

Genocide denial and freedom of political expression in the *Ingabire* case

Charles A Khamala*

ABSTRACT: Despite the International Criminal Tribunal for Rwanda having convicted numerous *genocidaires*, some genocide sympathisers still deny the genocide. Such a corruption of scholarship inflicts secondary victimisation on Tutsi ethnic minorities. In *Ingabire Victoire Umuhoza v Rwanda* the African Court on Human and Peoples' Rights rejected an opposition leader's conviction and sentence for her 'double genocide' statement, finding that the state could have adopted less restrictive measures to attain legitimate national security purposes. To evaluate Rwanda's genocide minimisation laws criminalising public incitement to divisionism, this article applies Waldron's argument endorsing hate speech regulations in liberal democratic societies. Comparisons are made with the 'Auschwitz lie' laws in European continental jurisdictions and common law countries. Provided that the dignity of affected persons is eroded by discrimination and defamation, even the European Court of Human Rights upholds genocide denial laws. The US Constitution does not do so. Instead, critics of hate speech regulation encourage civic dialogue to retain the issue of genocide in public memory. Counterfactually, Cohen praises the minority who refuse to deny the pain and suffering of others. Because theory matters, I use the Millian principles to analyse the African Court's interpretation of the Rwandan Supreme Court's *Ingabire* decision, in relation to the state's expressive freedom obligation in article 9 of the African Charter on Human and Peoples' Rights.

TITRE ET RÉSUMÉ EN FRANCAIS:

Négation du génocide et liberté d'expression politique dans l'affaire *Ingabire*

RÉSUMÉ: Certains partisans du génocide continuent de nier le génocide bien que le Tribunal pénal international pour le Rwanda ait condamné de nombreux génocidaires. Une telle corruption dans la littérature inflige une seconde victimisation aux minorités ethniques tutsi. Dans l'affaire *Ingabire Victoire Umuhoza c. Rwanda*, la Cour africaine des droits de l'homme et des peuples a rejeté l'inculpation et la condamnation d'un leader de l'opposition pour propos qualifiés de « double génocide » en estimant que l'État aurait pu adopter des mesures moins restrictives pour atteindre des objectifs légitimes de sécurité nationale. Pour évaluer les lois rwandaises relatives à la minimisation des crimes de génocide et qui criminalisent l'incitation publique au divisionnisme, cet article applique l'argument de Waldron adoptant les règles relatives au discours de haine dans les démocraties libérales. Des comparaisons sont faites avec les lois de « Auschwitz » dans les juridictions continentales européennes et les pays de la tradition *common law*. Pour autant que la dignité des

* Senior Lecturer, Africa Nazarene University Law School; PhD (Université de Pau et des Pays de L'Adour), LLM (London), LLB (Hons) (Nairobi), PGDip in Law (KSL); Advocate of the High Court of Kenya; Member ADC-ICT, List of Counsel: ICC, IRMCT, African Court on Human and Peoples' Rights; chalekha@yahoo.co.uk; c.khamala@anu.ac.ke

personnes affectées est érodée par la discrimination et la diffamation, même la Cour européenne des droits de l'homme retient la légalité des lois sur la négation du génocide. Il n'en n'est pas ainsi de la Constitution américaine. Au contraire, les détracteurs de la réglementation du discours de haine encouragent le dialogue civique à maintenir la question du génocide dans la mémoire publique. À l'inverse, Cohen loue la minorité qui refuse de nier la douleur et la souffrance des autres. Parce que la théorie compte, j'utilise les principes de Mills pour analyser l'interprétation donnée par la Cour africaine de la décision rendue par la Cour suprême du Rwanda dans l'affaire *Ingabire*, en ce qui concerne l'obligation de liberté expressive de l'Etat énoncée à l'article 9 de la Charte africaine des droits de l'homme et des peuples.

KEY WORDS: hate speech regulation, freedom of expression, Rwanda, liberal democracy, African Court on Human and Peoples' Rights, *Ingabire*

CONTENT:

1	Introduction	455
1.1	International and domestic responses to genocide	455
1.2	Extinguishing genocide ideology	457
2	Criminalising the theory of double genocide.....	459
2.1	To question or not to question ethnicity?	459
2.2	Political criminalisation and political corruption.....	461
2.3	Objectifying history to combat moral bankruptcy.....	462
3	The rationale behind and reach of genocide denial laws.....	463
3.1	The harm in hate speech etc.....	463
3.2	To permit or restrict genocide denial?.....	465
3.3	Criminalisation of genocide denial under European continental law	467
3.4	No crime of genocide denial under Anglo-American law	468
4	Role of media in the Rwandan genocide	471
4.1	Impact of free speech on media in neighbouring Uganda.....	471
4.2	<i>ICTR Media case</i>	472
4.3	<i>Rwanda v Valerie Bemeriki</i>	473
4.4	<i>Rwanda v Peter Erlinder</i>	473
4.5	Freedom of expression decisions by the African Court on Human and Peoples' Rights	474
4.6	Freedom of expression decisions by the East African Court of Justice.....	474
4.7	Denial and its discontents	475
5	Restricting freedom of expression in the <i>Ingabire Victoire Umuhoza case</i>	476
5.1	Political and legal contestations.....	476
5.2	Ingabire's argument before the African Court.....	477
5.3	Rwanda's defence	478
5.4	The judgment.....	478
5.5	Contested approaches to criminalising genocide denial	482
6	Conclusion	485

1 INTRODUCTION

1.1 International and domestic responses to genocide

The 100-day genocide raging from April 1994 claimed one million Rwandese lives and brought about an estimated 250 000 cases of rape.¹ The *Interahamwe* (those who work closely together and are united) militia further ravaged hundreds of thousands of mainly Tutsi minorities. Amid accusations of abandoning ethnically-targeted mass atrocity victims, the guilt-stricken United Nations (UN) established an

1 S Straus 'The historiography of the Rwandan genocide' in D Stone (ed) *The historiography of genocide* (2010) 517 at 526 & 529.

ad hoc International Criminal Tribunal for Rwanda (ICTR),² with its seat at Arusha, Tanzania. The ICTR convicted several senior *genocidaires*.³ Domestically, through traditional restorative justice approaches comprising 11 000 locally-elected *inyangamugaya* (people of integrity) heading *gacaca* tribunals, Rwanda dealt with over 100 000 lower-level suspects.⁴ Meanwhile, in 2002 the government enacted legislation criminalising public incitement to discrimination or divisionism, as follows:⁵

Any person who makes public any speech, writing, pictures or images or any symbols over radio airwaves, television, in a meeting or public place, with the aim of discriminating [against] people or sowing sectarianism [divisionism] among them is sentenced to between one year and five years of imprisonment and fined between five hundred thousand (500 000) [US \$1 000] and two million (2 000 000) Rwandan francs [US \$4 000] or only one of these two sanctions.

On the one hand, detractors of that law, such as Waldorf, lament its abuse to justify ‘censorship and propaganda on the grounds that political pluralism and press freedom have led – and will lead to hate media and incitement to genocide’. Their grievance is that ‘[b]y uncritically accepting that argument, international donors may be saving their guilty consciences in the short-term, but they run the risk of “aiding violence” in the long-term and setting a terrible precedent for other authoritarian regimes’.⁶

On the other hand, its exponent, Rwandan President Paul Kagame, justifies it as a necessary response to

a new phenomenon ... in the form of individuals and groups who seek to revise history for their own gain, including many who deny outright that genocide took place in Rwanda in 1994. These revisionists, including Rwandan and non-Rwandan ideologues, academics, journalists and political leaders, now claim that the genocide was a myth; that what occurred in 1994 was simply a civil war between two equal sides or the spontaneous flaring up of ancient tribal hatred.⁷

The President denounces genocide deniers as ‘revisionists and/or proponents of the theory of double genocide’. This is ‘another phase of genocide’. Besides invoking the UN’s political recognition ‘that the 1994

2 UN Resolution 955 (1994) adopted by the Security Council at its 3453rd meeting on 8 November 1994, <http://unscr.com/en/resolutions/955> (accessed 10 August 2018).

3 The ICTR indicted 93 individuals for genocide and other serious violations of international humanitarian law committed in 1994. Of these, 31 were transferred to a state to serve sentence; as at September 2018, one was awaiting transfer to a state to serve his sentence; 22 have served their sentences; six died while serving their sentences; one died before being transferred to serve his sentence; three died before judgment; 14 were acquitted; while two had their indictments withdrawn; <http://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf> (accessed 14 November 2018).

4 P Clark *The gacaca courts, post-genocide justice and reconciliation in Rwanda* (2010) 67.

5 Art 8 Law 47/2001 of 18 December 2001, Instituting punishment for offences of discrimination and sectarianism laws, <https://repositories.lib.utexas.edu/bitstream/handle/2152/4935/4040.pdf?sequence=1> (accessed 10 August 2018).

6 L Waldorf ‘Censorship and propaganda in post-genocide Rwanda’ in A Thompson (ed) *The media and the genocide* (2007) 404 at 413.

7 P Kagame ‘Preface’ in P Clark & ZD Kaufman (eds) *After genocide: transitional, justice, post-conflict reconstruction and reconciliation in Rwanda and beyond* (2008) xxi-xxii.

genocide of the Tutsi was the only genocide to be recognised', the President also emphasises the ICTR's decision that genocide denial is unacceptable.⁸ He cites *Prosecutor v Edward Karemera & Another*,⁹ where the Appeals Chamber 'ruled that all defendants before the Tribunal could argue against their involvement in the genocide but could not question whether genocide had taken place in Rwanda'.¹⁰ Kagame further vilifies those accusing his Rwandan Patriotic Front (RPF) 'the force that halted the genocide, of seeking to exterminate the Hutu population'. He dismisses their suggestions as 'an absolute falsehood, sheer nonsense'. He thus not only rejects 'moral equivalency between genocide crimes and isolated crimes committed by rogue RPF members' as 'morally bankrupt', but also as an 'insult [to] all Rwandans, especially survivors of the genocide'. In rejoinder, Reyntjens retorts how, because

history did not suit the regime, a new history needed to be constructed. Even the Constitution was called in to protect the truth. An amendment in August 13, 2008 added the words "against the Tutsi" after genocide in article 51, thus attempting to outlaw the proponents of "double genocide".¹¹

1.2 Extinguishing genocide ideology

In 2017 the African Court on Human and Peoples' Rights (African Court) adjudicated upon a domestic conviction resulting from this simmering debate over the existence of different 'truths'¹² about Rwanda's genocide. *Prima facie*, any unfortunate and devastating holocaust should provide circumstances which legitimately justify genocide denial regulations. Therefore, Rwanda's post-genocide laws punish deniers for genocide-laundering. Yet difficulties arise, as part 2 of this article indicates, from the fact that Rwanda's opposition craves 'less restrictive measures' by which the post-genocide state may protect vulnerable minorities from the 'theory of double genocide' and preserve an ethnically-inclusive environment. Opposition leader Ingabire Victoire Umuhoza's statement at the memorial, as indicated in the High Court's judgment of 30 October 2012, reads as follows:¹³

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

According to the provisions of article 5 of Law 84/2013 of 2013 she was convicted for: 'Supporting a double genocide theory for Rwanda is part

8 As above.

9 Case ICTR-98-44.

10 Kagame (n 7) xxiii.

11 F Reyntjens *Political governance in post-genocide Rwanda* (2013) 197; see also Constitution of Rwanda (2003) as amended.

