certain decisions and actions of the President of the Republic, even when such decisions and actions are public and of concern to the members of the population who elected him and expect his conduct to be impeccable. That is the principle of admissibility.

Defamation is punishable under the Burundian Criminal Code by a prison term of from one to five years, or a fine of from 50,000 to 100,000 francs or both. However, when such offence involves denunciation by the media of corruption and related offences, the prison term is from five to ten years, in addition to a fine of from 500,000 to 1,000,000 francs. The severity of the sentence is not only designed to punish those who would engage lightly in defamatory statements, but probably, and particularly, to discourage those journalists and civil society activists who are in a position to denounce acts of corruption, and who are numerous in a country that is classified as one of the most corrupt in the world.

These anti-freedom laws have already been used to prosecute journalists and civil society activists, some of whom have been imprisoned or convicted for exercising their profession, which consists in seeking out, gathering and disseminating information of all types, including information that is not favourable to the powers that be. The imprisonment and conviction of the journalists, Jean Claude Kavumbagu and Hassan Ruvakuki, or of the President of PARCEM, Faustin Ndikumana, which we have already discussed, are but a few examples of this practice. Those imprisonments or convictions occurred quite some time ago, but 2013 witnessed its fair share of harassment of civil society activists and journalists.

In its 2014 World Report, the NGO Human Rights Watch states, amongst other things:

Burundi has a vibrant independent civil society and media, but government officials have attempted to silence their criticisms and accused them of siding with the political opposition. Government and judicial

⁵³ Above p27

officials harassed, intimidated, and questioned several journalists about their reporting and threatened them with legal action. ⁵⁴

This is a portrayal amongst many others that explain the low ranking of Burundi in the area of freedom of expression for the year 2013: no. 143 out of 187 countries ranked.

In Part Three of this study, we will consider how the various actors view the exercise of freedom of expression in Burundi through the prism of their personal experiences.

Section Three: Qualitative Research into Impact of laws on expression

In this part of the study, we present the interviews with the principal stakeholders involved in the exercise of the freedom of expression, namely, political party leaders, civil society leaders, judicial authorities, lawyers and media professionals. The purpose of the interviews was to assess their perception of the laws governing freedom of expression and their impact on how it is exercised.

In a bid to obtain information covering the entire spectrum of the political and social life of the country, we interviewed leaders of both government and opposition political parties, as well as civil society leaders supposedly close to the opposition or affiliated to the Government. We also talked to the managers and journalists of public and private media, as well as a few representatives of groups or associations of underprivileged persons.

This section also includes an account of the campaign against the Press Law of June 2013, which is still on-going, eight months after the promulgation of the law.

3.1. Interviews with key political, advocacy and civil society leaders

Within this category, we interviewed two political leaders: the CNDD spokesperson, Mr François Bizimana, and CNDD-FDD Member of Parliament, Aimé Nkurunziza.

(a) François Bizimana

Mr François Bizimana is the spokesperson of the opposition party CNDD. He is a former member of the Legislative Assembly of the East African Community and a regular guest on radio talk shows, during which he impresses his audience with the clarity of his arguments, his quick wit and sense of repartee.

At the very beginning of his interview with us, he stated that he was prepared to express himself openly, rather than anonymously. 55 Asked whether he was familiar with the provisions of the law which limit or punish freedom of expression, he answered in the affirmative, citing the Press Law of June 2013, the 1991 law on public meetings and events and the law on the opposition. He also mentioned the bill on public meetings and events, which was under consideration by Parliament at the time. 56

In his view, the Press Law has the greatest impact on freedom of expression inasmuch as it concerns not only journalists, but the entire population:

⁵⁴ www.hrw.org, Human Rights Watch, World Report 2014.

⁵⁵ Interview with François Bizimana, 25 August 2013.

 $^{^{56}}$ Law No. 1/25 of 14 November 2012 on the Status of the Political Opposition in Burundi.

The exorbitant fines are there for the sole purpose of shutting down the media considering their inability to pay such fines. As to the sources of information, they constitute the very soul of information. As such, compelling journalists to reveal their sources of information amounts to closing the sources of that information and thereby preventing its dissemination.

The law on the opposition which imposes a leader of the opposition who has not been designated by the political parties but who claims to speak on their behalf is a subterfuge and an impediment to freedom of speech, since they are unable to express themselves as they wish. To illustrate this point, they are systematically locked out of the public media, ostensibly because they have a representative empowered to speak on their behalf.

The 1991 law on public meetings and events is used to prevent opposition political parties from meeting and demonstrating freely, on the grounds that they did not notify authorities of the events within the prescribed time limits. Regarding the bill being currently debated and which has been adopted without modification in this particular area, the text stipulates that a representative of the administration may attend any political party meeting and close it if he believes that there exists a threat to public order. The fact that someone external to the discussions is present is not something that is liable to encourage freedom of expression since some people would be afraid to express themselves.

Mr. François Bizimana said that he had been directly affected by the 1991 law on public meetings and events, for he had noticed that the opposition party militants had become discouraged and no longer attended rallies because they were systematically disrupted by the administration.

With regard to the use of the laws, Mr François Bizimana said that the Press Law came into force only very recently and has not yet been enforced. Nonetheless, he deplores the fact that the opposition political parties, including the CNDD, of which he is the Spokesperson, have practically no access to the public media, in violation of Law No. 1/18 of 25 September 2007 defining the missions, composition, organisation and functioning of the National Communication Council. The article reads as follows: "In the area of decision-making, the Council's mission shall be to: guarantee, free and fair access of political parties [...] to public [...] information [...] channels".

The reality, according to a study based on the year 2011, is that opposition political parties and the civil society are denied access to a media outlet as important as the national television network (public). Over the period of the study, the opposition political parties and the civil society were allocated only 1% of air time, as against 75% for the Government (President of the Republic, Vice-Presidents, ministers, etc.), and 22% for ordinary citizens.⁵⁷

The 1991 law on public meetings and events is used on a regular basis to ban the meetings and rallies of opposition political parties, as was the case in Minago and Gatumba, when the roads were blocked to stop opposition party rallies.

On the subject of the campaigns organised around the Press Law in particular, the former Member of Parliament said he was fully aware of them. He mentioned the petition addressed to the Head of State, which he signed, and also the various radio and television programmes in which he took part, the draft amendments proposed by media professionals with the assistance of legal experts, and the Internet campaign carried out from outside the country, all of which, regrettably, did not prevent the

⁵⁷ Donat Maganya, Information journalistique et communication dans les médias publics, le cas de la Télévision nationale, University of Burundi, thesis, December 2013.

promulgation of the controversial law. However, he believes that all is not lost considering that since the law was promulgated, no journalist has been harassed or imprisoned, with the Government seemingly reluctant to crack down.

(b) Aimé Nkurunziza

Aimé Nkurunziza of CNDD-FDD, the ruling party, is the Member of Parliament for Cibitoke. He is very conversant with the Press Law in his capacity as Chairman of the standing committee that studied the bill in detail before it was tabled before the plenary for debate and adoption.⁵⁸

As far as he was concerned, there was no law criminalising freedom of expression in Burundi. Certain opposition politicians, as well as certain media and civil society associations believed, or led others to believe, that the Press Law curtailed freedom, but nothing could be further from the truth.

Following the withdrawal of a number of political parties from the 2010 elections, the CNDD-FDD is practically the only party in government. A certain school of thought believes that in the absence of adversarial debate, all laws that are adopted inherently tend to limit the exercise of public freedoms. In fact, the relationship between public authorities and certain private media was unhealthy, and had led to suspicion within the media in respect of a bill which did not in fact contain any anti-freedom provisions.

Regarding, for example, the protection of sources, which has now been limited compared to the 2003 law, Mr Nkurunziza was of the opinion that there is nothing unusual in the 2013 law when compared to other laws, particularly in western countries. He cited the example of the Belgian law of 2005 which, with very few differences, imposes limits on the protection of sources under certain circumstances.

On the matter of fines, he stated that their role was dissuasive. Furthermore, in any case, not a single journalist had been sentenced to a fine, and yet the media had not changed their working methods in the slightest. If the journalists did their work in accordance with ethical principles and the code of conduct, by providing only balanced and verified information, the law would not be used against them.

Mr Nkurunziza deplored the fact that the most important component of the new law, the decriminalisation of press offences, a very important step forward in relation to the 2003 law, had been overlooked.

Mr Nkurunziza concluded with the following words:

contributions were taken into account, in particular when it came to the amounts of the fines. The campaign was also positive because it provided an opportunity for a broad-based democratic debate, and raised the awareness of the society.

Lastly, the controversies that marked the legislative process for the adoption of the law underscored the importance of the National Assembly and the need to be represented in it. If certain political parties had not boycotted the 2010 elections The campaign waged by media professionals had an impact in the sense that some of their, things could have turned out differently.

⁵⁸ Interview with Aimé Nkurunziza, 27 August 2013.

