not inconsistent with the Constitution as the Supreme Court did not outlaw the death penalty."[23]

A vestige of its colonial past, Kenya's mandatory death penalty stretched back almost 120 years. In *Muruatetu*, the Supreme Court displayed its readiness to move beyond the colonial laws that have stifled legislative and jurisprudential progress in many African countries. It also demonstrated its boldness in bringing about legal reforms by invoking international and foreign comparative law to promote constitutional values. While it left the constitutionality of the death penalty itself for a future case, the Court suggested it might be open to such challenges. Courts, legislatures, and constitutional reformers in other African countries will certainly take note.

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African Court of Human and Peoples' Rights—African Charter on Human and Peoples' Rights—right to defense—freedom of expression—right to a fair trial—right to presumption of innocence

INGABIRE VICTOIRE UMUHOZA V. THE REPUBLIC OF RWANDA. App. No. 003/2014. *At* http://en.african-court.org/index.php/56-pending-cases-details.
African Court of Human and Peoples' Rights, November 24, 2017.

In its landmark November 24, 2017 judgment in *Ingabire Victoire Umuhoza v. The Republic of Rwanda,* the African Court on Human and Peoples' Rights (ACtHPR) or Court) held that certain aspects of the right to a fair trial (presumption of innocence and illegal searches) and the right to freedom of expression under the African Charter on Human and Peoples' Rights (Banjul Charter) and the International Covenant on Civil and Political Rights (ICCPR) had been violated by the Republic of Rwanda (Respondent State). In its final orders, however, the Court rejected the applicant's prayer for immediate release and deferred its decision on other forms of reparation. The judgment has broad implications on how African states protect and respect the rights to a fair trial and freedom of expression. The case also offers some vital lessons on state backlash towards human rights litigation and African states' compliance with decisions of international courts (ICs).

Ms. Ingabire Victoire Umuhoza, the applicant in this case (Applicant), was the leader of a Rwandan political party, the *Forces Democratiques Unifiees* (FDU Inkingi), since 2000, and in that capacity, issued numerous statements criticizing the government. On January 16, 2010, Ms. Umuhoza returned to Rwanda after seventeen years abroad to officially register the party and participate in the upcoming general elections (paras. 5–6). Upon her arrival, the Applicant visited the Genocide Memorial in Kigali. There, she gave a speech lamenting the lack of recognition for the Hutus who perished during the genocide and severely

[23] Okungu, *supra* note 19, para. 9.

criticizing public officials and government institutions including the Gacaca court system (para. 160).[1]

On February 10, 2010, before she could register her political party, the Applicant was arrested and charged with the following offenses: the crime of spreading the ideology of genocide; aiding and abetting terrorism; sectarianism and division; undermining the internal security of the state and spreading rumors meant to incite the population against political authorities; establishment of an armed branch of a rebel movement; and attempted recourse to terrorism, armed force, and any form of violence to destabilize established authority and violate constitutional principles (paras. 7–8).

During her arraignment on June 20, 2011, the Applicant filed a pre-trial motion protesting the systematic body searches of her defense counsel by government security services. The High Court held that the security services had the power to carry out such searches (para. 15). Simultaneously, she also challenged the constitutionality of Law No. 33 of September 6, 2003 on the Repression of Crimes of Genocide and Crimes against Humanity (Law No. 33/2003) before the Supreme Court of Rwanda (para. 26). The Supreme Court rejected the unconstitutionality motion (para. 28). The Applicant's trial before the High Court began on September 5, 2011 (para. 15), and on October 13, 2011, the High Court dismissed all other objections and petitions and proceeded to examine the merits of the case (para. 18). On October 30, 2012, the High Court found the Applicant guilty of the crimes of: threatening state security and the Constitution; violating constitutional principles by resorting to terrorism and armed force, which are punishable under the 1977 Penal code; and minimizing genocide in violation of Article 4 of Law No. 33/2003. She was sentenced to eight years in prison (para. 23). She was acquitted of the charge of spreading rumors meant to incite the population against political authorities (para. 30).