12 Reyntjens (n 11) ch 7.

13 High Court Criminal Case RP 0081-0110/10/HC/KIG, 30 October 2012 quoted in Application 3/2014 <http://en.african-court.org/index.php/56-pending-cases-details/867-app-no-003-2014-ingabire-victoire-umuhoza-v-republic-of-rwanda-details> (accessed 15 August 2018) para 153.

of the offence of “negation of genocide”.’ According to article 6 of the Law.¹⁴

Minimisation of genocide shall be any deliberate act, committed in public, aiming at:

- (a) downplaying the gravity or consequences of genocide;
- (b) downplaying the methods through which genocide was committed.

On 18 October 2012, affirming her conviction for divisionism, the Supreme Court:¹⁵

- (i) declare(d) inadmissible the application filed by Ingabire Victoire seeking annulment of Article 4 of Law No 35bis/2009 of 6 September, 2003, punishing the crime of genocide ideology, crimes against humanity and war crimes, as unfounded;
- (ii) declare(d) inadmissible the request filed by Ingabire Victoire seeking annulment of Articles 4 to g of Law No 18/2008 of 23 July, 2008, repressing the crime of genocide ideology, as groundless; and
- (iii) however, *declare(d) admissible the application filed by Ingabire Victoire seeking annulment of Articles 2 and 3 of Law No 18/2009 of July, 2009, suppressing the crime of genocide ideology, but declare(d) the application groundless.*

Integrity scholars therefore pose two questions: first, they ask whether and in which circumstances genocide denial laws are valid; second, whether the right to free speech condones corrupting history. Waldron’s¹⁶ twin justifications for prohibiting the harm in hate speech are narrated in part 3 of the article. First, wounding words undermine the public good. Second, to vulnerable minorities, assurance of good standing confirms their dignity. Nonetheless, comparative studies contrast restrictive laws drawn from several European continental countries with permissive laws from Anglo-American common law jurisdictions. The extent to which either of these discordant Western liberal democratic traditions, regarding regulatory approaches towards genocide denial, may appropriately be transplanted into in post-colonial, multi-ethnic African countries, is unclear and problematic. Part 4 shows that anti-denial laws seem specifically apt in post-genocide Rwanda. After setting out the factual background to the *Ingabire case*, her conviction and appeal to the Rwandese Supreme Court, section 5 analyses the necessity and proportionality principles that the African Court applied. Significantly, given that the media incited ethnic polarisation in 1994, therefore notwithstanding exonerating Ingabire, the African Court upheld divisionism statutes as necessary to protect Rwanda’s national security.¹⁷ However, the regional court merely referred to statutory and international instruments as well as precedents of its own, rather than to academic authors, abstract reasoning or comparative law.¹⁸ Yet genocide denial law critics insist that aggrieved states should invest in producing

14 Application 3/2014 (n 13) para 155.

15 Judgment of 18 October, 2012, Supreme Court of Rwanda Criminal Appeal RPA 0255/12; quoted in Application 3/2014 (n 13) para 28 (my emphasis).

16 J Waldron *The harm in hate speech* (2012).

17 Application 3/2014 24 November 2017 (n 13).

18 A Jacab et al (eds) *Comparative constitutional reasoning* (2007).

counter-arguments which falsify and discredit denials.¹⁹ Therefore, borrowing from other human rights systems as well as applying Mill's 'principle of state infallibility', to overcome the irrationality of restricting hate speech,²⁰ I deconstruct that landmark decision.

2 CRIMINALISING THE THEORY OF DOUBLE GENOCIDE

2.1 To question or not to question ethnicity?

Because:

an outright military victory by the Rwandan Patriotic Front (RPF) had ended the genocide and facilitated transition to a new government, punishing the previous regime was viable (and desirable for both the RPF and the UN, still smarting from its embarrassing failure to intervene during the genocide).²¹

To Clark 'decisions regarding peace or justice were determined more by political exigencies than by high principle normative considerations'. Ngoga acknowledges that 'the RPF was in a position where it could impose its view on how to deal with the past. It did not have to seek compromise.'²² Nonetheless, 'what the Rwandan government calls revisionism – the deliberate propagation of genocide ideology – all forms of genocide, revisionism and denial have become common'.²³ This is because by attempting to complete the genocide, perpetrators tend to engage in it. Yet, attempts by some Rwandan and international commentators to deny altogether that a genocide occurred in 1994 is an assault against truth and an insult to all genocide survivors. Genocide ideology and revisionism, if not confronted head-on, sow the seeds of future violence.²⁴

Genocide denial is an invention by atrocity apologists, designed to prevent justice. Two additional problems therefore afflict the victorious RPF's measures in overcoming impunity. First, because 'international spreading of genocide ideology through the media and political discourse repeats many of the principles and tactics employed by genocidal ideologues in the lead up to the mass murder'; therefore, extraneous actors 'seek to minimize the seriousness of the crimes committed and send a message that future criminals can commit atrocities without fear of sanction'.²⁵ In this way, instrumentalist internationalisation attempts to reintegrate perpetrators back into the

19 A Jones *Genocide: a comprehensive introduction* (2011) 524.

20 JS Mill *On liberty* (1859).

21 P Clark 'The challenges of international criminal law in addressing mass atrocity' in W Schabas & N Bermaz (eds) *Routledge handbook of international criminal law* (2014) 147 at 150.

22 Reyntjens (n 11).

23 M Ngoga 'The institutionalisation of impunity: a judicial perspective on the Rwandan genocide' in Clark & Kaufman (n 7) 321.

24 Ngoga (n 23) 327.

25 Ngoga (n 23) 328.

survivor society. Second, and perhaps worse, the RPF's defensive aggression tends to become distorted or confused with the ousted regime's offensive aggression.

Two rival narratives of Rwandese history accuse each other of being false.²⁶ Kagame lambasts Lemarchand's 'simplistic' reference to Hutu/Tutsi terminologies that forms the basis of the problem of ethnicity in Rwanda' as 'mistaken ... distortions and prejudices'. Rather, he maintains that ethnicity was 'introduced by colonialists, and sustained by post-colonialist regimes, and used to foment the 1994 genocide'.²⁷ Kagame's 'new methodology, new literature and new history'²⁸ agrees with human rights activists who argue that the genocide was systematic, planned and organised. They suggest that by using the 'Hamitic hypothesis' colonialists constructed ethnicity to introduce 'divide and rule'. Notwithstanding that all groups in Rwanda speak Kinyarwanda, occupy the same region, practise similar religions and frequently intermarry, in 1930 the Belgians ascribed membership to the Tutsi (10-14 per cent) to herders who owned over 10 head of cattle. The Hutu (86-90 per cent) and Twa (2 per cent) were regarded as 'negroid' and denied leadership and educational opportunities. Dissatisfied with their inferior status, the majority invoked democratic logics to precipitate the 'Hutu Revolution', consigning the Tutsi elite into marginalisation. In 1990, the progeny of the exiles returned under the RPF to their motherland to wage a liberation war. Furthermore, upon return to multiparty rule, they joined with some Hutu opposition politicians to compete against incumbent elite Hutu rule. However, Kagame is now accused of re-writing Rwandan history in a version which claims pre-colonial harmonious ethnic co-existence between tribes. His myth conveniently justifies the RPF's counter-authoritarian turn as restoring ethnic unity, albeit using a minority Tutsi-elite of his own.²⁹

Conversely, numerous historians disagree that colonialism *created* Rwanda's warring ethnic identities, insisting instead that they built upon existing monarchic hierarchies and divisions. Nowadays 'the RPF has allowed very little space for political opposition and critical media'. Straus 'reports of disappearances and other serious human rights abuses. Often crackdowns are done in the name of extinguishing "genocide ideology" or "divisionism"'.³⁰ Given these divergent post-genocide narratives, Kagame questions whether scholars such as Lemarchand are 'wrong to suggest that the memory of Hutu victims has been thwarted or that there has been a clash of ethnic memories in Rwanda'.³¹ Lemarchand's conclusion in 1970 was that the 'Revolution of 1959' was not the end of tyranny for the Hutu, but rather the beginning of a period in which a new governing elite stepped in and

26 Straus (n 1).

27 Kagame (n 7) xxiii.

28 Reyntjens (n 11).

29 J Pottier *Reimagining Rwanda: conflict, survival and disinformation in the late twentieth century* (1995) ch 3.

30 Straus (n 1).

31 Kagame (n 7) xxvi.

'borrowed from the past the tools to shape the future'.³² This article asks: What then are the acceptable limits of denialist discourse in the free society? Should hate speech be permitted in the interests of permitting vigorous debate in a liberal public sphere?³³ Or should genocide denial be criminalised, and if so, why and how?

2.2 Political criminalisation and political corruption

According to Turk:³⁴

Legal norms defining offences (such as treason, sedition, subversion or disloyalty) are publicly justified as defences of the polity and its governmental structure, and assert or imply the primacy of collective or ruling group interests over subjectivity or individual interests.