3.1.1 Interviews with civil society

Burundi has a very vibrant civil society which militates in favour of human rights and good governance, and which is readily branded by the Government as a political opposition. This has led to the creation of associations that are reportedly affiliated with the Government and which systematically adopt a contrary position to the others. The situation became abundantly clear in the course of the debates surrounding the drafting, adoption and promulgation of the Press Law of June 2013.

A section of the civil society joined the media professionals in denouncing the Government bill as soon as it was made public, during its consideration by Parliament before its adoption, and when it was submitted to the President of the Republic for promulgation.

The most militant of those associations were the Forum for the Strengthening of Civil Society (FORSC), the anti-corruption organisation known by its French acronym, OLUCOME, and the Association for the Protection of Human Rights and Detained Persons (APRODH).

(a) Mr Vital Nshimirimana (lawyer)

In the opinion of the FORSC representative, Mr Vital NSHIMIRIMANA, whom we interviewed, there are three texts that criminalise freedom of expression. The first one is the anti-corruption law of 2006 Article 14 of which provides for a prison term of from five to ten years for anyone who is guilty of making false statements pertaining to crimes under this law (corruption, embezzlement, money-laundering, etc.) to the Anti-Corruption Brigade, a judicial authority, a public official, or to the media. He believes that this provision is nothing but a means of discouraging individuals wishing to denounce corruption.⁵⁹

In second position, according to the FORSC representative, is the text creating the positions of ministerial spokespersons. This institution constitutes an impediment to information access given that the spokespersons are the only ones authorised to provide information of any sort, no matter how harmless. The spokespersons themselves do not enjoy freedom of expression because they are required to seek the minister's opinion regarding which particular item of information may be made public and in what form.

Finally, the text which has the greatest impact on the right to freedom of expression is the Press Law of 2013.

In reality, that law affects not only journalists, but everyone. Having just been recently promulgated, it is yet to be enforced, but it hangs overhead like the sword of Damocles, as it may be called into use at any time. FORSC is obviously aware of the months-long campaign against the Press Law. In association with the media, numerous civil society associations, and certain political parties, FORSC took part in the media campaign aimed at radically amending the Government bill which, in the final analysis, was promulgated without any substantive changes. FORSC was closely involved in the drafting of the petition addressed to the Head of State, urging him not to promulgate the law in its original form. It participated actively in the mobilisation of petitioners through its networks in Bujumbura and the other parts of the country.

⁵⁹ Interview with Vital Nshimirimana, 23 August 2013.

In the opinion of the FORSC representative, those efforts did not lead to the achievement of the ultimate objective, which was to discourage the Government from adopting an anti-freedom law, but the outcome was not altogether negative for three reasons. Firstly, the challenges from all directions will persuade the authorities to use the anti-freedom provisions of the new law sparingly, and that is the reason why no journalist has been harassed so far, more than three months after the law came into force.

Secondly, public debate scored a significant victory during the period of the examination of the text, its adoption and its promulgation. No piece of legislation has ever before generated so much discussion among members of the political elite, the civil society, media professionals and the general public through the media, at work and recreational premises, and even in households. Another form of expression emerged in the process, and that is the petition addressed to the Head of State, which garnered close to 12,000 signatures, a significant figure in a country where people are not used to expressing themselves publicly or signing documents, for fear of placing themselves in danger. It is an experience that is likely to be replicated in other circumstances.

(b) Samuel Nkengurukiyimana

Samuel Nkengurukiyimna is the President of *Plate-forme intégrale de la société civile burundaise* (PISC).⁶⁰ His opinions are diametrically opposed to those of the President of FORSC and the other civil society associations which struggled to prevent the draft press legislation from being adopted and promulgated without substantive amendments. According to him:

There are no laws that limit or penalise freedom of expression in Burundi. The Constitution and the Press Law recognise the freedom to inform and to be informed. The problem is that journalists do whatever they like: they insult the Head of State and certain other authorities; they engage in biased reporting without ever being prosecuted. There are no journalists in prison, and none of them have ever been injured or killed in the course of exercising their functions. Willy Abagenzinikindi, the journalist who was attacked and wounded at his home and robbed of his professional equipment was in fact attacked by highway robbers.

The President of PISC knows about the campaign against the bill that was carried out by certain political parties, a segment of the civil society and media professionals. In his view, the campaign was not necessary because the previous law (of 2003) is very similar to the new one. Says he:

The general public was hoodwinked by the media and the texts were misrepresented. Regarding the obligation to reveal sources in certain circumstances, that provision, rather than being restrictive, is one that is necessary to ensure security and prevent the commission of certain crimes. The fines (between 2,000,000 and 6,000,000 francs) are not a problem and, on the contrary, are intended to encourage journalists to think hard about what they plan to publish, rather than engaging in licentious journalism and saying whatever they have in mind. In a nutshell, the new law is an excellent law: everyone is going about their business as usual and there is no reported case of this allegedly anti-freedom text having been used against any journalists.

Commenting on the petition addressed to the Head of State, the President of PISC plays down its importance, and raises a number of questions about it: who were the actual signatories of the petition? What is the weight to be given to the 12,000 alleged signatories out of 8.5 million Burundians? Who mandated the signatories to sign the petition?

⁶⁰ Interview with Samuel Ndayikengurukiye, 24 August 2013.

PISC joined other associations in supporting the government bill. Under the umbrella of the *Consortium Société Civile Citoyenne* (SOCIC), 19 associations sent an open letter to the President of the Republic on the subject: "Issues related to the divisive and subversive tendencies of certain Burundian media and civil society organisations". The associations in question expressed their views thus:

A handful of journalists, leaders of organisations and media barons, acting in cahoots with certain civil society leaders and a few politicians, sparked off a relentless and vicious campaign against the draft Press Law in Burundi, which was adopted by the National Assembly and the Senate on 3 and 19 April 2013, respectively.

This was followed [...] by large scale media hype which certain media used to proffer threats and words of intimidation against the President of the Republic and the National Assembly, as well as to defame individual parliamentarians and senators in relation to the proposed bill. The campaign also entails the deliberate distortion and misleading interpretations of the substance of the bill. They also engaged in the manipulation of public opinion and the international community.

The campaign conducted by certain activists against the draft Press Law is aimed at passing a "soft" law that would shield media professionals and press organs from possible legal proceedings in the event of serious lapses or even media offences, as has been regularly observed.

In spite of the campaign against the bill, it was passed without any substantive modifications, and signed into law. However, it would be difficult to accurately measure the impact of the campaign carried out by the associations under the umbrella of the *Société Civile Citoyenne* (SOCIC) in favour of the law, which might simply have been a case of the tail wagging the dog.

3.2 Interviews with law enforcement agencies

In this category, we interviewed the Spokesperson of the National Intelligence Service, a lawyer and member of the Burundi Bar, a high-ranking magistrate who wished to remain anonymous, and a lecturer who also works as a journalist.

(a) Télesphore Bigirimana

The representative of the security service that we interviewed is none other than its spokesperson. ⁶¹ Mr Télesphore Bigirimana, a former journalist of the Burundian press agency, readily agreed to the interview. His position obviously explains the cautious nature and careful phrasing of his answers. He stated that he was aware of the various texts that guarantee the freedom of expression, including the Constitution of the Republic and the Press Law. In contrast, he was not aware of any laws that limit or punish freedom of expression. In his opinion, all the laws that had been adopted were adopted by consensus and were therefore intended to serve the general interest. The Press Law has no negative impact on freedom of expression when one considers the degree of freedom of expression in Burundi as compared to the other countries of the sub-region. He was yet to be affected by a law that limits the freedom of expression.

⁶¹ Interview with Télesphore Bigirimana, 26 August 2013.

(b) Mr François Nyamoya

Contrary to the spokesperson of the intelligence service who has not yet been affected by the law, François Nyamoya, a lawyer, was once a victim when his freedom of expression was violated following a statement he made over *Radio Publique Africaine* calling for the dismissal of the head of the national intelligence agency and describing police officers as "bandits". He spent two weeks in prison and, according to him, would have stayed there much longer had the international community not intervened to secure his release.⁶²

Mr Nyamoya preferred to look at the bright side of his stay in Mpimba prison. He said:

That may surprise you, but my experience was rather positive. As a teacher of law and a lawyer, I discovered an aspect of our judicial system that I would never have known about without the experience. Considered that I was not treated badly, that is the part of the experience that stayed with me, given that there is nothing to be disputed about the fact of being deprived of one's liberty.

His imprisonment did not have any effect on his family life, as he explains:

Probably because, on account of my political activities, my family was somehow psychologically prepared for it in a country where human rights violations are a frequent occurrence, particularly the rights of opposition politicians. ⁶³

In fact, from a material point of view, my family was not affected which, unfortunately, is not the case with many others whose imprisonment has repercussions on their families because they are the main breadwinners for their families.

Regarding specific cases involving the use of anti-freedom laws, the lawyer revealed that when the previous law was still in force, RPA journalists whom he defended, amongst others, were harassed and prosecuted. Under the new law, there are no known cases of such prosecutions.