Both the prosecution and defense appealed to the Supreme Court of Rwanda (para. 29). The prosecution argued that the Applicant ought to have been convicted of intentionally spreading rumors meant to incite and of creating an armed group and that she ought to have been given a longer sentence (para. 30). The defense argued that the proceedings violated the basic principles of a fair trial (para. 31). The Applicant claimed that her defense was hampered by the presiding judge who "in actual fact was acting not as a judge but rather as a prosecution body" (para. 18). She also alleged that the judge had dismissed allegations that the prosecution had ordered prison services to search the personal effects of a defense witness, Habimana Michel, following testimony that undermined the charges against the Applicant. These illegal tactics, which produced allegedly compromising documents against the defense, were discovered during examination by the defense (paras. 21–22).

In a judgment delivered on December 13, 2013, the Supreme Court rejected the mitigating circumstances taken into account by the High Court and extended the Applicant's sentence from eight to fifteen years. It found her guilty of minimization of genocide, requalifying her acts under a newly enacted law, Law No. 84/2013, on the repression of the ideology of the crime of genocide. The Supreme Court also reversed the acquittal of the crime of spreading rumors to incite the population. All of the Applicant's arguments were rejected (para. 32).

[1] For more on the nature, strengths of, and criticisms of the Gacaca system, see Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (May 2011).

On October 3, 2014, the Applicant filed a case with the ACtHPR alleging violations of her human rights resulting from the manner of her arrest, detention, and trial (para. 34). Subsequently, by a letter dated March 1, 2016, Rwanda notified the Court that it was withdrawing its Declaration authorizing the Court to receive applications from individuals and nongovernmental organizations (NGOs) (para. 41).[2] In response to a preliminary objection by the Respondent State, the ACtHPR held that the withdrawal could not be applied retroactively to "the instant Application and that the Court has jurisdiction to continue hearing the Application" (para. 45).

The Court synthesized the Applicant's claims into three questions: (1) whether the difficulties faced by the defense counsel violated the Applicant's rights to a fair trial under Article 7 of the Banjul Charter and Article 14 of the ICCPR; (2) whether the Supreme Court's requalification of her acts under a new law, Law No. 84/2013 on the repression of the ideology of the crime of genocide, which was enacted after she committed the actions in question, violated the principle of non-retroactivity of criminal law; and (3) whether Rwandan laws that criminalize the minimization of genocide was a necessary and permissible restriction on the right to freedom of expression.

On the first issue, the Applicant argued that searches of defense counsel when attending court sessions and of defense witness Habimana Michel at the prison violated her right to a defense (para. 81). The government argued that it is common practice for guards to search prisoners and that the High Court had ordered searches of all parties in response to an earlier grenade attack in Kigali (para. 91). The ACtHPR ruled that the searches in themselves did not constitute a violation of the right to defense as they were conducted in adherence to the security measures adopted in the High Court and common practice in prisons (para. 96).

However, the right to defense, the ACtHPR observed, includes not only the right to choice of counsel, but also the right to call witnesses and have such witnesses protected from intimidation; to have access to, examine, and cross-examine witnesses; to give counsel for both parties an opportunity to express themselves in court; and to consult with clients and know and examine documents used against them at trial (para. 98). The search of Michel resulted in seizure of documents, which, without the knowledge of the defense, were later used against the Applicant in court. In addition, the Applicant alleged that the judges had refused defense counsel's requests to question the co-accused and that it was difficult for defense counsel to access the Applicant. The Respondent State did not deny these specific allegations, only the general contention that the Applicant's right to defense had not been violated. The Court held that these impediments suffered by defense counsel were incompatible with the right to defense under international standards and as protected by Article 7(1)(c) of the Banjul Charter (*id.*).

On the second issue, the Applicant submitted that she was first charged and convicted for propagating the ideology of genocide under Law No. 18/2008 of July 23, 2008. The Supreme Court later found her guilty of minimization of genocide, requalifying her actions

[2] Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights [hereinafter Protocol] provides that a state party to the Protocol may accept the competence of the Court to receive applications from individuals and accredited NGOs.

under a new law, Law No. 84/2013, on the repression of the ideology of the crime of genocide. She alleged that this requalification violated the non-retroactivity principle (para. 106), which provides that criminal responsibility and punishment must be based only on previously promulgated criminal laws (para. 109). The only exception is where retroactive application of a criminal law favors an individual by decriminalizing previous criminal conduct or provides a lighter penalty than the law that was in force during the commission of this conduct (para. 110). The crimes that Applicant was convicted of were committed between 2003 and 2010. During that period, the crime of minimization of genocide was prohibited by Law No. 33/2003, which provides for a sentence of ten to twenty years. The Supreme Court recharacterized the crime under Law No. 84/2013, which provides for five to nine years imprisonment for minimization of genocide (para. 111).