Thus, 'political criminalisation is viewed simply as the treatment accorded people who in fact resist political activity'.³⁵ Yet, for Philip political corruption is 'the decay or deconstruction of the political'. Hence,

the Western understanding of political corruption ... presupposes an understanding of the character of the political order ... a sense of the unity and cohesiveness of the political order being harmed or destroyed by malign influences.³⁶

Arguably, a similar 'sense of political order as involving a shared culture with public offices being directed to securing the public interest or public good' may inform Kagame's post-genocide governance policy. While denial is a tool deployed by rebels to subvert political values, critics compare how his authoritarian approach

plays a major part in ancient Greek and Roman thinking and goes on to be profoundly influential in Machiavelli's republicanism and on the languages of political theory in early modern Europe that JGA Pollock and others have traced through Britain to America.

On the account Philip proposes 'corruption arises within a set of largely Western assumptions about politics and its character'. Drawing an economic analogy with 'money laundering, the objective of which is to generate a profit for certain individuals', Ndahiro conceives of a political justification for criminalising genocide denial so as to prevent genocide-laundering. Just as tax evaders seek to place, layer and integrate their illicit 'earnings' into the legitimate economy, so also 'genocide laundering movements have been extremely active, constructing influential and ultimately divisive reinterpretations of the

32 Pottier (n 29) 122, citing R Lemarchand *Rwanda and Burundi* (1970) quoted in H Hintjens 'Genocide and obedience in Rwanda' paper presented at the conference on 'Conflict and identity in Africa' University of Leeds, African Studies Unit, 15-17 September 1997 7.

33 Jones (n 19) 521.

34 AT Turk *Political criminality* (1982) 578.

35 Turk (n 34) 82.

36 M Philip 'The definition of political corruption' in PM Heywood (ed) *Routledge handbook of political corruption* (2015) 17-29 at 20.

past and allowing many *genocidaires* to distance themselves from their crimes'.³⁷ Any 'payment from illegal activity, usually received in cash from underground economic transactions and, as such, not taxed but often laundered'³⁸ is called 'black money'. Part 4 below traces the devastating effect of words in the ICTR's landmark *Media case* which convicted journalists for inciting Hutus to murder Tutsis during the 1994 genocide. The point is that media silence regarding mass atrocities furthers the denial of ICTR judgments. Such layering of misinformation contributes to the final stage of genocide. For just as:³⁹

money launderers operate comfortably in countries and financial systems with weak or ineffective counter-measures. Many *genocidaires* and their allies have succeeded in doing the same regarding the most abominable crime: in propagating a revisionist view of the genocide that has gained currency around the world, they have successfully distanced themselves in the involvement of the genocide. Their profit is not money but impunity.

Insidiously, by distortion, degeneracy and falsification, genocide perpetrators and their acolytes seek to erase the identities of victims from collective memory. It would be academic surrender for serious scholars to permit pseudo-intellectuals to dilute valid genocide convictions or devour genocide denial laws with the effect of providing succour for *genocidaires*, because the trauma, including losing relatives, that the corruption of scholarship can condemn genocide victims and their descendants to suffer through secondary victimisation, is considerable. Therefore, 'efforts to counter genocide denial' for Ndahiro 'require(s) determination and international solidarity by (highlighting how individuals and organisations around the world have been duped by the launderers) including efforts to prosecute the deniers'. If the international media and even some human rights institutions unwittingly abet in adding insult to injury, then scholars are summoned to rationalise genocide denial laws, not only to ensure neutrality, but also to promote the criminal law's educational function.

2.3 Objectifying history to combat moral bankruptcy

As demonstrated above,

the Western conception of political corruption ... derives its meaning in large part from the sense that political order has (at least potentially) a certain function and character and that this is suborned and subverted when interests turn the political system to their own ends ... in the West ... [they] think that politics can be prevented from working as it should, with damaging long-term consequences, when people use their power for their own ends, or where the exercise of public office is subverted by forces that lack legitimate standing within the political system.⁴⁰

37 T Ndahiro 'Genocide-laundering: historical revisionism, genocide denial and the role of *rassemblement republicain pour la democratie* Rwanda' in Clark & Kaufman (n 7) 101 at 102.

38 <https://www.investopedia.com/terms/b/black-money.asp> (accessed 12 August 2018).

39 As above.

40 Philip (n 36).

Such accusations of authoritarianism are levelled against the RPF by genocide deniers. Yet, 'there is also a public discourse in which corruption is used by people to describe their sense that political power is subverted by sectional forces'.⁴¹ The latter position is endorsed by UN Resolution 955 and the ICTR Appeals Chamber and is also legislated under the Rwandan Constitution and divisionism statutes. It vindicates President Kagame's rebuttal that 'the case for moral equivalency' smirks of 'moral bankruptcy'. However, incongruence between popular and technical understandings of political corruption creates confusion. Hence, the purpose of this article is to construct a normative framework for hate speech law to more objectively explain the circumstances in which genocide denial regulation may be morally justifiable. It is useful to persuade policy makers and stakeholders about the legitimacy of hate speech laws, especially in post-genocide societies, and to give these laws and judicial decisions upholding them, wider acceptance. The aim is to understand Rwanda's 2003 divisionism laws criminalising public denial or minimisation of the 1994 genocide. To what extent can such legislation surpass strict liberal democratic constitutional scrutiny? The article further sets out to examine these anti-sectarianism laws in the African human rights system. Progressive nascent free speech jurisprudence provides the benchmarks against which to measure the Rwandan legislation as interpreted in the African Court's November 2017 decision. That judgment declared opposition politician Ingabire's 'double genocide' conviction as being in violation, *inter alia*, of free expression requirements under the African Charter on Human and Peoples' Rights (African Charter). To what extent is that finding morally and legally justifiable?

3 THE RATIONALE BEHIND AND REACH OF GENOCIDE DENIAL LAWS

3.1 The harm in hate speech

3.1.1 The public good of tolerance

Is a tolerant society a just society free from religious persecution, or is it a society in which people cohabit and deal with one another in spite of their religious differences in an atmosphere of civility and respect, in an atmosphere that is not disfigured by grotesque defamations?⁴²

Waldron poses this question of whether the targeted community should learn to live with epithets. He not only objects to those who hold that 'I hate what you say but I will defend to the death your right to say it'. He also rejects the notion that 'the bigoted invective that defiles our public environment, should be of no concern to the law'.⁴³ Waldron asserts

41 As above.

42 Waldron (n 16) 207.

43 Waldron (n 16) 3.

that people who detest hate speech should not learn to live with it. This follows Locke's⁴⁴ observations that

- (1) public expression of hatred and vilification are typical of an intolerant society;
- (2) there is a specific duty – perhaps even a legal duty – to refrain from rough usage of word, as well as rough action, if that is calculated to have the detrimental impact on an individual's person, honour or estate.⁴⁵

It undoubtedly 'is possible to harm people by execration as well as physical violence'.⁴⁶ On two similar grounds, Waldron's assurance theory justifies hate speech proscriptions. First, in order to protect the human dignity of sensitive individuals and groups to whom hurtful expressions are hurled. Alluding to the American Constitution,

there is a sort of public good of inclusiveness that our society sponsors and that it is committed to. We are diverse in our ethnicity, our race, our appearance, and our religions. And we are embarked on a grand experiment of living and working together despite these sorts of differences. Each group must accept that the society is not *just* for them, but it is for them along with all of the others. And each person, each member of each group, should be able to go about his or her business with the assurance that there will be no need to face hostility, violence, discrimination, or exclusion by others.⁴⁷

Waldron equates the right to enjoy an unpolluted physical environment with the public good of assurance of a hate free social environment, since

When this assurance is conveyed effectively, it is hardly noticeable; it is something on which everyone can rely, like the cleanness of the air they breathe or the quality of the water they drink from a fountain. This sense of security in the space we all inhabit is a public good, and in a good society it is something we all contribute to and help sustain in an instinctive and almost unnoticeable way.

Where members of such vulnerable communities are assured that they are welcome as individuals in good standing, hate speech diminishes the public good of having such an environment. Expressing hate 'sends a message to the members of the minority community denounced ... and to others in the community, who are not members of the minority under attack'.⁴⁸ Consequently,

it undermines the public good or makes the task of sustaining it much more difficult than it would otherwise be. It does this not only by intimating discrimination and violence, but by reawakening living nightmares of what this society was like ... in the past.

Waldron thus regrets that

In doing so it creates something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and less natural for even the good hearted member of the society to play their part in maintaining the public good.⁴⁹

44 J Locke *A letter concerning toleration* (1796) cited in Waldron (n 16) 211.

45 Waldron (n 16).

46 Waldron (n 16) 215.

47 Waldron (n 16) 4.

48 Waldron (n 16) 2.

49 Waldron (n 16) 4.

3.1.2 Protecting the right to reputation

Invective expression is also harmful because to ‘vulnerable minorities who in the recent past have been hated or despised by others within the society, the assurance offers a confirmation of their membership’.⁵⁰ Such basic social standing, he calls their *dignity*. This ‘second way of describing what’s at stake looks at it from the point of view of those who are meant to benefit’. He infers that

the guarantee of dignity is what enables a person to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with implicit assurance of being able to interact with others without being treated like a pariah.⁵¹

Therefore, ‘as proper objects of society’s protection and concern’ minorities are entitled to ‘the fundamentals of basic reputation that requires them to be treated as equals in the ordinary operations of the society’. Conversely,

the publication of hate speech is calculated to undermine ... [and] besmirch the basis of reputation, by associating inscriptive characteristics like ethnicity, or race, or religion, with conduct or attributes that should disqualify someone from being treated as a member of society in good standing.⁵²

Therefore, ‘hate speech is both a calculated affront on the dignity of vulnerable members of society and a calculated assault on the public good of inclusiveness’. Waldron thus prefers that ‘these sorts of publications should not be protected as free speech’.⁵³

3.2 To permit or restrict genocide denial?

On one side, liberal philosophers such as Waldron support genocide survivors who recognise that ‘violent words can injure as much as, often more than physical assault’.⁵⁴ Consider Charny’s insistence that

[d]enial of known events must be treated as acts of bitter and malevolent psychological aggression, certainly against the victims, but really against all of human society, for such denials literally celebrate genocidal violence and in the process suggestively call for renewed massacres – of the same people or of others.