François Nyamoya referred to the intense campaign against the promulgation of the law of 4 June 2013, both locally and internationally, and pointed out the example of the petition addressed to the Head of State, the media campaign against the adoption of the Press Law, and the petition addressed to the Constitutional Court.

As the lawyer for *Maison de la Presse* and the Union of Burundian Journalists, Mr Nyamoya François was deeply involved in that initiative as a co-drafter of the contribution of the media professionals to the press bill.

He is very familiar with the research carried out on the Press Law as a result of his having participated in it, alongside Mr Gérard Ntahe, an expert on Press Laws, and Professor Pascal Rwankara, a professor of constitutional law. Their critical analyses were not in vain because they were used as arguments against the promulgation of the law and as supporting materials in the petition addressed to the Constitutional Court.

⁶² Interview with François Nyamoya, 3 September 2013.

⁶³ Mr Nyamoya is the Secretary-General and spokesperson of the Movement for Solidarity and Development (MSD), a party that was founded by Alexis Sinduhije and is resolutely opposed to the Government in Bujumbura. The party was banned for four months in March 2014 and 22 of its members were sentenced to life imprisonment after a demonstration organised on 8 March 2014 ended in a confrontation with the police.

Whilst journalists have frequently been prosecuted and sometimes convicted, the case law was largely unknown to Mr Nyamoya. As a legal expert, he has already been personally involved in the application of those laws (investigation and indictment), especially in relation to the violation of the provisions that guarantee freedom of expression.

Mr. Nyamoya took part in the defence of RPA in cases involving its journalists, some of whom were even imprisoned on at least two occasions.

In the first case, the radio station broadcast a report on a fake plot against former President Ndayizeye and former Vice-President Kadege. The journalists had reported on the conduct of the investigation and denounced the false claims of attacks being prepared against political leaders. They had then been charged with violation of the confidentiality of the investigation and breach of public security. They were acquitted.

In the second case, they had broadcast a report on acts of violence perpetrated by the City's Mayor of Bujumbura against an ordinary citizen following an incident in a night club. The Mayor had then lodged a complaint against them for defamation.

In both cases, it was clear that the offence was not established, but the reports had simply made the authorities jittery.

Mr François Nyamoya is very knowledgeable about the international and African treaties or agreements to which Burundi is a party, and states that those instruments are relevant and constitute direct or indirect guarantors of the freedom of expression.

(c) Magistrate X.X.

The magistrate we interviewed demanded strict anonymity in exchange for accepting to answer our questions and express himself freely. This was a prior condition for him to be able to speak out frankly, rather than resorting to the usual clichés. ⁶⁴

The first point, according to him, is that magistrates find it difficult to interpret the legal texts in cases involving the media and journalists. Contrary to the Criminal Code, which is the generic law, the Press Law is specific to the domain and should serve as the authority for magistrates dealing with cases of press offences by journalists. Unfortunately, very few magistrates are familiar with media legislation, a subject that is not taught in the country's law faculties, where they studied. No seminars have been organised to bring them up to speed with the legislation, and apply it in the course of their work. As a result, the tendency is for the magistrates to apply the Criminal Code because they know it, rather than the Press Law, which leads them to deliver erroneous judgments. He suggests that the Ministry of Justice should organise appropriate training in order to remedy the situation.

When asked whether he had ever personally heard a media case, the magistrate said he had not. He regularly talks with journalists and professes to share their concerns when it comes to analysing the charges that are sometimes brought against them. He believes that freedom of expression is the crystallisation of the freedom of opinion, and that preventing a journalist from reporting on any

⁶⁴ Interview with Magistrate X. X., 9 May 2014.

particular topic amounts to preventing him from engaging in the thought process, which is incompatible with democratic principles.

The magistrate laments that the 2013 law compels journalists to release their confidential information sources. According to him:

Revealing the identity of your sources merely exposes them to reprisals. Anyone in possession of ill-gotten gains considers whoever denounces him or her as a mortal enemy. A journalist who denounces criminal activities is performing a function that he chose to perform of his own accord in full knowledge of the risks involved, but ordinary citizens would prefer to remain silent if the information that they provide exposes them to legal proceedings or reprisals.

The fines of two to six million francs which may be imposed on the media are there to encourage journalists to make only statements that are favourable to the authorities so as not to expose themselves to the fines, which may leave them with no alternative but to shut down, considering the precarious financial circumstances of the Burundian press.

We then went on to discuss the delicate matter of the independence of the judiciary in Burundi. The Magistrate was of the opinion that one must call a spade a spade: Burundian magistrates are anything but independent, given that their careers are totally dependent on their degree of docility towards the executive power, which is responsible for appointing them at its discretion. The manner in which they are prepared to deal with "delicate", that is, political cases, determines their career path. He then offered up a few examples.

The Presiding Judge in the case of the alleged perpetrators of the Gatumba massacre was promoted shortly after the verdict was announced. The official of the department of public prosecutions who investigated the case of Ernest Manirumva, the anti-corruption activist murdered in 2009, and whose real killers are reportedly living lavish lifestyles whilst scapegoats are serving heavy sentences, was promoted from the lowest jurisdiction straight to the Supreme Court. The magistrate who heard the Ruvakuki case at the Cankuzo *Tribunal de Grande Instance* was promoted to President of the *Tribunal de Grande Instance* of GITEGA after the journalist was sentenced to life imprisonment.

We also discussed the role of the National Legislative Council, a State organ responsible for studying both Government and private members' bills, harmonising legislative and regulatory texts, and updating and adapting the legislation in force to bring it into line with developments in Burundian society. According to the magistrate, many Government bills are adopted without the knowledge of the National Legislative Council, and it is sometimes the case that staff members of that institution hear about certain laws for the first time after they have been promulgated. For example, it would appear that the text of the 2013 Press Law was not sent to the Council for its opinion.

We concluded our interview by discussing the situation of certain cases opened against journalists, but which have not been dropped or closed with the delivery of a judgment. The magistrate explains:

The fact of the matter is that this is a ploy which involves keeping an empty case file in limbo whilst waiting for the opportunity to charge the journalist with another offence. The dormant charges would be retrieved

⁶⁵ About the Gatumba case, see *supra*, p. 39.

 $^{^{\}rm 66}$ About the Ruvakuki case, see $\it supra$, pp. 32-33.

from the drawer at the opportune moment and piled on top of the other charges faced by the journalist, who would then be treated as a repeat offender.

This is reminiscent of the manner in which the Etienne Ndikuriyo case (discussed below)67 was handled. Legal proceedings were brought against him in 2005, but no legal decision has ever been taken, and the case file is gathering dust in a drawer somewhere.

At the end of the interview, we reassured the magistrate that we would respect his wish to remain anonymous, without which he would not have spoken so frankly.

(d) Athanase Ntiyanogeye⁶⁸

Athanase Ntiyanogeye is a communication lecturer in various Burundian universities and in the University of Butare in Rwanda.

It is therefore quite logical that he admits to being knowledgeable about press-related legislation, beginning with the law of 1976. In this text, which was promulgated during the reign of the single party, UPRONA, there is practically nothing about freedom of expression for the simple reason that journalists were expected to work in accordance with UPRONA guidelines. They had to disseminate the inspiring messages of the Administration from the summit to the grassroots. For example, the reports of the correspondents of the Burundian Press Agency in the provinces had to be cleared by the territorial administration officers before onward transmission to the central editorial team; otherwise the reporters would be treated as outcasts.

Journalists of the editorial team of the national radio station (the television station was created in 1984) and of the state-owned daily newspaper *Le Renouveau* had a duty to broadcast and publish government decisions accompanied by positive comments, and there was zero tolerance for criticism. As he explains:

The situation could not have been otherwise since the country was under the single-party regime. There were no opposition parties, no civil society associations, and no private media. The entire state apparatus was appointed by the administrative hierarchy dominated by the UPRONA party.

Freedom of expression was finally established as a result of the democratisation process initiated in the early 1990s as part of the multiparty Constitution of 1992, which heralded the liberalisation of the press and freedom of association. Several publications were launched, numbering up to around 50 in 1996. However, according to Athanase Ntiyanogeye, those newspapers were produced by non-professionals, and the hunt for scoops at all costs was given priority over professional standards which require sources to be cross-checked before any information is published or broadcast.

He adds that in the aftermath of the assassination of President Melchior Ndadaye in October 1993, freedom of speech was exploited and used instead to send out messages of ethnic hatred, to such an extent that Reporters Without Borders described the Burundian press in 1996 as "hate media".

⁶⁷ About the Ndikuriyo case, see *infra*, p. 69.

 $^{^{\}rm 68}$ Interview with Athanase Ntiyanogeye, 8 May 2014.

In the end, it was the private radio stations set up in the early 2000s that successfully implemented the concept of media pluralism, by giving voice to members of the population in broadcasts during which anyone may express themselves freely on any subject.