The ACtHPR held that in this case, requalification of a criminal charge resulting from the same conduct did not violate the rule of non-retroactivity (para. 115). Moreover, the application of Law No. 84/2013 was favorable to the Applicant as it provided a lighter punishment than the earlier statute. "The fact that the punishment imposed on the Applicant by the Supreme Court was higher than the penalty that was initially imposed by the High Court was not because of the retroactive application of the new laws" (para. 117).

On the third issue, regarding the right to freedom of expression, the Applicant asserted that she was convicted for minimization of genocide for an opinion she expressed in a speech given at the Kigali Genocide Memorial. She argued that she had no intention to minimize genocide; on the contrary, her speech addressed "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" (para. 120). These expressions of opinion, the Applicant asserted, are protected by the Constitution of Rwanda and international human rights instruments. She also maintained that Rwandan laws that criminalize the negation of genocide are vague, unclear, and unnecessarily restrict the rights of individuals (para. 121).

The ACtHPR began by recognizing that freedom of expression is not an absolute right and can be limited by restrictions prescribed by law (para. 133). While the Court acknowledged that the conviction of the Applicant for the statement she made at the Kigali Genocide Memorial constituted a restriction on her freedom of expression, the issue was whether such restriction served a legitimate purpose, was necessary, and was proportional in the circumstances of the case (para. 134).

The Court first observed that there was no question whether the restriction was prescribed by Rwandan law (para. 135). The Court noted that the reference to "law" in Article 9(2) of the Banjul Charter must be interpreted in the light of international human rights standards, which require that restrictions on rights and freedoms be sufficiently clear, foreseeable, and compatible with regional and international human rights instruments (para. 136). In this case, while the laws concerning minimization of genocide are broad, set in general terms, and may be interpreted in various ways, the nature of the acts that these laws criminalize are difficult to specify. The Court stated:

> considering the *margin of appreciation* that the Respondent State enjoys in defining and prohibiting some criminal acts in its domestic legislation, the Court is of the view that

> the impugned laws provide adequate notice for individuals to foresee and adapt their behaviour to the rules. (Para. 138)[3]

The Court thus held that the laws satisfied the requirement provided by law.

The Court next held that the restriction served the legitimate purpose of maintaining national security and public order, especially considering Rwanda's history of genocide (para. 141).

The ACtHPR gave more extensive attention to whether the law was "strictly necessary . . . and proportional to the legitimate purposes pursued by imposing such restrictions" (para. 142). The Court observed that Rwanda's atrocious genocide warrants adoption of all measures to ensure "social cohesion and concordance among the people and prevent similar incidents from happening in the future" (para. 147). The remarks in question were made in Kinyarwanda and were of two types: those made in relation to the genocide and those directed against the government.

The first statement was uttered at the Kigali Genocide Memorial, where the Applicant lamented the lack of recognition for the Hutus who perished during the genocide. There were, in fact, different translations of the Applicant's exact statement considered by the High Court and the Supreme Court. The Applicant claims that she stated that:

> 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?" (Para. 151)

The High Court's version of the statement was similar to the Applicant's:

> 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. (Para. 153)

The version recounted by the Supreme Court was significantly different:

> 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?" (Para. 154)

The ACtHPR held that the variances among the different versions should be construed in a light favorable to the Applicant (para. 157). While the Court recognized the importance of prohibiting speech that denies or minimizes the magnitude of Rwandan genocide, it concluded that the Applicant's statement neither belittled the genocide against the Tutsis nor betrayed sympathy for the theory of double genocide. The Court also noted that different meanings may be implied from the context in which the statements were made, but reasoned that imposing criminal sanctions for statements that are otherwise clear merely based on

[3] Notably, this is the first use of the phrase "margin of appreciation" by the Court in its judgments.

context in which they were uttered would be detrimental to the enjoyment of rights and freedoms.