Equally empathically, Charny decries that besides maddening, insulting and humiliating surviving victims and their relatives,

deniers are also attacking the fundamental foundations of civilisation, namely the standards of evidence, fairness and justice, by flagrantly altering the historical record. Indeed the deniers always engage in a totalitarian overpowering of the knowledge process, fully intending to subjugate the integrity of human history, the memory, and communication to their demagogy and tyranny.⁵⁵

50 Waldron (n 16) 5.

51 Waldron (n 16) 220.

52 Waldron (n 16) 5.

53 As above.

54 Ndahiro (n 37) 123.

55 IW Charny ‘The psychological satisfaction of denials of the holocaust and other genocides by non-extremists or bigots, and even known scholars’ (2001) 6 *Idea: A Journal of Social Issues* 1.

Others who justify punishment of hurtful speech include Smith, Markusen and Lifton.⁵⁶

On the other side, equally formidable liberal scholars do not dispute the harm of hate speech, but nonetheless reject the authority of the state to punish hate speech crimes. Dworkin and Chomsky uphold expressive freedom of untruthful speech; they simultaneously stress the arbitrariness that governs *which* genocide denial is prohibited.⁵⁷ Dworkin ‘thinks that suppressing hate speech undermines the legitimacy of anti-discriminatory laws by depriving people of the opportunity to oppose them’.⁵⁸ For Baker ‘it poses a threat to the ethical autonomy of the individual’. More notoriously, Prunier, who earns the ‘public accolade for the so-called “theory of the double genocide”’⁵⁹ ‘emphasises that a “Rwandese ideology” based on the pseudo-scientific racial theories introduced under colonialism, pervaded’.⁶⁰ Nonetheless, European liberal democratic traditions regulate freedom of expression. It is not absolute. The broad question becomes: How do we distinguish hatred from ordinary dislike or disagreement?⁶¹ Given that derogation from free speech is permissible, a narrower issue arises about identifying the limited circumstances where genocide talk constitutes a legitimate threat to public security, safety, morality, health, etc. which may justify regulation.

If what people say out loud expresses extreme or intolerable dislike, it poses a problem that calls for legislation. Thus,

the spoken word can be wounding but also words that are printed, published, pasted up or posted on the Internet which comprise a semi permanent part of the visible environment in which our lives as members of vulnerable minorities, have to be lived.

Hate speech legislation is ‘concerned about the predicament of vulnerable people who are subject to hatred directed at their race, ethnicity, or religion’.⁶² Interestingly, European continental law construes freedom of expression differently from the common law. For Swart this is attributable to the former’s non-colonial past and strong monarchic traditions⁶³ plus the fact that the Jewish “holocaust denial”... began almost as soon as the war ended’.⁶⁴ Although it ‘sparked the best known “denial” movement however much it has been

56 Jones (n 19) 522 citing RW Smith & others ‘Professional ethics and the denial of the Armenian genocide’ (1995) 9 *Holocaust and Genocide Studies* 1-22.

57 Jones (n 19) 523 citing ‘An interactive session with Noam Chomsky’ at the Asian College of Journalism at Chennai India, http://www.greenmac.com/World_Events/aninterac.html.

58 Jones (n 19) 523 citing R Dworkin *Freedom’s law: the moral reading of the American Constitution* (1996); see also Waldron (n 16) 14-15 citing CE Baker *Human liberty and freedom of speech* (1989).

59 Jones (n 19) citing G Prunier *The Rwanda crisis: history of a genocide* (1997) 261.

60 Straus (n 1) 521.

61 Waldron (n 16) 36.

62 Waldron (n 16) 37.

63 B Swart ‘Denying Shoah’ in P Alldridge & C Brants (eds) *Personal autonomy, private sphere and the criminal law: a comparative study* (2001) 161 at 179.

64 WD Rubenstein *Genocide* (2004) 172.

confined to crackpots and propagandists', nonetheless, assertions that 'the Nazi's killed no Jews but that Jews are lying about their wartime experiences, are singularly shocking, especially to Jews'.⁶⁵ Consequently 'holocaust denial' is now illegal in many European countries.

3.3 Criminalisation of genocide denial under European continental law

3.3.1 France

In the 1981 case of *Ligue internationale contre la racisime et l'antisemitisme et autres v Robert Faurisson*,⁶⁶ a distinguished literature professor, Robert Faurisson, was charged and convicted of racial defamation. Although his three-month sentence was suspended, he was compelled to pay damages for falsely suggesting that the Holocaust was fiction to create an Israeli state and assist its war against Palestine. In 1988 another Frenchman, Robert Garaudy, an anti-Zionist philosopher, was also convicted.⁶⁷ In 1991 Faurisson was again convicted – under the new French Freedom of the Press Act⁶⁸ – for publicly denying crimes against humanity, and fined US \$50 000 of which US \$20 000 was suspended. No relief is forthcoming from regional or international law, as the UN Human Rights Committee⁶⁹ rejected his complaint. The Committee respected the decision of French courts that 'the author's statements, read in their full context, propagated ideas tending to serve the Nazi doctrine and policy of racial hatred and were of a nature as to raise and strengthen anti-Semitic feelings'.⁷⁰

Similarly, French far-right, former National Socialist leader, Jean-Marie Pen, has severally been punished and fined for 'holocaust apostasy'.⁷¹

65 Rubenstein (n 64) 173.

66 Tribunal de Grande Instance de Paris 8 juillet 1981 cited in C Fournet *The crime of destruction and the law of genocide: their impact on collective memory* (2007).

67 DE Lipstadt *Denying the holocaust: the growing assault on trust and memory* (1993).

68 (1990) (Gayssot's law after its communist legislator), <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&dateTexte=> (accessed 14 August 2018).

69 *Robert Faurisson v France* Communication 550/1993 UN Doc CCPR/C/58/D/550/1993(1996), <http://hrlibrary.umn.edu/undocs/html/VWS55058.htm> (accessed 14 August 2018).

70 Swart (n 63) 171.

71 'Jean-Marie Le Pen fined again for dismissing Holocaust as "detail"' *The Guardian* 6 April 2016 <https://www.theguardian.com/world/2016/apr/06/jean-marie-le-pen-fined-again-dismissing-holocaust-detail> (accessed 14 August 2018).

3.3.2 Belgium

In *B v Belgium*⁷² the European Court of Human Rights considered words by a Belgian leader of the ‘Sharia4Belgium’ radical Salafist organisation, Fouad Belkacem, who produced YouTube videos urging Muslims to ‘fight’ and ‘convert’ non-Muslims, whom he called ‘animals’. Because Belkacem’s speech was manifestly contrary to the spirit of the European Convention of Human Rights, the European Court held that ‘his conviction for the incitement of hatred, violence and discrimination under Belgian law did not breach [his] right to the freedom of expression, as protected by Article 10’.⁷³

3.3.3 The rest of Europe

Even German law demands that no one denies the state’s own monstrous past. It entrenches the ‘judicial notice’ legal principle, thereby elevating World War II mass extermination of Jewish peoples into an historical fact of public notoriety for which no evidence is necessary to establish its existence. Rather, any person denying the Jewish massacres is criminalised as insensitive towards human dignity and perpetrating the ‘Auschwitz lie’.⁷⁴ Similar genocide denial legislation has been enacted in Switzerland and Israel, among a host of other countries.

3.4 No crime of genocide denial under Anglo-American law

3.4.1 United Kingdom

Part 5 below explains the extent to which Mill’s famous theory on liberty regarded freedom of expression as a *privilege* rather than a *right*.⁷⁵ Regarding genocide denial law, Barendt pertinently observes as follows:⁷⁶

Another difficulty is defining the scope of the offence. Should it, for example, be confined to denial of the Holocaust or cover other atrocities which some respectable historians might regard as almost as appalling and as well-established such as the atrocities in Stalinist Russia, Cambodia, and Rwanda, or the genocide of the Armenians?

Yet, in 2000 in London, David Irving, the right-wing conservative, sued US academic Deborah Lipstadt and her book *Denying the holocaust*⁷⁷

72 (2017) ECHR 253.

73 ‘European Court of Human Rights finds hate speech not protected by freedom of expression’ 20 July 2017 <https://www.hrlc.org.au/human-rights-case-summaries/2017/9/26/european-court-of-human-rights-finds-hate-speech-not-protected-by-free-dom-of-expression> (accessed 8 August 2018).

74 Swart (n 63) 175-176.

75 Mill (n 20).

76 E Barendt *Freedom of speech* (2005) 177.

77 Lipstadt (n 67).

for libel. The suit was contested by her publisher, Penguin Books, comprehensively defeating Irving for grave distortions to advance a denialist agenda and saddling him with a two million sterling pound bill of legal costs, resulting in bankruptcy.⁷⁸ Still, Barendt believes:⁷⁹

It would, therefore, be wrong to introduce a specific offence of Holocaust denial into English law. It is better to rely on education and other measures, for instance, the institution of Holocaust Memorial Day, to deal with risks created by the dissemination of these claims.

He effectively concedes that modern British legislation in the area of hate speech 'is generally defended in terms of the hurt racial speech causes members of minority groups. If filled a gap in the common law'.⁸⁰

3.4.2 United States

The 1776 US Constitution provides that 'Congress shall make no law ... abridging the freedom of speech, or of the press'.⁸¹ One founding father, Thomas Jefferson, if asked to choose between either government without newspapers or newspapers without government, preferred the latter. He claimed that human beings cannot survive in the absence of free speech.⁸²

Since regulation distorts the working of a free market for the exchange of ideas, the 'market place of ideas' theory of free speech has been enormously influential in the US. This was held by Justice Holmes in *Abrams v United States*,⁸³ where the Supreme Court upheld the 1918 Amendment to the Espionage Act. Yet, many people are rightly horrified upon receiving evidence which discloses an aspirational/reality dichotomy between their government's official policies proclaiming human rights, while secretly condoning human rights abuses. For that reason, the Supreme Court is likely to strike down statutes purporting to criminalise absolute freedom of expression. Indeed, in *Collins v Smith*⁸⁴ the National Socialist Party of America was permitted to distribute pamphlets and organise political demonstrations in an Illinois neighbourhood with Jewish holocaust residents. Justice Decker declared that the government could not prohibit the expression of ideas 'because of disagreement with the message it conveys'.⁸⁵

78 As above; see also Jones (n 19) 522.

79 Barendt (n 76).

80 As above.

81 First Amendment; see also 'Jefferson's preference for "newspapers without government" over "government without newspapers"' (1787) <http://oll.libertyfund.org/quote/302> (accessed 1 August 2018).