Commenting on the law of June 2013, Athanase Ntiyanogeye believes that it is less liberal than the law of 2003 in two areas: the protection of the journalists' sources and the imposition of exorbitant fines. In his opinion, the restriction on the protection of sources has already been enforced in the cases of the Bonesha FM and RPA correspondents who were summoned to the Public Prosecutor's office in Bubanza and asked to reveal the identities of their informers for the story on the alleged distribution of weapons to the Imbonerakure youth group, which is affiliated with the ruling party, the CNDD-FDD.

The fines of between two and six million francs provided for in the law to punish press offences are much too high, and the only possible outcome of imposing them is that the media involved will have to shut down, as they are unable to afford them in any case.

Athanase Ntiyanogeye is not only a lecturer, but he is also a journalist with Burundi National Radio Television [RTNB], which recruited him in 1979. As a journalist, he remembers being the victim of harassment and mental coercion on two occasions. During the conflict between the Burundian government and the Catholic Church, which was sparked off in 1986 by President Bagaza and ended with the expulsion of practically all foreign missionaries, the stringent control of subsidised education by the Government, restrictions on the freedom of worship, and the imprisonment of several members of the local clergy, he and his colleagues were forced to read out statements drafted by the ministry of information at the time. They could not invoke the conscience clause, which was only adopted in the Press Law of 2003.

In 2002, he was prevented from publishing the statement of a member of the CNDD-FDD during the ceasefire negotiations conducted in South Africa, which he was covering at the time. His editor accused him of treason for having allowed an enemy to express himself. Even though he had made sure that his report was balanced, they did not even bother to listen to the information he had gathered. To his great disappointment, his report was simply thrown into the dustbin.

Asked why public media journalists never have any legal troubles, contrary to those of the private press, Athanase Ntiyanogeye explained that, as a result of being subjected to censorship, the public media journalists end up fostering self-censorship. They become docile and broadcast only information that is favourable to the Government in order to avoid any problems. In such circumstances, the journalists take great care not to compromise themselves when it comes to delicate issues.

3.3. Interviews with media practioners

A certain number of journalists have received criminal sentences or have been harassed by the judicial system whilst exercising their functions. Three telling examples come to mind: the cases of Domitille Kiramvu, Jean Claude Kavumbagu, Bob Rugurika and Gabriel Nikundana.

(a) Domitille Kiramvu⁶⁹

Domitille Kiramvu is a journalist with some thirty years of media experience. A graduate of the 1986 batch of the Bujumbura School of Journalism, she was immediately recruited by Burundi National Radio Television, which was then a state-owned monopoly where she would work until 2001. Subsequently, she and a few other colleagues joined Alexis Sinduhije, also a former employee of RTNB, and founded *Radio Publique Africaine* (RPA), where she has been working ever since.

It was from then that her talent blossomed, and she emerged as the most popular journalist in the country. A single and probably apocryphal anecdote would suffice to establish her notoriety: one day, an elderly and illiterate peasant woman went to a store to buy a radio set. Before paying for the set that she had chosen for herself, she inquired whether it could play Domitille Kiramvu's voice, an indispensable condition for her to part with the agreed amount.

Ironically, it was that notoriety that led her to suffer a great deal of harassment and trouble with the law. When the Kassy Manlan affair⁷⁰ broke, Domitille Kiramvu was the presenter of the radio news in Kirundi, and she was interrogated for more than eight hours by the first Deputy Public Prosecutor. For most of that time, she was asked to reveal the sources of her information, but she refused to do so. Amongst all the members of the editorial team of RPA, which broadcast the news in Kirundi, French and Kiswahili, she was the only one who was interrogated. She thinks it might be because the newscasts in Kirundi had a much larger audience than those in the other languages, which are understood by much fewer people in Burundi. Whatever the case, she considered such discrimination as an injustice against her.

She was never prosecuted or imprisoned in relation to the Kassy Manlan affair, but she was tailed on multiple occasions by a vehicle belonging to the "Documentation" [secret police] right to the front of her house. She was forced to spend the night away from home several times after successfully losing her tail. Sometimes, out of cynicism, the vehicles of the "Documentation" services would park in front of her hours for several hours, late into the night, with the aim of traumatising her family, which would stay awake until they had left. An employee of the "Documentation" service eventually informed her that their intention was not to eliminate her physically, but simply to intimidate her, frighten her into silence and, if possible, to cause her to quit her job, but she managed to hang on.

The second case attracted widespread media attention at the time it played out. It was the case of the Public Prosecutor vs. Serge Nibizi, Domitille Kiramvu, Mathias Manirakiza and Corneille Nibaruta (Case No. RP 15605).

The case held Burundian public opinion spellbound for two reasons. Firstly, it involved three of the most popular private radio stations in the country, and four renowned media personalities: Serge Nibizi (Acting Director of RPA), Domitille Kiramvu (famous RPA journalist), Mathias Manirakiza (Director of Radio Isanganiro) and Corneille Nibaruta (Director of Bonesha FM).

 $^{^{69}}$ Interview with Domitille Kiramvu, 13 May 2014.

⁷⁰ Kassy Manlan, an Ivorian national, was the representative of the World Health Organisation (WHO) in Burundi when he was brutally murdered in Bujumbura in November 2001. The Burundian police investigation led to the arrest of a certain number of individuals, including his own secretary, a Burundian citizen. RPA carried out its own investigation and exculpated the accused persons, but implicated certain barons within the circles of power. In the end, the Kassy Manlan case ground to a halt and the truth about his murder has never been established.

Secondly, the case was directly connected to a second case involving very high-ranking political leaders accused of having fomented a coup d'état: the former President of the Republic, Domitien Ndayizeye, the former Vice-President of the Republic, Alphonse-Marie Kadege, a senior officer of the Burundian army, Colonel Damien Ndarisigaranye, Mr Isidore Rufyikiri, a lawyer and member of the Burundi Bar, Dr Alain Mugabarabona, President of the FNL-ICANZO party, and many others.

In November 2006, the four radio stations had simultaneously broadcast information revealing an imminent attack against the palace of the President of the Republic and the residence of the President of the CNDD-FDD (the ruling party), Hussein Radjabu, with the aim of eliminating them physically.

The attack, planned by a group of police officers and demobilised soldiers, was intended to convince the national and international community, whose scepticism was making the Government uncomfortable, of the seriousness of the allegations made against former President Ndayizeye and his co-accused, who had been unceremoniously thrown in jail. At the same time, the attack would make it possible to eliminate all the opponents of the regime, real or imagined.

It all started with a letter of complaint against the three radio stations (RPA, Bonesha FM and Isanganiro), from the Director General of the National Police to the Public Prosecutor of Bujumbura Mairie. Acting on the complaint, the Public Prosecutor charged the four journalists with violating Article 11 of the 2003 law⁷¹ governing the press in Burundi.

According to the Public Prosecutor, the RPA radio station had broadcast information revealing the evidence that the Prosecution had intended to produce in court to prove the guilt of the accused persons in the case against Domitien Ndayizeye *et al.* RPA was therefore accused of publicising information in violation of the principle of the confidentiality of pre-trial investigations.

Serge Nibizi and Domitille were arrested on 24 November 2006, whilst Mathias Manirakiza was arrested one week later. For his part, the Director of Radio Bonesha FM, Corneille Nibaruta, escaped arrest by fleeing the country.

The defence lawyers easily demonstrated that the article relied on did not provide for any punishment, and therefore its violation did not constitute a criminal offence under the law. The Judge agreed with the defence argument and acquitted all the defendants on the grounds that an infringement of the Press Law had not been established.

The Public Prosecutor of Bujumbura Mairie lodged an appeal against the judgment at the Bujumbura Appeals Court as Case No. RPA 3440. The four accused were once again acquitted on the same grounds as the trial judgment, that is, that no crime had been committed. There was no further appeal of the judgment.

Within the context of that case, Domitille Kiramvu was summoned for the first time on 23 November 2006 and asked to appear at the Public Prosecutor's office the following day, 24 November. She was arrested after questioning, and immediately taken to the Mpimba central prison. She described the prison as hell on earth. As soon as she was inside, she was roughed up and insulted by prisoners, who

⁷¹ Article 11 of the law of 2003: "The right to broadcast or publish documents may not be invoked if the said documents relate to: [...] the confidentiality of a judicial investigation at the pre-trial stage".

had probably been bribed by the Administration. They shouted at her: "Do you think you are untouchable? ("Waruziko uri intakorwako?" in Kirundi).

The way she sees it, some prisoners have completely turned into wild animals, having lost all vestiges of humanity as a result of their incarceration at Mpimba prison. However, in exchange for money, she was able to win over some allies who became her bodyguards, providing security for her, cooking for her, and ensuring that she was not poisoned.

She suffered several incidents of bullying. For example, she regularly found dead rats under her bed sheets when she went to bed, which forced her to sleep on the floor in order to have some rest.