The second set of statements by the Applicant severely criticized the government and public officials. Even though some of her remarks could offend and discredit these actors, the Court noted that political speech directed against government institutions and public officials, especially when made by a public opposition figure such as the Applicant, deserve a higher degree of tolerance. Furthermore, there was no evidence of any threat to public order or state security (para. 161). The Court thus found "that the Applicant's conviction and sentence for making the above statements . . . [were] not necessary in a democratic society" (para. 162).

* * * *

While the ACtHPR found that the Applicant's human rights had been violated, its remedial orders were broad and non-specific, directing the Respondent State to "take all necessary measures to restore the rights of the Applicant and to submit to the Court a report on the measures taken within six (6) months" but deferring its decision on reparations (para. 173). The six-month mark came and went in May 2018, but Rwanda has yet to communicate to the Court any measures taken to comply with the judgment. In a letter dated May 28, 2018, the defense counsel wrote to Rwanda's minister of justice lamenting that the state is yet to take any measures to "restore the harm done to our client."[4] The Applicant is still serving her sentence notwithstanding the Court's finding that procedural irregularities violated her right to a defense and that her imprisonment for genocide minimization was unjustified and violated her right to freedom of expression.

The remedial orders of the African Court have tended to be limited in scope, finding human rights violations but leaving a wide margin of appreciation for states to determine how best to remedy these violations. This mirrors the past practice of the European Court of Human Rights (ECtHR) in cases like *Marckx v. Belgium*, where the Court declined to order the repeal or annulment of a law on illegitimate children.[5] The ACtHPR's practice of judicial restraint appears to be self-imposed; there is nothing within the Court's Protocol or the Rules of the Court that expresses or even implies that judgments ought to be limited in this way. To the contrary, Article 27 of the Protocol provides that the Court can "make appropriate orders to remedy the violation including the payment of fair compensation or reparation." This means the Court can not only impose monetary fines but can also order other effective remedial actions to be taken.[6]

The practice of other human rights tribunals also supports a more expansive approach to remedies. The African Commission on Human and Peoples' Rights has moved beyond giving only broad and limited remedies even though its orders are non-binding. Recently, for example, the Commission directed Uganda to revise the provisions of the Peoples' Defence Forces Act and to provide human rights training to its military personnel and law enforcement

[4] Letter from Dr. Caroline Buisman, Defense Counsel, to Mr. Johnston Busingye, Minister of Justice and Attorney General of Rwanda (May 28, 2018).

[5] Marckx v. Belgium, App. No. 6833/74, para. 58 (Eur. Ct. H.R. June 13, 1979).

[6] Andreas Zimmerman & Jelena Bäumler, *Current Challenges Facing the African Court on Human and People's Rights*, KAS INT'L REP. 7, 47 (2010).

officials.[7] The ECtHR too has slowly progressed towards giving more directed judgments. In 2004, the ECtHR ordered Georgia to secure the release of a prisoner at the earliest possible time.[8] The rationale for giving a directed judgment in that case was that there were no other possible means to remedy the prisoner's situation.[9] In *Broniowski v. Poland*, the first ECtHR pilot judgment, the court ordered Poland to remedy systemic violations of the property rights of thousands of similarly situated landowners.[10]

In an apparent backlash against the ACtHPR's authority while the case was pending, Rwanda took the drastic step of withdrawing its Article 34(6) declaration allowing individuals and NGOs to file applications directly with the Court. The Respondent State insisted that its withdrawal was immediately effective and deprived the Court of jurisdiction. The Court's rejection of this argument provided a unique opportunity to issue a binding judgment against Rwanda regarding important questions of international human rights law that also raise sensitive and ongoing domestic political issues.

Human rights reports have continually accused Rwanda of using its laws on genocide minimization, genocide denial, and incitement against the government to arrest and detain political opponents.[11] These reports have also documented restrictions on the media and civil society organizations that violate freedom of expression by limiting their ability to independently criticize government policies and practices.[12] These accusations would likely have come before the ACtHPR had Rwanda not withdrawn its declaration.[13]

The Court should be lauded for taking the necessary and important step of issuing a structural interdict[14] requiring Rwanda to report on its progress in complying with the judgment. However, considering Rwanda's mistreatment of political opponents, the Court ought to have issued broader measures aimed at stifling politically motivated abuses of rights. In addition, while the Court delivered a well-reasoned judgment concerning the Applicant, its proverbial pot broke at the door[15] by failing to prescribe specific and effective measures to remedy the violation of her rights.