82 'Extract from Thomas Jefferson to Edward Carrington' Paris, 16 January 1787 *Jefferson quotes and family letters* <http://tjrs.monticello.org/letter/1289> (accessed 1 August 2018).

83 250 US 616 (1919).

84 447 Suppl 676 ND (3rd) (1978) (*Skokie case*).

85 *Skokie case* (n 84) 476 688.

Subsequently, in *RAV v City of St Paul*⁸⁶ the Supreme Court outlawed the St Paul Bias-Motivated Crime Ordinance forbidding the placing on private or public property of *inter alia* a 'Nazi swastika which one knows ... arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender'. The Court rejected the offensive proscription of a 'symbol, object, appellation, characterisation, or graffiti' because it defined discrimination narrowly. Invoking the viewpoint-neutrality principle, the Court disqualified the Ordinance for failing to protect hate against other groups on the basis of political affiliation, union membership or sexual orientation. According to Swart, '[t]he Supreme Court held that resort to ... personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution'. Is the same true for group defamation? In 1952 the Court gave an affirmative response. However, in 1964 it curtailed the use of group libel laws to impose sanctions on expressions critical of public officials. Similar jurisprudence has been rendered by the African Court and eventually applied to absolve Ingabire, as will be shown in part 5 below.

3.4.3 Canada

Canada's chequered case law evinces a jaundiced face. Its genocide denial jurisprudence commenced in 1985 upon the conviction of an ardent neo-Nazi, Ernst Zundel, by a Toronto Court. Zundel founded Samisdat Publications devoted to printing and distributing racist, anti-Semitic and holocaust literature. The issues which arose in the genocide denial case against him were, first, whether he published *Did six million really die?* Second, were its statements false? Third, did he know of their falsity? The prosecution case combined both judicial notice and evidentiary strategies, particularly emotive eye witness testimonies. On conviction Zundel was sentenced to 15 months' imprisonment plus three years' probation.⁸⁷ In 1987, however, the Ontario Appellate Court set aside his conviction. A re-trial in 1988 re-convicted and re-sentenced him to nine months' imprisonment. Once again Zundel appealed.

This time the Canadian Supreme Court declared the genocide denial provision unconstitutional. In *Ernst Zundel v Her Majesty The Queen*,⁸⁸ Justice McLachlin held that the 'question of falsity of a statement is often a matter of debate particularly where historical facts are at issue'.⁸⁹ The statute was wrong because it invoked two untenable assumptions. First, that 'we can identify the essence of a communication and determine that it is false with accuracy'.⁹⁰ Second,

86 505 US 377 (1992); see also *Beauharnais v Illinois* 343 US 250 (1952); *New York Times v Sullivan* 376 US 254 (1964).

87 L Douglas *The memory of judgment: making law and history in the trials of the holocaust* (2001).

88 (1992) 2 SCR 731, 75 CCC (3rd) 449.

89 Douglas (n 87) 494.

90 Douglas (n 87) 509.

that ‘deliberate lies never have a value’.⁹¹ Yet lies stand for the idea that ‘the public should not be quick to adopt “accepted” versions of history, truth etc’. By virtue of the Canadian recognition of the absolute human right to free speech, copies of *Did six million really die?* are currently afloat in cyberspace. Conversely, *R v Keegstra*⁹² upheld Canada’s Criminal Code prohibiting publicly and wilfully promoting hatred. In an Alberta classroom, high school teacher James Keegstra communicated his hateful sentiments against the Jewish community. To protect target groups from hate propaganda, despite the impugned legislation infringing freedom of expression, the Supreme Court limited hate speech as reasonable and justifiable in a free and democratic society.⁹³

4 ROLE OF MEDIA IN THE RWANDAN GENOCIDE

4.1 Impact of free speech on media in neighbouring Uganda

Most African countries have colonial histories. In 1981, concerned that expressive freedom was repressed by colonialists and yet aided freedom fighters, the African Charter enshrined it at continental level.⁹⁴ Following the ‘second liberation’ or ‘third wave’ democratisation struggles of the 1990s, successor societies promulgated new constitutions with modern bills of rights. We would thus expect African governments to tolerate robust freedom of expression provisions which reject genocide denial laws. Indeed, the Ugandan Supreme Court – following a ‘progressive’ Canadian decision – conferred constitutional protection upon the freedom of the press as a right since ‘while truth and falsity are mutually exclusive, the purposes for protecting both are not’.⁹⁵ Citing *inter alia* *Edmonton Journal v Alberta (AG)*,⁹⁶ Mulenga JSC further stressed that even if one’s views are ‘false’ or ‘wrong’, a democratic society chooses to tolerate the exercise of the freedom even in respect of the so-called alarming statements. In that case, journalists were acquitted by

a (Ugandan) magistrate’s court with the publication of false news contrary to section 50 of the Penal Code. The story in *The Monitor* newspaper quoted the

91 Douglas (n 87) 510.

92 (1990) 3 SCR 697.

93 <https://globalfreedomofexpression.columbia.edu/cases/r-v-keegstra/> (accessed 15 August 2018).

94 Art 9 African Charter on Human and Peoples’ Rights, adopted 1 June 1981, entered into force 21 October 1986, <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed 19 August 2018).

95 *Charles Onyango Obbo & Another v Attorney-General* Constitutional Appeal 2 of 2002 per Mulenga JSC.

96 (1989) 2 SCR 1326.

Indian Ocean Newspaper that the late President Laurent Kabila had paid Uganda in gold.⁹⁷

Conversely, neighbouring Rwanda's appalling genocide experience would arguably justify exceptional derogation from free speech rights.

4.2 *ICTR Media case*

During Rwanda's 1994 genocide, Belgian-Italian journalist Georges Ruggiu was employed by the *Radio Télévision Libre des Mille Collines* (RTL) radio station which broadcasted anti-Tutsi hate speech.

It was no coincidence that RTL, with its catchy nationalistic theme tunes and racist jingles, began to broadcast in August 1993, within days of a peace agreement between the RPF and the Hutu government. That agreement sought to bridge the ethnic divide and provide a timetable for power-sharing democracy, bringing an end to Rwanda's dictatorship by the northern oligarchs who had controlled the country for 20 years.⁹⁸

In *Prosecutor v Georges Ruggiu*,⁹⁹ the accused pleaded guilty before the ICTR of inciting Hutus to massacre Tutsis with the intention of destroying – in whole or in part – the Tutsi ethnic group in Rwanda. He incurred 12 years' imprisonment. Another case accused ex-university history lecturer Ferdinand Nahimana – who had joined former Foreign Ministry, Political Affairs Director Jean-Bosco Barayagwiza – to co-found RTL. From July 1993 to July 1994, its despicable messages cast Hutu opposition members as accomplices of the Tutsi enemy. Critically 'to commit genocide, it is necessary to spread an ideology that defines the victim as being outside human existence – vermin, subhuman'.¹⁰⁰ Hence Nahimana called anti-Tutsi *inyenzi* (cockroaches). He was convicted *inter alia* for direct and public incitement to commit genocide.

The third accused was the founder and editor of *Kangura* newsletter, Hassan Ngeze, who circulated hate messages depicting Tutsis as planning to subvert the Rwandan democracy by ousting Hutus from power. 'In 1990 *Kangura* ... published the infamous "Hutu 10 Commandments", instructing Hutus to sever ties with Tutsis and to protect the gains of the Hutu revolution'.¹⁰¹ In addition, Barayagwiza and Ngeze were founding members of the *Coalition pour la Défense de la République* (CDR). Ngeze allegedly distributed firearms, supervised roadblocks and ordered massacres in Gisenyi *préfecture*, which regional committee, Barayagwiza chaired. In 1995 Barayagwiza published a book entitled *Is Hutu blood red?* exposing his anti-Tutsi

97 BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 9 *African Human Rights Law Journal* 1 at 12-13.

98 L Melvern 'The past is prologue: planning the 1994 Rwandan genocide' in Clark & Kaufmann (n 7) 21 at 23.

99 Case ICTR-97-32-I Judgment and Sentence (TC1) 1 June 2000.

100 Melvern (n 98).

101 Straus (n 1) 523.

political views. In 2003 the ICTR convicted all three of genocide and sentenced them to life imprisonment. However, on appeal to the ICTR Appeal Chamber in *Prosecutor v Ferdinand Nahimana & Others*¹⁰² in 2007, although both Nahimana and Ngeze's guilt *inter alia* of direct and public incitement to commit genocide, was affirmed, their sentences were reduced considerably, from life to 30 years' imprisonment. Barayagwiza was acquitted on this count and his already reduced sentence of 35 years was altered to 32 years.

4.3 *Rwanda v Valerie Bemeriki*

In 2009 another RTLM employee, Valerie Bemeriki, admitted before a *gacaca* tribunal of using the radio network to say to Hutus: 'Do not kill those cockroaches with a bullet – cut them to pieces with a machete.'¹⁰³ She was convicted at the Kigali grassroots of planning genocide, inciting Hutus, and complicity in several murders and imprisoned for life.¹⁰⁴

4.4 *Rwanda v Peter Erlinder*

Following *Karamera*, genocide denial can be seen as device by which prosecutors can restrict defences of genocide accused. In 2008 Peter Erlinder – lead defence lawyer at the ICTR – wrote an article 'The great Rwanda genocide cover up' suggesting that 'new evidence at the UN Rwanda Tribunal exposed Kagame as the war-criminal who actually touched-off the 1994 Rwanda Genocide by assassinating the previous President' Juvénal Habyarimana. In 2010, Erlinder – a US law professor – was charged with genocide denial which Kagame said threatened state security. If found guilty of grossly minimising or attempting to justify the 1994 genocide, he faced up to 20 years in prison. After retracting his offensive statements, Erlinder was released. Kagame was subsequently re-elected, consolidating wide respect for rebuilding Rwanda since the genocide. However, his critics insist that his strong-arm tactics have high costs in terms of negating free speech.¹⁰⁵

102 Case ICTR-99-52-T Appeals Judgment, 28 November 2007 (*Nahimana et al* Appeals Judgment) (*Media* case).

103 'Rwanda jails journalist Valerie Bemeriki for genocide' *BBC* 9 December 2009 <http://news.bbc.co.uk/2/hi/africa/8412014.stm> (accessed 15 August 2018).