She was released provisionally on 7 February 2007. She has this to say: "After the 70 days spent in Mpimba prison, I estimate that I lost 10 years of my life expectancy. I emerged from the prison having lost a great deal of weight, with grey hair, stomach problems and high blood pressure, whereas I had been in very good health when I went in."

She mentioned the sleepless nights during which she did not have a single wink. The schedule itself was designed to cause suffering for the prisoners, who were locked up in their cells at 6 p.m., with lights out as from 7 p.m.

However, she was most affected by the fate of her family:

During my sleepless nights, I was constantly thinking about my three children who were 14, 12, and 8 years old, respectively, at that time: what did they need? Were they healthy? What would happen if one of them fell ill? There is one thing I shall never forget, and that is Christmas day in 2006 and New Year's day in 2007 which I spent without my children.

At this point, her eyes welled up with tears, but she quickly mastered her feelings.

Even though she cannot be certain, she believes the fact that her eldest son, who is normally very intelligent, repeated his class that year, and that her youngest daughter contracted an illness which the doctors were unable to diagnose, are not unrelated to her imprisonment and the trauma they suffered as a result.

Her husband's personal and professional life was also seriously disrupted. Although not used to certain tasks, he was compelled to take charge of everything at home, supervise the children's studies, and drive them to Mpimba twice a week to see their mother, etc. After she was released from Mpimba prison, he asked her if it would not be better to quit such a dangerous occupation and do something else, but after a frank discussion, they agreed that she should pursue her career despite the inherent risks. Her husband arranged for her to receive treatment in the United Arab Emirates, where her stomach problems healed, but the high blood pressure persists to this day.

More recently, Domitille Kiramvu was charged by the Public Prosecutor's office in Bujumbura Mairie following a complaint by the then Mayor of Bujumbura. In October 2010, she reported over *Radio Publique Africaine* (RPA) about a brawl involving the Mayor and a gang of youth in a trendy night club, as a result of which the Mayor sued for defamation. The case was called on nine occasions at the *Tribunal de Grande Instance* of Bujumbura Mairie. She showed up in court on all those occasions but the plaintiff did not condescend to appear even once. Having fallen from grace, the city's Mayor was jailed in 2013

for corruption, and as if by magic, the case was not called again. It is therefore dormant, and may be reactivated at any moment.

Domitille Kiramvu is currently the presenter of the 12.30 news over *Radio Publique Africaine* which the current regime has publicly vilified. Her news bulletin has the largest audience amongst all radio stations, and has made her the most famous journalist in the country. She still receives anonymous calls insulting her, as well as calls from certain authorities accusing her of bias, or threatening her with legal action, but she has become hardened.

In any case, many Burundians appreciate her courage and professionalism. In December 2012, the Ernest Manirumva Prize, named after the anti-corruption activist who was murdered in 2009, was awarded to Domitille Kiramvu, chosen from amongst 13 candidates. The award consists of a cash prize of 1,000,000 Burundian francs (around 700 dollars) and a painting depicting a set of scales, the symbol of fairness and justice for all. At the award ceremony, the French Ambassador, Mr Monsieur Lamy, informed her that she had an invitation to Paris in early 2013.

(b) Jean Claude Kavumbagu

Jean Claude Kavumbagu is the Managing Editor and founder of the online news agency, Net Press.

In the course of the interview, he revealed that he had been imprisoned on five occasions, four times in Mpimba central prison (June 1999 – 13 days; December 2001 – 8 days; September 2008 to March 2009 - 6 months; July 2010 to May 2011 - 10 months) and the fifth time at the presidential police jail (July 2003 - 5 days).⁷²

On the first occasion, he was charged with failure to make a legal deposit for the agency to the judicial authorities of Bujumbura Mairie even though the Press Law of 1997 did not require a deposit for news agencies and radio stations, but only for newspapers.

On the second occasion, he was charged with insulting the Attorney General. This was after a clandestine site known as *Le Témoin* published a scathing attack against the Attorney General, who concluded that the article in question had originated from Net Press.

On the third occasion, he was jailed for insulting the Head of State. This followed reports that the Head of State had taken out huge amounts of money in order to attend the Olympic Games in Beijing. This issue has already been discussed in Part Two of this study.

On the fourth occasion, he was accused of treason in the aftermath of the Al Shabbab attacks in Uganda. He had written that the group involved could easily attack Bujumbura considering the laxity that is characteristic of the security forces. At the end of the trial, he was sentenced to eight months' imprisonment after having spent ten months in the Mpimba central prison. The case has already been discussed in Part Two of this study.

As to his imprisonment at the presidential police jail, he was accused of having links to a site that criticised Burundian authorities.

⁷²Interview with J.C. Kavumbagu, 25 August 2013.

Regarding cases of judicial harassment, the agency was banned on three occasions: for eight months in 1997; 36 days in 2002; and one week in 2005. The first ban was imposed after the agency was accused of publishing information that had been censored in the printed copies of the newspaper *Aube de la Démocratie*. The second ban came after the director of the agency was accused of making a triumphant statement upon his release from prison on 29 December 2001.

Mr Kavumbagu also mentions the numerous appearances before the appeals courts following trials at the end of which he was acquitted and the Public Prosecutor lodged appeals.

According to him, the reason for the legal proceedings against him was that government authorities wanted to intimidate him and dissuade him from providing information to the public on matters that they were trying to conceal.

As far as he is concerned, the court cases did not hamper his work for several reasons. To begin with, both national and international opinion were on his side. He even won an award in the United States after his release in May 2011. However, the proceedings have had an impact on his journalists, who are wary of reporting on certain issues for fear of being sent to prison. That is the reason why he organises meetings from time to time to boost their morale.

In the latest case involving his imprisonment at the national "Documentation" service, he ended up paying a settlement fine of 100,000 Burundian francs.

Mr Kavumbagu describes the detention conditions as deplorable, citing the example of overcrowding. For example, in May 2011, there were 3,495 inmates in the prison which has a capacity of 800. Remand prisoners made up 72.2% of the total, as against 27.8 % for convicted criminals, which is abnormal. Given the circumstances, it goes without saying that the hygienic conditions, even without getting into the details, leave a lot to be desired. The feeding conditions are equally disastrous.

In spite of his long criminal record, he continues to work, and there has been no impact on his family or in the community, which frequently sings his praises for having survived so many hassles.

On the contrary, his colleagues are afraid of covering certain subjects for fear that he could end up once more in prison, or they could be imprisoned.

The Association of African Journalists paid his legal costs, which amounted to USD 3,000 because he was defended by four lawyers.

(c) Gabriel Nikundana

Gabriel Nikundana has suffered harassment whilst performing his duties as a journalist.⁷³ He was accused of doing the enemy's bidding, in other words, of treason. He was forced to pay a fine of 200,000 Burundian francs for his release, and that is where the case ended.

These are the facts of the case: In 2007, the former Head of State, Domitien Ndayizeye, former Vice-President Alphonse Kadege and other personalities were arrested on suspicion of plotting a coup d'état. Gabriel Nikundana was tasked with investigating the case, which turned out to be a complete fabrication. He broadcast the information over his radio station, and that is when his troubles began.

⁷³ Interview with Gabriel Nikundana, 20 September 2013.

Firstly, he learnt that he was being targeted by the National Intelligence Service. Subsequently, he received several summonses. It was then that he decided to flee to Uganda, where he lived the life of hardship of an exile. He was forced to sell some of his property just to survive before he was given assistance by Amnesty International. He was swindled by a fellow compatriot who took away all his documents and refused to return them unless he paid a huge amount of money that he did not have. In order to avoid a fateful encounter with the Ugandan police, he slept during the day and ventured out only after nightfall. A Congolese scoundrel who had learnt from the newspapers that he was a refugee in Uganda passed himself off as Mr Nikundana and swindled Reporters Without Borders. Mr Nikundana finally returned to Burundi in January 2007, only after the release of the individuals that he had defended.

For Gabriel Nikundana, the consequences of his harassment were many and varied. Imprisonment and exile are terrible ordeals for the family that is abandoned by the victim, who does not know when they will be reunited. They can lead to serious health conditions, such as hypertension resulting from a situation of permanent stress.

At the professional level, whether you admit it or not, your enthusiasm is curbed. You are always worried that whatever you are doing may lead to unpleasant consequences. His professional colleagues became increasingly afraid of tackling certain so-called burning issues. In 2003, his publisher, who had fallen ill, prevented him from reporting on certain matters in order to avoid problems with the political authorities. Since he had interviewed the spokesperson of the rebels who were detested by a part of the Burundian population, Mr Nikundana was considered as their accomplice, and forced to stay away from certain circles.

In 2007, he was already a married man and family head. He continued receiving his salary, but no one knows whether this would have been the case had he stayed in exile for years.

Gabriel Nikundana believes that when all is said and done, his trials and tribulations had one positive effect: he has learned to navigate his way through difficult situations and to fend for himself. Subsequently, the news that the suspects whose innocence he had proclaimed had been released was a source of pride for him because of the sense of a job well done.