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[7] Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda, Communication 339/2007, African Commission on Human and Peoples' Rights, para. 139 (Apr. 28, 2018).

[8] Assanidze v. Georgia, App. No. 71503/01, para. 14(a) (Eur. Ct. H.R. Apr. 8, 2004).

[9] *Id.*, paras. 202–03

[10] Broniowski v. Poland, App. No. 31443/96, 40 Eur. H.R. Rep. 21 (2005).

[11] Amnesty International, *Amnesty International Report 2017/18: The State of the World's Human Rights*, 315 (Feb. 22, 2018).

[12] Human Rights Watch, *World Report 2017: Rwanda Events of 2016*, at 504–10 (2017).

[13] It should be noted that communications brought before the African Commission on Human and People's Rights by Rwandan nationals can be referred to the ACtHPR by the Commission. Protocol, *supra* note 2, Art. 5.

[14] A structural interdict is an order by a court that grants the court supervisory powers of its orders. The parties must periodically report to the court their progress in implementation.

[15] "The water pot breaks at the door" is a Kenyan proverb that symbolizes someone working hard or succeeding a something but then drops the ball at a critical end point.

United States Supreme Court—Alien Tort Statute—corporate liability—international human rights violations

JESNER V. ARAB BANK, 138 S. Ct. 1386.
United States Supreme Court, April 24, 2018.

The exclusion of transnational human rights litigation from U.S. federal courts is, for most practical purposes, now complete. On April 24, 2018, the U.S. Supreme Court delivered a 5–4 ruling in *Jesner v. Arab Bank,* deciding that foreign corporations cannot be sued under the Alien Tort Statute (ATS).

The ATS, a sparsely worded statute from 1789, grants U.S. federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] After almost two centuries of dormancy, the ATS was revived at the urging of American human rights lawyers in 1980,[2] ushering in the modern era of transnational human rights litigation in U.S. courts.

The petitioners in *Jesner* were some 6,000 foreign nationals who were the plaintiffs in five lawsuits, filed in New York between 2004 and 2010. Their ATS suits alleged that they or their families were injured or killed by terrorist activity in the Middle East. And they claimed that the defendant, Arab Bank, helped finance such activity in violation of international law. Arab Bank, based in Jordan, is valued at "one-fifth to one-third of the total market capitalization of the Amman Stock Exchange."[3]

The District Court dismissed their claims on the grounds that corporations could not be sued under the ATS, and the Second Circuit Court of Appeals affirmed. The U.S. Supreme Court then granted certiorari.

Jesner is not the first time that the question of corporate liability under the ATS has been presented to the U.S. Supreme Court. As the petitioners' lawsuits made their way through New York federal courts, the Court decided another ATS case arising from litigation in New York. That case, *Kiobel v. Royal Dutch Petroleum*, involved Nigerian plaintiffs.[4]

Kiobel had been dismissed by the Second Circuit Court of Appeals in New York on the basis that there was no corporate liability under customary international law and that therefore corporations could not be sued under the ATS. The *Kiobel* plaintiffs petitioned the U.S. Supreme Court, which granted certiorari to address the corporate liability question. Instead, however, the Court asked for re-argument and ultimately dismissed the *Kiobel* petitioners' claims on the grounds that the presumption against extraterritoriality applied to the ATS and that the alleged unlawful conduct in Nigeria fell outside the statute's scope.[5] In so doing, it left the Second Circuit's holding on corporate liability intact, paving the way for the question to come back to the Court in *Jesner.*

[1] 28 U.S.C. § 1350.

[2] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

[3] Brief for Hashemite Kingdom of Jordan as Amicus Curiae at 2, Jesner v. Arab Bank, 138 S. Ct. 1386 (No. 16–499).

[4] *See* David P. Stewart & Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AJIL 601 (2013). *See also* Anupam Chandler, *Agora: Reflections on* Kiobel, 107 AJIL 829 (2013).

[5] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).