104 Trial International 'Valerie Bemeriki' 21 April 2016 <https://trialinternational.org/latest-post/valerie-bemeriki/> (accessed 15 August 2018).

105 H Holland 'Rwanda frees US lawyer due to health, charges remain' *Reuters* 17 June 2010 <https://af.reuters.com/article/topNews/idAFJ0E65GoLO20100617> (accessed 15 August 2018).

4.5 Freedom of expression decisions by the African Court on Human and Peoples' Rights

A progressive decision by the African Court demonstrates judicial control over domestic penal laws which unjustifiably stifle free speech. In *Lohé Issa Konaté v Burkina Faso*, Konaté, a contributing editor for the weekly newspaper *L'Ouragan*, published some articles in August 2012, detailing allegedly corrupt practices of state prosecutor, Placide Nikiéma. He accused the latter of unlawfully interceding in cases concerning alleged currency counterfeiting and illegal trading in second-hand cars. The Ouagadougou High Court convicted Konaté for defamation, public insult and insulting a magistrate, which conviction was later affirmed by the Court of Appeals. In addition to suspending *L'Ouragan's* publication for six months, Konaté – together with Roland Ouédraogo, its editor-in-chief – was imprisoned for 12 months, fined US \$2 900 and ordered to pay Nikiéma US \$7 800 compensation. However, in December 2014 the African Court reversed the Burkina Faso Court since

apart from serious and very exceptional circumstances for example, defence of international crimes, *public incitement to hatred*, discrimination or violence or threats of violence against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the African Charter and the ICCPR.¹⁰⁶

Here universal rights trumped draconian press laws.

4.6 Freedom of expression decisions by the East African Court of Justice

In *Burundi Journalists Union v The Attorney-General of the Republic of Burundi*¹⁰⁷ the East African Court of Justice struck down article 19 of Burundi's Press Law which prohibited the

dissemination of information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the state and national economy, diplomacy, scientific research and reports of Commissions of Inquiry by the state.¹⁰⁸

It thus could not stand the test of reasonability, rationality or proportionality.

106 Application 4/2013 <http://en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details> (accessed 15 August 2018) (emphasis added).

107 Judgment of 15 May 2015 in Ref 7 of 2013 <http://eacj.org/?cases=burundi-journalists-union-vs-the-attorney-general-of-the-republic-of-burundi> (accessed 15 August 2018) <http://www.mediadefence.org/sites/default/files/files/20150515%20EACJ%20Burundi%20Press%20Law%20judgment.pdf> (accessed 15 August 2018).

108 As above.

4.7 Denial and its discontents

Cohen argues that a denial of responsibility inevitably follows one of four paths: obedience to superiors; conformity with society; necessity; or splitting of the personality.¹⁰⁹ He ‘attempts to answer a set of questions that have long tormented researchers concerned with terrorism, war, and genocide’. These are: ‘What do we do with our knowledge about the suffering of others, and what does this knowledge do to us?’ For him, government or individual denial of atrocity and suffering can take the form of several logical assertions that ‘something did not happen, does not exist, is not true or is not known about’.¹¹⁰ Besides the first two categories of denying what is actually untrue and of deliberate deception, ‘denial may be neither a matter of telling the truth nor intentionally telling a lie’. Rather, ‘[s]ometimes we are not entirely aware of switching off or blocking out ... There seem to be states of mind, or even whole cultures, in which we know and don’t know at the same time’.¹¹¹ Therefore, for Cohen ‘the problem is not to uncover more evidence of denial, but to find the conditions under which information is acknowledged and acted upon’. He poses a counterfactual question thus: ‘Instead of asking why most people deny atrocity and suffering, we must turn to the minority who refuse to do so’.¹¹²

As receptacles which preserve experiences, words matter.¹¹³ This explains why post-conflict governments deploy state machinery to sustain history, including through lustration measures such as memorials. Remembrance prevents genocide-laundering from corrupting Rwanda’s genocide-centred memory. Acknowledgment demands that scholars procure and abet the state’s protective efforts by whistle-blowing. Not surprisingly, deniers then accuse the government of falsifying history. Reyntjens, for example, is aggrieved about

seizure of power and consolidation of hegemony by a group of Rwandans ... through the elimination of countervailing voices, both political and social, by repression, terror, and massive human rights abuses. Skilful information management and communication, as well as the imposition of a monopolistic narrative have been crucial instruments to further this project.¹¹⁴

As shown above, the ideological debate is complex. Deniers ask: Was the RPF’s counter-genocide response predominantly murderous or were there only a few rogue elements? Are the institutions, particularly the domestic legislature or judiciary ethnicised or politicised to enact and implement divisionism laws irresponsibly? The prevailing intellectual confrontation thus suggests that if state propaganda, legislation and adjudication are deployed to combat genocide-

109 S Cohen *States of denial: Knowing about atrocities and suffering* (2001).

110 MS Hamm ‘Book review: Stanley Cohen, *States of denial: knowing about atrocities and suffering*’ (2002) 11 *Critical Criminology* 177.

111 Hamm (n 110) 178.

112 180.

113 G Sartori *The theory of democracy revisited: Part two: the classical issues* (1987) 261 & 479.

114 Reyntjens (n 11) 253.

laundering, then the onus shifts to an aggrieved denier to adduce either direct or circumstantial evidence to explain why Rwanda should not provide adequate security to protect vulnerable minorities from a contaminated social environment, which hateful words facilitate spontaneous mass aggression that could inflict human rights atrocities. In the absence of official overreach, neither the international media nor legal intellectuals can afford to remain comatose about or become complicit with them. Remaining silent attracts Hannah Arendt's charge that 'the mendacity of Adolph Eichmann's character was integral to the whole of German society, shielding it from reality'.¹¹⁵

Following Waldron's rationalization of hate speech laws, and given Rwanda's murderous past, this article's major proposition empathises with notions that if the theory of 'double genocide' is not prohibited, then Tutsi survivors shall suffer secondary victimization. But to what extent are Rwanda's existing divisionism regulations valid? The minor proposition holds that we can learn from the African Court's decision, the reasons for rejecting the Rwandese judiciary's Ingabire conviction. While the regional Court correctly exonerated her on grounds that her domestic convictions violated Rwanda's African Charter article 9 obligations, it did so because they were erroneously predicated upon insufficient evidence. The domestic courts' evaluation of her utterances did not surpass the requisite beyond reasonable doubt threshold to warrant 'double genocide' punishment under Rwandese law. Importantly, the genocide denial laws themselves remained intact. Besides, as the African Court noted as set out under part 5 below, in light of *Konaté*, Ingabire's 15-year incarceration was disproportionate.

5 RESTRICTING FREEDOM OF EXPRESSION IN THE *INGABIRE VICTOIRE UMUHOZA* CASE

5.1 Political and legal contestations

To test the above claims, this part sets out the factual backdrop of the *Ingabire Victoire Umuhoza* case, culminating in the African Court's decision. By balancing principles deployed by the judges concerning restricting the freedom of expression against those of national security interests, it critically analyses possible grounds for state interference, legitimate purpose, necessity and proportionality. The African Court refers to its own 2014 *Konaté* decision,¹¹⁶ which held that

the terms "within the law" in article 9(2) of the Charter envisages the possibility where restrictions may be put in place on the exercise of freedom of expression provided that such restrictions are presided by law, serve a legitimate purpose and are necessary and proportional as may be expected in a democratic society.¹¹⁷

115 H Arendt *Eichmann in Jerusalem: a report on the banality of evil* (1963).

116 *Konaté* (n 106) cited in *Ingabire* case (n 17) para 133.

117 As above (n 17) para 133.

Departing from the version set out in the introduction to the instant article, what follows will set out conflicting versions of the FDU-Inkingi (Unified Democratic Forces-Inkingi) opposition party leader's alleged contentious words and the African Court's interpretation of whether or not they may be interpreted as genocide denial. By way of prelude, the saga can be traced through media reports that the opposition leader:

Ms Ingabire returned to Rwanda in 2010 after 17 years in exile in Holland, and said she intended to run against Paul Kagame, the incumbent president, in elections that year. Security forces arrested her after she questioned why memorials to the 800,000 people who died in 100 days of killing in 1994 failed to include Hutu victims of the slaughter. Most of those who died were from the Tutsi tribe, but many Hutus who sheltered Tutsis or were seen as moderates opposed to the ethnic cleansing were also killed.¹¹⁸

In 2013 'Rwanda's Supreme Court [not only] upheld the conviction of [the] opposition leader'. It even 'increased her jail term from eight to 15 years. She was found guilty of threatening state security and "belittling" the 1994 genocide'. It 'also found her guilty of spreading rumours intended to incite people to revolt – charges on which she had earlier been cleared'.¹¹⁹

5.2 Ingabire's argument before the African Court

In 2017 the African Court considered Ingabire's substantive contention that she had been convicted and sentenced 'both at the High Court and the Supreme Court of [Rwanda] for the remarks that she made at Kigali Genocide Memorial, and her interviews and other statements she expressed on different occasions'. The key question that the Court addressed was 'whether such restriction was admissible, in that, it was provided by law, served a legitimate purpose, and was necessary and proportional in the circumstances of the case'.¹²⁰ Sub-issues are analysed in the following section. In brief, Ingabire contended, first, that

the opinion she expressed in the course of her speech at the Kigali Genocide Memorial concerned the management of power, the sharing of resources, the administration of justice, the history of the country and the attack that led to the demise of the former President of the Republic,¹²¹

consequently that 'she had no intention to minimise and trivialise genocide or to practice the ideology of genocide and that the right to express her opinion was protected by the Constitution of Rwanda and other international instruments'. In the second place she complained that Rwanda's criminalisation 'of the negation of genocide are vague and unclear, and do not comply with the requirement that restrictions on the rights of individuals must be necessary'. Nonetheless, the

118 M Pflanz 'Rwanda Hutu opposition leader jailed for "denying genocide"' *The Telegraph* 30 October 2012, <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/9643356/Rwanda-Hutu-opposition-leader-jailed-for-denying-genocide.html> (accessed 16 August 2018).