(d) Bob Rugurika

Bob Rugurika,⁷⁴ in his capacity as Editor-in-Chief of *Radio Publique Africaine*, has had to face systematic judicial harassment. By way of illustration, he received 10 summonses to appear before the Public Prosecutor over a period of four months, from July to November 2011. On 10 July, he was interrogated for over one hour by the Public Prosecutor for having devoted a broadcast to an open letter dated 23 June 2011 from Pancrace Cimpaye, the spokesperson of the opposition party FRODEBU (Front for Democracy in Burundi), who was in exile at the time, to the President of the Republic.

According to RPA, which interviewed Bob Rugurika, the disclosure of that information was characterised by the Public Prosecutor as an insult against the Head of State. Bob Rugurika was further accused of having broadcast certain extracts of a statement from the US Secretary of State, Hillary Clinton, dated 18 June 2011, in which reference was made to the Arab spring, among other issues. The broadcast of this information was considered by the Public Prosecutor as a "call to a popular uprising".

⁷⁴ Interview with Bob Rugurika, 3 September 2013.

On 20 July 2011, two days after he had been summoned, he was once again questioned about the coverage of the press conference organised by ADC-IKIBIRI on 13 July to denounce the increase in the cost of water. This was after reports on sensitive issues such as the extra-judicial killings alleged to have been carried out by State agents and the misappropriation of public funds. Cases were regularly opened against him, but never closed, with the result that he can once again be summoned at any moment, which creates a feeling of permanent apprehension. Each time he answered a summons, he did not know whether he would be allowed to return home.

The harassment did have a catastrophic effect on his family. His wife was forced into exile in Europe as a result of the permanent situation of insecurity. Each time a vehicle stopped in front of their house, she feared that they had come to arrest him. The hardest part was on the days when he was summoned to the Public Prosecutor's office: her life would come to a standstill until his return. She was driven into exile because of this permanent atmosphere of insecurity.

On the professional front, Bob Rugurika admits that such incidents disrupt his work. He is haunted by persistent fear and the feeling of being watched everywhere he goes. Even though he is regularly encouraged by his entourage, there is an effect on him, given that he is prone to anxiety when working on certain delicate issues.

Following the promulgation of the new Press Law, the journalists of his editorial team are afraid of reporting on certain matters in case they are compelled to reveal their sources. Bob Rugurika thinks that the journalists are shying away from issues that require investigative journalism, preferring instead to focus on factual reporting. Some information that would be of great interest to the public is simply swept under the carpet because of the fear of possible consequences. He concludes: "Women journalists in particular are not assigned to cover delicate stories unless they themselves volunteer to do it. The men, who are supposed to be much tougher, are sent to do those jobs".

3.3.1 Editors and publishers

There are two categories of media in Burundi: public media and private media. The public media have no major problem with the new law because they are adept at providing "guidance" to their journalists, who know what can or cannot be said, and are aware of the issues that have to be sidestepped. In short, even when censorship is not openly practised, as in the case of the national television, self-censorship is prevalent although the individuals involved may not admit it.

(a) Mr Emmanuel Ngendanzi

Mr Emmanuel Ngendanzi is the Director of the National Radio network (state-owned).⁷⁵ A trained journalist and active member of the Burundian Association of Broadcasters (ABR), he has extensive knowledge of the legal media framework, having worked in the media for close to 25 years. He frankly acknowledges that the Press Law curtails freedom, as suggested by a great many media professionals. The Law logically has the greatest impact on the freedom of expression, particularly by way of the article requiring journalists to reveal their sources of information.⁷⁶

 $^{^{75}}$ Interview with Emmanuel Ngendanzi, 4 September 2013.

⁷⁶ Mr Emmanuel Ngendanzi was relieved of his functions shortly after our interview with him. According to certain sources, he was apparently a victim of his liberalism, which was considered by his heads as unbecoming.

The previous law has already been used against journalists. He cites the case of the Director of Net Press agency who was sent to prison for publishing an article denouncing the exorbitant amounts disbursed to fund the Head of State's attendance at the Olympic Games in China. He was jailed for refusing to reveal his sources.

Mr Emmanuel Ngendanzi is aware of the campaign conducted by media professionals against the draft law, as well as with the petition against the bill which garnered close to 12,000 signatures. Unfortunately, the campaign was not successful in that it failed to stop the law from being promulgated. As a member of the Burundian Association of Broadcasters (ABR), he took part in both initiatives whilst keeping a low profile on account of his position. Lastly, he is aware of the research done on the draft law by legal experts. He mentions Mr François Nyamoya, Mr Gérard Ntahe and Professor Pascal Rwankara.

Mr Emmanuel Ngendanzi, as the director of a public media organ, believes that the National Radio has not been affected in any way by the law in force. His station has not failed to broadcast any information because of the current law or the previous one.

He denies that self-censorship is a reality and concludes by stating that his editorial line protects his radio station: it is free to broadcast what it wishes, but his professionalism and sense of responsibility protects it from legal proceedings, which would be unjustified.

His station's relationship with the Government, which subsidises it, has always been very good, and they have never had anything to do with the courts or the National Intelligence Service.

(b) Patrick Ndikumana

Patrick Ndikumana is the director of the community station Bonesha FM which, alongside RPA and Radio Isanganiro, is regularly summoned by the judicial authorities.⁷⁷ He explains that the new law, in one way or the other, has an impact on the manner in which information is processed:

Even when you try to observe ethical principles and the code of conduct, you are always wondering whether you may not have violated one or the other provision of the new law. Each morning, we review the previous day's broadcasts to determine whether we have not given the authorities an opportunity to strike. Action may be initiated by the National Communication Council which, pursuant to one provision of the new law, may shut down a media outlet after three warnings. Considering that the National Communication Council receives its orders from the Government, we are afraid of being forced to close down at any moment. Furthermore, we can also be targeted by the judicial system which may impose such heavy fines on media outlets that they might as well be directly ordered to shut down. As a result, the station may find itself compelled to refrain from broadcasting certain types of information. For example, information about rebels may simply be shelved since it is possible for those responsible to be prosecuted for "enemy propaganda in times of peace or in times of war", if such information is made public.

Other items of information may not be broadcast because of the need to protect one's sources. This would happen if the source demands that his or her identity should not be revealed. It is only after a source formally accepts to be cited that the information is broadcast.

All these precautions insidiously lead to self-censorship, which is the worst enemy of the freedom to inform.

⁷⁷ Interview with Patrick Nduwimana, 30 August 2013.

The Director of Bonesha concedes that the campaign against the adoption of the law of June 2003 was a failure, but adds that Radio Bonesha and the other associations and media outlets which took part in the campaign will not give up. They are determined to resume the fight for a less restrictive law whenever the opportunity arises. He concludes:

For the time being, the Government has become more flexible and is allowing the media to operate freely, but with the 2015 elections coming up soon, things are likely to change. The provision prohibiting the media from covering unauthorised gatherings will undoubtedly be one of those that will be most frequently used to prevent the general public from being informed about the activities of opposition parties. Nevertheless, in spite of everything, the private press will continue to do its job.

3.3.2. Interviews with Journalists

(a) Esdras Ndikumana

Esdras Ndikumana is the correspondent for Radio France International (RFI)⁷⁸ in Bujumbura. During our interview, he said that he knew the legislative framework for the media in Burundi very well in his capacity as a seasoned journalist, and also as a member of the Burundian Media Observatory. He states that the Press Law restricts freedom of expression insofar as it requires journalists to reveal the sources of their confidential information. He further refers to the restrictions in respect of information relating, for example, to State security, the national debt, or the national currency. The new law is yet to have any negative effect on the freedom of expression, but whilst the previous law was still in force, he was personally affected on one occasion: during a sensitive assignment he was undertaking for French television in 2011 (specifically a news feature on the existence of a Burundian rebel movement operating in the East of the DRC), he was charged with espionage. In spite of what happened to him then, he does not practice self-censorship like his media colleagues. He is somehow untouchable on account of the influence of Radio France International. He is able to cover delicate issues such as corruption or bad governance without any overwhelming fear of harassment or arbitrary legal proceedings as is the case with journalists working for the local media.

(b) Philibert Musobozi

Mr Philibert Musobozi has been a direct victim of judicial harassment. He was prosecuted for disclosing information involving a former mayor of Bujumbura. He was summoned by the Office of the Public Prosecutor of Bujumbura Mairie, and subjected to a two-hour long interrogation before being released. A case was opened at the *Tribunal de Grande Instance*, and over the course of one year, he was regularly summoned to answer to the crime of defamation. The case ended abruptly when the Mayor of Bujumbura dropped the charges after losing his position. As a result, he was never given a custodial sentence, or ordered to pay a fine.

That notwithstanding, any such case has an impact on family life, given the stress that family members have to endure because they are worrying about whether their loved one would return from the interrogation or be whisked off directly to Mpimba prison. In particular, the spouse starts wondering what would become of her and the children, in the absence of the moral and material support of the family head.

⁷⁸ Interview with Esdras Ndikumana, 1 September 2013.

Lastly, harassing a journalist has an obvious impact on his/her colleagues who then shy away from tackling sensitive issues in order not to suffer the same fate. Women, in particular, refrain from assuming high-profile responsibilities, which influences the assignment of tasks during editorial meetings.

3.4 Description of campaigns to reform laws

The 1990s witnessed the advent of democratisation in Africa.

Burundi was not spared by this phenomenon, and press freedom was one of the characteristics of the new era. Accordingly, one year before the multi-party elections of 1993, Burundi adopted a Press Law on 26 November 1992, which was to be repealed four years later by Legislative Decree No. 1/006 of 21 March 1997.

In spite of the democratic progress achieved, those two initial texts were not well received by media professionals, who described them as anti-freedom. On the contrary, Law No. 1/025 of 27 November 2003 was favourably received because it ushered in important innovations in relation to the previous texts.

The main innovations of this law were its explicit inclusion of provisions on:

- the conscience clause
- protection of journalists' sources;
- government assistance to private media;
- exemption from transaction taxes;
- notification before the publication of all newspapers and periodicals, rather than prior authorisation; and
- limiting the legal deposit to a single copy instead of two, which should be done at the time of distribution rather than several hours before.

However, the imposition of custodial sentences and much heavier fines than those prescribed in the Criminal Code for the same offences has been systematically challenged by the journalists.

The need to remedy the shortcomings in the 2003 law was raised during the National Conference on Media and Communication held in Gitega from 4 to 5 March 2011. On that occasion, the Minister of Communication underscored the need to develop a shared vision of communication in Burundi in order to guarantee the sector's development. She further stressed that this could only be achieved by taking into account the proposed improvements to the current legal framework, in which the Press Law has pride of place.

However, the draft law tabled by the Government elicited a strong reaction from media professionals, who felt that they had been short-changed with regard to their expectations. They teamed up with a segment of the civil society and the political class and launched a multifaceted campaign to dissuade Parliament from passing the law, considered by them to be anti-freedom. After the passage of the law, they addressed a petition to the Head of State urging him not to promulgate it.

Whilst the Government bill was being debated in Parliament, the media professionals scheduled a series of radio broadcasts during which they appealed to various political actors and representatives of

the civil society for their support. Articles deploring the bill were published in the private print media. In October 2012, they submitted a document to Parliament entitled *Draft Press Law of Burundi – Contribution of Media Professionals*, in which they suggested amendments, identified the restrictions on freedom of expression contained in the bill, and proposed changes intended to bring it into line with the international instruments on human rights to which Burundi is party.

On 3 May 2013, the World Press Freedom Day was devoted solely to debating the controversial draft law. The final outcome was disappointing, as Parliament totally ignored the contribution of the media professionals and adopted the Government bill without any significant changes, even though the National Assembly committee tasked with studying the text in detail had proposed amendments that were unanimously acclaimed by the media.

After the law was adopted, it was duly submitted to the Head of State for promulgation. The media professionals then prepared a petition, signed by those who supported it, in which the Head of State was urged not to confirm the law. The petition drew close to 12,000 signatures, and yet this was not enough to dissuade the Head of State from promulgating the new law on 4 June 2013.

The media professionals did not abandon the struggle. They filed an application to the Constitutional Court, through two lawyers, challenging the constitutionality of the law. In a judgment delivered in January 2014, the Constitutional Court invalidated two articles of the law (Articles 61 and 62) on the grounds that the settlement fines prescribed are not provided for in the Burundian criminal justice system. In other words, it would suffice to delete the word "settlement" ["transactionnelle" in French], in order for the entire text to be constitutional. The restrictions on the protection of sources, as well as on the subjects that journalists are authorised to investigate, were all adjudged to be constitutional.

On 19 July 2013, the Union of Burundian Journalists, assisted by Media Legal Defence Initiative, filed a petition against the State of Burundi, represented by the Attorney General, before the East African Court of Justice.

The Applicants argued that, by adopting the Press Law of June 2013, Burundi was in breach of the fundamental principles of the East African Community set forth in Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community. More specifically, the Union submitted that the Law restricts freedom of expression, which is the touchstone for the Community's principles such as democracy, the rule of law, accountability, transparency and good governance. Further still, the Press Law violates Burundi's obligation, enshrined in the Treaty, to recognise and promote human and peoples' rights in accordance with universally accepted human rights standards, given that the Law violates freedom of expression. Specifically, the Press Law violates the rights of journalists to protect their sources. It also contains disproportionate restrictions to the freedom of expression of the media; unlawfully imposes a censorship regime for films produced in Burundi; provides for a right of reply and rectification, which undermines the rights of the media to freedom of expression; and, lastly, imposes a regime of fines and penalties that are unduly restrictive and contrary to the generally accepted principles of criminal procedure. The case was adjourned until January 2015, for supplementary information on the part of both parties.

⁷⁹ Petition filed by the Union of Burundian Journalists against the Attorney General of Burundi before the East African Court of Justice, 19 July 2013. The proceedings are still pending before the Court.

Professional media organisations were at the frontline of the struggle against the promulgation of the law and, after the law was promulgated, they petitioned the Constitutional Court to declare the law unconstitutional. The organisations in question are: the Union of Burundian Journalists, the Burundian Association of Radio Broadcasters (ABR), *Maison de la Presse*, the Association of Women Journalists (AFJO), and the Association for Freedom of Expression. As we already know, the outcome was not positive.

Several local, regional and international organisations also took part in the campaign, including FORSC, FOCODE, ACAT, OLUCOME, and APRODH at the local level. The Association of East African Journalists, the Federation of African Journalists, the International Federation of Journalists, Article 19, Media Legal Defence Initiative, *Institut Panos Paris*, ONG 11.11.11, and many others also supported the campaign.

The diplomatic community, far from standing idly by, threw its considerable weight behind the campaign against the promulgation of the Press Law and, following its promulgation, publicly expressed its disapproval. On 26 April 2013, with the agreement of the heads of European diplomatic missions in Burundi, the European Union Delegation issued a statement on the press bill. The Delegation noted the adoption by the Burundian Senate on 19 April of a new law amending Law No. 1/025 of 27 November 2013 governing the press in Burundi. It expressed its concern about certain provisions which appeared to be of a nature to undermine the principles of freedom of the press and expression, as recognised by the Burundian Constitution and several international legal instruments, including the International Covenant on Civil and Political Rights, to which Burundi is a party, which protects the freedom of expression within the context of civil rights and freedoms.⁸⁰

The Delegation further noted that the ill-defined provisions of the new law relating to waivers in respect of the confidentiality of sources, the subjects on which journalists may not report, and the prerogatives of the National Communication Council, raise questions about their intended objective. The adopted provisions are not in keeping with the rules and principles of the International Covenant, particularly as concerns the principle of proportionality.

Shortly thereafter, on 5 June 2014, the UN Secretary-General, Ban Ki Moon, voiced his disappointment following the promulgation of the new Burundian Press Law, which may potentially imperil freedom of expression in that country.

"Mr Ban emphasises that the right to freedom of expression and pluralistic and free media are essential components of a healthy democracy", said the Secretary-General's spokesperson in a press release. Using diplomatic but unequivocal language, the Secretary-General, according to his spokesperson, urges the Government of Burundi to ensure that its legal framework is aligned with the country's democratic tradition, as well as international human rights standards. ⁸¹

On 6 June 2013, two days after the promulgation of the law, the French Minister of Foreign Affairs released a communiqué in which France expressed its concern following the promulgation by the Burundian authorities of a Press Law that is out of line with Burundi's international commitments. "The

⁸⁰ European Union Delegation in Burundi, ccas.europa.eu|delegations|burundi|press_comerf.

 $^{^{\}rm 81}$ Breaking news from the UN News Service, www.un.org.

communiqué urged the Burundian authorities to respect press freedom and the commitments made during the Burundi Development Partners Conference in Geneva". 82

In a statement on the promulgation of the Law of 4 June 2013, released through its embassy in Burundi on 10 June 2013, the United States said it was deeply concerned by the controversial law which imposes restrictions on standard journalistic practices by exposing journalists to heavy fines.⁸³

"The United States shall continue to stand firm against any actions that undermine democratic progress", the statement continues, urging the Burundian Government to comply with its obligations as a signatory of the International Covenant on Civil and Political Rights, and respect its commitments under the Universal Declaration of Human Rights.

Lastly, Belgium, the former administering power of the trust territory of Burundi, reacted on 9 July 2013 with an appeal by its Minister of Foreign Affairs, Didier Reynders, to the Burundian authorities to exercise the "greatest caution" in the enforcement of a certain number of laws on public freedoms, such as the new and controversial Press Law, two years from the general elections of 2015.⁸⁴

It is noteworthy that, setting aside China, the European Union, France, the United States and Belgium are Burundi's leading development partners, financing half of the country's annual budget in the form of development aid.