119 'Victoire Ingabire: Rwanda leader's jail term raised' *BBC* 13 December 2013 <https://www.bbc.com/news/world-africa-25371874> (accessed 16 August 2018).

120 *Ingabire case* (n 17) para 134.

121 *Ingabire case* (n 17) para 120.

Rwandan courts found her ‘guilty of spreading rumours likely or seeking to cause a revolt among the population against established authority’.¹²²

5.3 Rwanda’s defence

In rebuttal, the Rwandan government argued not only that ‘the right to express one’s opinion is subject to limitations and that considering the social context, the history of and environment in Rwanda, there was reason to enact laws to penalise the minimisation of genocide’, but also that ‘the judgment of its Supreme Court had alluded to the fact that other countries had imposed similar restrictions so as to prevent the minimisation of genocide’.¹²³ As *amicus curiae* the National Commission for the Fight against Genocide (CNLG) argued that ‘the theory of double genocide’ to which Ingabire referred was ‘nothing but another way of denying the genocide perpetrated in 1994 against Tutsis in Rwanda’. This is because

revisionism is structured around a number of affirmations which help to conceal the criminal intent that is an integral part of the crime of genocide, without denying the reality of the massacres and to sustain the idea of double genocide ... to transform the 1994 genocide against Tutsis in Rwanda into an inter-ethnic massacre, and at the same time, exonerate the perpetrators, their accomplices and their sympathisers.¹²⁴

According to CNLG, Ingabire’s statement at the Kigali Genocide Memorial ‘signifies that there were two genocides in Rwanda, and that the Tutsis are therefore as guilty as their executioners’. It submitted that her contentious statements were

“a manipulation skillfully executed and sowing the seeds of confusion around the genocide” as well as “a revisionist manoeuvre with the peculiar feature of using partial and dishonest methodology to select, disguise, divert or destroy information that corroborates the existence of genocide against the Tutsis”.¹²⁵

5.4 The judgment

5.4.1 Framing issues

Three sub-issues emerged for determination: one, whether the interference against her was provided by law; two, whether the restriction served a legitimate purpose; and three, whether the restriction was necessary and proportional.

122 *Ingabire* case (n 17) para 121.

123 *Ingabire* case (n 17) para 125.

124 *Ingabire* case (n 17) para 128.

125 As above para 129.

Interference provided for by law

Regarding the first issue, because ‘the nature of the offences that these laws seek to criminalise is admittedly difficult to specify with precision’, the African Court found that the interference against her was provided by law. Specifically, considering the margin of appreciation that member states to the African Charter enjoy ‘in defining and prohibiting some criminal acts in its domestic legislation ... the impugned laws provide adequate notice for individuals to foresee and adapt their behaviour to the rules’. The African Court therefore conceded that ‘the said laws satisfy the requirement of the “the law” as stipulated under article 9(2) of the Charter’.¹²⁶

Legitimate purpose

Turning to the second issue of whether the restriction served a legitimate purpose, the African Court recalled its *Konaté* test that ‘restriction made on the exercise of freedom of expression must be strictly necessary in a democratic society and proportional to the legitimate purposes pursued by imposing such restrictions’.¹²⁷ Crucially, it agreed that

given its past history of genocide, the kind of (genocide denial) restrictions imposed by the domestic law ... are meant to protect state security and public order. The nature of the crimes for which [Ingabire] was charged and convicted also relate to the protection of national security, from expression which create divisions among the people and internal strife against the government.¹²⁸

Necessity and proportionality

Regarding the third issue of whether the restriction was necessary and proportional, the African Court decided that

the determination of necessity and proportionality in the context of freedom of expression should consider that some forms of expression such as political speech, in particular, when they are directed towards the government and government officials, or are spoken by persons of special status, such as public figures, deserve a higher degree of tolerance than others.¹²⁹

Moreover, because ‘[t]he assessment of necessity and proportionality under article 9(2) of the Charter and article 19(3) of ICCPR cannot be done in a vacuum and due consideration should be given to particular contexts in which the impugned expressions were made’.¹³⁰ Therefore, ‘freedom of expression protects not only “information” or “opinions that are favourably received or regarded as inoffensive, but also those that offend, shock or disturb” a state or any section of the population’.¹³¹

126 *Ingabire case* (n 17) para 138.

127 As above.

128 *Ingabire case* (n 17) para 139.

129 *Ingabire case* (n 17) para 142.

130 *Ingabire case* (n 17) para 144.

131 *Ingabire case* (n 17) para 143.

5.4.2 Analysing conflicting testimonial statements

Validating minimisation laws

The African Court began by analysing Rwanda's and CNLG's prayer 'to consider its particular past history and apply the principles of margin of appreciation and subsidiarity'.¹³² It appreciated the fact that

Rwanda suffered from the most atrocious genocide in the recent history of mankind and this is recognised as such internationally. This grim fact of its past evidently warrants that the government should adopt all measures to promote social cohesion and concordance among the people and prevent similar incidents from happening in the future. It goes without saying that it is entirely legitimate for the state to have introduced laws on the 'minimisation', 'propagation' or 'negation' of genocide.¹³³

Nevertheless, it reasoned that 'the laws in question should not be applied at any cost to the rights and freedoms of individuals or in a manner which disregards international human rights standards'. Furthermore: 'The legitimate exercise of rights and freedoms by individuals is as important as the existence and proper application of such laws and is of paramount significance to achieve the purposes of maintaining national security and public order'.¹³⁴ Therefore, the African Court was compelled to 'examine the nature of the opinion alleged to have been expressed by [Ingabire] and determine whether such expression warranted her conviction and imprisonment, and whether such measure was proportional under the circumstances'.¹³⁵

Three 'double genocide' statements

Ingabire's statements that were alleged to have been made on different occasions were of two natures: first, 'those remarks made in relation to the Genocide, particularly, at the Kigali Genocide Memorial'; second, those directed against the government, including the President of the Republic, and the judiciary (comprising the gacaca courts).¹³⁶ In the first version, in her own words:¹³⁷

At the Kigali Genocide Memorial, [Ingabire] claim[ed] to have made the following statement in Kinyarwanda:

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

The second version was recorded before the Rwandan High Court quoted in the introduction to the article.¹³⁸

132 *Ingabire* case (n 17) para 145.

133 *Ingabire* case (n 17) para 147.

134 *Ingabire* case (n 17) para 148.

135 *Ingabire* case (n 17) para 149.

136 *Ingabire* case (n 17) para 150.

137 *Ingabire* case (n 17) As above para 151.

138 *Ingabire* case HC (n 13).

In the third version, as recounted by the Supreme Court, her statement reads:¹³⁹

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

For the African Court, the key issue was an evidentiary one, of whether in that speech Ingabire made at the Genocide Memorial she propagated the ‘theory of double genocide’.¹⁴⁰

5.4.3 The verdict

Reasonable doubt

Decisively, the versions of Ingabire’s ‘speech made at the Memorial, as recited by the High Court and the Supreme Court’ were, the African Court held, ‘at variance’ not only with each other but also with her own version. In pertinent part, ‘while the version of the speech as indicated by the Supreme Court talks about “another side of genocide: the one committed against the Hutu” the version of the speech, as recounted by the High Court talks about Hutus being ... “victims of crimes against humanity and war crimes”’.¹⁴¹ Because of ‘these conflicting versions of the said speech as quoted by the domestic courts’ and further upon implying the principle of legality to place the burden of proof on the prosecution, therefore the African Court held that ‘the doubt should benefit’ Ingabire. The African Court consequently relied on the High Court’s version of her speech, set out in the introduction to the article, similar to what was tendered before the African Court in ‘evidence, which was not challenged by the respondent State’.¹⁴² Ultimately there was ‘nothing in the statements made by [Ingabire] which denies or belittles the genocide committed against the Tutsi or implies the same’.¹⁴³

Nothing in her remarks suggested that she advanced ‘double genocide’. Although ‘she admitted “the genocide against the Tutsis” but has never claimed that a *genocide* was committed against the Hutus’. Rebuking disproportionality, it was held that ‘putting severe restrictions such as criminal punishments, on the rights of individuals merely on the basis of contexts would create an atmosphere where citizens cannot freely enjoy basic rights and freedoms, including the right to freedom of expression’.¹⁴⁴

139 *Ingabire case* (n 17) para 154.

140 *Ingabire case* (n 17) para 155.

141 *Ingabire case* (n 17) para 156.

142 *Ingabire case* (n 17) para 157.

143 *Ingabire case* (n 17) para 158.

144 As above para 159 (emphasis added).

Criticising public officials

Ingabire's second group of statements contained severe criticisms against the government and public officials, alleging that political power is 'dominated by a small clique' that has 'a secret parallel power structure around president Kagame'. She stated that she was ready to fight against

the yoke [of fear], poverty, hunger, tyranny, servitudes, corruption, unfair gacaca court system, repression, prison term for works of general interests (TIG), reasons that lead people to flee the country, inequality, expropriation, homelessness, lack of self-esteem and killing through torture.¹⁴⁵

The African Court held that 'these statements are of the kind that is (sic) expected in a democratic society and should thus be tolerated, especially when they originate from a public figure'.¹⁴⁶ In any event, there was 'no evidence showing that the statements caused strife, public outrage or any other particular threat to the security of the state or public order'.¹⁴⁶ Because Ingabire's 'conviction and sentence for making the above statements both at the Kigali Genocide Memorial and on other occasions, was not necessary in a democratic society', her 'punishment was not proportionate to the legitimate purposes which the conviction and sentence seek to achieve' therefore Rwanda 'could have adopted other less restrictive measures to attain the same objectives'.¹⁴⁷ It violated article 9(2) of the African Charter and article 19 of the ICCPR.¹⁴⁸ However, there were no exceptional and compelling circumstances to warrant repeal with retroactive effect, of its divisionism-creating law.¹⁴⁹ Rwanda was not precluded 'from considering such measure on its own'.¹⁵⁰

5.5 Contested approaches to criminalising genocide denial

5.5.1 European and African human rights regional jurisprudence

The African Court upheld Rwanda's genocide denial laws. Under these laws it is not possible to objectively discuss whether or not the anti-genocide campaign against the state-sponsored murderers, was mirrored by some rogue crimes by RPF officers. Neither can critics seek to ethnicise the atrocities to suggest that they were morally defensible. Nowadays, given that country's ghastly past, it is officially impermissible to question whether the revolutionaries acted purely in

145 *Ingabire* case (n 17) para 160.