The Special Rapporteur on Freedom of Expression and Access to Information plays a key role in the defence and protection of the right to freedom of expression. Her Activity Report for 2013 states that, on 24 and 25 June 2013, in collaboration with the Centre for Human Rights of the University of Pretoria, she organised a stakeholders meeting on the "Decriminalisation of Laws Limiting Freedom of Expression and the Safety of Journalists in Eastern Africa" Bujumbura, Burundi.

The 2013 Rapporteur's Report reveals that a letter was sent to President Nkurunziza appealing to him not to promulgate the draft law because it contained provisions that violate international conventions of which Burundi is a State Party.

In line with her mandate to "Make public interventions where violations of the right to freedom of expression and access to information have been brought to her attention, including by issuing public statements, press releases, and sending appeals to Member States asking for clarifications," the Special Rapporteur forwarded a joint letter of Appeal to the Republic of Burundi during the period under review. 86

On May 30 2013, the Special Rapporteur, together with the Special Rapporteur on Human Rights Defenders, Honourable Commissioner Reine Alapini-Gansou, sent a joint letter of Appeal to the Republic of Burundi on the adoption of a new Draft Media Law by Burundi's National Assembly and Senate on 3 and 19 April 2013 respectively.

 $^{^{\}rm 82}$ http://www.diplomatie.gouv.fr/fr/dossiers-pays/burundi/.

www.afriquinfos. com. etats-unis.

⁸⁴ www.Rtbf.be|info|monde|detai|.

⁸⁵ Special Rapporteur on Freedom of Expression and Access to Information, 2013.www.achpr.org/fr/sessions/54th/intersession.../freedom-of-expression/.

³⁶ Ibidem.

Whilst commending the adoption of the Law, the Special Rapporteurs expressed concern about certain provisions in the Law, in particular **Articles 6, 16, 18, 19, and 60**, which are reported not to comply with the African Charter, the Declaration on the Principles of Freedom of Expression in Africa (the Declaration), the UN Declaration on Human Rights Defenders (the UN Declaration), and other international and regional standards on freedom of expression and access to information.

In the letter of Appeal, the Special Rapporteurs respectfully made a humble appeal to H.E Pierre Nkurunziza, President of the Republic of Burundi, to take their concerns about the Law into account and make amendments to the same, so as to ensure that it fully complies with the African Charter, the Declaration, the UN Declaration and other applicable international and regional standards on freedom of expression and access to information.

They underscored **Article 9** of the African Charter, **Article 6** of the UN Declaration, and also highlighted **Principles I (1), X (2), XII (1) and XIII (1)** of the Declaration.

Section Four: Conclusion and recommendations

It has been repeatedly stated that Burundi is a party to the international instruments that proclaim and guarantee freedom of expression. The ratification of an international convention is not a matter to be taken lightly, but rather a commitment to adhere to all its provisions and to put in place at the national level a legal and regulatory framework for their effective implementation.

Admittedly, Burundi's Constitution sets out and guarantees the human rights proclaimed in the international instruments, but their enforcement is hampered by a body of laws that sometimes fly in the face of those rights. We have cited the example of the 2013 Press Law, several aspects of which curtail freedom; the law on public meetings and events; the anti-corruption law, whose Article 14 deters individuals wishing to denounce cases of corruption, particularly since the Burundian Criminal Code does not admit the defence of truth; and lastly, the creation of the top-down position of spokespersons within the Administration, thereby preventing the general public from keeping abreast of what is really happening at the summit of government institutions.

In addition to the laws criminalising freedom of expression, of note is the fact that the judicial system frequently acts on the orders of Government authorities and, when requested by the latter, is quick to harass journalists because of their professional activities. We have provided examples of such harassment, where only journalists of the private media are targeted.

By way of conclusion of this study, we would like to make the following recommendations:

1. Legislation

The Government must understand that it is counter-productive to institute a legislative framework that criminalises press freedom and, by extension, democracy. Burundian political leaders are constantly proclaiming that Burundi is a democracy in which freedom of expression is unrestricted. They should match their words with action by amending the provisions of the laws that curtail freedom, as follows:

1.1. The Press Law

Protection of journalists' sources

Article 16 of the Press Law proclaims the protection of journalists' sources, but Article 20 of the same law curiously limits the principle by introducing exceptions that void it of any substance. Short of removing it altogether, as in the case of the 2003 Press Law, the article should be amended to align it with the provisions of Article XV of the Declaration of Principles on Freedom of Expression in Africa, which institutes reasonable limits.

Insult against the Head of State

The crime of insult against the head of State should be eliminated to reflect the situation in modern democracies. Alternatively, magistrates should approach this type of offence with the greatest caution in order to remain within the meaning of Article XII of the Declaration of Principles on Freedom of Expression in Africa.

Public order and security

Public order and security are fundamental rights, as well as a prerequisite for the exercise of the individual and collective rights set forth in Article 28 of the Universal Declaration of Human Rights. It is against this backdrop that the Press Law prohibits journalists from publishing or broadcasting information that could threaten public order and state security. However, Press freedom may only be restricted where there is a risk of harm to a legitimate interest, that is, in case of a real and imminent danger, if the danger is serious, or if there is a close causal link between the expression and the harm, as set out in Article XIII of the Declaration of the Principles on Freedom of Expression in Africa.

Exorbitant Fines

The exorbitant fines prescribed in the Press Law have as their sole objective to bankrupt the media. They should be reduced to reasonable levels compatible with the economic situation of the country and, by the same token, with the financial circumstances of the Burundian media. At their current levels, the fines are contrary to Article XII of the Declaration on the Principles of Freedom of Expression in Africa, which provides that "sanctions shall never be so severe as to inhibit the right to freedom of expression [...]".

1.2. The Criminal Code

The Criminal Code, like the Press Law of Burundi, provides for and punishes the crime of defamation. Anyone accused of defamation is presumed to have acted in bad faith and with malicious intent. Some countries' laws stipulate that the accused person may be acquitted if he/she produces evidence of the truthfulness of the allegations. This is known as the proof of the truthfulness of the defamatory statement, or the defence of truth. Burundian lawmakers should adopt a similar provision that is consistent with Article XII of the Declaration of the Principles of Freedom of Expression in Africa, which states that "no one shall be found liable for true statements, opinions [...] which it was reasonable to make in the circumstances"

1.3. The Anti-Corruption Law

Whereas the offence of defamation in the Criminal Code is punishable by a prison term not exceeding five years or a fine of 10,000 francs, or both, the anti-corruption law considers it as a serious offence punishable by five to ten years' imprisonment and a fine of between 500,000 and one million francs. The punishment is excessively harsh and could potentially hamper the exercise of freedom of expression. It is abundantly clear that the objective sought here is to intimidate.

1.4. The Law on public meetings and events

Articles 4, 5, 12 and 13 of this law should be modified to ensure that the freedom to organise meetings and rallies proclaimed in Article 1 is not merely an empty shell.

(a) Burundian Journalists

As we have already seen, Burundian journalists are faced with several challenges as a result of legislation that impedes the exercise of their profession. Some of them have been the victims of harassment by the police and the judiciary, whilst others have been imprisoned. They must continue to hold firm and not allow themselves to be discouraged, as freedoms must be fought for and will not be offered on a silver platter. They must act in a professional manner at all times by observing the law and the code of ethics that they themselves adopted. That is the price that must be paid for the survival of a free press.

(b) Magistrates

The Burundian justice system has to deal with press offences on a regular basis. It has to prove itself to be independent of the political authorities, and treat them impartially, even if this might be costly to them at times. The credibility of magistrates will be measured on the basis of their independence in rendering justice, in spite of the pressure exerted on them from various angles.

In any case, magistrates who hear cases involving journalists should adjudicate such cases without undue delay. Etienne Ndikuriyo is a journalist who was arrested in June 2005, detained for 16 days in the holding cells of the "Documentation" service, and thereafter transferred to Mpimba central prison. Accused of "insulting the Head of State", he was granted provisional release and ordered to appear before the Prosecutor three times per week. His case is still at the pre-trial investigation stage. It has neither been dismissed nor settled with a conviction or an acquittal. The former journalist, currently employed by the Burundian Red Cross, may be summoned to appear before an investigating magistrate or a judge at any moment, seven years after his provisional release. The case is a sword of Damocles hanging over his head, and he is not alone in that situation.

(c) The International Community

The international community should continue to exert pressure on Burundi to adopt a legal framework for the press that is in keeping with international standards, since the community is quite capable of achieving results when it is really determined to do so. If Hassan Ruvakuki, the correspondent for Radio France International, had not received the support of France, he would probably still be behind bars like his co-accused who were not given similar support, and who continue to rot in various prisons across the country amidst total indifference. Despite the respectful appeals of the Special Rapporteur on Freedom of Expression urging the Burundian Government to exercise greater restraint, the draft Press Law was adopted without any changes.

The Special Rapporteur should continue to draw the attention of the Burundian Government to the compelling need to institute a legal framework that is in line with its international obligations. It may be useful for her to visit the country again.