146 *Ingabire* case (n 17) para 161.

147 *Ingabire* case (n 17) para 162; see also Supreme Court sentencing decision of 13 December 2013.

148 *Ingabire* case (n 17) para 163.

149 Secs 116 & 463 of Organic Law 1/2012 of 2 May 2012, relating to the Penal Code as well as that of Law 84/2013 of 28 October 2013.

150 *Ingabire* case (n 17) para 169.

defence of Tutsi lives, property and dignity or were disproportionate. Clearly, no one can defend, whether politically or judicially, aggressive killing as excusable. Consequently, crimes on the part of the RPF soldiers have 'been punished and are still being punished'.¹⁵¹ However excesses, if attributable to honest mistakes, may be legally defensible as part of a generally disciplined defensive aggression.

5.5.2 The Millian approach

Mamdani is convinced that 'the only peace possible between Hutu and Tutsi is armed peace'. This is because 'the dilemma of post-genocide Rwanda lies in a chasm that divides Hutu as a political majority from Tutsi as a political minority'.¹⁵² Concerning whether or not to secure peace through military means or genocide denial law, for Reyntjens

[t]his dilemma would not exist in case of genuine (ie non-ethnic) democracy and genuine (ie not victor's) justice. Both aims would then be reconcilable and this is what responsible political leadership in Rwanda would have to strive for if the nation is to survive in the long term.¹⁵³

Conversely, Mill's infallibility presumption begins by arguing that 'if we are interested in having the truth prevail we should allow all available arguments to be heard'.¹⁵⁴ This assumes that short of an imminent emergency, the publication of a possibly true statement is the highest public good.¹⁵⁵ He thus answers 'the apparent irrationality of the doctrine of freedom of expression'. For him what is objectionable about censorship is that in order to be protected by a law protecting an autonomous man against coming to have false beliefs on account of another's freedom of expression, 'a person would have to concede to the state the right to decide certain views were false and since it had so decided, to prevent him from hearing them advocated even if he might wish to do so'.¹⁵⁶

Significantly, 'the Millian Principle rests on a limitation of the authority of states to command their subjects rather than the right of individuals'.¹⁵⁷ Nonetheless, 'exceptions should be allowed in cases of diminished responsibility' since 'there may seem to be an obvious case for allowing deviations from the principle in times of war or other grave emergency'.¹⁵⁸ Additionally, 'the Millian Principle allows one, even in normal times, to consider whether the publication of certain information might present serious hazards to public safety by giving people capacity to inflict certain harms'.¹⁵⁹

151 Kagame (n 7) xxiv.

152 M Mamdani *When victims become killers: colonialism, nativism, and the genocide in Rwanda* (2001) 266 cited in Reyntjens (n 11) 262.

153 Reyntjens (n 11).

154 T Scanlon 'A theory of freedom' in R Dworkin' (ed) *The philosophy of law* (1977) 153 at 162.

155 Barendt (n 76) 8.

156 Scanlon (n 154) 164.

157 Scanlon (n 154) 167.

158 Scanlon (n 154) 169.

159 Scanlon (n 154) 170.

The best rejoinder to authoritarian repression of genocide denial 'is that suppression of speech creates suspicion of authority and destroys tolerance. It is better', Barendt concludes:¹⁶⁰

[t]o permit dissemination, say, of hate speech than to curtail the freedom of extremists. The latter course might encourage people to believe the truth of suppressed speech, which they would otherwise ignore or reject.

Worse still, 'driven underground it may surface later in a more dangerous form'.

5.5.3 'Forfeiture' and 'human rights' approaches to regulation

Prohibition of hate speech 'because it is possibly true' is undesirable because it entails an unwarranted "'assumption of infallibility" on the part of the state'.¹⁶¹ Indeed, 'it is only because opponents of (governmental) measures are free to challenge their wisdom that the government can ever be confident that it is appropriate to legislate'. Alternatively, 'it is still wrong to suppress speech because it is objectively false for people holding the beliefs will no longer be challenged and forced to defend their views'. Thus, Norrie distinguishes a state's repressive responses, as either entailing broad 'forfeiture' of all an attacker's rights, on the one hand, or limiting its responses, to relent in respect of the attacker's 'human rights', on the other. Ultimately, 'the moral issues are at large, conflicted, and this leads back to the broad and vague "umbrella" standard of judgment as is provided by reasonableness'.¹⁶²

RPF's public defence constitutes a *justification* to harms, unlike polluting the social environment or denuding dignity by offensive aggression of deniers who raise a defence of *excuse* predicated upon colonial ethnic exclusion. As a modern phenomenon, the Rwandan genocide commenced with the 1994 attacks which subsequently triggered political and judicial responses, including proscribing 'double genocide'. Thus deniers forfeit any defence that denial laws are in and of themselves unnecessary or disproportionate. Nonetheless, it is trite law that the implementation of *justifiable* self-defence must remain necessary, be in response to an imminent threat, and use proportionate force, which is reasonable in the circumstances. In the *Ingabire* case, the absence of evidence of 'double genocide' speech on her part, therefore, correctly resulted in the African Court's finding that 'the restriction served a legitimate purpose' as 'article 27 of the Charter requires that all rights and freedoms must be exercised "with due regard to the rights of others, collective security, morality and common interest"'.¹⁶³

160 Barendt (n 76) 9.

161 Barendt (n 76) 8.

162 AW Norrie *Crime, reason and history: a critical introduction to criminal law* (2014) 277.

163 *Ingabire* case (n 17) para 140.

6 CONCLUSION

To contribute to the campaign against denial, this article has critically evaluated Rwanda's 1994 genocide minimisation law criminalising the public negation of the genocide *inter alia* with words, and making that crime punishable by between 10 and 20 years' imprisonment. Indeed, former colonial power Belgium's hate speech restrictions are similar to those enacted in Rwanda's 'illiberal' democracy. Yet, in both contexts the regional human rights courts have upheld them. But certain remarks by opposition leader Ingabire were not restricted by the African Commission, due to insufficient evidence. This explains why the African Court upheld that Law, but simultaneously held that Rwanda violated Ingabire's right to freedom of opinion and expression. The article argues that while the African Court applied a 'human rights' approach to prohibited speech to interpret Rwanda's minimisation laws, the domestic courts relied on a 'forfeiture' approach to curtail the expressive freedom of extremists. The regional court deployed the attitude that free speech is a right, as held in the US case of *Sullivan*, which had been transplanted in *Konaté*. However, it also harboured reasonable doubts about whether opposition leader Ingabire's remarks constituted 'double genocide'. Similarly, in the *Belkacem* case the European human rights system robustly upheld Belgium's hate speech regulations. Although Rwandan courts' adopting a 'forfeiture' approach to public defence is justified by colonial and post-colonial history, unless its implementation respects human rights, the state not only violates its treaty obligations, but also loses democratic legitimacy.

The validity of Rwanda's divisionism laws debunk Straus's charge that 'as they searched for the origins of the genocide and in response to the ahistorical claims of ancient tribal hatred, authors turned to (Rwanda's) history of ethnicity'. It is untrue that 'consumers of this history attribute too much blame' in his view 'to colonialism' since Europeans did not invent the categories "Hutu" and "Tutsi", nor did they invent social hierarchies in Rwanda'.¹⁶⁴ Rather, the article agrees with Swart that 'denial is a form of racism as insidious and potentially dangerous as other more open direct, manifestations of racism. Different attitudes exist as to how the law should react'.¹⁶⁵ Instead, civic campaigns and formal education in school curriculums may sensitise audiences about the hideous mass atrocities and their duty to respect ethnic diversity.

Rwanda had previously made a unilateral declaration under article 34(6) of the African Court Protocol allowing individuals and non-governmental organisations to bring claims directly to the Court against Rwanda. However, in February 2016 it withdrew its declaration accepting the African Court's jurisdiction. Rwanda's reason for

164 Straus (n 1) 521.

165 Swart (n 63) 177.

withdrawing was that its declaration was being exploited by ‘convicted genocide fugitives’.¹⁶⁶ Yet, withdrawing may be seen as an unfortunate overreaction: first, given that evidentiary mistakes resulting in Ingabire’s domestic conviction that violate the African Charter were attributable to reasonable doubts emanating from ambiguous judicial construction of her offensive statements; second, since the African Court nevertheless sustained Rwanda’s revisionism statutes; third, because Rwanda’s withdrawal of permission for individual petitions took effect as President Kagame ascended to the position of AU Chairperson. His political influence may thus have the effect of reducing member states’ confidence in the African Court’s capacity to respect national interests. Without article 34(6) declarations by member states, the regional court’s workload diminishes upon which its performance correspondingly deteriorates. Mercifully, by Presidential Order Number 131/01 of September 14, 2018 President Kagame gave clemency to Victoire Ingabire Umuhoza and by his prerogative ‘Ingabire became free’ albeit at the same time as 2,139 other prisoners all over the country – all beneficiaries of a similar exercise of commutation of sentences or parole¹⁶⁷ although arguably she is ‘still a prisoner in a different form’.¹⁶⁸

166 International Justice Resource Centre ‘African Court holds Rwanda violated Victoire Ingabire’s freedom of expression’ <https://ijrcenter.org/2017/12/12/african-court-holds-rwanda-violated-victoire-ingabires-freedom-of-expression/> (accessed 18 August 2018).

167 A Rudatsimburwa ‘Victoire Ingabire – when denial is in the DNA’ *The New Times* 21 September 2018 <https://www.newtimes.co.rw/.../victoire-ingabire-when-denial-dna> (accessed 17 November 2018).

168 ‘How Kagame deceived the world that he freed Victoire Ingabire Umuhoza’ *The Rwandan* 17 September 2018 <http://www.therwandan.com/how-kagame-deceived-the-world-that-he-freed-victoire-ingabire-umuhoza/> (accessed 17 November 2018).